submit names extracted from those documents for checking against U.S. immigration records. Leads on modern human rights abusers come from a variety of sources. One primary source is the Department of Homeland Security (DHS), especially its Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (the DHS component responsible for adjudicating naturalization applications). OSI also relies on its own research, leads provided by human rights organizations, media reports, and referrals from foreign governments and international tribunals regarding U.S. citizens who may have participated in the perpetration of human rights violations.

As OSI's new jurisdiction expands the geographic and temporal scope of its work, public referrals will likely increase. Some of these calls may come to U.S. Attorneys' Offices. It is also possible that AUSAs will realize that defendants or targets of investigation in seemingly unrelated matters have a history which suggests they could have participated in the commission of human rights violations. AUSAs who come into possession of information about naturalized citizens who may have participated in the commission of human rights abuses are asked to contact OSI. If the suspected human rights violator is not a naturalized citizen, the information should instead be transmitted to ICE in the DHS. If the suspect's citizenship is not known, it may be ascertained by contacting OSI.

Q: What if I get press inquiries about an OSI matter?

OSI cases frequently attract press attention, and reporters who are not aware of OSI's involvement sometimes direct their inquiries to the local U.S. Attorney's Office. If you or someone in your office receives a call from the press, or from any party seeking information, please direct the caller to the Department's Office of Public Affairs, at (202) 514-2007.❖

ABOUT THE AUTHOR

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OSI's Expanded Jurisdiction under the Intelligence Reform and Terrorism Prevention Act of 2004

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I. Introduction

For twenty-five years, it has been the mission of the Office of Special Investigations (OSI) to investigate naturalized U.S. citizens and U.S. residents suspected of participating in crimes of persecution sponsored by Nazi Germany or its allies from 1933-1945, and take legal action to denaturalize and remove (deport) or extradite such persons. The 1979 Attorney General Order that created OSI tasked the unit with this sole responsibility. *See* Order No. 851-79 (Sept. 4, 1979).

On December 17, 2004, the President signed into law the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, 118 Stat. 3638 (2004), which grants OSI authority, in addition to its existing World War II-related responsibilities, to investigate and take legal action to denaturalize any naturalized U.S. citizen who participated abroad in acts of genocide or, acting under color of foreign law, participated in acts of torture or extrajudicial killing. It also mandates the exclusion and removal of such persons, which will be handled by the Department of State (State) and the Department of Homeland Security (DHS).

This new jurisdiction means a vastly expanded geographic scope for OSI. Over the sixty years since World War II ended, government-sponsored torture and extrajudicial killing have been perpetrated in numerous countries. Genocide has been committed as well, most notoriously in Rwanda during 1994.

In enacting the provisions relating to post-World War II human rights violators, Congress expressed a clear desire for coordinated and effective law enforcement action in cases of state-sponsored atrocities. In a November 2003 report, the Senate Judiciary Committee outlined the justification for the legislative provisions that were ultimately enacted as part of IRTPA. After noting OSI's success in the Nazi-era cases ("The success of the OSI in hunting Nazi war criminals demonstrates the effectiveness of centralized resources and expertise in these cases. The OSI has worked, and it is time to update its mission."), the Committee opined:

> Not enough is being done about the new generation of international human rights abusers living in the United States, and these delays are costly. Such delays make documentary and testimonial evidence more difficult to obtain. Stale cases are the hardest to make. The mistakes of the past–when decades passed before Nazi war criminals who settled in this country were tracked down and brought to justice–should not be repeated.

S. REP. NO. 108-209, in support of S. 710, the Anti-Atrocity Alien Deportation Act of 2003 (Nov. 24, 2003) at 7.

II. Background

Recent data confirm that the concerns of Congress were well-founded. DHS announced in April 2005, for example, that its Bureau of Immigration and Customs Enforcement (ICE) was tracking and litigating more than 900 cases involving human rights violators from more than sixty countries in immigration courts nationwide.

The nature of the problem is dramatically exemplified by the case of Kelbessa Negewo, an Ethiopian citizen, who immigrated to the United States and was eventually naturalized. Negewo served as a local official under the repressive military regime that ruled Ethiopia from 1974 to 1991. In September 1990, three Ethiopian women filed suit against Negewo under the Alien Tort Claims Act (28 U.S.C. § 1350) in U.S. District Court in Atlanta, alleging that they had been tortured in a jail he controlled. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 844-46 (11th Cir. 1996).

In August 1993, the district court found that Negewo had both supervised and directly participated in the torture of the women and the court awarded damages. *Id.* at 846. In its decision, the district court described the torture. It found, for example, that one of the plaintiffs had been forced to remove her clothes, then was bound by her hands and feet, hanged from a pole, and beaten severely while water was poured on her wounds to increase the pain. *Abebe-Jira v. Negewo,* 1993 WL 814304 (N.D. Ga., Aug. 20, 1993) at *2, *aff'd,* 72 F.3d 844 (11th Cir. 1996).

Negewo's application for citizenship was granted in 1995 while his (unsuccessful) appeal was pending, even though some personnel of the former Immigration and Naturalization Service were aware of the district court judgment against him. That judgment had been reported and even featured in a front-page article in the Atlanta Journal and Constitution (August 21, 1993). A denaturalization action was filed against Negewo in May 2001 by the U.S. Attorney's Office in Atlanta. Negewo's U.S. citizenship was finally revoked pursuant to a settlement agreement in October 2004, eleven years after a federal district court found that he had committed torture.

Negewo is currently in federal custody pending the outcome of removal proceedings. That case, initiated by ICE in January 2005, was the first removal action brought under IRTPA's

human rights violator provisions. If the United States is successful in these proceedings, Negewo likely will be removed to Ethiopia, where in 2002 he was convicted *in absentia* and sentenced to life imprisonment for numerous human rights violations, including thirteen counts of murder, three counts of disappearance, one count of torture, and one count of unlawful taking of property. *See* Teresa Borden, *Deportation in Motion for Torturer*, ATLANTA JOURNAL CONSTITUTION, Jan. 5, 2005, at A1.

Another human rights violator who became a naturalized U.S. citizen faced criminal prosecution. Eriberto Mederos, a Cuban-American who immigrated to south Florida in the 1980s, was alleged to have used electroshock equipment to torture opponents of the Castro regime while working at a Cuban psychiatric hospital. In 1991, these allegations were published in a book and were soon examined by the FBI. When Mederos applied for citizenship in 1993, the INS naturalization examiner was unaware of the allegations against Mederos and permitted him to gain naturalization. *See, e.g.,* Madeline Baro Dias, *Former Inmate Alleges Torture,* SOUTH FLORIDA SUN-SENTINEL, Jul. 18, 2002 at 3B and Chitra Ragavan, *A Tale of Torture and Intrigue,* U.S. NEWS & WORLD REPORT, Sept. 10, 2001 at 33.

In September 2001, Mederos was charged by the U.S. Attorney's Office in Miami with unlawful procurement of U.S. citizenship. The criminal complaint alleged that Mederos lied under oath when he applied for citizenship by falsely claiming he had not assisted in persecution and had not been a member of the Communist party. Mederos was convicted on those charges in August 2002, but died before he could be sentenced. *See, e.g.,* Charles Rabin, *Accused Cuban Torturer Dies After Trial,* THE MIAMI HERALD, Aug. 24, 2002 at B1.

III. The legislative response

During the 106th, 107th, and 108th Congresses, a bipartisan group of lawmakers led by Senators Orrin Hatch and Patrick Leahy and Representatives Mark Foley and Gary Ackerman sponsored legislation intended to address this problem. Their proposed Anti-Atrocity Alien Deportation Act (AAADA) would have mandated the exclusion, removal, and denaturalization of post-World War II human rights violators, specifically participants in genocide and, where carried out under color of law of a foreign nation, torture and extrajudicial killings as well. That legislation also sought to provide OSI with authority to investigate and litigate the pertinent denaturalization actions.

The original version of the AAADA passed the Senate by unanimous consent in November 1999, but it repeatedly failed to reach the House floor, having stalled in the Subcommittee on Immigration, Border Security, and Claims of the House Committee on the Judiciary as a result of disagreements on a peripheral issue involving the Convention Against Torture. However, on October 8, 2004, as the House of Representatives was in its closing hours of considering the House version of the 2004 intelligence reform bill (H.R. 10), Rep. Foley introduced an amendment that would, in effect, insert the text of the AAADA into the intelligence reform bill. He, Rep. Ackerman, and House Immigration, Border Security, and Claims Subcommittee Chairman John Hostettler, spoke in favor of the amendment. Their comments stressed the nexus between human rights violator cases and terrorism cases, and also referenced OSI's record over the past twenty-five years in investigating and prosecuting Nazi cases.

When the intelligence reform legislation (S. 2845 and H.R. 10) went to conference committee in October 2004, the Foley amendment was one of the comparatively few immigration provisions in the House version found acceptable by the Senate conferees. It was retained in the compromise legislation that was hammered out on December 6. The bill was approved by the House of Representatives on December 7, 2004 by a vote of 336-75, and it was passed by the Senate the following day, in the closing legislative action of the 108th Congress, by a vote of 89-2. Ten days later, it was signed into law by President Bush.

IV. The relevant provisions of IRTPA

To deal with modern human rights violator cases in a centralized and systematic way, IRTPA names the Office of Special Investigations as the specific government unit with authority to detect, investigate, and take legal action to denaturalize any naturalized U.S. citizens who participated abroad in acts of genocide or in acts of torture or extrajudicial killing committed under color of foreign law. It does so through Title V, Subtitle E, which consists of six sections, numbered 5501

through 5506. Collectively, these provisions contain the full text of the AAADA. For purposes of this article, three changes effected by IRTPA to the Immigration and Nationality Act are most pertinent.

A. Expanding the human rights violator exclusion/removal provisions

IRTPA amended the grounds of exclusion and removal set forth in Immigration and Nationality Act (INA) §§ 212(a)(3)(E) and 237(a)(4)(D), 8 U.S.C. §§ 1182(a)(3)(E) and 1227(a)(4)(D), respectively. Previously, those sections provided for the exclusion and removal of persons who "ordered, incited, assisted, or otherwise participated" in Axis-sponsored acts of persecution, as well as those who "engaged" in genocide. The provisions relating to Axis-sponsored persecution are unchanged, but the genocide provision was amended and new provisions were added.

Pursuant to IRTPA, the existing exclusion and removal provisions relating to genocide now apply to persons who "ordered, incited, assisted, or otherwise participated" in genocide. *See* 8 U.S.C. § 1182(a)(3)(E). In addition, Title 8 previously referred to conduct that is defined as genocide for purposes of the Convention on the Prevention and Punishment of the Crime of Genocide. The Senate Judiciary Committee explained that, for clarity and consistency, the new statute substitutes the definition of genocide contained in 18 U.S.C. § 1091, "which was adopted to implement United States obligations under the Convention and also prohibits attempts and conspiracies to commit genocide." S. Rep. No. 108-209, at 9 (2003). While the federal criminal statute is limited to those offenses committed within the United States or by a U.S. national, the grounds for exclusion and removal added by IRTPA relate to acts committed outside the United States that would be criminal under 18 U.S.C. § 1091 if committed in the United States or by a U.S. national. *See* S. REP. NO. 108-209, at 10 (2003).

The new provisions of Title 8 also provide for the exclusion and removal of aliens who, under color of foreign law, "committed, ordered, incited, assisted, or otherwise participated" in "torture" (as defined in 18 U.S.C. § 2340—the domestic federal criminal prohibition enacted pursuant to U.S. obligations under the Convention Against Torture), or any "extrajudicial killing" committed under color of foreign law (as defined in section 3(a) of the Torture Victim Protection Act (TVPA) of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1991)). The Senate Judiciary Committee emphasized that the phrase "committed, ordered, incited, assisted, or otherwise participated" is intended "to reach the behavior of persons directly or personally associated with the covered acts, including those with command responsibility." S. REP. NO. 108-209, at 10 (2003). Attempts or conspiracies to commit torture or extrajudicial killing are encompassed in the "otherwise participated in" language. S. REP. NO. 108-209, at 10 (2003).

As defined in Title 18, "torture" means "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. 2340(1).

"[S]evere mental pain or suffering" is further defined to mean the

> prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2).

As defined in the TVPA, the term "extrajudicial killing" means "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Extra-judicial killing, however, does not include "any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." TVPA, Pub. L. No. 102-256, 106 Stat. 73 (1991). As of yet, there are no published court decisions addressing whether particular

conduct constitutes an extrajudicial killing for purposes of this provision.

It is important to bear in mind that the definitions of both "torture" and "extrajudicial killing" require that the alien be acting under color of law. A criminal conviction, criminal charge, or confession, is not required for an alien to be inadmissible or removable under the new grounds added by IRTPA. *Cf.* INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i), (barring admission of alien who has been convicted of a crime involving moral turpitude or who admits committing acts that constitute the essential elements of such a crime).

B. The moral character provision

INA § 101(f)(9), 8 U.S.C. § 1101(f)(9), as added by IRTPA, also provides that a person described in INA § 212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E), shall not, as a matter of law, be regarded as a person of good moral character. Thus, persons who participated in Axis-sponsored persecution, genocide, torture, or extrajudicial killings, are now statutorily barred from naturalization as U.S. citizens. *See* INA § 316(a), 8 U.S.C. § 1427(a) (requiring applicant for naturalization to prove good moral character). They are also barred from certain other immigration benefits, most notably cancellation of removal under INA § 240A, 8 U.S.C. § 1229(c)(4). Before the enactment of IRTPA, Axis persecutors and persons who had "engaged" in genocide were already barred from obtaining such benefits.

C. Consideration for criminal prosecution

Finally, INA § 103(h)(3), 8 U.S.C. § 1103(h)(3), as added by IRTPA, provides that consideration shall be given, where possible, to the criminal prosecution or extradition of persons who participated in Axis-sponsored persecution, or in genocide, torture, or extrajudicial killing. This provision directs that the Attorney General "shall consult with the Secretary of Homeland Security in making determinations concerning the criminal prosecution or extradition" of such persons.

V. Application of IRTPA

A. Civil prosecutions

Questions have arisen as to whether the new denaturalization grounds in IRTPA can be applied only to persons who were naturalized after IRTPA was enacted. As a result, the government may have to rely on remedies available pre-IRTPA in prosecuting human rights violators naturalized before IRTPA's enactment. This may include, *inter alia*, seeking the denaturalization of human rights violators who had not been lawfully admitted because they engaged in genocide, pursuant to 8 U.S.C. § 1182(a)(3)(E) (relying on the pre-IRTPA language), otherwise lack good moral character, pursuant to 8 U.S.C. § 1427(a)(3), concealed material facts or made willful misrepresentations in procuring naturalization, pursuant to 8 U.S.C. § 1451(a), or did not properly procure citizenship pursuant to any other relevant law or regulation (including, for example, on the basis of initial entry through an invalid visa).

B. Potential criminal prosecutions

The possibility of prosecution under various criminal statutes, such as 18 U.S.C. § 1425 (obtaining naturalization by fraud), 18 U.S.C. § 1001 (making a false statement regarding a matter within the jurisdiction of a federal agency), 18 U.S.C. § 2340 (torture, if committed after November 20, 1994), or 18 U.S.C. § 2441 (war crimes, if committed after August 21, 1996) should always be considered. In the Criminal Division, prosecutions for torture and war crimes are the responsibility of the Domestic Security Section or, if there is a terrorism nexus, the Counterterrorism Section. Any such prosecution would arise from the same nucleus of operative facts as the civil case. Prosecuting under the criminal statutes might, at least initially, permit the government to imprison human rights violators upon conviction and it would be consistent with IRTPA Section 5505's injunction that consideration be given, where possible, to the criminal prosecution of such violators. Fortunately, a criminal conviction under 18 U.S.C. § 1425 automatically results in revocation of U.S. citizenship under 8 U.S.C. § 1451(e), thus setting the stage for removal proceedings to be instituted by ICE.

Criminal prosecutions could confer other important advantages. In the first place, they would permit the use of grand juries to investigate cases. This would help ensure secrecy during the investigative stage and provide for compelled testimony and production of evidence through the use of grand jury subpoenas. The secrecy feature, in particular, may be of utmost importance in the modern human rights violator cases, where there is the potential for witness intimidation. This is quite possible in cases where younger perpetrators committed crimes on behalf of regimes that are still extant and active. Moreover, in cases involving multiple parties, where some subjects might be persuaded to testify on behalf of the government, grand jury investigations facilitate granting immunity from criminal prosecution and developing cooperating witnesses.

Criminal investigations can also employ search warrants. Again, given the relative recency of the criminal conduct at issue, it is possible that OSI's new generation of defendants, as well as their cohorts, will still have evidence of their crimes within their constructive possession. Civil discovery methods (such as document requests and depositions), which necessarily rely on the honesty of the defendants, would likely be far less effective than search warrants in obtaining such evidence. Moreover, in certain instances in civil prosecutions, defendants might invoke their Fifth Amendment right not to incriminate themselves through the act of producing incriminating documents. *See, e.g., United States v. Hubbell*, 530 U.S. 27 (2000). The ability to collect evidence pursuant to valid search warrants in criminal proceedings would provide a solution to this potential problem.

VI. Conclusion

With the enactment of IRTPA, the scope of OSI's jurisdiction has been significantly expanded. After a quarter-century of investigating and prosecuting individuals who participated in Axis-sponsored persecution, OSI is well-positioned to identify and take legal action against other naturalized human rights violators who have come to the United States. We look forward to working on these important cases with our colleagues in the U.S. Attorneys' Offices, and encourage prosecutors to call OSI at (202) 616-2492 with any questions regarding OSI's new jurisdiction.❖

ABOUT THE AUTHOR

❑**Gregory S. Gordon** served as law clerk to U. S. District Court Judge Martin Pence from 1990-1991 (D. Haw.). After a stint as a litigator in San Francisco, he worked with the Office of the Prosecutor for the International Criminal Tribunal for Rwanda from 1996-1998. He then became a criminal prosecutor with the U. S. Department of Justice, Tax Division. After a detail as a Special Assistant U.S. Attorney for the District of Columbia from 1999 through 2000, he was appointed in 2001 as the Tax Division's Liaison to the Organized Crime Drug Enforcement Task Forces (Pacific Region) for which he helped prosecute large narcotics trafficking rings. He became an OSI prosecutor in 2003. In 2004, his article *"A War of Media, Words, Newspapers and Radio Stations": The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech* was published in Vol. 45, No.1 of the Virginia Journal of International Law.✠