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Trading With The Enemy: Holocaust Restitution, the United States Government, and American Industry

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TRADING WITH THE ENEMY: HOLOCAUST RESTITUTION, THE UNITED STATES GOVERNMENT, AND AMERICAN INDUSTRY

Michael J. Bazylar & Amber L. Fitzgerald***

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Nearly two years after [the conclusion of] the last of the major Holocaust-era negotiations in the waning hours of the Clinton administration, justice is still beyond reach for too many aging victims. The unfinished business from World War II includes . . . a final accounting still owed by the American government itself. [T]he American government has properly called upon other countries to face their past. . . . It is time now, more than 55 years after the end of World War II . . . to finish at last the unfinished business of World War II and to bring justice to elderly Holocaust survivors. They must wait no longer.¹

I. INTRODUCTION

While the United States has been the leading force behind European governments and corporations examining their roles in the Holocaust, little has been done by American industry and, to an extent, by the U.S. government to help Holocaust survivors.² Following the accusations of wartime wrongdoing raised against various European concerns, greater scrutiny has now also been applied to the conduct of the U.S. government and American corporations during World War II. Although Europe was the site of the Holocaust and the perpetrators of the “Final Solution,” including the attendant financial machinations, were also primarily from Europe, the conduct of American industry and government during the war is not entirely blame-free.

1. Stuart Eizenstat, *Justice Remains Beyond Grasp of Too Many Holocaust Victims*, FORWARD, Oct. 18, 2002, available at <http://www.forward.com/issues/2002/02.10.18/oped1.html> (statement by Stuart Eizenstat, President Clinton’s Special Representative on Holocaust Issues).

2. For a collection of documents pertaining to the U.S. government’s activities involving Holocaust issues, see the official website of the U.S. Department of State, at <http://state.gov/p/eur/rt/hlcst/> (last visited June 21, 2003). See also *Law-Related Resources on Nazi Gold and Other Holocaust Assets, Swiss Banks During World War II, and Dormant Accounts*, available at <http://www.lib.uchicago.edu/~llou/nazigold.html> (last visited June 21, 2003).

To date, three books have been published on the Holocaust restitution movement. See JOHN AUTHERS & RICHARD WOLFFE, *THE VICTIMS FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST* (2002); MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* (2003) [hereinafter BAZYLER, *HOLOCAUST JUSTICE*]; STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2003).

The litigation against European companies has forced American companies to confront their own shady wartime past. The Holocaust restitution movement — born in the United States with the specific aim of uncovering financial misfeasance in wartime Europe — has now enmeshed both the U.S. government and corporate America. The finger of blame that was first pointed from the United States to Europe is now being pointed back to the United States. Unfortunately, there seems to be a double standard at play. The demands made by the United States towards European governments and corporations to honestly confront and document their wartime financial dealings and other activities are not being registered in the United States itself.

This Article will examine the effects of the Holocaust restitution movement on the U.S. government and industry. Part II sets out the critical role played by the United States in prompting European governments and corporations to recognize their long overdue wartime financial obligations to survivors of the Holocaust and other victims of World War II. Part III focuses on steps taken by the U.S. government to recognize its own obligations. Part IV analyzes the lawsuits filed against the U.S. government and American corporations for their wartime and postwar financial dealings. Finally, in Part V, the Article concludes with two sets of recommendations — one directed towards the U.S. government and the other towards American industry — regarding what each needs to do to confront their unfinished business of World War II.

II. THE ROLE OF THE UNITED STATES IN RESTITUTION EFFORTS ABROAD

The unresolved controversies involving unscrupulous financial dealings during the Holocaust and its aftermath finally began to be settled at the end of the 20th century not in Europe, where the Holocaust took place, but in the United States. The United States has been the prime mover behind the numerous agreements concluded between 1998 and 2001 that led to compensation for individuals whose families' bank accounts had been looted either during or after the war. The United States also forced Germany to pay former slaves of German companies seeking payment for their wartime labor, and European insurance companies to recognize survivors' claims to benefits of in-

surance policies issued to their family members who perished during the war. These settlements brought about by the U.S. government and in U.S. courts since August 1998, when the first settlement was made between the Swiss banks and Holocaust-era claimants for \$1.25 billion, have now reached a figure somewhere between \$8 to \$11 billion, depending on the method of calculation.³

All levels of government in the United States — local, state, and federal — were involved in the efforts. At the federal level, the seriousness of commitment (at least during the Clinton Administration) was illustrated by the fact that at one time there were concurrently at least two federal government officials with the word “Holocaust” in their titles: Stuart Eizenstat, a Jewish-American lawyer with a long history of public service, was the Special Representative of the President and Secretary of State for Holocaust Issues, and J.D. Bindenagel, a career diplomat, was made the Special Envoy for Holocaust Issues and given the rank of Ambassador.⁴ Various other officials also held lower-level posts working under Eizenstat and Bindenagel on Holocaust restitution matters. Without the Clinton Administration’s determination to resolve by the close of the 20th century what has been labeled the “unfinished business” of World War II,⁵ the efforts by other supporters of the Holocaust restitution movement would have failed.

Holocaust restitution, however, is not merely a federal issue. Although the subject is strongly connected to U.S. foreign affairs, state and local government officials have also been deeply and passionately involved in the struggle — often to the consternation of federal officials, who considered the non-federal officials to be intermeddlers. The lead was taken by California, which passed numerous laws allowing suits to be brought in its state courts against European private concerns doing business in California for their long-forgotten activities in wartime

3. See, e.g., EIZENSTAT, *supra* note 2, at 345 (citing \$8 billion figure). See also World Jewish Congress, at <http://www.wjc.org.il/> (last visited June 21, 2003); Claims Conference, at <http://www.claimscon.org> (last visited June 21, 2003) (citing \$11 billion figure).

4. On May 1, 2002, Randolph Bell replaced Bindenagel as Special Envoy for Holocaust Issues, and was also given the title of Ambassador.

5. See generally EIZENSTAT, *supra* note 2.

Europe.⁶ In New York, Alan Hevesi, then-Comptroller of New York City, and Carl McCall, then-Comptroller of New York State, led efforts to compel the same concerns doing business in New York likewise to settle Holocaust-era claims. In December 1997, Hevesi formed and then spearheaded the Executive Monitoring Committee, which boasted over 900 state and local officials throughout the United States working to pressure the Europeans to resolve Holocaust era claims.⁷

Not to be forgotten is the all-important role played by American judges, both at the federal and state level.⁸ After U.S. lawyers began filing suits against the Europeans in American courts in 1996, the presiding judges issued critical rulings allowing the cases to go forward. While not all rulings were for the Holocaust claimants, the plaintiffs' lawyers obtained enough favorable decisions to sustain the momentum of the Holocaust restitution litigation. The judges also played an important role in bringing about the settlements. Once the cases were settled, there came the difficult task of deciding how — and to whom — the funds should be distributed. Here, American judges became overseers of the settlements, ensuring that the agreements they approved in principle were effectuated in reality.

6. For a listing of state and federal laws dealing with Holocaust restitution, see Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, app. B, at 272–83 (2000) [hereinafter Bazylar, *Nuremberg in America*]. The list can also be found at the website of the Presidential Advisory Commission on Holocaust Assets in the United States, at <http://www.pcha.gov/lawsinfo.htm> (last visited June 21, 2003).

7. For information on the Executive Monitoring Committee, see Press Release, Hevesi: \$10 Billion in Restitution Must Be Distributed to Holocaust Survivors as Quickly as Possible (Jan. 19, 2003), available at http://www.comptroller.nyc.gov/press/2001_releases/01-01-003.shtm. The Committee used to issue a newsletter, *International Monitor*, discussing its work. Since Hevesi's departure from the New York City Comptroller's Office for an unsuccessful run for New York City mayor, the Executive Monitoring Committee has become dormant. It may now be resurrected, as Hevesi was recently elected Comptroller of New York State.

8. For a discussion of the critical role played by various U.S. federal and state judges in the Holocaust restitution movement, see Bazylar, *Nuremberg in America*, *supra* note 6, at 61–63 (federal judge Edward R. Korman); *id.* at 240–42 (federal judge Shirley Wohl Kram); *id.* at 131–36 (California state judge and now federal judge Florence-Marie Cooper); *id.* at 105–08 (federal judge Michael Mukasey); *id.* at 244 (federal judge Sterling Johnson).

The following sections discuss the Holocaust restitution movement abroad and the role the United States played in driving the movement. The purpose of this discussion is straightforward: the United States, having accomplished what it could in Europe, should now redirect some of the pressure placed on the Europeans to efforts within the United States itself.

A. Switzerland

The beginning of the Holocaust restitution litigation movement can be traced to October 1996, with the filing of class action lawsuits in New York against the three largest Swiss banks for failing to return monies that had been deposited by Holocaust victims.⁹ Only after a U.S. government report confirmed the claims did the major Swiss banks begin to take the lawsuits seriously.¹⁰ In April 1996, Senator Alfonse D'Amato, the Chairman of the U.S. Senate Banking Committee, began holding hearings on the matter, forcing the banks to testify about their wartime and postwar behavior. In December 1996, the Swiss government created a commission of historians to look into the financial dealings of the Swiss government and industry with the Nazis.¹¹ Earlier, the Swiss banks themselves created the Independent Committee of Eminent Persons ("ICEP"), headed by former U.S. Federal Reserve Bank Chairman Paul Volcker, to ferret out the dormant accounts belonging to Holocaust victims that might have been left in Swiss banks

9. For a detailed discussion, see *id.*, at 31–93. See also BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 1–58.

10. See U.S. DEP'T OF STATE, UNITED STATES AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II: PRELIMINARY STUDY (1997) [hereinafter EIZENSTAT REPORT I]; U.S. DEP'T OF STATE, UNITED STATES AND ALLIED WARTIME AND POSTWAR RELATIONS AND NEGOTIATIONS WITH ARGENTINA, PORTUGAL, SPAIN, SWEDEN, AND TURKEY ON LOOTED GOLD AND GERMAN EXTERNAL ASSETS AND U.S. CONCERNS ABOUT THE FATE OF THE WARTIME USTASHA TREASURY (1998) [hereinafter EIZENSTAT REPORT II] See also William Scally, *U.S. Report Details Close Swiss-German War Ties*, REUTERS, Dec. 17, 1996, available at <http://www.english.upenn.edu/~afilreis/Holocaust/nazi-swiss-dealings.html>.

11. For information about the so-called Bergier Commission, see Independent Commission of Experts Switzerland — Second World War, at <http://www.uek.ch/en/uekinkuerze.htm> (last visited June 21, 2003).

for over a half century.¹² In 1997 the Swiss Bankers Association published two lists containing approximately 1,756 names of holders of dormant accounts from the World War II era that may have belonged to Holocaust victims. The Swiss banks later added another 3,500 names to the list. The aim of these lists — in addition to getting the Swiss out of the public relations disaster resulting from their now-revealed failure to return monies after the war — was to help survivors and heirs locate assets that might have been deposited in Swiss banks. The investigation resulted in the Swiss banks settling the class action litigation in August 1998 for \$1.25 billion dollars, at that time the largest settlement of a human rights case in U.S. history.¹³

The settlement reached by the Swiss banks with the plaintiffs was the direct result of U.S. pressure.¹⁴ Only after the U.S. government issued a report condemning the Swiss for their wartime and postwar behavior, which led to the creation of the ICEP and the Bergier commissions, did Switzerland finally begin to reevaluate its own history. Once the Swiss were forced completely to reevaluate their wartime behavior and pay restitution, other nations followed suit — also under U.S. compulsion.

B. Germany

Germany and its industry have likewise been forced to recognize the slave labor claims they had steadfastly rejected for the last fifty-five years. While the Federal Republic of Germany (West Germany) acknowledged its role as the legal successor to

12. For information about the so-called Volcker Committee, see The Independent Committee of Eminent Persons: "The Volcker Commission," at <http://www.icep-iaep.org> (last visited June 21, 2003).

13. For information about the Swiss banks settlement, including a list of dormant account holders, awards issued, and links to other websites dealing with the Swiss banks settlement, see Holocaust Victim Assets Litigation (Swiss Banks) CV-96-4849, at http://www.swissbankclaims.com/home_main.asp (last June 21, 2003) (official web site maintained by the federal court). The \$1.25 billion Swiss banks settlement amount was topped in December 1999, by the German slave labor settlement of DM10 billion (approximately \$5 million). See discussion *infra* Part II.B.

14. In his memoir, Eizenstat discusses in detail how officials in the U.S. government, as well as other state and local officials and private individuals, forced the Swiss to settle. See EIZENSTAT, *supra* note 2. See also AUTHERS & WOLFFE, *supra* note 2, at 94–106.

the Nazi regime and began paying certain reparations to Jewish victims in the 1950s,¹⁵ West German industry failed to recognize, with some very minor exceptions, claims for slave and forced labor by individuals made to work for private German companies during World War II. Between eight to ten million people worked either as slaves or forced laborers.¹⁶ In the end, Germany had to react swiftly considering the success of the previous claims made against the Swiss. Only after the German industrialists began to feel the pressure of American litigation did they agree to pay their still-uncompensated slave laborers.¹⁷

Beginning in 1998, aging survivors filed over fifty class action lawsuits in the United States against their former German masters,¹⁸ including such prominent firms as DaimlerChrysler, Volkswagen, BMW, Allianz, Siemens, and Degussa. In addition, German banks with U.S. offices also began to face litigation for their wartime theft of Jewish assets, and German insurance companies were asked to answer for their failure to honor insurance policies purchased by Holocaust victims.

The first slave labor lawsuit in the United States was filed in March 1998 against Ford Motor Company (“Ford”) and its Ger-

15. See U.S. Holocaust Memorial Museum Website, German Restitution Law, available at http://www.ushmm.org/assets/frg_restitution.htm (last visited June 21, 2003) (summary provided by the Embassy of the Federal Republic of Germany to the United States). However, slave labor claims by both Jewish and non-Jewish victims had been excluded from the early reparations program. BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 61–62. The German Democratic Republic (East Germany) refused to make any payments during its existence, claiming that it was not the successor state to Nazi Germany.

16. See Bazylar, *Nuremberg in America*, *supra* note 6, at 191–94. An explanation of the terms “slave labor” and “forced labor” is necessary. The Germans did not have separate terms to distinguish between those who were worked to death and those who were treated as capital assets. The term “Zwangsarbeiter” (forced laborer) was applied to both. Recently, however, the term “slave laborer” has been applied to the former and “forced laborer” to the latter. It is important to recognize, however, that both were slaves, as that word is commonly known, and for that reason this Article uses the term “slave” for both. For a further discussion of these terms and their application, see *id.*, at 192, n.784.

17. For a fuller discussion of these claims and the settlement, see AUTHERS & WOLFFE, *supra* note 2, at 189–246; BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 59–109; EIZENSTAT, *supra* note 2, at 205–92.

18. These lawsuits are listed in Bazylar, *Nuremberg in America*, *supra* note 6, app. A, at 265–72.

man subsidiary, Ford-Werke, A.G.¹⁹ The complaint alleged that Ford had knowingly used forced labor in Nazi Germany during World War II through its subsidiary Ford-Werke, A.G., and that it had benefited economically. Ford-Werke, A.G. was one of fifty-one companies that had used Nazi victims from Auschwitz and Buchenwald in its factories as slave laborers. Following this lawsuit against Ford, fifty-six other lawsuits were filed in California, Illinois, Indiana, New Jersey, and New York against more than twenty different German and Austrian firms for their use of slave labor during the war. Some of the more notorious cases included Degussa being sued for supplying the Zyklon-B used in the Nazi gas chambers and processing the gold taken from Holocaust victims.²⁰ Bayer, Hoechst, and Schering were sued for their involvement in medical experiments performed on the victims of the Nazi regime.²¹ Hugo Boss, now an Italian clothier but originally a German company, was sued for its use of slave labor to make SS uniforms.²² Volkswagen was sued twice in the same day in New Jersey and New York federal courts by its former Jewish and non-Jewish slaves.²³

The effects of the U.S. litigation were far reaching. The head of a Polish foundation working on behalf of former Polish slaves stated, "As long as there were no lawsuits, German companies refused to talk. Our lawsuit is intended to force German businesses to talk about our claims. . . . We hope that thanks to filing the lawsuit in the United States, America will become a spokesman for all victims."²⁴

The U.S. media also kept up the drumbeat. Holocaust restitution became a "hot story" in newspapers and magazines.

19. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999). For a detailed discussion, see Bazyler, *Nuremberg in America*, *supra* note 6, at 191–236. See also REINHOLD BILLSTEIN, ET AL., *WORKING FOR THE ENEMY: FORD, GENERAL MOTORS, AND FORCED LABOR IN GERMANY DURING THE SECOND WORLD WAR* 239–49 (2000) [hereinafter *WORKING FOR THE ENEMY*].

20. *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999).

21. *Holocaust Experiment Survivors Sue Three German Drug Firms*, JERUSALEM POST, May 27, 1999, at 5.

22. *Hugo Boss Used Slaves to Work for Nazis; Charge by Holocaust Survivors*, DAILY MAIL (London), May 15, 1999, at 30.

23. Marilyn Henry, *Advocate for Former Slave Laborers: VW Lawsuits "Crazy"*, JERUSALEM POST, Sept. 3, 1998, at 4.

24. Beata Pasek, *Nazi Slaves Still Feel Victimized*, ASSOCIATED PRESS, Apr. 5, 1999, available at 1999 WL 15999622.

Lawyers working for survivors launched a newspaper campaign, including full-page ads in the *New York Times*, “naming and shaming” German companies with seemingly sterling reputations in the United States.²⁵ The ads reminded consumers that these same companies had participated in the most shameful crime in history. Prime-time U.S. television shows broadcast stories on the subject, with the lawyers’ elderly clients appearing to discuss how they were forced to work as slaves for Volkswagen, Mercedes-Benz, Siemens, and other prominent German companies.

At the state and local governmental level, Hevesi and his fellow regulators refocused their campaign from Switzerland to Germany, threatening German industry with the same kind of economic sanctions and boycotts they had previously used against the Swiss banks. One example of how state and local officials became passionate activists in the Holocaust restitution campaign was the filing by California governor Gray Davis in his capacity as a private citizen of a lawsuit against Ford. Brought in California state court in San Francisco, the suit also named General Motors, through the actions of Opel A.G., its German subsidiary, as a defendant, as well as several German companies doing business in California claimed to have used slave laborers during World War II.²⁶ Davis and his fellow plaintiffs alleged that the companies’ continued refusal to pay their former slaves for wartime servitude while at the same time doing business in California was an unfair trade practice under that state’s law.²⁷

In the face of such constant pressure, German government and industry began to negotiate with various Jewish organizations and plaintiffs’ attorneys in the United States on the details of a settlement fund. The first meeting was held at the U.S. Department of State and chaired by then-Under Secretary of State Stuart Eizenstat, the Clinton Administration’s “point

25. See BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 68 (reproducing ad directed at DaimlerChrysler with the tag line “Mercedes-Benz. Design. Performance. Slave Labor.”).

26. *Davis Joins Holocaust Lawsuit Targeting U.S. Auto Makers*, L.A. TIMES, Apr. 1, 1999, at A3.

27. *Id.* See also WORKING FOR THE ENEMY, *supra* note 19, at 241.

man” on Holocaust issues.²⁸ Just as with the Swiss bank negotiations, the major obstacle was money. The slave labor claims eventually led the German government and leading German firms to establish on February 16, 1999, a \$1.7 billion (DM3 billion) fund to compensate the laborers, called the German Economy Foundation Initiative.²⁹ German Chancellor Gerhard Schröder explicitly stated that the fund was being established “to counter lawsuits, particularly class action suits, and to remove the basis of the campaign being led against German industry and our country.”³⁰ Both plaintiffs’ attorneys representing the uncompensated slave laborers and American Jewish leaders unanimously felt that the \$1.7 billion offered by the Germans was woefully inadequate.³¹ While negotiations still had a long way to go after the announcement of the \$1.7 billion fund, Schröder’s statement explicitly demonstrated that until the U.S. lawsuits were filed, both the German government and its industry were content to avoid seriously dealing with the issue.

A month later Germany’s Foreign Minister met with Jewish leaders in New York. Further, the German government and industry leaders began negotiating with both plaintiffs’ attor-

28. See David E. Sanger, *Germans Approve Plan to Pay Holocaust Victims*, N.Y. TIMES, Feb. 10, 1999, at A10.

29. Roger Cohen, *German Companies Adopt Fund for Slave Laborers Under Nazis*, N.Y. TIMES, Feb. 17, 1999, at A1. According to the *New York Times*, the announcement of the fund “was clearly aimed at stopping a wave of lawsuits in American courts against German companies that used slave labor and forced labor during World War II.” *Id.* See also Michael J. Bazylar, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 615 (1999).

German Chancellor Gerhard Schröder made it obvious that the fund was being established as a means to shortcut lawsuits filed against German industry in the United States. Such an admission is astounding because it explicitly demonstrates the strength of the American system of justice. Fear of American litigation led the Germans to capitulate and agree to pay the slave laborers.

Id.

30. Roger Cohen, *German Companies Adopt Fund for Slave Laborers Under Nazis*, N.Y. TIMES, Feb. 17, 1999, at A1.

31. See Roger Cohen, *Germans Lag in Reaching Slave Labor Settlement*, N.Y. TIMES, Aug. 25, 1999, at A11. (“The sticking point really is the numbers . . . Although the talks have been going on since February [1999], the sides are some way apart.”) (quoting Alissa Kaplan, Jewish Claims Conference spokeswoman).

neys and various Jewish organizations on the details of the fund. The first meeting was held at the U.S. State Department, with Eizenstat chairing the meeting.³²

On September 13, 1999, there was a significant setback when two different federal judges in New Jersey dismissed five slave labor lawsuits, including the lawsuit against Ford.³³ The judges reasoned that treaties enacted after World War II prevented the American judiciary from examining the substance of these lawsuits. Such claims, ruled the judges, could only be resolved through government-to-government negotiations, not private litigation.³⁴ Despite this legal victory, Germany and its industry did not walk away from the negotiating table.

On December 17, 1999, U.S. and German negotiators agreed to a global settlement of all American litigation for DM10 billion (approximately \$5 billion) to compensate the roughly one million surviving Nazi-era slave and forced laborers.³⁵ Stuart Eizenstat represented the U.S. government during the negotiations. The fund precludes any future legal claims against any German firms and their subsidiaries for their wartime acts by obligating the U.S. executive branch to make an appearance in any lawsuit filed in an American court against a German entity for such acts with a request to the court that the lawsuit be dismissed. On July 17, 2000, President Clinton and German Chancellor Schröder finalized the agreement between the two nations.³⁶

32. See U.S. Diplomatic Mission — Information Resource Centers, Holocaust Issues, Policy Statements, at <http://www.usembassy.de/policy/holocaust> (last visited June 21, 2003).

33. See, e.g., *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 285 (D.N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 491 (D.N.J. 1999).

34. *Burger-Fischer*, 65 F. Supp. 2d at 285; *Iwanowa*, 67 F. Supp. 2d at 491.

35. Statement of Stuart E. Eizenstat, Treasury Deputy Secretary, Plenary Session, Slave and Forced Labor Negotiations, Berlin, Germany, Office of Public Affairs, U.S. Department of Treasury, LS-298 (Dec. 17, 1999), available at <http://www.ustreas.gov/press/releases/ls298.htm> (official U.S. government announcement of German slave labor settlement). For information about the German fund, see the official website of the German Economy Foundation Initiative Steering Group, at <http://www.stiftungsinitiative.de/eindexr.html> (last visited June 21, 2003). See also BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 79–109.

36. See William Drozdiak, *Germany Sets Fund for Slaves of Nazis; \$5 Billion Will Go to Aging Survivors*, WASH. POST, July 18, 2000, at A17. See also

While the agreement obligated the U.S. executive branch to seek dismissals of all present and future litigation against any German entity arising out of World War II, the German government was obligated to pass legislation establishing a joint public-private German Fund Foundation, which the German parliament promptly enacted the next month, on August 12, 2000. Over 1,600 German companies, including American subsidiaries of German companies, pledged to contribute to the fund. In June 2001, the first payments began to go out to the survivors.³⁷

The German slave labor agreement would never have been reached without pressure from and direct involvement by the United States. The German government acknowledged that the major incentive for establishing the fund was to end the litigation in American courts, as German companies did not fear being sued anywhere else in the world, even in their own courts.³⁸ The German companies were also well aware that state and local governments would seek sanctions against German industry if a speedy resolution of these claims was not achieved once

Statement by the President: Payments to Victims of Nazi Slave and Forced Labor, The White House, Office of the Press Secretary, Camp David, Maryland (July 17, 2000), *available at* <http://www.usembassy.de/policy/holocaust/clinton1.htm>.

37. See AGREEMENT BETWEEN THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA CONCERNING THE FOUNDATION "REMEMBRANCE, RESPONSIBILITY AND THE FUTURE," *available at* the website of the German Economy Foundation Initiative Steering Group, at www.stiftungsinitiative.de/eindexr.html (last visited June 21, 2003). See also A Law on the Creation of a Foundation Remembrance, Responsibility and Future. *Id.* It should be noted that Germany and its industry, despite making these payments, continues to deny that German companies which used Jews and others as slaves during the war have any legal liability for such acts. See *id.* ("No legal basis exists for claims against German enterprises with regard to forced labor or to injuries consequential upon persecution during the Nazi era.")

38. See BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 347, n.33; Marilyn Henry, *U.S. and Germany Agree on Terms for "Legal Peace" on Slave Labor Claims*, JERUSALEM POST, June 14, 2000, at 7; William Drozdiak, *Germans Up Offer to Nazis' Slave Laborers; Survivors Would Receive Over \$5 Billion From Government, Industry Under Settlement*, WASH. POST, Nov. 18, 1999, at A36; William Drozdiak, *Germans Reach Settlement With Slave Laborers*, WASH. POST, Dec. 18, 1999, at A20.

the litigation was underway.³⁹ In the U.S. Congress, legislation was also introduced that would have overturned previous court rulings and specifically allowed survivors to sue the German companies in the courts of the United States. Finally, German companies did not want to risk any of their business in the United States as their wartime history was resurrected for American consumers.

C. France

Even before the litigation was launched against German industry, lawsuits were being filed in the United States against French banks.⁴⁰ In December 1997, the first lawsuit, *Bodner v. Banque Paribas*, was filed against the six large French banks on behalf of “the Jewish victims and survivors of the Nazi Holocaust in France, their heirs and beneficiaries.”⁴¹ The suit was brought by sixteen Holocaust survivors, all U.S. nationals who were either former French nationals or refugees living in France during the occupation, for the banks’ theft of their assets in the aftermath of the German occupation of France in 1940.

A second class action lawsuit, *Benisti v. Banque Paribas*,⁴² was filed a year later on behalf of another group of survivors, all of whom were foreign nationals.⁴³ This suit added other French banks, as well as two American banks with branches in wartime Paris, Chase Manhattan and J.P. Morgan, to the litigation. Three months later, in March 1999, yet another suit was filed against the French banks in California.⁴⁴ This suit alleged that the French banks’ refusal to return Holocaust victims’ deposited

39. Imre Karacs, *Ex-Nazi Slaves Tell Germany: Raise Payout or Face Trade War Threat to Boost £2.7m Payout Offer*, INDEP. (London), Dec. 10, 1999, at 19. See also Imre Karacs, *Germany’s £3.2bn Bid to Close Book on Nazi Past Leaves Only Rifts and Rancour in its Wake*, INDEP. (London), July 18, 2000, at 3.

40. For further discussion, see BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 176–201.

41. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 121 (E.D.N.Y. 2000).

42. See *id.* at 124.

43. *Id.* at 121.

44. See Complaint at ¶ 1, *Mayer v. Banque Paribas* (Cal. Sup. Ct. 1999) (No. BC 302226).

assets amounted to unfair business practices under California law.

With the mounting litigation, other entities in the United States began pressuring France and its banks to settle the suits. In September 1999, the House of Representatives Banking Committee, chaired by Republican Congressman Jim Leach, held hearings at which officials of the French government's historical commission came to testify before U.S. federal legislators, who scrutinized their past misappropriations of Holocaust victims' assets. Leach, taking on the role played three years earlier by Senator Alfonse D'Amato during the Senate Banking Committee's hearing on the Swiss banks, chastised the French financial institutions. Alan Hevesi, then-New York Comptroller, also chose to enter the fray. Hevesi's Executive Monitoring Committee not so coincidentally added the issue of the French banks to its September 1999 meeting agenda. This was also seen as "a way to pressure French banks to settle the lawsuits."⁴⁵

A significant legal victory came in August 2000, when Brooklyn federal judge Sterling Johnson denied the French banks' motion to dismiss and ordered the banks to engage in pre-trial discovery.⁴⁶ Forced to produce documents of their wartime dealings, the French banks began looking for a way to end the litigation.

In January, 2001, during President Clinton's last month in office, Eizenstat skillfully crafted a settlement with the French banks and, in the last few days of the Clinton administration, French negotiators came to the United States to meet their American counterparts and finalized the agreement to compensate Holocaust victims for lost assets. The French banks agreed to pay more than \$172.5 million to 64,000 known account holders and other undocumented claimants. The payments to the victims would be made through the Drai Commission.⁴⁷ In turn, the agreement also settled the three lawsuits that had been filed against the French banks.⁴⁸

45. Pauline Jelinek, *Holocaust Compensation Promised*, ASSOCIATED PRESS, Jan. 18, 2001, available at 2001 WL 9867508.

46. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

47. For further information, see Part V, *infra*.

48. Pauline Jelinek, *Holocaust Redress Deals Enter Last Phase; That's the Timely Payment to Victims*, SAN DIEGO UNION-TRIB., Jan. 19, 2001, at A9. In

The political pressure, together with the legal decision in favor of the plaintiffs, proved to be a significant element in causing the French banks to seek a speedy end of the litigation. To their credit, the French banks realized that if they were to avoid the trauma experienced one year earlier by the Swiss banks at the hands of federal and local politicians — and not jeopardize their ability to do business in the United States — they needed to remove the issue from the American political arena.

D. Austria

At about the same time the settlement was reached with the French banks, Eizenstat also achieved a settlement with Austria on wartime profiteering activities during World War II. As in Germany, Austrian government and industry created a fund under Austrian law — called the Austrian Fund for Reconciliation, Peace and Cooperation — to compensate their former slaves.⁴⁹ In October 2000, Austria and the United States, with the concurrence of the World Jewish Congress and the class action lawyers, finally agreed to the \$410 million fund, which came into existence in November 2000. As with the German

July 2002, the Belgian banks, which also engaged in theft of the bank accounts of their Jewish account holders during the war, likewise settled. See BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 201. As a result of that settlement, the American-based bank Wells Fargo & Co. (“Wells Fargo”) became inadvertently enmeshed in the Holocaust restitution saga. In 1996, Wells Fargo acquired a Belgian bank in business during the war. When twenty-two banks in Belgium agreed to pay approximately €59 million to settle these wartime claims, Wells Fargo initially balked at participating in the settlement, arguing that it did not have any relationship with the Belgian bank during the war. A day later, it changed its mind. On Mar. 11, 2003, Wells Fargo both apologized to the Belgian Jewish community and agreed to contribute €267,000 to the Belgian banks settlement. See *Wells Fargo Plans Holocaust Payout After Refusing*, HA’ARETZ (Israel), Mar. 13, 2003, available at <http://www.haaretzdaily.com>; Thomas S. Mulligan, *Bank Has Change of Heart on War Claims*, L.A. TIMES, Mar. 12, 2003, at C1. See also Thomas S. Mulligan, *Wells Refuses Belgium Claim, Bank Does Not Believe It Is Responsible for Jewish-Owned Deposits Seized During WWII*, L.A. TIMES, Mar. 11, 2003, at C1.

49. For information about the Austrian slave labor fund, see Austrian Fund for Reconciliation, Peace, and Cooperation, *The Austrian Reconciliation Fund: Voluntary Payments by the Republic of Austria to Former Slave and Forced Labourers of the Nazi Regime on the Territory of Present-Day Austria*, at <http://www.reconciliationfund.at/history.htm> (last visited June 21, 2003).

fund, the Austrian fund began to make payments only after all of the lawsuits pending in the United States against Austrian firms were dismissed. Over 20,000 former slaves are expected to receive payments.

A second agreement was also crafted between the Austrians and Eizenstat relating to non-labor restitution issues.⁵⁰ With this agreement, Austria agreed to provide compensation for the seizure of Jewish property in Austria after the Nazis came to power and to pay pensions to all Jewish survivors who had been persecuted and stripped of their Austrian citizenship. Only a month after the settlement was established, however, a suit for non-labor claims was filed in a California federal court in an attempt to void the deal.⁵¹ As with Germany, Austria is not willing to make payments unless all suits are dismissed. As of June 2003, with the litigation still pending, no payments have been made to the survivors.

E. Israel

The initial accusations that the Swiss banks failed to return funds deposited by Holocaust victims led to inquiries as to whether banks in other countries might also be holding such pre-war and wartime dormant accounts. One surprising answer was Israel. In the 1930s, thousands of European Jews had opened accounts at the Anglo-Palestine Bank in British Palestine. These accounts typically contained £1,000 (approximately \$4,500),⁵² the amount required to be eligible for an entry permit into British Mandate Palestine. As World War II progressed, Great Britain classified these deposits as belonging to enemy aliens, since the European Jewish depositors came from Germany, Austria, and eventually other nations conquered by Nazi Germany.

The fate of the deposits remained a mystery for over a half century — until the onset of the campaign against the Swiss

50. For information about compensation by Austria for non-slave labor claims, see National Fund of the Republic of Austria for Victims of National Socialism, at www.nationalfonds.org (last visited June 21, 2003).

51. Chava Anderman, et al. v. Federal Republic of Austria, et al., CV-01-01769 (U.S. Dist. Ct. C.D. Cal. 2003), available at 2003 US Dist LEXIS 6395.

52. See Michael J. Bazylar, *www.swissbankclaims.com: The Legality and Morality of the Holocaust-Era Settlement With the Swiss Banks*, 25 *FORDHAM INT'L L.J.* 64, 87–88 (2001).

banks. In January 2000, Bank Leumi, Israel's largest bank and the Anglo-Palestine Bank's successor, admitted to holding approximately 13,000 dormant accounts, many of which are believed to have belonged to victims of Nazi persecution.⁵³ Like the Swiss banks, Bank Leumi initially refuted the accusations that it might be holding such funds. This led to Bank Leumi being accused of being no better than the Swiss banks. Bank Leumi soon gave up the fight. Embarrassed into following the model adopted by the Swiss banks and other European corporations, it created a claims settlement process — still continuing as of the date of this writing — for survivors and heirs entitled to the funds. The Bank Leumi episode illustrates an important legacy of the Swiss campaign. Restitution claims made by Holocaust survivors — or for that matter any other historical claims for financial wrongs — can no longer be ignored by those accused of benefiting from such wrongs. The accusations are now taken seriously.⁵⁴

In July 1999, the Israel Museum in Jerusalem, Israel's premier art institution was discovered to be holding a painting by Impressionist Camille Pissarro stolen by the Nazis from its Jewish owners. The Pissarro had made its way into the post-war New York art market and was purchased by an American couple, who then donated it to the Israel Museum. The museum had been displaying the painting since 1997. The Israel Museum reached an agreement with the elderly heir of the pre-

53. EIZENSTAT, *supra* note 2, at 347.

54. Information about Bank Leumi's Holocaust-era dormant accounts and claims process can be located at Unclaimed Assets.com, at <http://www.unclaimedassets.com/israel.html> (last visited June 21, 2003). For a discussion of the efforts by Israeli companies and the Israeli government with respect to Holocaust restitution, see Netty C. Gross, *Cheating Our Own: Israel Stalls on Holocaust Reparations*, JERUSALEM REPORT, Dec. 16, 2002, at 14; Allyn Fisher-Ilan, *Israel's Unfinished Holocaust Business*, JERUSALEM POST, Jan. 21, 2000, at 7B. See also Jack Katzenell, *Israel Has WWII Assets*, AP ONLINE, Apr. 13, 2000, available at 2000 WL 19049913 (discussing publication of treatise in Israel, *Forgotten Property* by Israeli professor Yossi Katz, regarding "land, houses, and other assets in what was then British Mandatory Palestine . . . purchased by European Jews, many of whom later died in the Holocaust"); Nina Gilbert, *Panel to Probe Holocaust-Era Assets*, JERUSALEM POST, Apr. 20, 2001, at 5A.

war owners, allowing the museum to display the painting on a long-term loan.⁵⁵

In November 2001, an Israeli parliamentary commission concluded that the total value of unclaimed Holocaust-era assets held by Israeli banks, the State of Israel, and various Israeli public institutions amounted to approximately 25 billion shekels (\$6.25 billion), a much larger figure than previously believed.⁵⁶ Most of this was land purchased by European Jews in pre-war Mandatory Palestine.⁵⁷ When these individuals perished, the land remained unclaimed.⁵⁸ If the Holocaust restitution campaign had not begun in Europe, Israel would never have been pressured to look at its own role. As with the other Holocaust restitution settlements, the original pressure came from the United States.

F. Insurance Claims

Before the two world wars, insurance policies and annuities were popular investment vehicles in Europe.⁵⁹ Upon coming to power in Germany, the Nazis' persecution of Jews included the confiscation of insurance policies from its Jewish citizenry.

55. See David B. Green, *Israel Museum Drags Its Feet Over Its Looted Picasso*, JERUSALEM REPORT, Aug. 2, 1999, at 4. See also Rebecca Trounson, *After Circuitous Journey, Painting Lost to Nazis Finds a Home in Israel*, L.A. TIMES, Feb. 19, 2000, at A6.

56. EIZENSTAT, *supra* note 2, at 347.

57. *Id.*

58. Etgar Lefkovits, *Dormant Holocaust-era Assets Valued at NIS 25b*, JERUSALEM POST, Nov. 9, 2001, at 1A.

59. Jews in pre-war Europe often purchased insurance, and an insurance policy was known as a "poor man's Swiss bank account." A particularly poignant example of the theft of insurance proceeds by the Nazis, and German insurers' collusion in such theft, occurred in the aftermath of *Kristallnacht* in November 1938. Since many of the Jewish merchants whose shops and other properties were damaged or looted during the campaign held casualty insurance to cover such losses, the Nazis ordered the insurance companies to pay all such claims to the state rather than to the injured parties. In a deal made with the insurers, the companies were allowed to expunge the claims of their Jewish policyholders by paying only a fraction of the claims' value to the German state. For a discussion of the scheme concocted in the aftermath of *Kristallnacht*, as well as a general discussion of the Holocaust-era restitution claims, see DEBORAH SENN, WASH. ST. INS. COMM'N, PRIVATE INSURERS & UNPAID HOLOCAUST-ERA INSURANCE CLAIMS (1999), available at http://www.insurance.wa.gov/publications/holocaust/Rev_Report.pdf [hereinafter SENN, PRIVATE INSURERS].

Jews were also forced to cash in their insurance policies on a mass scale, both to pay Nazi taxes assessed especially against them and also for the costs of emigration from Germany.⁶⁰ After the war, insurance companies that had sold insurance to Jews in Germany and other parts of prewar Europe refused in many instances to honor these policies.⁶¹

Like the Swiss banks, the European insurance companies or their successor companies that sold policies to the Jews in prewar Europe are still operating today. Unbeknownst to most Americans, European insurance business are big players in the U.S. insurance market. In 1996, for example, Germany's Allianz collected more than \$6 billion in premiums in the United States.⁶² Allianz also owns the Fireman's Fund Insurance Company and thirteen other U.S. subsidiaries.⁶³ Switzerland's Zurich Insurance Group collected \$5.8 billion in premiums in the United States in 1996.⁶⁴ Zurich owns over twenty U.S.-based subsidiaries, including Farmers Group, Inc., Kemper Investors Life Insurance Co., Fidelity and Deposit Company of Maryland, and the Maryland Casualty Co.⁶⁵ Another Swiss insurance company, Winterthur Group of Switzerland, owned by Credit Suisse Bank, collected in 1996 \$1.4 billion in premiums in the United States.⁶⁶ Winterthur owns twenty-eight U.S.-based subsidiaries, including Vanguard Insurance, Unigard Insurance, and Southern Guaranty Insurance.⁶⁷ In 1999, Italy's Assicurazioni Generali collected over \$600 million in premiums in the United States, which it also earned through various U.S.-based subsidiaries.⁶⁸

The United States once again took the lead in forcing European insurers to recognize long dormant Holocaust-era insurance claims. All levels of the U.S. government became involved.

60. *Id.* at 17.

61. *Id.* at 14.

62. *Id.* at 21.

63. DEBORAH SENN, WASH. ST. INS. COMM'N, SUMMARY REPORT TO THE NAIC HOLOCAUST INSURANCE ISSUES WORKING GROUP app. A (June 18, 1998) *available at* <http://www.insurance.wa.gov/industry/holocaust/sumrpt.asp> [hereinafter SENN, SUMMARY REPORT].

64. *Id.*

65. *Id.*

66. *Id.* at 9.

67. SENN, SUMMARY REPORT, *supra* note 63, at app. A.

68. *See* SENN, PRIVATE INSURERS, *supra* note 59, at 21.

At the state level, U.S. state insurance commissioners began to threaten European insurance companies doing business in their states with loss of their licenses unless they quickly recognized these claims.⁶⁹ Some commissioners also began holding hearings on the matter.⁷⁰

Other state government officials also started to put political pressure on the insurance companies to expeditiously settle the claims.⁷¹ In May 1999, California Governor Gray Davis and California Insurance Commissioner Chuck Quackenbush held a bipartisan press conference at the Simon Wiesenthal Center in Los Angeles, issuing stern warnings to the European insurers.⁷² Governor Davis announced, "We come to send a message [to the insurance companies]. You can pay now or we guarantee you will pay more later."⁷³ With a special budget allocation from the California Legislature for this work, the California Department of Insurance began running full-page ads chastising the insurance companies. Under the bold headline of "Time Is Running

69. Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 20 (2002).

70. *Id.*

71. In the United States, insurance is regulated at the state level. To operate in a state, insurance companies must receive a license and are subject to heavy business regulations. All states have some government official, whether an appointed or elected insurance commissioner or some other official in another state agency, in charge of regulating insurers operating in the state. An insurance company failing to meet the state's license requirements can be expelled from doing business in the state by having its state insurance charter revoked by the insurance commissioner.

72. Simon Wiesenthal Center, California Insurance Commissioner Chuck Quackenbush Launches Aggressive Program to Secure Restitution for Holocaust Survivors and Their Heirs, at <http://www.wiesenthal.com/swiss/CalInsConf.cfm> (last visited June 21, 2003).

73. Added Quackenbush, then the highest-ranking Republican officeholder in California: "There is a limit to our patience. When they feel the heat, they will see the light." Elli Wohlgelernter & Tom Tugend, *California Pressures Insurance Companies on Holocaust-Related Payments*, JERUSALEM POST, May 3, 1999, at 5. Quackenbush, along with Deborah Senn, the Washington State Commissioner of Insurance, took the most aggressive and principled stances against the European insurers in the Holocaust restitution arena. The next year Quackenbush was forced to resign from office after revelations that he entered into "sweetheart" deals with other insurance companies he was regulating. Senn, who ran for the U.S. Senate, failed in her election bid. As a result, claimants of the Holocaust insurance restitution movement lost two of their most effective government supporters.

Out,” one advertisement began as follows: “For sixty years, insurance companies have profited by not paying on insurance policies issued to Jews and others who were murdered by the Nazis during the Holocaust.”⁷⁴

Beginning in 1997, two class action lawsuits were filed against more than one dozen European insurers in a New York federal court, followed by six individual actions filed in California.⁷⁵ The claims were brought either by Holocaust survivors or their heirs against insurance companies doing business in the United States.

The European insurance company with the most notoriety in the field of Holocaust-era restitution is Assicurazioni Generali S.p.A., the largest insurance company in Italy and owner of Migdal, Israel’s largest insurer.⁷⁶ Generali, as the company is commonly known, was founded in 1831 by a group of Jewish merchants⁷⁷ and, until recently, its chairman was a Jewish survivor of Auschwitz.⁷⁸ In pre-war Europe, Generali was known as a “Jewish company whose sales agents saturated the major Jewish population centers before the war.”⁷⁹ Generali, along with other European insurers, has been accused of failing to honor policies purchased by Holocaust victims in pre-war Europe.⁸⁰ In May 1998, after the lawsuit against Generali was

74. California Department of Insurance, *Time is Running Out*, May 1999 (advertisement run by the California Department of Insurance) (on file with the authors).

75. For a comprehensive discussion on the subject of insurance claims, see Bazylar, *Nuremberg in America*, *supra* note 6.

76. ISRAEL MINISTRY OF FOREIGN AFFAIRS, ECONOMIC SURVEY, COMMUNICATED BY GPO ECONOMICS DESK (Aug. 1, 1996), *available at* www.mfa.gov.il/mfa/home.asp.

77. Marilyn Henry, *A Holocaust Paper Trail to Nowhere?*, JERUSALEM POST, May 12, 1998, at 11.

78. David Zev Harris, *A Questionable Policy*, JERUSALEM POST, Feb. 7, 1999, at 11.

79. Henry, *supra* note 77.

80. *Id.* Generali originally maintained that it had no records of policies it issued before the war. In late 1997, however, it revealed that a warehouse at its headquarters in Trieste, Italy, was found to contain partial records (called “water copies,” akin to carbon copies) of such policies. *Id.* Originally said to contain records of between 330,000 and 384,000 pre-war policyholders, Generali culled the list down to approximately 100,000 policies, which it transferred to a CD-ROM disc. In mid-1998, it turned over the disc to Yad Vashem to match the names of Holocaust victims found in Yad Vashem’s archives with

filed, California enacted the Holocaust Victims Insurance Act, which provided jurisdiction over Holocaust-era insurance cases, nullified any forum selection clauses, and extended the statute of limitations until 2010 for the insurance claims.⁸¹

The other insurance company with a large stake in the pre-war European market is Allianz of Germany, presently the second largest insurance concern in the world.⁸² Allianz's CEO, Kurt Schmidt, was Hitler's Minister of Economy.⁸³ Allianz also insured a number of concentration camps, including Auschwitz and Dachau.⁸⁴

Around the same time that the lawsuits were being filed, the National Association of Insurance Commissioners,⁸⁵ composed of the insurance regulators in all fifty states, created a working group on Holocaust and insurance issues.⁸⁶ Some of the regulators began holding hearings, inviting the companies to explain their reasons for not paying pre-war policies. Commissioners began threatening to revoke the licenses of the European insurers for failure to honor these claims.

The commissioners from California, New York, and Florida — states where the combined populations contained the largest concentration of Holocaust survivors in the United States — prodded five of the insurers being sued, including Generali and

its list. In early 2002, Generali finally released a list containing 8,740 names of pre-war Jewish policyholders.

81. BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 127.

82. See Brendan Noonan, *On a Grand Scale*, BEST'S REV. — LIFE-HEALTH INS. ED., Dec. 1, 1999, at 41, available at 1999 WL 29605916 (providing detailed analysis of Allianz's world-wide business empire). See also the webpage of Allianz, at <http://www.allianz.de> (last visited June 21, 2003).

83. See BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 114.

84. John Marks and Jack Egan, *Insuring Nazi Death Camps: History Catches Up with Another German Corporation*, U.S. NEWS & WORLD REPORT, Feb. 22, 1999, at 52 (citing report by German weekly periodical *Der Spiegel*).

85. Headquartered in Kansas City, Missouri, the National Association of Insurance Commissioners ("NAIC") is a voluntary organization of the chief insurance regulatory officials of the fifty states, the District of Columbia, and four U.S. territories. The association's overriding objective is to assist state insurance regulators in protecting consumers and helping maintain the financial stability of the insurance industry by offering financial, actuarial, legal, computer, research, market conduct, and economic expertise. Formed in 1871, it is the oldest association of state officials. For more information see NAIC, *The NAIC: A Tradition of Consumer Protection*, at <http://www.naic.org/about/background.htm> (last visited June 21, 2003).

86. BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 133.

Allianz, to form and fund the International Commission on Holocaust Era Insurance Claims (“ICHEIC”). The organization was headed by former U.S. Secretary of State Lawrence Eagleburger.⁸⁷ ICHEIC was established in 1998 by the National Association of Insurance Commissioners in cooperation with several European insurance companies, European regulators, representatives of several Jewish organizations, and the State of Israel.⁸⁸ The commission is charged with establishing a just process to expeditiously address the problem of unpaid insurance policies issued to victims of the Holocaust.⁸⁹

Following the model of the Swiss banks’ ICEP, ICHEIC is similarly intended to be a non-adversarial alternative to the U.S. litigation brought against the insurance companies. In February 2000, ICHEIC announced after numerous delays that it would begin a two-year claims process to locate and pay unpaid Holocaust-era insurance policies.⁹⁰ That same month, ICHEIC began placing advertisements in newspapers and journals around the world, inviting Holocaust survivors and heirs to submit claims.⁹¹

Unfortunately, ICHEIC has done a poor job to date.⁹² By early 2002, ICHEIC, while spending \$30 million on expenses, had made offers on only approximately 1,000 of the 81,000 claims received.⁹³ The individual California lawsuits, five of which

87. *Id.* at 133–34. The other three insurers participating in ICHEIC are France’s AXA, Swiss insurers Winterthur Lieben (owned by Credit Suisse Bank) and Zurich. Eagleburger has attempted to have the other European insurers sued join the Commission, but without success. *Id.*

88. In addition to the participating insurance companies and the insurance commissioners of the three states, the World Jewish Congress, the Claims Conference, and the World Jewish Restitution Organization (all related NGOs), as well as the State of Israel, have a seat on the ICHEIC board.

89. See The International Commission on Holocaust Era Insurance Claims, at <http://www.icheic.org/eng> (last visited June 21, 2003).

90. Henry Weinstein, *Spending by Holocaust Claims Panel Criticized*, L.A. TIMES, May 17, 2001, at A1.

91. *Id.*

92. See *id.* See also Henry Weinstein, *Insurers Reject Most Claims in Holocaust Cases*, L.A. TIMES, May 9, 2000, at A1; Michael Maiello & Orbert Lenzer, *The Last Victims*, FORBES, May 14, 2001, at 112. For the current status of the ICHEIC claims settlement process, see ICHEIC, *Claims Processing*, at <http://www.icheic.org/eng/claims.html> (last visited June 21, 2003).

93. See Weinstein, *Spending by Holocaust Claims Panel Criticized*, *supra* note 90; Michael Maiello & Robert Lenzer, *The Last Victims: As the Jews Fled*

have settled, have yielded higher payments than the amounts distributed through ICHEIC.⁹⁴ While the settlement terms remain confidential, the *New York Times* reported that one of the California cases alone settled for \$1.25 million.⁹⁵

On September 19, 2002, a \$275 million agreement between ICHEIC and the German foundation Remembrance, Responsibility and the Future was reached to settle unpaid insurance claims for Holocaust survivors and their families worldwide.⁹⁶ As discussed above, the Foundation is an entity funded by the German government and companies and was created pursuant to the July 2000 Executive Agreement between the United

the Holocaust, European Insurers Pocketed Their Premiums. Decades Later, They Promised Compensation. But So Far, They've Paid Out a Pittance, FORBES, May 14, 2001, at 112.

94. A substantial reason for the settlement of the individual suits in California has been California's aggressive stance against the insurers accused of failing to honor Holocaust-era insurance claims. California led the way in enacting new laws threatening suspension of licenses of such insurers (CAL. INS. CODE §§ 790–790.15 (West 2003), enacted in 1998), requiring the insurers to open their pre-war insurance records (CAL. INS. CODE § 13800 (West 2003), enacted in 1999), and extending the limitations period for filing suits for such claims until December 3, 2010 (CAL. CIV. PROC. CODE § 354.5 (West 2003), enacted in 1998). The states of Washington and Florida have followed suit by enacting similar statutes. See Holocaust Victim Insurance Act, FLA. STAT. ANN. § 626.9543 (West 2003), enacted in 1999; Holocaust Victims Insurance Relief Act, WASH. REV. CODE ANN. § 48.104.060 (West 2003), enacted in 1999; Holocaust Victims Insurance Act, WASH. REV. CODE ANN. § 48.104.040 (West 2003), enacted in 1999. The insurance companies have challenged these statutes, asserting that they are unconstitutional. To date, no final ruling has been issued on this question.

95. *Holocaust Insurance Settlement Reported*, N.Y. TIMES, Nov. 25, 1999, at A4 (reporting settlement of *Stern v. Assicurazioni Generali*, a case filed by a Holocaust survivor, Adolf Stern, eighty-two years old, and his family for policies purchased from Generali by his father Moshe "Mor" Stern, a wealthy wine and spirits merchant from Uzghorod, Hungary who perished at Auschwitz. In June 1945, Adolf, who survived Buchenwald and was then twenty-eight years old, presented himself at Generali's offices in Prague seeking payment on the policies. At his deposition, Adolf testified that Generali officials demanded that he produce a death certificate for Mor. When Adolf explained that the Nazis did not issue death certificates, he was forcibly ejected from Generali's offices. (Deposition of Adolf Stern, at 26–27)).

96. See Press Release, U.S. Dep't of State, Philip T. Reeker, Deputy Spokesman, Holocaust Insurance Agreement Reached (Sept. 19, 2002), available at www.state.gov/r/pa/prs/ps/2002/13580.htm.

States and Germany,⁹⁷ entered into effect on October 17, 2002.⁹⁸ ICHEIC will work with the German Foundation and the German insurance industry association to distribute the \$275 million fund.

G. Art

The Nazis stole an estimated 220,000 works of art from both museums and private collections throughout Europe.⁹⁹ The value of this plundered art — amounting to \$2.5 billion in 1945 prices, or \$20.5 billion today — exceeded the total value of all artwork in the United States in 1945.¹⁰⁰ After the war, Nazi-looted art was soon transplanted throughout the world.¹⁰¹ Since 1997, a number of prominent American museums have been embarrassed to find that their collections include Nazi-stolen art.¹⁰²

97. Press Release, U.S. Dep't of State, Richard Boucher, Spokesman, Holocaust Insurance Agreement Signed (Oct. 17, 2002), *available at* www.state.gov/r/pa/prs/ps/2002/14455.htm.

98. For a copy of the Agreement between the International Commission on Holocaust Era Insurance Claims and the foundation Remembrance, Responsibility and Future and the German Insurance Association, see <http://www.icheic.org/eng/press.html>.

99. For further discussion, see BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 202–68. One of the most publicized books on the subject of Nazi-stolen art is HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART (1997). Feliciano, a Paris-based journalist, first published his book in France, where it caused a sensation and led to the first identification of Nazi-stolen art found in French museums and private collections. Another worthy treatment of the subject can be found in LYNN NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994). Pillaging of art treasures in the aftermath of war continues to this day, the looting of the Iraqi antiquities in the aftermath of the Iraqi war being the latest example. For a proposal by Holocaust art historians on adopting the postwar model in retrieving Nazi stolen art to the situation in Iraq, see Constance Lowenthal and Stephen Urice, *An Army for Art*, N.Y. TIMES, Apr. 17, 2003, at A25.

100. Bazylar, *Nuremberg in America*, *supra* note 6, at 161.

101. For a thorough overview of the activities of art recovery in various countries, see the Commission for Art Recovery, *at* <http://www.comartrecovery.org/common/htm/welcome.html> (last visited June 21, 2003). This Commission is associated with the World Jewish Congress and the World Jewish Restitution Organization.

102. For an excellent discussion of the problem of Nazi-stolen art found in the United States and possible solutions, see Lee Rosenbaum, *Will Museums in U.S. Purge Nazi-Tainted Art?*, ART IN AMERICA, Nov. 1, 1998, at 37.

The worldwide movement to recover Nazi-looted art also has its roots in the United States. In late 1998, the U.S. Department of State and the U.S. Holocaust Memorial Museum hosted the Washington Conference on Holocaust-Era Assets at the U.S. Department of State.¹⁰³ Forty-four governments, as well as numerous international non-governmental organizations, sent delegations to the conference to deal with Nazi-stolen assets, including artwork found throughout the world.¹⁰⁴ The conference was designed as an international effort to help research and uncover cultural assets seized by the Nazis during World War II and to return those assets to their pre-war owners or heirs.¹⁰⁵ At the conclusion of the conference, the participating nations adopted by consensus the Washington Principles, an 11-point plan created to help individuals in their efforts to recover Nazi-looted works of art.¹⁰⁶

The principles are “comprehensive guidelines intended to identify artworks looted by Nazis during World War II, locate the prewar owners and settle conflicting claims to property worth billions of dollars on today’s market.”¹⁰⁷ Small steps have been made to comply with these principles and return Nazi-looted assets. For example, as recently as December 2002, the United States returned to Russia an archive that Germany captured when it occupied Smolensk during World War II. The Germans took a small portion of the archive to Bavaria, where U.S. forces retrieved it at the end of the war and finally brought it to the United States in 1947. The documents then remained for many years at the National Archives.¹⁰⁸ In the end, with the assistance of the private Commission on Art Recovery, which

103. Washington Conference Principles On Nazi-Confiscated Art, Released in connection with the Washington Conference on Holocaust-Era Assets, Washington, D.C. (Dec. 3, 1998), *available at* http://www.state.gov/www/regions/eur/981203_heac_art_princ.html [hereinafter Washington Principles].

104. *Id.*

105. See Norman Kempster, *44 Nations Set Guidelines for Retrieving Nazi Loot Art: Washington Conference*, L.A. TIMES, Dec. 4, 1998, at A8.

106. Washington Principles, *supra* note 103. These principles were reaffirmed at an international conference in Vilnius, Lithuania in October 2000.

107. See Kempster, *supra* note 105.

108. U.S. DEP'T OF STATE, MEDIA NOTE, OFFICE OF THE PRESS SECRETARY, RETURN OF SMOLENSK ARCHIVE (Dec. 13, 2002), *available at* <http://www.state.gov/r/pa/prs/ps/2002/15942.htm>.

helped to effectuate an agreement, the U.S. government returned the documents to Smolensk.¹⁰⁹

In late 2000, the American Association of Museums (“AAM”) and American Association of Museum Directors (“AAMD”) agreed to implement a more proactive role regarding Holocaust-looted art works.¹¹⁰ The U.S. museum community also agreed to establish a centralized database of the stolen Holocaust-era art.¹¹¹ As of June 2003, this “Nazi-era Provenance Internet Portal” was still not functioning.

To date, unlike in the other Holocaust-era claims litigation, less than a handful of lawsuits have been filed in the United States involving World War II looted art.¹¹² Since each lawsuit involves a specific work of art, all were individual lawsuits, rather than class action litigation. Furthermore, litigation in the United States involving Nazi looted art has not produced the same results as litigation pertaining to other Holocaust issues. No Holocaust artwork suit has ever reached trial; all have either settled or are still ongoing. Thus far, the community of museums, galleries, and art dealers seems unwilling to establish any fund similar to others created. Instead, the professional art world leaves each defendant who unluckily ends up with Nazi-stolen artwork to fend for itself. This situation continues despite the fact that museums, art dealers and collectors, through their postwar practice of turning a blind eye towards

109. “The return of the Smolensk Archive is part of the U.S. Government’s effort to resolve outstanding disputes over cultural property from the World War II era. It is our belief that such returns help to build an atmosphere of trust and mutual respect between peoples.” *Id.*

110. See PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS, PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS’ ASSETS app. E (2000) (letters of agreement from the AAM and AAMD to the PCHA on Oct. 20, 2000) [hereinafter PCHA FINAL REPORT].

111. See American Association of Museums (“AAM”), *AAM Recommended Procedures for Providing Information to the Public About Objects Transferred in Europe During the Nazi Era* (May 2, 2001), available at http://www.aam-us.org/initiatives/nazi-era/procedures_nazis.cfm.

112. For a general discussion of the law in the United States dealing with stolen art, see RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 201–58, 550–63, 1431, 1434 (1998). One body successful in resolving Nazi looted art claims without litigation is the New York State Banking Department’s Holocaust Claims processing Office (“HCPO”). Without the HCPO, many more Nazi looted art claims would have been forced into litigation.

art with suspicious provenance that suddenly appeared in the marketplace,¹¹³ are responsible for creating a market that permits looted art to be purchased by innocent buyers.

H. Role of Historical Commissions

One of the results of the pressure from the United States in the area of Holocaust restitution has been the creation throughout the world of historical commissions devoted to Holocaust issues.¹¹⁴ European governments and private companies have been forced to examine and expose the truth about their histories during the Nazi era. After a half century of silence, the full historical record of German, Austrian, French, British, and also American companies profiting from the Holocaust is only now coming to light. The historical black hole of commerce in Nazi-era Europe is finally being filled in by Holocaust historians, who are now much in demand to staff the historical commissions being created by governments and private companies to research and issue reports about their financial dealings with the Nazis. All of this is being done in the aftermath, and as a consequence of, the Swiss campaign.

1. Switzerland

As discussed below, in response to the allegations made against them, the Swiss banks and the Swiss government created, respectively, the Volcker Committee and the Bergier Commission to uncover the truth about Switzerland's financial shenanigans during World War II. The Swiss model is now the prototype used by other European governments and private

113. See Judith Dobrzynski, *Loot-Holders Learn that Honesty Can Be Tricky*, RALEIGH (N.C.) NEWS & OBSERVER, Sept. 13, 1998, at G3.

When the idea of levying a tax on dealers and auction houses, or their transactions, has come up at symposiums and conferences, it has not won resounding support from the art trade, with few people in the business feeling a responsibility for what happened in the war.

Id.

114. This method of investigation has been so prominent that the *New York Times* reported that "the lawsuits have also created a mini-boom for . . . [World War II-era] historians and research specialists." Barry Meier, *Historians Are in Demand to Study Corporate Ties to Nazis*, N.Y. TIMES, Feb. 18, 1999, at C2.

corporations when confronted with accusations about their war-time role.

a. Volcker Report

In December 1999, an independent committee of experts created by the Swiss Bankers Association and headed by American Paul Volcker, the former head of the U.S. Federal Reserve Board, concluded a three-year study of the World War II-era dormant accounts held by the Swiss banks.¹¹⁵ In an interview following the issuance of the report, Volcker made the following comment: “They were lackadaisical, to say the least The banks had no incentive to find out the truth about the assets because they felt they should protect the honor of Switzerland. They could have solved this problem a long time ago if they really wanted to.”¹¹⁶

The so-called Volcker Committee found 53,886 accounts in Swiss banks that could have been linked to people persecuted by the Nazis.¹¹⁷ It eventually published 21,000 of these names, which were most likely to be accounts of persecuted Jews.¹¹⁸ The committee’s report cautioned, however, that its numbers were imprecise because “[t]here can be no assurance that all possible accounts have been identified or that some have not been misidentified as those of victims.”¹¹⁹ Nevertheless, even this figure was much higher than the number of dormant accounts the Swiss banks originally claimed to have uncovered. In February 1996, the Swiss Bankers Association announced

115. See PAUL A. VOLCKER ET AL., INDEPENDENT COMMITTEE OF EMINENT PERSONS, REPORT ON DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION IN SWISS BANKS (1999), available at http://icep-iaep.org/final_report/ [hereinafter ICEP REPORT].

116. William Drozdiak, *Panel Discovers 54,000 Accounts of Nazi Victims; Swiss Banks Cleared of Conspiracy*, WASH. POST, Dec. 7, 1999, at A1.

117. See ICEP REPORT, *supra* note 115, at 10.

118. See The Special Masters for Claims Resolution Process for Deposited Assets, Press Release, The Claims Resolution Process Begins, Feb. 5, 2001, available at http://www.specialmasters.org/_press_releases/pr010206.phtm.

119. *Id.* at 6. Moreover, the figure issued by the Volcker Committee is probably underestimated. As the Israeli newspaper *Ha'aretz* pointed out, the committee auditors were “able to examine only four million out of a total of 6.7 million accounts in Swiss banks at the end of the war. Details on the remaining accounts were not kept.” See Yair Sheleg, *Israel: Volcker Panel Numbers Too Low*, HA'ARETZ (Israel), Dec. 7, 1999.

that it knew of only 774 unclaimed bank accounts opened by foreign clients before 1945.¹²⁰ The auditors then matched the names of holders of the discovered dormant accounts to lists of those who had perished in the Holocaust kept by the U.S. Holocaust Museum and the Yad Vashem Holocaust Center in Israel.¹²¹ Both these lists of victims, however, are incomplete.¹²² While the Volcker Committee report cleared the Swiss banks of any criminal wrongdoing, the actions of the banks “led the Committee to question whether their duty of due care in their dealings with customers was observed by a number of banks and their officers in the special situations following World War II.”¹²³ The Committee found that:

The record is clear, certainly by today’s standards, that the handling of these funds was too often grossly insensitive to the special conditions of the Holocaust and sometimes misleading in intent and unfair in result. Our inquiry is one reflection of a willingness by Switzerland to deal with that heritage more forcefully and openly.¹²⁴

120. *See Veil Lifted on Holocaust Accounts in Swiss Banks*, AGENCE FRANCE-PRESSE, Dec. 6, 1999 [hereinafter *Veil Lifted on Holocaust Accounts*] (on file with authors).

121. Yair Sheleg, *Israel: Volcker Panel Numbers Too Low*, HA’ARETZ (Israel), Dec. 7, 1999, available at 1999 WL 29286184.

122. For example, “the list of victims maintained by Yad Vashem includes only about half of all those who died in the Holocaust.” *Veil Lifted on Holocaust Accounts*, *supra* note 120.

123. ICEP REPORT, *supra* note 115, at 14.

124. *Id.* at 23. In the section entitled “Evaluation of Bank’s Conduct,” the report also made the following findings:

In setting the record straight, the Committee has come to certain conclusions about the appropriateness of the actions of the Swiss banks in dealing with the accounts of victims of Nazi persecution. Assessing the record as a whole, the committee concluded:

- (a) The auditors have reported no evidence of systematic destruction of records of victim accounts, organized discrimination against the accounts of victims of Nazi persecution, or concerted efforts to divert the funds of victims of Nazi persecution to improper purposes; and
- (b) There is, however, confirmed evidence of questionable and deceitful actions by some individual banks in the handling of accounts of victims, including withholding of information from Holocaust victims or their heirs about their accounts, failure to

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b. Bergier Final Report

At the end of 1996, the Swiss federal assembly established by unanimous vote the Independent Commission of Experts Switzerland — Second World War (“ICE”) to investigate assets moved into the country before, during, or immediately after the war.¹²⁵ The commission consisted of an international panel of

keep adequate records, many cases of insensitivity to the efforts of victims or heirs of victims to claim dormant or closed accounts, and a general lack of diligence—even active resistance—in response to earlier private and official inquiries about dormant accounts. . . .

No less important were various actions resulting in the closing of accounts. Normal fees and charges, assessed on all dormant accounts, were applied even to victims where banks knew or should have known that the account holder was dead or had disappeared leading to eventual closing by exhaustion of the account values. Moreover, long dormant accounts were transferred to the banks’ profit accounts, most without retaining readily available documentation necessary to easily identify the accounts of returning depositors. The criticism, applicable in this case to the treatment of all dormant accounts, of such actions is even more pointed with respect to the extraordinary charges for searches for victims’ accounts or to close accounts. This criticism also applies to the placing of accounts in fee-free suspense accounts without payment of interest and, in many cases, without adequate documentation. In these cases, tracing of ownership was difficult or impossible, with a consequent greater impact on Holocaust victims whose accounts became involuntarily dormant. These actions . . . led the Committee to question whether their duty of due care in their dealings with customers was observed by a number of banks and their officers in the special situation following World War II.

. . . .

Finally, the Committee also notes that a factor in the indifferent treatment of many claimants to the accounts of victims of Nazi persecution was a fear of embarrassment and litigation arising out of transfers of victims’ accounts to Nazi authorities after these victims had been coerced into signing transfer papers. At the time, ethical and business dilemmas were plainly created for the bank in this situation. However, the practice apparently adopted after the War by a few banks or bank officials of denying to claimants in such cases all knowledge of the existence of an earlier closed account relationship is impossible to justify.

Id. at 13–15.

125. For the complete final report and information on the Independent Commission of Experts Switzerland — Second World War (“ICE”), including

historians, economists, and lawyers, headed by Swiss historian Jean Francois Bergier.¹²⁶ The government of Switzerland allocated approximately \$15 million for the research needed to the complete final report, which was published in March 2002.¹²⁷ The role of the commission was “to shed light upon certain controversial or insufficiently analyzed aspects of this history, aspects in which it appeared that Switzerland, that is to say its political authorities and economic decision-makers, had perhaps been derelict in assuming their responsibilities.”¹²⁸

its mandate, see <http://www.uek.ch>. Besides the final report, ICE completed several other reports on a variety of topics, such as:

Switzerland and refugees during the Nazi Era, Flight Assets/Looted Assets, Interhandel, Clearing, Transit, Electricity, Swiss Subsidiary Companies in the Third Reich, Swiss Refugee and Foreign Economic Policies as covered by the Press; Camouflage/Transfer, Transit, Trade with Securities, Dormant Accounts, Refugee Policy (reedited with supplementary information), Research contributions on aspects of private and public law, the Swiss Land Bank (Bodenkreditanstalt), Swiss-Italian financial relations, Swiss policy regarding gypsies, and German ransom demands, (the last two being unchanged re-editions of the complementary studies which had already appeared as supplements to the Refugee Report); Swiss foreign economic policy, Armaments industry/trade in war material, Swiss insurance companies in the Third Reich, the Swiss financial center, Gold transactions (supplemented re-edition), Aryanization in Austria, and Franco-Swiss financial relations.

Id. ICE also participated in the Washington Conference on Holocaust-Era Assets.

126. ICE consists of a president, and four Swiss and four non-Swiss members (Britain, Israel, Poland, and the United States). See Independent Commission of Experts Switzerland, *Second World War, The Most Important Information at a Glance*, at <http://www.uek.ch> (last visited June 21, 2003).

127. The financing of ICE's research work and the publication of its reports is derived from the Swiss Confederation's general funds. See *id.* In adopting the December 13, 1996 Federal Decree, parliament approved a guarantee credit which was initially fixed at 5 million francs. In view of the extremely comprehensive mandate which was formulated by the Federal Council, and given the enormous number of documentary sources to be examined both at home and abroad, the Swiss parliament, in the December 18, 1997 Federal Decree on the 1998 estimated budget, granted an additional credit of 17 million francs to cover the period running from 1998 to 2001. This means that a total of 22 million francs has been placed at the disposal of the ICE. *Id.*

128. See Jean-Francois Bergier, Introductory Address, ICE Press Conference, (Mar. 22, 2002), available at <http://www.uek.ch> [hereinafter Bergier Address].

The 600-page report contains devastating information about the role of Switzerland during the Nazi era.¹²⁹ ICE recognized that former Swiss political leaders had not always responded to the “humanitarian needs of the time” when neutral Switzerland was surrounded by countries plagued with war.¹³⁰ The commission stated that it had found “quite egregious failures,” especially concerning three areas.¹³¹ The first area was the Swiss treatment of refugees seeking protections within its borders. Bergier stated “the refugee policy of our authorities contributed to the most atrocious of Nazi objectives — the Holocaust.”¹³² He further explained:

The uncertainty as to the figures and the speculation they give rise to, do nothing to alter the fact that a large number of persons whose lives were in danger were turned away — needlessly. Others were welcomed in, yet their human dignity was not always respected. The courage of certain citizens along with their sense of justice, plus the selfless commitment of large segments of the population succeeded in toning down of-

129. See *id.* See also Elizabeth Olson, *Commission Concludes that Swiss Policies Aided the Nazis*, N.Y. TIMES, Mar. 23, 2002, at A4; Elizabeth Olson, *Panel Criticizes Swiss Wartime Past Historians Say Actions Assisted the Nazis*, N.Y. TIMES, Mar. 23, 2002, at A5; *Did the Swiss Help the Nazis?*, DESERET NEWS (Salt Lake City), Dec. 2, 2001, at A17. In addition to the 600-page report, the Bergier Commission produced twenty-five volumes of detailed and generally high-quality studies on specific issues, such as looted art, insurance policies, gold transactions and immigration policy. See <http://www.uek.ch/en/index.htm> (last visited June 21, 2003). The breadth of the work of the Bergier Commission stands in sharp contrast to the paltry studies issued by the Presidential Commission on Holocaust Assets in the United States. See discussion *infra*.

130. William Hall, *Switzerland Seeks to End Bitter Debate over War*, FIN. TIMES, Mar. 23, 2002, at P6. To aid its investigation, the Commission issued a press release on August 14, 1997, inviting anyone to give statements to ICE in confidence “who possess information about the scope and fate of assets brought to Switzerland as a result of national-socialist rule, about business activities of Swiss enterprises abroad, about the attitude of Swiss authorities and individuals towards refugees and prisoners as well as general information.” Press Release, Independent Commission of Experts Receives Testimonies (Aug. 14, 1997), at <http://www.uek.ch/en/presse/pressemitteilungen/970814e.htm>.

131. See JEAN-FRANCOIS BERGIER ET AL., FINAL REPORT: SWITZERLAND, NATIONAL SOCIALISM AND THE SECOND WORLD WAR (2002) (final report of the Independent Commission of Experts Switzerland-Second World War), available at <http://www.uek.ch> [hereinafter ICE FINAL REPORT].

132. See Bergier Address, *supra* note 128.

ficial policy. But they were unable to bend it. Yet the authorities knew the fate that was in store for the victims. They also knew that a more flexible and magnanimous attitude would not have generated consequences of an unbearable nature either for the country's sovereignty or for its inhabitants' living standard however precarious it might have been at the time.¹³³

The second area involves the concessions that both the Swiss government and Swiss private business made to the Nazi regime: "Businesses saw the chance to make a profit; others, like the Federal state itself, viewed their actions as a condition for survival."¹³⁴ The Commission noted that the neutrality preached was often not legitimate and cited several examples such as the shipments of war materials, improper control of the train route between Germany and Italy, and the Swiss government's issuance of a credit line to Germany.¹³⁵

The third area concerns the inadequacy of the restitution process after World War II.¹³⁶ Bergier further commented that the Swiss government's and private businesses' refusal to return assets "is at the root of the property claims along with the problems of Switzerland's image and history, problems which Switzerland was forced to confront in recent years since it had neglected to do so back when the time was ripe for them to be resolved."¹³⁷

After the issuance of the report, the Swiss government acknowledged that past errors could never fully be mended, though it was convinced that "by facing history we not only become more aware of our obligations to today's victims, but can also draw inspiration which will guide our actions."¹³⁸

133. *Id.*

134. *Id.*

135. *Id.*

136. Specifically, ICE found that:

Neither the Swiss Confederation by virtue of its insufficient and inadequate legal provisions, nor the private sector of industry, banks, insurance and trust companies, art galleries and museums, accorded the matter its due importance by undertaking in a timely manner the measures necessary for the legitimate beneficiaries to regain possession of their assets.

Id.

137. *Id.*

138. Peter Capella, *Wartime Swiss Authorities Contributed to Holocaust: Commission*, AGENCE FRANCE-PRESSE, Mar. 22, 2002, available at 2002 WL

2. Germany

The government of Germany has both apologized and taken responsibility for the horrific acts committed by the German people during the Nazi era. Since the 1950s, Germany (first as West Germany and later as unified Germany) has paid approximately \$80 billion to some Jewish victims of Nazi persecution.¹³⁹ German industry, however, has been less open about its role during the war. Official histories of major German companies were often circumspect regarding the companies' eager participation in Nazi-era crimes. The Holocaust restitution lawsuits filed in the United States, which specifically targeted German companies, forced them to confront the dark years of their corporate history.

As important as the DM10 billion financial settlement was in itself, the litigation led German companies to hire Holocaust historians to examine their wartime archives and to issue findings about corporate activities during World War II.¹⁴⁰ As reported by the London-based *Guardian*, the words "independent critical review" have become the mantra for German companies attempting to come to grips with their wartime past. Major industrial firms such as Volkswagen, Daimler-Benz, Deutsche Bank, Dresdner Bank, Allianz, and Bertelsmann have all commissioned "independent critical reviews" of their business records from the Nazi Era.¹⁴¹ Moreover, constructive self-criticism has in itself become something of a growth industry in Germany, with bodies such as the Society for Business History and the Institute for Bank Historical Research assisting firms to face their past.¹⁴²

2368750. See also Elizabeth Olson, *Panel Criticizes Swiss Wartime Past Historians Say Actions Assisted the Nazis*, N.Y. TIMES, Mar. 23, 2002, at A5; *Did the Swiss Help the Nazis?*, DESERET NEWS (Salt Lake City), Dec. 2, 2001, at A17.

139. Roger Cohen, *Germans Lag in Reaching Slave Labor Settlement*, N.Y. TIMES, Aug. 25, 1999, at A11.

140. *Id.*

141. See Barry Meier, *Chronicles of Collaboration: Historians Are in Demand to Study Corporate Ties to Nazis*, N.Y. TIMES, Feb. 8 1999, at C1.

142. Dan Glaister, *Shadow of Shame*, GUARDIAN (London), Dec. 22, 1998, at 2. For information about the Society for Business History [Gesellschaft für Unternehmensgeschichte e.V] see <http://www.unternehmensgeschichte.de/english/index.htm> (last visited June 21, 2003). For information on the Institute for Bank Historical Research [Institut für bankhistorische Forschung

German subsidiaries of some American companies have also begun to examine their wartime role. In 1998, Ford began an in-house study of the wartime role of Ford-Werke A.G., Ford's German subsidiary, which had exploited the vast pool of slave labor that the Nazis made available to German private industry during the war.¹⁴³ In December 2001, Ford released the study, which concluded that the parent company did not profit from its German subsidiary's operations in Nazi Germany. At the same time, Ford announced that it would be "donating the documents for this project, along with a searchable database, to the Benson Ford Research Center at Henry Ford Museum & Greenfield Village, where they will be available for research [by the public]."¹⁴⁴

In 1999, General Motors hired Yale University historian Henry Turner to identify, collect, and catalog documents relevant to the role of its German subsidiary, Opel A.G., during the Third Reich.¹⁴⁵

For further discussion of claims against American companies arising from their wartime activities and dealings with Nazi Germany and in occupied Europe, see Part IV.B., *infra*.

3. Austria

The Austrian Historical Commission was established on October 1, 1998 and published its final report on February 24,

e.V], see <http://home.t-online.de/home/0696311134-0001/brosceng.htm> (last visited June 21, 2003).

143. RESEARCH FINDINGS ABOUT FORD-WERKE UNDER THE NAZI REGIME (Dec. 6, 2001), at <http://media.ford.com> [hereinafter FORD-WERKE REPORT]. See also Henry Weinstein, *Ford Says WWII Study Clears Firm*, L.A. TIMES, Dec. 7, 2001, at C1.

144. FORD-WERKE REPORT, *supra* note 143. See also Tom Brown, *Report Explains Ford's Role in Nazi Germany*, SAN DIEGO UNION-TRIB., Dec. 7, 2001 (discussing the Ford-Werke Report); David Runk, *Ford Releases Nazi Labor Report*, ASSOCIATED PRESS, Dec. 6, 2001.

145. According to Yale Library staff, Professor Turner deposited with the Yale Library the scanned images of Opel and General Motors documents that he generated as part of his research. They are available on CD-ROMs. The Yale Library also has a printed list of the documents. However, the materials are not available on-line. Under GM's agreement with Yale, patrons must be physically present in the library to view the materials. E-mail from Richard Szary, Director, Manuscripts and Archives, Yale Library, to Amber L. Fitzgerald (May 15, 2003) (on file with the authors).

2003.¹⁴⁶ This near-comprehensive 14,000-page report consists of 53 individual reports written by 160 international researchers over a period of four and a half years, the results of which were summarized in a 453-page final report issued on January 24, 2003.¹⁴⁷ This summary final report is divided into two parts: a discussion of the expropriation of property during the World War II and an examination of the political, economic and legal aspects of restitution and compensation after 1945.¹⁴⁸ The total costs for this research and report amounted to €6.5 million.¹⁴⁹ The Commission criticized Austria's postwar governments for their reluctance to indemnify Nazi victims, but also claimed that the government had made attempts to compensate the victims but their attempts were often hampered by ambiguous laws and subject to bureaucratic obstacles.¹⁵⁰

4. France

The private French banks did not follow the example of the Swiss banks by creating a parallel Volcker Committee. The French government, however, seeing the writing on the wall, followed the example of the Swiss authorities. In December 1997, French Prime Minister Lionel Jospin created the "Prime Minister's Office Study Mission Into the Looting of Jewish Assets in France,"¹⁵¹ essentially a French version of the Bergier Commission. The Study Mission was popularly known as the

146. See Press Release, Final Report by Historical Commission: Expropriation in Austria During NS Era and Compensation After 1945 (Feb. 28, 2003), available at <http://www.austria.org/press/318.html> [hereinafter Final Report: Expropriation in Austria].

147. For further information, see The Austrian Historical Commission, at <http://www.historikerkommission.gv.at> (last visited June 21, 2003). The final report is in German, but the Commission plans to issue the report in English.

148. *Id.*

149. Final Report: Expropriation in Austria, *supra* note 146.

150. *Id.*

151. See REPUBLIQUE FRANCAISE, THE PRIME MINISTER'S OFFICE STUDY MISSION INTO THE LOOTING OF JEWISH ASSETS IN FRANCE, EXTRACTS FROM THE SECOND PROGRESS REPORT OF THE STUDY MISSION INTO THE LOOTING OF JEWISH ASSETS IN FRANCE (1999) (on file with the authors). See also REPUBLIQUE FRANCAISE, THE PRIME MINISTER'S OFFICE, EXTRACTS FROM THE SECOND REPORT OF THE STUDY MISSION INTO THE LOOTING OF JEWISH ASSETS IN FRANCE § 1 (1999) [hereinafter REPUBLIQUE FRANCAISE, EXTRACTS FROM THE SECOND REPORT].

“Mattéoli Commission,” named after its chairperson, former cabinet minister and Resistance fighter, Jean Mattéoli.¹⁵² Its task was to study “the various forms of spoliation visited upon the Jews of France during World War II” and the postwar efforts to remedy such spoliation.¹⁵³

The mandate of the nine-member commission was limited. Its task was merely to determine what was taken from the Jews in France during wartime, and it had no power to grant compensation.¹⁵⁴ Before the Commission was disbanded, it recommended the establishment of a successor governmental commission to consider making payments to the victims of the spoliation. In the words of Jean Mattéoli, the Commission “proposed the creation of a body that would examine individual claims from victims of anti-Semitic legislation passed during the Occupation.”¹⁵⁵

Prime Minister Jospin followed Mattéoli’s recommendation. On September 10, 1999, Jospin announced the creation of the so-called “Commission for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force During the Occupation,” otherwise known as the “Drai Commission,” after its chairman, the noted French jurist Pierre Drai.¹⁵⁶ As observed at that time by the head of the Jewish community in France, “this marks the first time a state, other than Germany, recognizes the principle of individual reparation. It’s something

152. Taking a cue from the Swiss government’s effort in public relations, the Mattéoli Commission published an English-language newsletter describing its work. *Compare* Update from the Mattéoli Commission (Newsletter of The Study Mission Into The Looting of Jewish Assets in France) (Sept.1999) [hereinafter Mattéoli Commission Update], *with* Dialogue (Latest News from the Task Force on Switzerland — World War II). See REPUBLIQUE FRANCAISE, EXTRACTS FROM THE SECOND REPORT, *supra* note 151. See also *French Panel to Pay Jews Persecuted During War*, CHI. TRIB., Sept. 12, 1999, at 10 (statement of Henri Hadjenberg, president of the Representative Council of French Jewish Organizations, known by its French acronym “CRIF”).

153. *Id.*

154. Moreover, while the nine-member commission is supposed to determine what was taken, it cannot issue compensation. (“The Mission of which I am chairman is a study mission.”). Mattéoli Commission Update, *supra* note 152 (Feb. 1999), at 1.

155. *Id.* at 1.

156. See *French Panel to Pay Jews Persecuted During War*, CHI. TRIB., *supra* note 152.

we have been waiting for years.”¹⁵⁷ France was making significant progress. The Drai Commission was later given the task of paying the Holocaust victims from the fund created by the negotiations of the United States and France.

In April 2003, the Drai Commission recommended that the French government pay \$91 million in compensation and that the French banks pay \$3.7 million in compensation to Holocaust survivors and heirs as damages for spoliation during wartime.¹⁵⁸ The recommendations are not binding, and the French government, as of May 2003, is still deciding whether to follow them.

5. Other Countries

Many other nations have followed the Swiss, German, Austrian, and French examples by establishing their own bodies for investigating previously unexamined conduct during World War II. Since the beginning of the Holocaust restitution campaign in 1996, the following countries have created commissions of inquiry into Holocaust issues: Argentina, Belgium, Brazil, Croatia, Czech Republic, Estonia, Greece, Hungary, Israel, Italy, Latvia, Lithuania, The Netherlands, Norway, Portugal, Slovak Republic, Spain, Sweden, and Turkey.¹⁵⁹ Other countries, while not formally creating a commission, have also conducted new research on their wartime conduct, including: Albania, Australia, Belarus, Bosnia and Herzegovina, Bulgaria, Canada, Chile, Cyprus, Denmark, Finland, Iceland, Ireland, Luxembourg, Macedonia, Moldova, Poland, Russia, Slovenia, South Africa, Ukraine, United Kingdom, and Uruguay.¹⁶⁰

The pinnacle of this movement to create bodies to study the Holocaust and to promote Holocaust education and remembrance came in January 2000, at the Stockholm International Forum on the Holocaust, held at the invitation of the Swedish

157. *Id.*

158. *France Owes WWII Jews Millions*, AP ONLINE, Apr. 16, 2003, available at 2003 WL 19159298.

159. See PCHA FINAL REPORT, *supra* note 110, app. D, at 53 (2000). See also United States Holocaust Memorial Museum, *List of Government-Appointed Historical Commissions Concerning the Holocaust*, at <http://taskforce.ushmm.org/combody.htm> (last visited June 21, 2003).

160. PCHA FINAL REPORT, *supra* note 110, app. D, at 54.

Prime Minister Göran Persson.¹⁶¹ At the Stockholm Conference, the participating nations pledged to continue educating their populace about the Holocaust and its lessons, and to periodically judge the progress of their work.

Without the impetus from the U.S.-driven Holocaust restitution movement, which created a new awareness of the crimes committed during World War II, it is unlikely that any of these bodies would have been established.

III. HOLOCAUST RESTITUTION IN THE UNITED STATES

While pressuring Europeans to provide restitution to World War II survivors worldwide, the United States has failed to recognize the role played by its own government and that of corporate America in disreputable dealings both during and after the war. Although the U.S. federal government has made significant contributions to wartime restitution funds, it can, and should, do more. Corporate America, implicated in wartime economic dealings with the Nazis, has done even worse. American corporations doing business with Nazi Germany and in wartime Europe have failed both to confront their negative wartime past and to disgorge profits they earned from such behavior.

A. Post-World War II Payments by the U.S. Government

During World War II, the U.S. government froze assets owned by nations with whom it was at war and nations occupied by the Axis powers, including their nationals.¹⁶² The freeze included U.S.-based assets of Jews who fled Nazi Germany or Nazi occupied countries.¹⁶³ Soon after the war ended, Holocaust survivors, heirs of victims, and Jewish organizations began making claims against these frozen assets held by the U.S. Office of the Alien Property Custodian.¹⁶⁴ Based on extensive re-

161. The official website of the Stockholm International Forum on the Holocaust can be found at <http://www.holocaustforum.gov.se> (last visited June 21, 2003).

162. See Joan Gralla, *US Holocaust Reparation May Have Been Inadequate*, JERUSALEM POST, Jan. 7, 2001, at 4.

163. *Id.*

164. See *Id.* See also PCHA FINAL REPORT, *supra* note 110, at Staff Report, SR-162 to SR-172.

search into the Office of Alien Property Custodian, the Jewish Restitution Successor Organization (“JRSO”)¹⁶⁵ claimed that \$3 million was due from the U.S. government.¹⁶⁶ In a 1956 report to the U.S. Senate, a Jewish official put the figure at \$865,000.¹⁶⁷ By the early 1960s, it was believed that the United States possibly had frozen \$1.5 million in Holocaust families’ assets.¹⁶⁸

The freezing of assets belonging to foreign nationals had begun almost six months before the United States officially entered the war. With the authority vested in the Trading with the Enemy Act of 1917 (“TWEA”),¹⁶⁹ President Franklin Delano Roosevelt issued an executive order on June 14, 1941 freezing assets of certain designated foreign nations and their nationals.¹⁷⁰

165. In Germany, organizations were created to trace and recover heirless property of those Jews who were victims of the Nazis. The first Jewish body to make claims in the American Zone of Germany was the Jewish Restitution Successor Organization (“JRSO”). The JRSO was created in 1947 by Jewish groups in the United States to “acquire, receive, hold, maintain and distribute for purposes of Jewish relief . . . the property of Jews, Jewish organizations, cultural and charitable funds and foundations, and communities which were victims of Nazi or Fascist persecution or discrimination.” PCHA FINAL REPORT, *supra* note 110, at Staff Report, Abbreviations and Glossary, SR-219. In 1948, the United States recognized the JRSO as the “official successor organization allowed to claim identifiable heirless assets and to obtain title to Jewish property in the U.S. Zone of Germany unclaimed as of December 31, 1948.” *Id.* Where the former Jewish property owner within the American Zone had died without an heir, or where no claim was made, the JRSO was empowered to file claims and apply the proceeds to the relief of needy Jewish refugees anywhere in the world. The JRSO also claimed restitution of Jewish communal property, meaning property owned by Jewish communities in pre-war Europe, such as synagogues. See The Museum of Tolerance Multimedia Learning Center, *Jewish Successor Organizations*, at <http://motlc.wiesenthal.com/index.html> (citing ENCYCLOPEDIA JUDAICA (1972)).

166. PCHA FINAL REPORT, *supra* note 110, at 13.

167. *Id.* at SR-170 to SR-171.

168. Gralla, *supra* note 162, at 4.

169. See 50 U.S.C app. §§ 1–39 (2000).

170. See Exec. Order No. 8785, 3 C.F.R. 948 (1938–43). The foreign countries designated in this order were: Norway, Denmark, The Netherlands, Belgium, Luxembourg, France (including Monaco), Latvia, Estonia, Lithuania, Rumania, Bulgaria, Hungary, Yugoslavia, Greece, Albania, Andorra, Austria, Czechoslovakia, Danzig, Finland, Germany, Italy, Liechtenstein, Poland, Portugal, San Marino, Spain, Sweden, Switzerland, and Union of Soviet Socialist Republics. *Id.* at 949.

The TWEA was initially enacted in response to the outbreak of World War I as a tool to weaken Kaiser Germany's wartime economy.¹⁷¹ Since its enactment in 1917, the TWEA, which authorizes the President to regulate certain transactions in times of war and during peacetime emergencies,¹⁷² has been used against numerous other countries designated as enemies of the United States.¹⁷³

By 1946 under the TWEA, the Office of Alien Property Custodian held or froze "enemy" property totally approximately \$400 million (the value eventually appreciating to \$900 million). This included U.S.-located property of Nazi victims who were nationals of Germany and other Nazi-occupied nations.¹⁷⁴ In August 1946, Congress enacted an amendment to Section 32 of the TWEA,¹⁷⁵ which returned assets to "enemy" citizens who were persecuted survivors of the war.¹⁷⁶ The 1946 amendment, however, did not cover Nazi victims who died without leaving an heir.¹⁷⁷

Several years later, in August 1954, Congress once again amended the TWEA to address the issue of heirless assets.¹⁷⁸ The amended section allowed these assets to be inherited by certain Jewish charitable organizations, who would then use the money to assist victims of Nazi persecution to build new lives.¹⁷⁹ The amendment set a \$3 million limit on the total amount of property that could be turned over to the organizations.¹⁸⁰ President Dwight D. Eisenhower then issued Executive

171. Marielise Kelly, *Artwork from "Enemy" Nations: Informational Material Under the Trading with the Enemy Act, A Relic of the Perceived Communist Threat, Cernuda v. Heavey*, 14 SUFFOLK TRANSNAT'L L.J., 567, 569-70 (1991).

172. 50 U.S.C. app § 5(b) (2000).

173. Beth Castelli, *The Lifting of the Trade Embargo Between the United States and Vietnam: The Loss of a Potential Bargaining Tool or a Means of Fostering Cooperation?*, 13 DICK. J. INT'L L., 297, 302 (1995).

174. See EIZENSTAT REPORT I, *supra* note 10, at xxxiii.

175. An Act to Amend the First War Powers Act of 1941, ch. 878, § 1, 60 Stat. 925 (50 App. §§ 32-37) (1946). See EIZENSTAT REPORT I, *supra* note 10, at xxxiii.

176. See EIZENSTAT REPORT I, *supra* note 10, at xxxiii.

177. *Id.*

178. See 50 U.S.C. 32(h).

179. EIZENSTAT REPORT I, *supra* note 10, at xxxiv.

180. *Id.* at 197.

Order 10587, which designated the JRSO as “successors in interests” to the heirless properties.¹⁸¹

By August 1955, the JRSO had filed approximately 11,000 claims; however, two years into the claims process, by June 1957, some 9,000 of the filed claims had either been withdrawn or closed because the JRSO could not prove that the claims involved heirless property.¹⁸² Since standards for recognizing a claim were unduly strict, several attempts were made to provide instead a lump sum settlement amount to the JRSO.¹⁸³ The first attempt, H.R. 7830, introduced by Representative Isidor Dollinger in May 1957, would have provided a lump sum payment of \$1 million to the JRSO.¹⁸⁴ However, H.R. 7830 failed to become law.¹⁸⁵

The next attempt to deal with the problem was made during the Kennedy Administration. H.R. 5028,¹⁸⁶ introduced in August 1961, amended Section 32 of the TWEA to reduce the limit from the \$3 million to \$500,000.¹⁸⁷ In support of the bill, Deputy Attorney General Byron R. White stated that there were no more than approximately five hundred outstanding claims filed by the JRSO that would satisfy the burden of the existing law, and a lump sum payment of \$500,000 would allow for their rapid disposition.¹⁸⁸ Monroe Goldwater, President of the JRSO, also supported H.R. 5028. Goldwater thought it would be the most expedient method for assuring that Jewish victims could receive the heirless assets.¹⁸⁹ In a letter to Congress, he wrote:

[T]he processing of individual claims, case by case, is an impossible task. There still remain thousands of claims, many of them small in amount. A number of claims involve complicated facts, and hearings on them would consume more time of

181. *Id.*

182. *Id.*

183. *See id.* at 197–98.

184. *Id.* at 197.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 197–98.

189. *Id.* at 198.

the Government and the JRSO than the amounts involved would warrant.¹⁹⁰

H.R. 5028 finally became law in October 1962.¹⁹¹ President John F. Kennedy, in February 1963, issued Executive Order 11087, transferring \$500,000 to the JRSO.¹⁹² With the moneys, the JRSO allocated \$350,000 to help set up housing projects for Holocaust survivors, \$100,000 for scholarship funds for the children and grandchildren of Holocaust victims, and \$50,000 to the Catholic Relief Service — National Catholic Welfare Conference in New York to provide disabled survivors with rehabilitation grants.¹⁹³

Almost forty years later, this drawn-out process was examined anew. In 2000, the Presidential Advisory Commission on Holocaust Assets in the United States reviewed this chain of events and found the \$500,000 lump sum settlement to have been “inadequate.”¹⁹⁴ According to the Commission, “the JRSO reluctantly accepted the . . . lump sum settlement of all claims it made for unclaimed property vested in the Office of Alien Property.”¹⁹⁵ The United States would not contribute any more funds for Holocaust survivors and other still-living victims of World War II until 1997, as part of its role in the current efforts in Holocaust restitution.¹⁹⁶

190. *See id.* at xxxii (quoting a letter from Monroe Goldwater on July 28, 1961 to Representative Peter F. Mack of the House Interstate and Foreign Commerce Committee).

191. Amendment to the War Claims Act of 1948, Pub. L. No. 87-846, tit. I, 76 Stat. 1107 (Oct. 22, 1962).

192. EIZENSTAT REPORT I, *supra* note 10, at 198.

193. PCHA FINAL REPORT, *supra* note 110, at SR-171.

194. PCHA FINAL REPORT, *supra* note 110, at 13.

195. *Id.* at SR-171.

196. Irwin Nack, Investigative Counsel for the New York State Banking Department and expert in the field, disagrees with the presumption that the U.S. government had an obligation to make additional contributions or to conduct further studies of its wartime and postwar activities.

I disagree with the premise of your article that there was wrongdoing by the U.S. government which necessitates the kind of historical review that took place in Switzerland and other European countries. There were detailed and documented instances of collaboration and facilitation leveled against those countries which clearly warranted the reviews they undertook. Indeed, the reports themselves make amply clear that such self examination was indeed warranted. In the context of the U.S. government, however, you simply did not (and still

B. Nazi-Looted Books

The fate of books looted by Nazis from Jewish collectors has received little attention. After the defeat of Nazi Germany, the U.S. Army seized several million of such books, which were then collected in a warehouse outside Frankfurt at the Offenbach Archival Depot and placed under the control of the Monuments, Fine Arts, and Archives Section of the First U.S. Army.¹⁹⁷

do not) have that smoke — you don't have those allegations of government collaboration, facilitation or acquiescence. Switzerland, for example had a detailed roadmap to work from — they knew what the allegations were — they knew that there were serious allegations regarding the Swiss National Bank gold purchases from Nazi Germany. That was not and is not the case with the U.S. government — although one can criticize the effectiveness of certain post-war restitution efforts such as those involving heirless Holocaust victims' assets which vested with the U.S. government after the war, I don't think anybody can say (or has said) that these shortcomings were the result of deliberate misconduct. Moreover, the extensive documentary record points to a concerted wartime effort by the U.S. government to protect the U.S.-based assets of Europeans (Jews and non-Jews) who fell under the Nazi yoke. Nor should we forget that President Roosevelt began exercising this executive authority as early as April of 1940 — more than a year and a half before the U.S. entered the war. Similarly, the post-war effort to facilitate the return of assets to their non-enemy owners was not a perfect one, but it was well-intentioned.

E-mail from Irwin Nack to Michael J. Bazylar, June 25, 2003 (on file with the authors).

197. STUART GOLDMAN, LIBRARY OF CONGRESS, ACQUISITIONS IN POSTWAR GERMANY (Nov. 24, 1999), at <http://www.us-israel.org/jsource/Holocaust/crs12.html> [hereinafter GOLDMAN REPORT]. Stuart Goldman is a specialist in the Congressional Research Services of the Library of Congress' Russian Affairs, Foreign Affairs, Defense and Trade Division.

In 2003, the issue of World War II-stolen books resurfaced, however, not with books stolen by the Nazis, but as a result of looting by Japanese troops in occupied Hong Kong. As reported by the Hong Kong-based *South China Morning Post*:

They are Hong Kong's most overdue library books — 60 years past their return date and, on the basis of a daily \$1 charge for late returns, the “borrowers” are liable for a \$3.5 million fine. The University of Hong Kong is not imposing any charges, however. It just wants books back. Missing from the collection are 168 books, 138 of which were taken by the Japanese military during the World War II occupation. Another 30 were stolen in a burglary during the occupation. They are believed to be still in Hong Kong. HKU librarian Anthony Ferguson said: “We wouldn't make them pay a dollar. Instead we'd just have a celebration if they returned our books to us.”

In early 1946, the U.S. Army attempted to repatriate the books to their previous owners or heirs.¹⁹⁸

At the same time, the U.S. Library of Congress¹⁹⁹ representatives assigned to U.S. military intelligence sent a mission to the American-occupied zone of Germany with the authority to requisition the Nazi-looted books.²⁰⁰ Between March and September 1946, the Library of Congress shipped back to Washington, D.C. 382 crates containing some 77,000 items, including Jewish cultural materials.²⁰¹

In addition to the books, the Library of Congress also received from the Jewish Cultural Reconstruction, Inc. ("JCR")²⁰² 5,708 books, pamphlets, periodicals, and newspapers, 107 of which were defined as rare.²⁰³ By agreement with the U.S. government, in 1949 the JCR received these "heirless" and "unidentifiable" books from the U.S. Military Government in Germany, which had taken steps to identify and retribute items seized by the Nazi regime to their original owners or to their countries of origin.²⁰⁴ The JCR subsequently distributed almost 500,000 of these books to scholarly institutions in the United States, Israel, Europe, and Latin America.²⁰⁵ Between July 1, 1949 and January 31, 1952, approximately 158,000 items went to libraries in the United States.²⁰⁶ However, "some libraries, including unfortunately, the Library of Congress, had for whatever rea-

Patsy Moy, *Library Seeks Return of Books 60 Years Overdue*, S. CHINA MORNING POST, Mar. 4, 2003, at 1.

198. See Michael Dobbs, *Epilogue to a Story of Nazi-Looted Books: Library of Congress Trove of War Propaganda Included Many Stolen Jewish Works*, WASH. POST, Jan. 5, 2000, at C1.

199. The Library of Congress was established as a legislative library in 1800. It is the largest library in the world, with more than 120 million items on approximately 530 miles of bookshelves. The collections include more than 18 million books, 2.5 million recordings, 12 million photographs, 4.5 million maps, and 54 million manuscripts. See Library of Congress, at <http://www.loc.gov> (last visited June 21, 2003).

200. See Dobbs, *supra* note 198.

201. GOLDMAN REPORT, *supra* note 197.

202. The JCR was created in 1947 to preserve the cultural assets of the Jewish people. *Id.*

203. PCHA FINAL REPORT, *supra* note 110, at 13.

204. GOLDMAN REPORT, *supra* note 197.

205. *Id.*

206. PCHA FINAL REPORT, *supra* note 110, at 13.

son, failed to put the JCR bookplates into the books.²⁰⁷ In fact, by the late 1990s, the Library of Congress still had the bookplates that it had received from the JCR over fifty years ago.²⁰⁸ The JCR had specifically requested that the institutions receiving the books affix the bookplates to recognize that they were formerly owned by victims of the Holocaust.²⁰⁹

In the late 1990s, the issue of the Nazi-looted books subsequently captured by the U.S. government was resurrected by the Nazi War Criminal Records Interagency Working Group ("IWG").²¹⁰ As a result of questions asked by the IWG at its December 1996 meeting,²¹¹ the U.S. Justice Department's Office of Special Investigations ("OSI"), whose mission it is to hunt down Nazis and their accomplices living in the United States, began a comprehensive study in 1997 to determine whether the Library of Congress had improperly acquired Nazi-looted books. In September 1999, the OSI issued its report: a fifty-five page study that exonerated the Library of Congress.²¹² The report con-

207. Bennett Freeman, Holocaust Era Assets — The Politics of Archival Openness, Address at the 2001 Annual Meeting of the Research Libraries Group, Inc. (2001), *available at* <http://www.rlg.org/annmtg/freeman-klothen01.html> (last visited June 21, 2003) (Bennett Freeman is the former U.S. Deputy Assistant Secretary of State for Democracy Human Rights and Labor).

208. PCHA FINAL REPORT, *supra* note 110, at 14.

209. *Id.*

210. Nazi War Crimes Disclosure Act of 1998, Pub. L. No. 105-246, 112 Stat. 1859. President Clinton established the Nazi War Criminal Records Interagency Working Group ("IWG") in accordance with the Nazi War Crimes Disclosure Act. For more information on the TWG, see the official website of the National Archives and Records Administration, *at* <http://www.archives.gov/iwg/index.html> (last visited June 21, 2003).

The group is made up of public members and federal agency representatives who are directed to locate, inventory, recommend for declassification, and make available all classified Nazi war criminal records, subject to certain specified exceptions; coordinate with federal agencies and expedite the release of such classified records to the public; and complete its work to the greatest extent possible and report to Congress within one year.

Exec. Order No. 13110, Nazi War Criminal Records Interagency Working Group, WEEKLY COMP. PRES. DOC. 37 (Jan. 11, 1999), *available at* <http://www.fas.org/sgp/clinton/eo13110.html>.

211. GOLDMAN REPORT, *supra* note 197.

212. *Id.*

cluded that the library had made a good faith effort to distinguish books that could not be restituted.²¹³

In 1999, the PCHA also took up the issue.²¹⁴ The commission found that beyond the 5,708 books received from the JCR, it “also suspected that other items looted by the Nazis had made their way to the Library of Congress through other channels.”²¹⁵ On September 29, 2000, the commission reached an agreement with the Library of Congress,²¹⁶ under which the latter agreed “that the JCR collection should be handled in a manner suited to its special provenance” and further to identify, recognize, and provide special access to the JCR collection.²¹⁷ As a result of the negotiations with the PCHA, the Library of Congress created the Holocaust-Era Judaic Heritage Library.²¹⁸ On its website, it also reveals that “[i]n addition — through federal transfers that occurred before JCR began its distributions in 1949 — the Library received approximately 150 Hebraic volumes bearing the stamps of anti-Semitic Nazi organizations that are also

213. *Id.* The report stated:

During the course of research for this report, no documentation was located in the records of the MFA&A at the National Archives or the Library of Congress Mission at the Library of Congress that suggested or stated that agents or representatives of the Library of Congress had acted inappropriately in securing books and other materials before they could be restituted to their proper owners.

Id.

214. PCHA FINAL REPORT, *supra* note 110, at 13.

215. *Id.*

216. *See id.* app. E, at 56 (Letters of Agreement, Letter from James H. Billington, The Librarian of Congress, to Edgar Bronfman, Chairman, PCHA).

217. *Id.* Billington also wrote:

Working diligently, staff of both the Library and Commission located sufficient information to enable the Commission to undertake a sampling of the Library’s Hebraic collections. During July, we accorded a team of samplers from the Commission unprecedented and total access to the Hebraic stacks, in compliance with the Library’s collections security procedures. Using a sampling method . . . the team physically examined more than 25,000 Hebraic volumes.

Id.

218. *See* Library of Congress, *The Holocaust-Era Judaic Heritage Library*, at <http://lcweb.loc.gov/rr/amed/hs/hscoll.html> (last visited June 21, 2003) (containing a link to the “virtual library,” which is its online search catalogue).

likely to have been seized by the Nazis from Jewish victims of the Holocaust.²¹⁹

C. Royalties from *Mein Kampf*

It is not well known that the U.S. government had, for many years, made money from the sale of Hitler's notorious anti-Semitic tract, *Mein Kampf*. Since Adolf Hitler became an enemy alien as soon as the United States entered the war in December 1941, the U.S. government, pursuant to the TWEA, froze and began collecting royalties on the American edition of the book, always freely available in the United States since it is constitutionally protected speech. By June 1945, the royalties amounted to \$20,580.²²⁰ The United States quietly continued to receive the royalties for thirty-four more years, until 1979.²²¹ By that time, the royalties totaled \$139,000.²²² In 1979, the U.S. government sold the royalty rights to the book's American publisher, Houghton Mifflin,²²³ which continues to publish the book.²²⁴ Over time, the monies received by the U.S. government, and maintained by the Justice Department were eventually transferred into the War Claims Fund.²²⁵

219. See Library of Congress, African and Middle Eastern Reading Room, *About the Hebraic Collections*, at <http://lcweb.loc.gov/rr/amed/hs/hscoll.html> (last visited June 21, 2003).

220. PCHA FINAL REPORT, *supra* note 110, at SR-62.

221. David Whitman, *Money From a Madman, Houghton Mifflin's Mein Kampf Profits*, U.S. NEWS & WORLD REPORT, Oct. 16, 2000.

222. *Id.*

223. *Id.* In 1962, Congress required the Justice Department to return the copyright interests to works by foreign artists who were Nazis or Nazi sympathizers to their owners. *Mein Kampf*, however, was specifically excluded from that move. *Id.*

224. See Houghton Mifflin Company, at <http://www.hmco.com> (last visited June 21, 2003).

225. See David Whitman, *Money From a Madman, Houghton Mifflin's Mein Kampf Profits*, U.S. NEWS & WORLD REPORT, Oct. 16, 2000. The War Claims Fund was established on July 3, 1948. See 50 U.S.C. § 2012 ("There is hereby created on the books of the Treasury of the United States a trust fund to be known as the War Claims Fund. The War Claims Fund shall consist of all sums covered into the Treasury pursuant to the provisions of section 39 of the Trading With the Enemy Act of October 6, 1917, as amended (section 39 of this Appendix). The moneys in such fund shall be available for expenditure only as provided in this Act (sections 2001 to 2017p of this Appendix) or as may be provided hereafter by the Congress.").

D. Nazi Persecutee Relief Fund

Decades had passed before the United States would make additional contributions to benefit Holocaust survivors and other wartime victims beyond its pittance payment in 1963 of \$500,000. In December 1997, with the term “Nazi Gold” blaring in the headlines,²²⁶ the London Gold Conference was convened²²⁷ at the urging of the British Government.²²⁸ At the conference, forty-two countries came together over a half-century after the war to finally uncover the full extent of the Nazi plundering of gold during World War II and its present-day implications. The delegates discussed the issues surrounding how much gold was actually stolen by the Nazi regime, where it went, and what work still remained to rectify the harm, including the distribution of the remaining gold being held by the Tripartite Gold Commission (“TGC”).²²⁹

226. The term “Nazi gold” is actually a misnomer, since it implies that the gold belonged to the Nazis. In fact, the gold was not Nazi gold, but gold stolen by the Nazis during their plunder of Europe. Two types of “Nazi gold” are at issue: (1) “monetary gold” stolen by the Nazis from the central banks of the countries they conquered; and (2) “private gold” forcibly taken from the Jewish victims killed by the Nazis, including gold teeth and fillings ripped from the victims’ mouths. See, e.g., TOM BOWER, NAZI GOLD: THE FULL STORY OF THE FIFTY-YEAR SWISS-NAZI CONSPIRACY TO STEAL BILLIONS FROM EUROPE’S JEWS AND HOLOCAUST SURVIVORS (1998); GEORGE CARPOZI, JR., NAZI GOLD: THE REAL STORY OF HOW THE WORLD PLUNDERED JEWISH TREASURES (1999); ISABEL VINCENT, HITLER’S SILENT PARTNERS: SWISS BANKS, NAZI GOLD AND THE PURSUIT OF JUSTICE (1997); Lyonette Louis-Jacques, *Law-Related Resources on Nazi Gold and Other Holocaust Assets, Swiss Banks During World War II, and Dormant Accounts* (last modified Oct. 23, 1999), available at <http://www.lib.uchicago.edu/~llou/nazigold.html> (providing resources on Holocaust restitution assets by the University of Chicago Law Library). See also *Political Scene: Ratification of OECD Pact on Corruption Delayed, Economist Intelligence Unit Country Report — Switzerland 2nd Quarter, 1999* (Apr. 6, 1999), available at 1999 WL 14365009 (containing section entitled “Nazi gold and Jewish assets” that summarizes Swiss government and private industry efforts to correct wrongs committed during World War II).

227. For a first person account of the conference and its aftermath, see EIZENSTAT, *supra* note 2, at 111–14.

228. The chief promoter of the conference was Lord Greville Janner, who had worked as a war-crimes investigator after the war. Lord Janner is the head of the London-based Holocaust Educational Trust.

229. Stuart Eizenstat, *Closing Plenary Statement at the London Conference on Nazi Gold* (Dec. 4, 1997), available at http://www.ess.uwe.ac.uk/documents/eizen_nazigold.html; STUART D. GOLDMAN, OVERVIEW OF LONDON GOLD CONFERENCE, REPORT TO THE U.S. HOUSE OF REPRESENTATIVES (1999),

Formed in 1946 by the United States, Britain and France, the TGC was created to deal with the gold stolen by Nazi Germany from the national treasuries of occupied countries and which the Allies recovered after the war.²³⁰ However, some of the recovered gold also included “victim gold,” i.e., gold usually stripped from corpses of Jews and other victims after being removed from gas chambers and before being burned in the crematoria or open air. Since 1946, the TGC has distributed gold to fifteen countries whose treasuries were looted during World War II.²³¹ Surprisingly, a half-century after its creation, the TGC had not yet distributed about 5.5 tons of gold, worth some \$60 million.²³²

At the conference, TGC officials recommended that the countries contribute their portions of the remaining assets held by the TGC to the still-living survivors of the Holocaust.²³³ The conference delegates agreed,²³⁴ and nine countries that still had portions of their assets being held by the TGC decided to forego their claims to the assets.²³⁵

available at <http://www.us-israel.org/jsource/Holocaust/crstoc.html> [hereinafter GOLDMAN, OVERVIEW OF LONDON GOLD CONFERENCE]. See also GOLDMAN REPORT, *supra* note 197.

230. See U.S. DEP'T OF STATE, TRIPARTITE GOLD COMM'N (1997), available at http://www.state.gov/www/regions/eur/tripartite_gold_commission.html. See also U.K. FOREIGN & COMMONWEALTH OFFICE, POST HOLOCAUST ISSUES (2000), available at <http://files.fco.gov.uk/info/briefs/holocaust.pdf> [hereinafter POST HOLOCAUST ISSUES].

231. Ten countries originally submitted claims, but due to the splitting up of former Yugoslavia and former Czechoslovakia, fifteen countries received gold distributions: Albania, Austria, Belgium, Bosnia, Croatia, the Czech Republic, Federal Republic of Yugoslavia, Former Yugoslav Republic of Macedonia, Greece, Italy, Luxembourg, the Netherlands, Poland, Slovak Republic, and Slovenia. See POST HOLOCAUST ISSUES, *supra* note 230.

232. See U.S. DEP'T OF STATE, TRIPARTITE GOLD COMM'N, *supra* note 230. See also POST HOLOCAUST ISSUES, *supra* note 230.

233. See POST HOLOCAUST ISSUES, *supra* note 230; GOLDMAN, OVERVIEW OF LONDON GOLD CONFERENCE, *supra* note 299.

234. See POST HOLOCAUST ISSUES, *supra* note 230; GOLDMAN, OVERVIEW OF LONDON GOLD CONFERENCE, *supra* note 299.

235. See Press Release, Treasury Department, Treasury Deputy Secretary Stuart E. Eizenstat First Report, *Remarks to the United State Chamber of Commerce*, Office of Public Affairs (May 1, 2000), available at <http://www.ustreas.gov/press/releases/l5586.htm>; POST HOLOCAUST ISSUES, *supra* note 230. The nine countries are: Austria, Croatia, Greece, Italy, Luxembourg, Netherlands, Spain, United Kingdom, and the United States.

The participating governments also decided to take immediate steps to help the still-living and most needy Holocaust victims by creating the International Fund for Needy Victims of Nazi Persecution, or the "Nazi Persecutee Relief Fund."²³⁶ Seventeen countries contributed to the fund,²³⁷ which was managed by the British government, with the moneys held at the Federal Reserve Bank of New York.²³⁸ Of the \$58 million collected, the United States, eventually, contributed almost half of the total amount, a fact specifically recognized in the Fund's Final Report.²³⁹

The United States initially pledged \$4 million to the fund.²⁴⁰ Since the conference delegates agreed that each country could determine how its contribution would be distributed, the United States chose to spend its money providing support to so-called "double victims," i.e., Holocaust victims who had survived Nazism but were then trapped behind the Iron Curtain after the war.²⁴¹ As a consequence of the breakup of the Soviet Union and the fall of the Iron Curtain, these survivors have become "the neediest of the needy," since today they are no longer protected by the social safety net which had existed in the Soviet Union and Eastern Europe under Communist rule.²⁴²

The grants from the fund are channeled through non-governmental organizations ("NGOs") that have an established record of previously working with Nazi victims. The United States chose the Conference on Jewish Material Claims Against Germany ("Claims Conference") as the venue to distribute its

236. See GOLDMAN, OVERVIEW OF LONDON GOLD CONFERENCE, *supra* note 299.

237. Contributions were received from Austria, Belgium, Czech Republic, Croatia, France, Greece, Italy, Latvia, Luxembourg, the Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden, the United Kingdom, and the United States. INTERNATIONAL FUND FOR ASSISTANCE TO THE VICTIMS OF NAZI PERSECUTION, FINAL REPORT 4 (2002) [hereinafter NAZI PERSECUTEE FUND FINAL REPORT].

238. *Id.* at 4.

239. *Id.* at 20.

240. See GOLDMAN, OVERVIEW OF LONDON GOLD CONFERENCE, *supra* note 299.

241. Treasury Secretary Stuart E. Eizenstat, Testimony of Deputy Treasury Secretary Stuart E. Eizenstat before the House Banking Committee (Sept. 14, 1999), available at <http://www.ustreas.gov/press/releases/ls96.htm>.

242. *Id.*

shares of the fund.²⁴³ The Claims Conference is an NGO representing twenty-three Jewish NGOs globally.²⁴⁴ Created in 1951 as a conduit to distribute reparation payments by West Germany, the Claims Conference has used its pre-existing contacts with local aid networks in Eastern Europe and the former Soviet Union to deliver food, medicine and clothing to Holocaust survivors in the region.²⁴⁵

In 1998, Congress passed the Holocaust Victims Redress Act (“HVRA”),²⁴⁶ which appropriated \$25 million for the Nazi Persecutee Relief Fund.²⁴⁷ Of this amount, \$10 million was allocated to surviving slave and forced laborers. The HVRA was intended to address three main issues:

243. See Claims Conference, at <http://www.claimscon.org/index.asp> (last visited June 21, 2003). The Claims Conference has also distributed funds on behalf of the governments of Spain, France, and Austria. According to the Claims Conference:

The Spanish government made a grant of \$1.5 million in 2001 for Sephardic Jewish victims of Nazi persecution residing in Bulgaria, Greece, Tunisia, and the former Yugoslavia. The money will be used for medical care, medication, medical equipment, and capital improvements to old age homes The French government made a grant of 5 million Francs (approximately \$690,000). The money will be used in Ukraine, Belarus, and Moldova for basic medical needs and social assistance programs The Austrian National Fund made a grant of \$230,000 for medical care, modernization of medical facilities, and social welfare programs in Romania, Hungary, and Slovakia.

Id.

244. The Conference on Jewish Material Claims Against Germany or “Claims Conference” was formed in 1951 to negotiate compensation and restitution for survivors of the Holocaust and heirs of victims. For more information, see Claims Conference, at <http://www.claimscon.org> (last visited June 21, 2003).

245. *Id.*

246. Holocaust Victims Redress Act, Pub. L. No. 105-185, 112 Stat. 15 (1998).

247. See *id.* The Act provides three important measures: (1) it authorizes the President to commit the U.S. to contribute up to \$25 million over three years to international organizations for the benefit of Holocaust survivors, §103(a); (2) it authorizes the President to commit \$5 million for archival research and translation services to assist in the restitution of assets looted or extorted from victims of the Holocaust, §103(b); and (3) commits the Congress to seek appropriate means for addressing the issue of restituting private property, including works of art. *Id.* § 202.

First, it seeks to redress a perceived inequity in earlier Holocaust legislation. Second, it both instructs the United States to work toward a speedy resolution of the claims some 15 countries have on a stock of gold seized from their central banks by the Nazis during World War II that is now under the control of the United States, Britain, and France, and urges these countries, once distribution is made, to use all or a substantial portion of this gold to aid Holocaust survivors. Third, it expresses the sense of the Congress that all governments undertake good faith efforts to return works of art confiscated from rightful owners during the period of Nazi rule.²⁴⁸

Stuart Eizenstat, who headed the U.S. delegation at the London Gold Conference, later explained:

The U.S. had no claim on any of the gold. Indeed, our armed forces, at the end of the War, had actually collected over 300 tons of gold hidden by the Nazis and returned it to the countries from which it had been stolen. Nevertheless, to show moral leadership [,] Congress and the Administration . . . made a \$25 million contribution to the Fund²⁴⁹

In 2001, as part of the \$25 million allocated by the HVRA, the U.S. government made a grant of \$4.5 million for Jewish victims of Nazi persecution in Romania, Slovakia, Hungary, Yugoslavia, and in the former Soviet Union through the Hased centers.²⁵⁰ The funds are being used for medication, winter relief, food packages, and homecare.²⁵¹

The United States made its pledge to the Nazi Persecutee Fund as a good-will gesture, with no legal or moral obligation to do so. As Eizenstat explains in his memoir: "I have rarely been more proud of my country than when I formally announced our contribution of \$25 million over three years, approved without dissent by Republicans and Democrats in Congress."²⁵² The U.S.

248. See GAIL E. MAKINEN, STATUS OF HOLOCAUST VICTIMS REDRESS ACT, REPORT TO THE U.S. HOUSE OF REPRESENTATIVES (1999), available at <http://www.us-israel.org/jsource/Holocaust/crs3.html>.

249. Press Release, Treasury Department, Treasury Deputy Secretary Stuart E. Eizenstat Remarks to the United States Chamber of Commerce, Office of Public Affairs (May 1, 2000), available at <http://www.treas.gov/press/releases/ls586.htm>.

250. NAZI PERSECUTEE FUND FINAL REPORT, *supra* note 237, at 4.

251. *Id.*

252. EIZENSTAT, *supra* note 2, at 114.

government was finally contributing not only words, but also substantial dollars to help Holocaust survivors.

E. The Eizenstat Reports

The U.S. Department of State coordinated the creation of two different reports, commonly referred to as the “Eizenstat Reports,” which analyzed the efforts of the United States, its wartime allies, and the efforts (or lack thereof) of neutral nations to recover and restore assets stolen by Nazi Germany.²⁵³ The Eizenstat Reports were initiated in part because of a sense of duty stemming from our major role in the war effort, and in part because of a feeling that the United States did not do enough to recover stolen assets in the period directly after the war.²⁵⁴

The coordination of these reports, which involved more than a dozen federal agencies, was led by Eizenstat, then Under Secretary of State. The reports themselves were prepared by the State Department’s chief historian, Dr. William Slany. The reports analyze the role of neutral countries in helping to sustain

253. The first report is entitled *Preliminary Study on U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II* and was issued in May 1997. See EIZENSTAT REPORT I, *supra* note 10. The final report is a supplement to the first report and is entitled *U.S. and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns about the Fate of the Wartime Ustasha Treasury*. It was issued in June 1998. See EIZENSTAT REPORT II, *supra* note 10. A summary of the June 1998 report can be found at U.S. Dep’t State, http://www.state.gov/www/regions/eur/rpt_9806_ng_links.html (last visited June 21, 2003).

254. See Bennett Freeman, *United States and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II*, 14 AM. U. INT’L L. REV. 137, 143 (1998) (transcript of the proceedings at the Conference on Neutrality, Morality, and the Holocaust, on April 23, 1998 at the American University Washington College of Law). Speaking at a law school conference in 1998, a top State Department official explained:

We have a particular responsibility because we were one of the major Allies in the war. We also feel a particular responsibility given the fact that our particular record on recovery of Nazi-confiscated assets was less than perfect, despite the tremendous amount of hard work and attention given by Seymour Rubin and others immediately after the war.

Id.

the Nazi regime, including its war effort, and also cover the steps taken by the United States and the Allies to make assets available for assistance to stateless victims of Nazi atrocities.²⁵⁵

The first Eizenstat Report was issued in May 1997, after a seven-month effort by eleven U.S. government agencies.²⁵⁶ The focus of this report was the U.S. negotiations with wartime neutral countries pertaining to Holocaust assets.²⁵⁷ With the issuance of the first report, Eizenstat recognized "that if we were going to shine the bright light of history on other nations, we also had to look carefully at America's role, and the study does so."²⁵⁸ The report's major focus was on neutral Switzerland, due to close ties between Nazi Germany and Switzerland, and the leading role of the Swiss in helping Germany trade with other countries.²⁵⁹ The report also included a brief analysis of issues

255. *Id.* at 138–39. See also Bennett Freeman, *The U.S. Government and the Wartime Neutrals: History of Justice After Half a Century*, 20 CARDOZO L. REV. 453 (1998); Malvina Halberstam, *Framing the Issues*, 20 CARDOZO L. REV. 443 (1998).

256. The following agencies involved in creating this report were: the Central Intelligence Agency, the Department of Commerce, the Department of Defense, the Department of Justice, the Department of State, the Department of the Treasury, Federal Bureau of Investigation, Federal Reserve Board, National Archives and Records Administration, National Security Agency, and the U.S. Holocaust Memorial Museum.

257. See EIZENSTAT REPORT II, *supra* note 10. See also Freeman, *supra* note 255, at 138.

258. EIZENSTAT REPORT II, *supra* note 10, at iv. The report stated that:

American leadership in the postwar negotiations to retrieve Nazi gold and other assets was clearly well-intentioned, but unfortunately limited. There was a demonstrable lack of senior level administration support for a tough and consistent U.S. negotiating position with the neutrals. Moreover, there was an even greater lack of attention to ensuring the implementation of agreements already negotiated, like the 1946 Washington Agreement. The reason is quite clear when one goes through the report, and that is that war-time objectives were replaced by new Cold War imperatives.

U.S. Dep't of State, Special Briefing, on the Record Briefing by Undersecretary of Commerce for International Trade Stuart Eizenstat and State Department Chief Historian William Slany on Release of Report of U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II, *available at* <http://www.state.gov/www/regions/eur/970507eizenstat.html> (last visited June 21, 2002) [hereinafter Special Briefing].

259. *Id.*

involving wartime neutrals Argentina, Portugal, Spain, Sweden, and Turkey.²⁶⁰

Released in June 1998, the second Eizenstat Report was meant to “take the heat off” the Swiss by detailing the shady business dealings of the “other neutrals.”²⁶¹ The report did not shy away from criticizing the postwar actions of the U.S. government and its military. Asked about these self-criticisms, Eisenstat commented:

We clearly had short-comings in terms of our pursuit of the recovery of looted gold and of German external assets. . . . [O]ur own focus drifted from trying to get this back and trying to put pressure on neutrals to our understandable pre-occupation with the new Cold War which was emerging. This is likewise a recognition that we might have done more.²⁶²

Both reports are significant historical documents, as they uncovered, more than a half-century after the war, malfeasance by Switzerland and other neutral nations both during and after the war.

260. *Id.*

261. EIZENSTAT, *supra* note 2, at 111. The Swiss government issued the following statement in response to the second Eizenstat Report:

The Federal Council today acknowledged receipt of the so-called Second Eizenstat Report published by the American government; it views it as a further contribution to clarifying events before, during, and after World War II. . . . In regard to Switzerland, the American report contains no essentially new findings. Thus no change is appropriate in the Federal Council's consistently pursued course concerning the principles of truth, justice, and solidarity. . . . The Federal Council already clearly denied the unacceptable criticism of the initial Eizenstat Report when it was published. . . . It hopes that the report now in hand will contribute to more objective discussion, particularly in the United States, on Switzerland's role during World War II.

Swiss Federal Chancellery Information Service, Federal Council Declaration on Second Eizenstat Report (June 2, 1998), *available at* <http://www.admin.ch/cp/f/1998Jun2.180304.9513@idz.bfi.admin.ch.html>.

262. State Department, Special Briefing Upon the Release of the Report, U.S. and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns about the Fate of the Wartime Ustasha Treasury (June 2, 1998), *available at* http://www.state.gov/www/policy_remarks/1998/980602_eizenstat_nazigld.html [hereinafter Special Briefing II].

F. American Industry Fund

In May 2000, in the midst of the Holocaust restitution battles with European companies, Eizenstat announced plans for a new fund for Holocaust survivors to be created by American industry.²⁶³ The impetus for the fund was the establishment a year earlier by German industry and the German government of the DM10 billion German Foundation Fund.²⁶⁴ American industry was now going to create its own fund to help elderly and needy Holocaust survivors.²⁶⁵

Altruism was not the only reason for the fund's creation. At the time of the proposal, various U.S. corporations had either been sued or threatened with litigation stemming from their financial activities in wartime Europe.²⁶⁶ The American Industry Fund, formally referred to as the Center for Corporate Citizenship Foundation ("CCCF"), was to be established through the U.S. Chamber of Commerce,²⁶⁷ which, like the German Foundation, would solicit voluntary donations from local industry.²⁶⁸ Eizenstat and the U.S. Chamber officials contemplated that donations would not be limited only to companies that did business in Nazi Germany and occupied Europe during World War II.²⁶⁹ Like the German initiative, where companies that had not existed during the war made contributions, it was an-

263. Press Release, Treasury Department, Treasury Deputy Secretary Stuart E. Eizenstat Remarks to the United States Chamber of Commerce, Office of Public Affairs (May 1, 2000), available at <http://www.treas.gov/press/releases/ls586.htm> [hereinafter Eizenstat Treasury Press Release].

264. *Id.*

265. Brigitte Greenberg, *U.S. To Start War Reparation Fund*, WASH. POST, Apr. 29, 2000, available at 2000 WL 19886122.

266. See Joseph Kahn, *U.S. Firms Plan Fund for Victims of Hitler Move Partly Aimed at Heading off Lawsuits*, CHI. TRIB., Apr. 30, 2000, at 11.

267. Press Release, United States Chamber of Commerce, U.S. Chamber Announces Humanitarian Aid Fund Donations to Support Disaster Victims and Others (May 1, 2000), available at www.uschamber.com/press/releases/2000/may/00-61.htm.

268. *Id.*

269. Eizenstat stated that "among those benefiting from conscript labor were scores of companies that had been owned, in whole or in part, by American firms before they were nationalized by the Nazi regime. . . . Many of the subsidiaries were returned to their American parents after the war." Eizenstat Treasury Press Release, *supra* note 263.

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anticipated that American companies founded after the war would become participants.²⁷⁰

Eizenstat announced the creation of the Fund at a press conference held in the U.S. Chamber's Washington, D.C. headquarters.²⁷¹ According to Eizenstat:

[T]he U.S. Chamber is again showing its leadership and foresight by moving ahead with the establishment of a humanitarian fund of a Center for Corporate Citizenship and a special institution to create a fund for a variety of humanitarian purposes: to assist in natural disaster relief and to relieve the suffering of survivors of one of the greatest human disasters of our time, the Holocaust, and the travails of slave and forced laborers.²⁷²

The variety of projects for which fund money was to be used appeared to be strange. Holocaust survivors were to compete for funds with victims of natural disasters and other humanitarian concerns.²⁷³ How this amalgam of causes came together was never explained.

At the urging of American companies, former slave and forced laborers of wartime Germany still living in the United States both Jews and non-Jews would receive a supplemental lump sum payment on top of the one-time payment they would be receiving from the German Foundation Fund.²⁷⁴

270. Eizenstat had hoped "that not only those parent companies [doing business in Nazi Germany and late wartime Europe] but also other American companies now operating in Europe will see their way clear to participate, whether their subsidiaries had World War II activities or not." *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* Eizenstat explained:

[A] number of U.S. companies have suggested a way be found to create a fund, under the auspices of the Chamber, to voluntarily supplement the payments to be made by the German Foundation. This would be a very important moral gesture. It will ease the situation of some who are most in need. Since only those slave laborers and those forced laborers living in the five nations of Central and Eastern Europe that participated in our talks are receiving specific national allocations of funds from the German Foundation, with 800 million DM set aside for those living elsewhere, such a fund would be especially meaningful to those survivors living in the rest of the world, including tens of thousands who are U.S. citizens.

Id.

Unfortunately, almost nothing came from this grand idea. While the U.S. Chamber began taking steps to create a non-profit corporation to which American companies could make contributions, over one year after Eizenstat's announcement, not one pledge had been made to the Fund.²⁷⁵

In December 2001, more than eighteen months after the Chamber's announcement, came the first pledge. Ford, which had already been sued for using slave labor in its German plant during the war, announced that it would contribute \$2 million to the American Industry Fund.²⁷⁶ Ford made the promise as part of its response to the release of an internally-funded study on Ford's activities in Nazi Germany.²⁷⁷

Eizenstat stated that he hoped this move by Ford would inspire other American corporations to make their own donations.²⁷⁸ American industry, however, answered with silence. Even Ford, according to the company's website, has still not fully honored its pledge.²⁷⁹ As of June 2003, it appears that the Chamber of Commerce fund is moribund. In sum, Eizenstat's grand announcement in May 2000 has, thus far, amounted to nothing.²⁸⁰

275. See also Henry Weinstein, *Ford Says WWII Study Clears Firm*, L.A. TIMES, Dec. 7, 2001, at C1.

276. *Id.*

277. *Id.*

278. *Id.*

279. See Ford Motor Company, *Human Rights: Report Issued on Ford-Werke Under the Nazi Regime*, at <http://www.ford.com> (last visited June 21, 2003) ("Ford will donate the other \$2 million to the U.S. Chamber of Commerce Center for Corporate Citizenship to support its World War II Humanitarian Fund. It is anticipated that the money will be used to fund internationally recognized organizations whose mission is to help survivors of economic terrorism under the Nazi regime, including forced and slave laborers.").

280. In his memoir, Eizenstat explained his disappointment:

We jointly launched [the Fund] with fanfare at a news conference at the Chamber's Washington D.C. headquarters. But the money never arrived. Despite several more meetings with [John] Rintamaki [Ford's group vice president and chief of staff], who made a genuine effort to convince other firms to join, it was a dry hole. In December 2001, two years after my first meeting with Rintamaki and well after the end of the Clinton Administration, one of Rintamaki's aides told me that the Ford Motor Company would contribute \$2 million. No other American company ever gave a nickel to the chamber fund, re-

There are a variety of reasons why the Chamber's American Industry Fund initiative was a failure. First, the Chamber never properly promoted the fund. It failed to send solicitation letters, publicize the fund, or engage in any other activities to inform American companies, their stockholders, and consumers that a fund had been created to assist, among other projects, aging Holocaust survivors living in the United States. This is in contrast to Germany, where German industry and the German government put together an extensive media campaign for the German Foundation.²⁸¹ Eizenstat also has spoken little about the Fund since his initial May 2000 press conference.

Even if American industry did not feel a responsibility to aid elderly Holocaust survivors, a good way to promote the Fund would have been to publicize its other humanitarian purposes.

lying upon their German subsidiaries to pay instead into the German foundation.

EIZENSTAT, *supra* note 2, at 255. Craig Johnstone, who had been spearheading the creation of the Fund at the U.S. Chamber of Commerce, commented in April 2002:

Here is where things stand. The initial impetus for the fund came in the expectation that there would be a prompt legal settlement in which the US companies would be held harmless for the use of their assets by others in World War II. A few companies indicated their possible willingness to contribute to a fund for the victims of disasters as a demonstration of their good will provided such contributions were not seen as any kind of admission of guilt or liability. The creation of the fund was held up for some time because the legal issues remained unresolved. The fund is now being created and Ford Motor Company has agreed to provide an initial contribution. Although the final paperwork has not yet been done, the fund will be a humanitarian fund in which the donors will be able to specify their preferences for ultimate disposition of funds they contribute. Donations from some donors might go to the victims of national disasters in any part of the world. Donations from some will be targeted for the victims of the Holocaust, and for some more specifically for those WWII slave laborers. In all cases the fund will act only as a pass-through mechanism providing grants to others who will actually disperse the funds for the victims. We want to facilitate humanitarian assistance and want to maximize the levels actually going to victims. We are consulting a board of unpaid supervisors. As you can see, this is a slow process. Not much more to report at this time.

E-mail from Craig Johnstone to Ian Kaufman (student and research assistant of Michael J. Bazylar), Apr. 15, 2002 (on file with authors).

281. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, *supra* note 69, at 66.

For example, one idea possibly considered by Chamber members supporting the Fund was to help former American POWs who had been slaves of Japanese industry during World War II.²⁸² Like their German counterparts, these aging survivors of Japan's slave labor program had also been struggling since the end of the war to secure justice for their wartime suffering. However, unlike the former slaves of corporate Germany, these survivors have been unsuccessful in obtaining either compensation or recognition of wrongs from corporate Japan.²⁸³

A U.S. Chamber campaign publicizing the plight of these aging American POWs — especially in light of the current climate of patriotism in the aftermath of September 11, 2001 and the placing of American troops in combat in Afghanistan and Iraq — surely would have been successful in obtaining donations to the Fund. The U.S. Chamber, however, has done nothing on this issue.

Second, fears of American litigation have acted as a deterrent to the Fund. At the time of the Fund's announcement, American companies were embroiled in lawsuits for their allegedly wrongful wartime activities, and the U.S. lawyers who had filed these suits signaled that lawsuits against other American companies would soon follow.²⁸⁴ Contribution to the Fund could be interpreted as an admission of liability, so American companies that had done business in wartime Europe were reluctant to participate. Even if the exposure to potential liability could be worked out — for example, by the issuance of an official statement by the U.S. Chamber and the contributing company that a

282. *Id.* at 60.

283. *Id.* To date, Japanese corporate defendants sued in American courts have beaten back the suits. In contrast to German companies, Japanese companies implicated in wartime slave labor have been unwilling even to discuss the creation of a fund for the POWs. Charles Burrell, *State Is Ground Zero for WWII Lawsuits: California Lets Ex-POW's Take Aim at Japan*, SAN FRANCISCO CHRON., Apr. 22, 2001, at A1. The British government, in the face of Japanese intransigence, made its own payment of £10,000 (approximately \$15,000) to each of the still-living British soldiers who worked as slaves for Japanese industry. Richard Norton-Taylor, *£10,000 Payout to Japan POWs: "Debt of Honour" Repaid After 50-Year Struggle*, GUARDIAN (London), Nov. 8, 2000, at 12. *Payments to Begin for Former POWs*, L.A. TIMES, Feb. 1, 2001, at A4. The United States government has not followed suit.

284. Pauline Jelinek, *Actions of U.S. Firms in Nazi Era Targeted*, COLUMBIA, Aug. 28, 2000, at E1.

contribution is not an admission of guilt²⁸⁵ — there still remained the problem that a company making a contribution would appear tainted by this action.

Third, immediately after Eizenstat's May 2000 announcement, German government officials expressed their concern that a U.S. fund could rival its own restitution efforts. If an American company made a contribution to the U.S. Fund, its German subsidiary, the Germans argued, would feel relieved of responsibility to make a contribution to the German Foundation.²⁸⁶ On the other hand, an American company currently doing business in Germany that made a pledge to the German Foundation felt relieved of the responsibility to make a contribution to the American Fund. As a result, no American company doing business in Germany — other than Ford — offered to contribute to the Fund, and Ford itself has yet to follow through on its offer.

Eizenstat has not given up. Now out of government, he has taken the initiative of salvaging the idea of creating the “mirror image” fund he first proposed in May 2000 at the Chamber's headquarters. In 2003, he and Craig Johnstone, a former colleague at the State Department and a vice president of Boeing who assisted Eizenstat in trying to create the fund through the Chamber of Commerce, formed the Humanitarian Aid Foundation (“HAF”). The aim of HAF is to “fund organizations that provide services and assistance to groups of individuals and specific populations that are, or have been, victims of acts against humanity or natural disasters.”²⁸⁷ The Chamber of Commerce is now out of the picture. HAF is purely a private

285. Eizenstat confronts this problem in his memoir, stating that it had been worked out:

Craig Johnstone, head of the international division of the U.S. Chamber of Commerce and a former State Department colleague, made it easier for the companies to contribute without appearing to admit wartime guilt by persuading the Chamber of Commerce to approve a humanitarian fund that its corporate membership could use for everything from hurricane relief to Holocaust relief.

EIZENSTAT, *supra* note 2, at 255.

286. *Germany Fears Rivalry from U.S. Holocaust Fund*, ASSOCIATED PRESS, May 2, 2000 (on file with authors).

287. See Humanitarian Aid Foundation (“HAF”), at <http://www.humanitarianaidfoundation.org> (official website of HAF and listed as under construction) (last visited June 21, 2003).

effort by Eizenstat and Johnstone.²⁸⁸ Ford provided initial funds to create HAF, as part of its initial contribution it had earlier pledged to the now-defunct Chamber of Commerce fund.²⁸⁹ As of April 2003, HAF is in a "very early development phase."²⁹⁰ It has does not yet have a full board of directors, and Ford still remains the only company pledging to the fund.

G. Presidential Advisory Commission on Holocaust Assets in the United States

In June 1998, during the Clinton Administration, Congress established the Presidential Advisory Commission on Holocaust Assets in the United States ("PCHA").²⁹¹ Created during the heyday of the Holocaust restitution movement, the Commission was seen as an important symbol. The United States, once leading the charge to have the Europeans examine their shady wartime history, was now going to examine its own. As explained by Representative Jan Schakowsky:

While we are actively pursuing reparations internationally on behalf of Holocaust victims and survivors, we also need to look carefully at the role of the United States. The United States

288. HAF was incorporated by the McCormick Group, a Williamston, Michigan-based consulting firm specializing in the creation of foundations and non-profit entities. All information about HAF comes from Dan McCormick, principal of the McCormick Group.

289. Ford is listed as one of the clients of the McCormick Group. See <http://www.mcc-group.com/history.htm> (last visited June 21, 2003).

290. E-mail from Dan McCormick to Michael Bazylar, Apr. 28, 2003 (on file with authors).

291. PCHA was established by the U.S. Holocaust Assets Commission Act of 1998, Pub. L. No.105-186, 112 Stat. 611. Section 2 provides that the Commission consisted of twenty-one members, which was mandated to include eight Congressional members, representatives of the Departments of Army, Justice, State and Treasury, the Chair of the Holocaust Memorial Council, and eight private citizens. *Id.* The members included Senator Barbara Boxer, Edgar M. Bronfman (Chair) (Head of the World Jewish Congress), Senator Christopher Dodd, Stuart E. Eizenstat, former Rep. Ben Gilman, Patrick T. Henry, Roman R. Kent, a Holocaust survivor and leader in the Claims Conference, former Rep. Rick A. Lazio, Ira H. Leesfied, Miles Lerman, former Rep. James H. Maloney, Dr. Jehuda Reinharz, Margaret Milner Richardson, James Robinson, former Rep. Patricia Schroeder, Rep. Brad Sherman, William S. Singer, Senator Gordon H. Smith, Senator Arlen Specter, Rev. Cecil Williams and Neal Wolin). For more information on these members, see PCHA, at <http://www.pcha.gov/aboutpcha.htm> (last visited June 21, 2003).

has been a strong leader on Holocaust claims issues. We should also set an example of what it means to conduct transparent self-evaluation.²⁹²

Two stalwarts of the Holocaust restitution movement were the prime movers for the establishment of the PCHA. Senator Alfonse D'Amato, who had played a key role in pressuring the Swiss banks to come to terms with their past, introduced legislation in April 1998 to create the commission.²⁹³ Upon the establishment of the PCHA, President Clinton appointed Edgar Bronfman, Sr., the billionaire scion of the Seagram's liquor empire and head of the World Jewish Congress, to chair the twenty-one-member commission.²⁹⁴ This seemed like a natural choice, since Bronfman first brought the issue of Holocaust restitution to the attention of the Clinton Administration. Bronfman was also the first to confront the Swiss banks with accusations that they failed to return monies deposited in Holocaust-era dormant accounts. For this reason, the PCHA was sometimes called the "Bronfman Commission."²⁹⁵

The PCHA was created for many of the same reasons that had inspired the Eizenstat Reports.²⁹⁶ However, its track record has been poor. For example, while the Commission recognized that "[t]he need for action is urgent, as the survivors are aging," members of the Commission were not named until November 1998, five months after the body's creation, and the PCHA did not begin work until March 1999.²⁹⁷ Due to this delay and other reasons, such as an unexpected volume of documents, Congress

292. See 145 CONG. REC. H9256 (daily ed., Oct. 4, 1999) (statement of Rep. Schakowsky).

293. David E. Sanger, *Inquiry to Ask if Nazi Loot May Also Be in U.S.*, N.Y. TIMES, Apr. 2, 1998, at A8.

294. Lynn Sweet, *Justice Urged for Nazi Victims*, CHI. SUN-TIMES, Dec. 1, 1998, at 23.

295. See, e.g., *Bronfman Commission to Continue Study of U.S. Handling of Looted Assets; An Update on the Progress in Seeking Restitution for Holocaust Survivors*, INT'L MONITOR, Jan. 2000, available at <http://www.comptroller.nyc.ny.us/2000MONITOR.shtm>.

296. See 145 CONG. REC. H9253-54 (daily ed., Oct. 4, 1999) (statement of Rep. Rick. A. Lazio).

297. *Id.*

allocated the Commission an additional \$2.5 million, and extended its one-year mandate for an additional year.²⁹⁸

The PCHA's mission was to investigate what happened to these Holocaust victim's assets which came into the possession or control of the U.S. government.²⁹⁹ Critically, the Commission was not charged with locating and returning assets; rather, it was to write the history of the collection and disposition of assets of Holocaust victims that had come under U.S. control. Once the historical truth was revealed, the Commission was to make recommendations based upon its findings. In its mission statement, the Commission pledged that its work would "demonstrate the leadership of the United States in the international effort to obtain justice for the victims and survivors of the Holocaust and their families."³⁰⁰

298. See U.S. Holocaust Assets Commission Extension Act of 1999, Pub. L. No. 106-155, 112 Stat. 1740. According to Gregg Rickman, Legislative Director to former Senator Alfonse D'Amato, the mandate of the Commission had to be extended because, soon after its creation, the Commission ran into "organizational difficulties." E-mail from Gregg Rickman to Michael J. Bazylar, Apr. 11, 2003 (on file with the authors). For Rickman's account of the Holocaust restitution movement and his personal involvement, as well as the contribution of former Senator D'Amato, see GREGG J. RICKMAN, SWISS BANKS AND JEWISH SOULS (1999).

299. Congress specifically mandated the Holocaust Assets Commission to: (1) study and develop a historical record of the collection and disposition of specified assets of Holocaust victims if they came into the possession or control of the federal government, including the Board of Governors of the Federal Reserve System or any Federal Reserve bank, at any time after January 30, 1933 (Section 3(a)(1)); (2) comprehensively review any research by others . . . "the collection and disposition" of Holocaust victims assets "to the extent that such research focuses on assets that came into the possession or control of private individuals, private entities, or non-Federal government entities within the U.S." (Section 3(b)); and (3) submit a final report to the President containing any recommendation for legislative, administrative, or other action as deemed necessary or appropriate (Section 3(d)(1)). Pub. L. No. 105-186, 112 Stat. 611 (1998).

300. PCHA Mission Statement, available at <http://www.pcha.gov/missionstatement.htm>. See also 145 CONG. REC., *supra* note 294 (statement of Rep. Rick A. Lazio: "I am confident that the United States Holocaust Assets Commission will establish that America is doing all it can to return all manner of assets to their rightful owners. In so doing, we will confirm our leadership in the international effort to obtain justice for the victims of the Holocaust and their families.").

The areas of focus for the Commission were art and cultural property, gold, and non-gold financial assets.³⁰¹ Congress also mandated the Commission to review research done by private individuals or entities, as well as by any federal and non-federal government entities.³⁰² Thus, the Commission also worked in collaboration with international and state Holocaust commissions, banking and insurance companies, and other agencies.³⁰³ As the Commission proceeded with its investigations, it discovered that more than seventy-five separate U.S. government

301. Pub. L. No. 105-186, sec. 3(a)(2), 112 Stat. 611, 612 (1998). The Commission's focus, according to section 3(a)(2), included the following types of assets:

(A) gold, including gold bullion, monetary gold, or similar assets in the possession of or under the control of the Board of Governors of the Federal Reserve System or any Federal reserve bank;

(B) gems, jewelry, and non gold precious metals;

(C) accounts in banks in the United States;

(D) domestic financial instruments purchased before May 8, 1945, by individual victims of the Holocaust, whether recorded in the name of the victim or in the name of a nominee;

(E) insurance policies and proceeds thereof;

(F) real estate situated in the United States;

(G) works of art; and

(H) books, manuscripts, and religious objects.

Id.

302. Pub. L. No. 105-186, § 2(b), 112 Stat. 611, 613 (1998).

303. PCHA FINAL REPORT, *supra* note 110, at Staff Report, ch. 1. The Commission limited the scope of its report to the following issues:

(1) how Nazis acquired assets from Holocaust victims throughout Europe came into the control of U.S. government agencies; (2) how U.S. agencies came to control victims' assets through measures designed to wage economic warfare; (3) how these agencies handled victims' assets while they remained under U.S. control; (4) how the U.S. government restituted or disposed of the assets; (5) how well the structure controlling the flow of assets actually worked; (6) how restitution policy evolved in its sensitivity to the interests of individual victims; (7) what the role of the U.S. government was in establishing Jewish successor organizations; and, (8) what the role of successor organizations was in the restitution of victim assets.

Id. at SR-2.

agencies or their branches may have been involved in the passing of assets of Holocaust victims.³⁰⁴

Unfortunately, Congress never specifically mandated the PCHA to examine the role of private industry in the United States. Arguably, its mandate was broad enough for it to do so, but the PCHA never looked at the behavior of American private enterprise during the war. Gregg Rickman, Legislative Director to former Senator D'Amato, explains, "Every line of the legislation creating the PCHA was negotiated with the Clinton White House legislative staff. There was a fear of expanding any investigation beyond the concept of U.S. government responsibility for assets. Even if this idea had gained support, the resulting investigation would have taxed the Commission far beyond its physical and material capabilities. This requirement would have drastically changed the mission and operation of the Commission and would have rendered it inoperable."³⁰⁵ Of course, this begs the question: Why did Congress not adequately staff and fund the Commission so that it could conduct a full investigation of Holocaust assets in the United States without straining its physical and material capabilities? The answer, it seems, is that the U.S. government was unwilling to do what was necessary (and what many European nations had done) to assess its role and that of private industry for wartime and postwar acts.

Based upon its investigation, the Commission uncovered several factors that impeded the postwar process of restitution of

304. See 145 CONG. REC. H9253-54 (daily ed., Oct. 4, 1999) (statement of Rep. Rick A. Lazio). Millions of World War II document pages also were found to contain additional information on victims' assets. *Id.*

305. E-mail from Gregg Rickman to Michael J. Bazylar, Apr. 11, 2003 (on file with the authors). According to Marc Masurovsky, co-founder of the Washington, D.C.-based Holocaust Art Restitution Project who was later appointed as director of research on monetary gold for the PCHA, the Commission made a calculated decision not to investigate American companies, despite the fact that other U.S. government agencies, notably the U.S. Treasury, including its Foreign Funds Control Division, the Wartime Office of Censorship, the Federal Reserve Bank of New York, the Bureau of Customs, the Federal Bureau of Investigation, the Office of Strategic Services, the Office of Naval Intelligence, the Military Intelligence Service, and other government offices had come across information linking American companies and businesspeople with activities that were inimical to the interests of the United States and its allies at war with Nazi Germany and its allies. *Id.*

Holocaust victims' assets both in Europe and within the United States.³⁰⁶ First, the PCHA discovered that Holocaust victims' belongings found in the United States were returned after the war to the countries of origin, such as Germany and Austria, or to other international organizations,³⁰⁷ and not to survivors or victim's heirs.³⁰⁸ The United States also did not monitor the treatment of the property to ensure that the recipient governments or organizations located the rightful owner.³⁰⁹ It did provide a legal basis for internal restitution, which allowed persecutees to file petitions for the return of property, but strict deadlines hindered this process and non-restituted assets were therefore transferred to the governments of Germany and Austria.³¹⁰

The Commission also found that the politics surrounding the Cold War led to inconsistent restitution policies.³¹¹ Rather than helping individual Holocaust victims, the United States at times impeded the restitution process to survivors or heirs in Eastern bloc countries.³¹²

Finally, the Commission found problems at central collecting points.³¹³ Because these collecting points lacked regulations and security, U.S. government officials and others had ample opportunity to purloin some of the property.³¹⁴ One illustrative example is the story of the Hungarian Gold Train, discussed *infra*.

306. See PCHA FINAL REPORT, *supra* note 110, at 8–18.

307. *Id.* They included the Jewish Restitution Successor Organization (JSRO), the American Joint Distribution Committee and the Preparatory Committee of the International Refugee Organization (“PCIRO”). E-mail from Marc Masurovsky to Michael J. Bazylar, May 11, 2003 (on file with the authors) [hereinafter Masurovsky E-mail].

308. *Id.*

309. *Id.*

310. See Michael J. Kurtz, *Inheritance of Jewish Property*, 20 CARDOZO L. REV. 625, 638-39 (1998) (discussing U.S. Military Law 59, which provided the legal basis for internal restitution).

311. See PCHA FINAL REPORT, *supra* note 110.

312. *Id.*

313. *Id.* This is “despite an otherwise astonishing and unprecedented property rescue and collection operation undertaken almost single-handedly by the U.S. military in liberated Europe.” Masurovsky E-mail, *supra* note 307.

314. See *id.* at 11. According to Masurovsky,

[T]here is no compelling evidence that U.S. government officials looted the property at the collection points. Rather, there were many instances where soldiers and employees at collecting points abused

Overall, however, the PCHA praised the work of the United States in returning assets to Holocaust victims in the aftermath of the war.³¹⁵ In its Final Report, totaling 313 pages, the Commission made six general recommendations to the President, summarized as follows:

- (1) The President should establish a foundation to promote further research and education concerning Holocaust-era assets;
- (2) The President should require federal institutions to search their records or holdings for Holocaust-era assets and if any assets are located, return the belongings to the victims or their heirs;
- (3) The federal government should preserve archival records of the holocaust era and facilitate research into such records;
- (4) The Department of Defense should create regulations for future conflicts which may involve restitution of victims' assets;
- (5) "The United States should continue its leadership to promote the international community's commitment to addressing asset restitution issues"; and

their position to supply the black market with cultural property awaiting restitution. Most of the abuses by U.S. officials occurred in the field. However, no light has yet been shed on the misappropriation of identifiable property dubbed "heirless" in Germany and Austria by groups, acting in collusion with sympathetic U.S. Army officers and restitution officials, seeking to acquire them for the purpose of liquidating them and distributing the resulting funds as they saw fit.

Id.

315. PCHA FINAL REPORT, *supra* note 110, at 5-6. The Commission concluded:

United States forces in Europe made extraordinary efforts to locate, safeguard, identify and retribute assets taken by the Nazis and their collaborators from victims of the Holocaust. Because of the enormity of Nazi crimes, the undertaking by U.S. agencies to preserve, protect and return looted assets was unparalleled in history and willingly carried out by a victorious power committed to righting the wrongs of a defeated enemy regime. U.S. military and civilian personnel encountered a myriad of obstacles under the very difficult circumstances prevailing in postwar Europe. Their achievements were nothing short of heroic.

Id.

(5) Congress should pass legislation to remove impediments to the restitution of Holocaust victims' assets such as amending the Federal Immunity from Seizure Act and the National Stolen Property Act.³¹⁶

As of this writing, none of the recommendations have been adopted. Already this has created negative consequences. For instance, the Department of Defense has no regulations in place to restore victims' assets in postwar Iraq. Moreover, the work of the PCHA has been widely criticized.³¹⁷ The Commission spent a total of \$6 million,³¹⁸ with little to show for it. Its first report, on the Hungarian Gold Train,³¹⁹ issued on October 14, 1999, was condemned, at least by one scholar, as being inaccurate.³²⁰ Its final report, issued in December 2000, also was not enthusiastically greeted, and included grumblings that the re-

316. *Id.* at 21–26 (Commission Recommendations).

317. For a response to the critics, see Appendix *infra* (E-mail reply from Kenneth Klothen, former executive director of the PCHA).

318. See U.S. Holocaust Assets Commission Extension Act of 1999, Pub. L. No. 106-155, § 2(b)(1), 112 Stat. 1740. This bill authorized an additional \$2.5 million for the Commission's work, an increase of 71% over the original \$3.5 million. PCHA Commission Chair Edgar M. Bronfman explained, "The more the Commission uncovers, the more we discover we have to examine. This unanimous agreement to extend the Commission and drastically increase our authorized funding proves the House's commitment to our work and America's commitment to achieving justice for Holocaust victims and their families, . . . I look forward to prompt consideration in the Senate." The primary author of the House bill was Rep. Rick Lazio (R-NY), who was joined by twenty-seven Members of Congress as co-sponsors. Rep. James Maloney (D-CT), Rep. Brad Sherman (D-CA), International Relations Chairman Benjamin Gilman (R-NY), Banking Committee Chairman Jim Leach (R-IA), and Banking Committee Ranking Democrat Rep. John LaFalce (D-NY) signed on as original co-sponsors. PCHA Press Release, House Votes Unanimously To Extend Holocaust Commission, Final Report Due by December 2000, 71 Percent More Funds Authorized (Oct. 4, 1999), available at <http://www.pcha.gov/pr991004.htm>.

319. PCHA, PROGRESS REPORT ON: THE MYSTERY OF THE HUNGARIAN "GOLD TRAIN," available at <http://www.pcha.gov/goldtrainfinaltoconvert.html>. [hereinafter PCHA GOLD TRAIN REPORT].

320. See RONALD W. ZWEIG, THE GOLD TRAIN: THE DESTRUCTION OF THE JEWS AND THE LOOTING OF HUNGARY (2002). Zweig is a professor at Hebrew University in Jerusalem and a Holocaust scholar. His account of the Hungarian gold train saga differs significantly from the findings of the PCHA. Unlike the PCHA Report, he does not find that the U.S. Army stole significant items from the Gold Train. *Id.* at 118–30, 155.

port was a whitewash.³²¹ Gregg Rickman, who was closely involved in the creation of the PCHA, comments, "The problem with the Commission was that despite being given a defined mandate, they were their own worst enemy. They delayed their own work through inaction. Moreover, they found nothing of any original or lasting value and quite honestly wasted the taxpayer's money."³²²

The private criticisms did not become public until more than two years later. In March 2003, the *New York Times* published an article quoting "experts, historians and economists who worked from 1998 to 2000 on the panel."³²³ The article accused the Commission of "fail[ing] to examine critical records pertaining to traffic in looted art before, during and after World War II."³²⁴ Specifically, the PCHA neglected to review the vast array of documents found in the U.S. National Archives relating to World War II and the Holocaust. The Commission also failed to examine the records of American museums to determine how they had acquired works of art that originally came from post-war Europe.³²⁵ Benjamin Gilman, a former New York Congressman who served on the Commission, explained, "The tents were folded much to the chagrin of many of us. I felt we should have been doing much more than we did."³²⁶ According to Eizenstat, who also was a Commission member, "Lack of time

321. See Richard Chesnoff, *Holocaust Debts Haunt the U.S., Too*, N.Y. DAILY NEWS, Jan. 24, 2001, at 37. It appears that former Rep. Patricia Schroeder was wrong when she stated on the eve of the issuance of the PCHA Final Report that "I hope they [Europe] react by saying we've done a very thorough job of trying to clean our own house or at the least say we're not perfect. . . . This is not a whitewash." See Joan Gralla, *US Holocaust Reparation May Have Been Inadequate*, JERUSALEM POST, Jan. 7, 2001, at 4. For the critics of the PCHA, the final report, indeed, was a whitewash.

322. E-mail from Gregg Rickman to Michael J. Bazylar, Apr. 11, 2003 (on file with the authors).

323. Ralph Blumenthal, *Panel on Nazi Art Theft Fell Short*, N.Y. TIMES, Mar. 3, 2003, at E1.

324. *Id.*

325. *Id.* According to Masurovsky, "the Commission obtained U.S. government documents from the National Archives detailing the activities of unscrupulous American art dealers and museum officials in the U.S. zone of Germany after the end of the war, but chose to ignore them." Masurovsky E-mail, *supra* note 307.

326. Blumenthal, *supra* note 323.

was a major problem.”³²⁷ Eizenstat also agrees that the PCHA’s mandate was too narrow.³²⁸ As a result, according to these insiders, the PCHA “came up with a report that broke little new ground and failed to come to grips with the question of how much stolen art passed through American controls.”³²⁹

The greatest problem appears to be that the PCHA was dissolved before it finished its work. As a result, the PCHA never answered the question of how much Nazi-looted art made its way to the United States — the largest art market in the world. The Commission also failed to meet one of its primary goals: to assemble a database of Holocaust-era assets still present in the United States.³³⁰ Moreover, because of its limited mandate, the Commission failed to make critical inquiries into the activities of U.S. non-governmental actors during and after the war. These include:

- American museums and private art dealers, with respect to their involvement in the trade of Nazi-looted art;
- American banks, with regard to activities of some banks in Nazi-occupied Europe, and the possible existence of Holocaust-era dormant bank accounts in the United States;
- American insurance companies, and their possible complicity with the Nazi industrial machine.

327. *Id.*

328. *Id.*

329. *Id.*

330. According to Masurovsky,

[T]he idea of a database antedates the Commission by nearly four years. In fact, the leadership of the Commission was averse to this task. Lucille Roussin, former deputy director of the Commission’s Art and Cultural Property Team, made preliminary inquiries into the viability of such a database in the summer of 1999 shortly before she left the Commission. Financial concerns prevented the Commission from following through on this idea until the following year when it agreed to create a basic computerized listing of specific works of art listed on claims filed with the occupation military government U.S. (“OMGUS”). The Commission never acknowledged the efforts made by U.S. restitution groups towards the creation of such a database.

Masurovsky E-mail, *supra* note 307.

All of these questions have been answered in Europe by local governmental commissions, but in the United States the PCHA managed to avoid them.³³¹

Now that the PCHA's mandate has officially expired, the question of what can still be done must be asked. With regard to the outstanding issues involving Nazi looted art, Eizenstat favors another international art conference, akin to the one held in Washington, D.C. in 1998.³³² He also wants the private sector to continue the work, favoring the creation of a private foundation to take up where the PCHA left off.³³³ Kenneth Klothen, the PCHA's former executive director, also favors this approach, indicating, "efforts were under way to continue the commis-

331. Masurovsky points out that "even more glaring is the PCHA's suppression of the findings of the 4-person gold team [which Masurovsky headed] charged with examining the fate of so-called victim gold that fell under the control or possession of the U.S. government." Masurovsky E-mail, *supra* note 307.

Among the findings reached by the gold team, according to Masurovsky, were:

The U.S. gold policy since 1934 made it possible for victim gold [gold stolen or forcibly taken from Holocaust victims] to enter the monetary reserves of the United States without concern for the origin of the gold as of 1939; that the U.S. Department of the Treasury uncovered the presence of more than 2000 gold bars on deposit in its vaults in New York City that potentially contained traces of Holocaust victims gold; that the U.S. government recruited Albert Thoms as its gold expert in April 1945, the former director of the Reichsbank's precious metals department, responsible for the incorporation of Jewish-owned gold into the monetary reserves of the Third Reich from 1939–1945.

Masurovsky also points out that:

[T]he gold team also discovered that the postwar settlements relative to looted gold reached between the United States and its allies, on the one hand, and the governments of the so-called neutral countries — Spain, Sweden, and Portugal, on the other hand, were in fact aimed at allowing hundreds of tons of looted gold to circulate freely in the international gold market, thus depriving Holocaust victims and survivors of the opportunity to recover millions of dollars of stolen property.

Id.

332. Blumenthal, *supra* note 323.

333. *Id.*

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sion's work as a citizens' commission constituted as a private nonprofit foundation."³³⁴

IV. RESTITUTION LITIGATION AGAINST U.S. GOVERNMENT AND CORPORATIONS

A. Holocaust Litigation against the U.S. Government

In May 1945, while liberating Nazi-occupied territories, the U.S. Army seized a train allegedly containing millions of dollars worth of gold, jewelry, art, and other valuables that had been confiscated from Hungarian Jews.³³⁵ This train became known as the Gold Train. Despite protests from the Hungarian Jewish community, and contrary to international norms and its own internal regulations, the U.S. government did not attempt to return the property to the country of origin or to the original owners.³³⁶ Instead, the items were labeled "unidentifiable" and

334. *Id.* Masurovsky comments that:

[A]lthough the creation of such a foundation is laudable, it bespeaks the failure of the PCHA to provide the leadership and vision necessary to carry out in full the mandate set forth by Congress in 1998 [in creating the PCHA]: fully accountability and transparency of the U.S. government's treatment of Holocaust victims' assets and its knowledge of the private sector's misappropriation of such assets before, during, and after the Second World War. Nothing guarantees that such a foundation will not repeat the mistakes of the PCHA.

Masurovsky E-mail, *supra* note 307.

335. See PCHA GOLD TRAIN REPORT, *supra* note 319, at Introduction. Zweig, in his story of the Gold Train, disagrees with the PCHA researchers, both as to the contents on the train and their value by the time the train was seized by the U.S. Army. As proof, he cites, among other evidence, the report of Abba Schwartz, a young American lawyer appointed by the U.S. Army to "organize the taking over of the victim assets and their sale." ZWEIG, *supra* note 320, at 192. Schwartz, upon inspecting the contents of the so-called Gold Train by the time they were stored in a U.S. Army warehouse in Salzburg, reported to his superiors that "this property consists largely of bulky silver items, rugs, fur coats, cameras, all of doubtful value, and a relatively small quantity of valuable personal property. I do not believe that we will net from the Hungarian Gold Train property nearly as much as I anticipated before I viewed it." *Id.* at 195.

336. After the close of World War II, the United States signed two international agreements which should have governed the disposition of the property found on the Gold Train. The Final Act of the Paris Reparation Conference and the Five-Power Agreement for Non-Repatriable Victims of Germany both allowed the sale of ownerless property for the benefit of non-repatriable refu-

were either auctioned off, sold at U.S. Army Exchanges, personally appropriated by American officials, or stolen outright.³³⁷ None of the property was returned, nor was any restitution made to the owners. The PCHA concluded in October 1999 that “[t]he story of the Gold Train provides both a comprehensive illustration of the questions that arose from the United States’ restitution policy and its implementation, and a mysterious example of one egregious failure to follow that policy.”³³⁸

1. Background on the Gold Train

The Gold Train saga is part of the story of the Nazis’ final attempts to destroy the Jews of Hungary.³³⁹ In the final fourteen months of the war, Hitler’s henchmen sent over 400,000 Jews

gees. *Id.* Also, in adherence to international law, the United States had its own procedures which provided that “[i]dentifiable looted works of art and cultural material will be restituted to the governments of the countries from which they were taken, and all property had to be ‘restored to the government of the country from which it was taken’ or acquired in any way. . . .” *See id.* (citing both NARA, RG 59, Lot 62D-4, Box 28, Problem: External Restitution of Cultural Property, tit. 18, Change No. 1, Feb. 12, 1947, Pt. I. Policy and Organization; NARA, RG 59, Lot 62D-4, Box 28, Problem: External Restitution of Cultural Property, Extension of Restitution to Austria and Satellite Countries, Mar. 4, 1946).

337. Then-Secretary of State George C. Marshall made the following statement attempting to explain why the assets were not returned: “American Forces having examined the portion of the Hungarian train in the American Zone of Austria, the U.S. Commander [General Mark Clark] determined that the contents therefore were unidentifiable as to owners and, in view of the territorial changes in Hungary, as to national origin; restitution to Hungary being therefore not feasible, it was determined, with the approval of this government, that the property in question would be given to the Intergovernmental Committee for Refugees.” *See id.*

338. *See id.* at Introduction.

339. *See* U.S. HOLOCAUST MEMORIAL MUSEUM, HUNGARY AFTER THE GERMAN OCCUPATION, at <http://www.ushmm.org/wlc/en> (last visited June 21, 2003).

In mid-May 1944, the Hungarian authorities, in coordination with the German Security Police, began to systematically deport the Hungarian Jews. SS Colonel Adolf Eichmann was chief of the team of ‘deportation experts’ that worked with the Hungarian authorities. The Hungarian police carried out the roundups and forced the Jews onto the deportation trains. In less than two months, nearly 440,000 Jews were deported from Hungary in more than 145 trains. Most were deported to Auschwitz.

See id.

from Hungary and its annexed territories to Auschwitz and other concentration camps.³⁴⁰

While Hungary established ties with the Nazi regime after Hitler came to power in 1933, it did not become an official ally of Germany and the Axis powers until November 1940. Nonetheless, Germany invaded Hungary on March 19, 1944. Before this invasion, the pro-Nazi Hungarian regime enacted a number of anti-Jewish laws, and approximately 63,000 Jews lost their lives during this time. After Germany occupied Hungary, a program of large scale extermination of Hungarian Jewry started as Nazi officials began deporting Jews to concentration camps in the east for extermination. The architect of the extermination program was the notorious Adolf Eichmann.

Concomitant with this occupation, the Nazis, using Hungarian administrators, began passing new, more stringent anti-Jewish laws in Hungary. At the close of the first business day after Germany's invasion, the Hungarian Finance Minister banned all Jews from withdrawing large amounts of money from their accounts and sealed all their safe deposit boxes.³⁴¹ Subsequently, over one hundred anti-Jewish laws were passed during 1944 alone.³⁴²

340. ZWEIG, *supra* note 320, at 49. Zweig provides a detailed account not only of the course of events surrounding the Gold Train, but also the anti-Semitic events that occurred in Hungary during World War II. After the first German troops reached Budapest on March 19, 1944 and created a new government, the Germans and their Hungarian collaborators prepared the process to deport the Jews from Hungary. "The elimination of the Jewish community was able to proceed with a relentlessness and speed that was unprecedented elsewhere in Europe." *Id.*

341. *Id.* at 53

342. *Id.* at 50. Zweig explained:

The destruction of European Jewry was not only racial warfare against the Jewish people, but was also a very profitable venture for the German state, for the bureaucracies within that state were involved with the killing programme, and a lucrative opportunity for personal enrichment by thousands of officials, SS and soldiers. The Third Reich had become used to the idea that as the Final Solution was introduced into each occupied country in turn, new opportunities were opened up for individual looting and for the official seizure of Jewish property. Now that the installation of the Sztojay government ensured Hungarian cooperation with German plans for the largest remaining Jewish community in Europe, new possibilities of enrichment opened up for Germany.

The new Hungarian government passed several decrees concerning Jewish property.³⁴³ On April 6, 1944, police departments were issued orders to prevent Jews from hiding, selling, or giving away their valuables.³⁴⁴ The same day, the Hungarian government passed the most restrictive law against Jewish property, Decree No. I.66/1944, "Concerning the Declaration and Sequestration of the Wealth of the Jews."³⁴⁵ This regulation required Jews to officially declare the value of their property and surrender valuables, including wedding rings, to the authorities by April 30.³⁴⁶

After the official process of gathering the possessions of the Jews, the Hungarian government began its process of herding Jews into ghettos. During this stage, the remaining property of the Hungarian Jews was plundered as they were forced from their homes into collective living quarters. In the end, the possessions of 800,000 people had been stolen.³⁴⁷

With the advance of the Soviet Red Army in late 1944, the Nazis began to take steps to evacuate the most valuable Jewish possessions from Hungary. A train of forty-two freight wagons was prepared in Budapest, containing thousands of stolen items. On the train there were "literally tons of Jewish religious silverware (Sabbath candlesticks, Kiddush cups, Torah crowns and breastplates, Hallah plates, and other items) . . ."³⁴⁸

Id. at 50–51.

343. *Id.* at 53.

344. *Id.*

345. *Id.* at 54.

346. *Id.* Zweig explained the process in detail:

During April long lines of Jews formed outside the offices of the Royal Hungarian Post Savings Bank across the country, waiting to surrender their possessions. First they were required to surrender their bicycles and radios, and later their savings, jewelry, gold and other valuables. The latter items were placed in individually named envelopes and detailed receipts were issued, creating the illusion that one day they would regain their belongings. The deception was total. Each stage of the legalized plunder was designed to keep the flames of hope alive, and to cultivate the belief that by making yet another material sacrifice, by giving up more and more of their personal possessions following each new decree and official demand, they would be able to avoid the fate of other Jewish communities across Europe.

Id. at 55.

347. *Id.*

348. *Id.* at 73.

The train was under the command of Árpád Toldi, who at that time held the title of Hungarian Commissioner for Jewish Affairs.³⁴⁹ Toldi was given the responsibility of overseeing the stolen property.³⁵⁰

As the Gold Train made its way westward from Budapest, it eventually reached the town of Brennbergbanya, on the Austrian-Hungarian border. After hiding the train and taking inventory of its contents, Toldi's appointed commander, a Hungarian official named Laszlo Avar, ordered the train to continue into Austrian territory.³⁵¹ With the looming threat of Russian capture and the disorganization of the final days of the Third Reich, the train with its confiscated Hungarian Jewish property was concealed in the Tauern Tunnel in Western Austria.³⁵²

On July 11, 1945, an American military intelligence unit finally discovered the train.³⁵³ On July 19, 1945, the Hungarian military was relieved of its guard duties and the train came under complete U.S. control.³⁵⁴ In the following weeks, various Hungarian officials asked for some kind of acknowledgement that the contents of the train were Hungarian property. Despite these pleas, American authorities considered the cargo "persecutee property" and "looted goods," and gave no credence to the Hungarian government's claims.³⁵⁵ The U.S. Army then transferred the train's assets to a storage facility in Salzburg, Austria.³⁵⁶

349. *Id.*

350. *Id.*

351. For a detailed description of the treatment of the train and its contents while in Brennbergbanya, Hungary, *see id.* at 79–92.

352. For a detailed description of the events that took place while the Gold Train was transported from Brennbergbanya to its final hiding place inside Austria, *see id.* at 93–117.

353. *Id.* at 123.

354. *Id.*

355. *Id.* at 124.

356. Former U.S. Secretary of State George C. Marshall acknowledged this event:

Prior to their withdrawal from Hungary the Nazis had collected a considerable quantity of movable property belonging to Jewish victims of Nazi action. It is understood that this property belonged to Jewish victims in all parts of so-called Greater Hungary. It was removed by train to Austria, where, having been separated into two trains, it was found by American and French forces.

See PCHA GOLD TRAIN REPORT, *supra* note 319, at Pt. II.

As early as December 1945, the Hungarian Jewish community became aware that the contents of the Gold Train were in the possession of the United States.³⁵⁷ Despite pleas by Hungarians Jews³⁵⁸ that the property could, in fact, be identified, the United States determined that the property would be auctioned off because “it was impracticable to return individual items to the original owner[s] or heirs and is believed to be in the best interest of [the] class who were despoiled.”³⁵⁹ In late 1946, U.S. authorities, concerned with increasing power of the Soviet Union in postwar Hungary, decided that none of the goods from the Gold Train would be returned to Hungary.³⁶⁰ Instead, the U.S. Army turned over most of the Gold Train assets, along with other Hungarian assets, to the International Refugee Organization (“IRO”).³⁶¹ The IRO auctioned off the assets and used the proceeds to aid displaced populations and refugee resettle-

357. On December 20, 1945, the Temporary Managing Committee of the Central Bureau of Hungarian Jews sent a letter to the U.S. Legation informing them that:

In the country, all valuables in Jewish property — even golden wedding rings — have been collected by official persons before the Jews have been transported to gathering places in order to be deported. The valuables deposited by Jewish persons or by the authorities that have collected them have been loaded up, later in railway-cars and carried away in western direction, and, as the defeat of the German Army became evident, transported to Austria, after having been tithed several times.

Id.

358. The Committee also made the following emotional plea, which was ignored:

The Jews having been robbed also of everything else they possessed, all clothes, underwear, furniture, etc. it is not only their undoubted right to claim that the objects stored in the railway-cars under American Control, should be rendered to them, but their demand is justified from humane standpoint too. By recovering a part of the valuables lost, many of them could begin to rebuild their homes and their existence.

Id.

359. See PCHA GOLD TRAIN REPORT, *supra* note 319, at Pt. III (citing NARA, RG 84, Papers of the U.S. Legation in Budapest, Box 4, Robert S. Folson of U.S. Legation in Budapest to Central Board of Jews in Hungary, May 19, 1947).

360. *Id.*

361. *Id.*

ments.³⁶² Many Gold Train valuables not turned over to the IRO were stolen.³⁶³ Some U.S. military personnel requisitioned materials for their personal use and numerous high-ranking officials appropriated materials that had been found on the Gold Train to furnish their residences.³⁶⁴ Gold Train assets were also

362. ZWEIG, *supra* note 320, at 191–206. Zweig concludes that, in the end, the wealth, which was recovered from the Gold Train, turned out to be worth a fraction of the hundreds of millions of dollars, which had been widely claimed. Rather, Zweig finds that the Gold Train took on mythical proportions. In contrast to the PCHA, he also does not lay much blame on the U.S. government or its military authorities.

The assets of the Hungarian Gold Train may well have been worth \$120 million or even \$300-350 million in the circumstances of 1938, or even of those of 1944, when the owners of the items of value were still alive. By 1945, after the items had been vandalized and broken up, and the original owners could no longer be traced, the expropriated goods were worth very much less. It was a fantasy to believe the prosperity of a community could be seized and redistributed, or transferred to the Reich.

Id. at 220. Zweig also concludes:

It was the people who used [the goods] who gave real value to the items of the Gold Train; the value was not inherent in the objects themselves. . . . Some degree of wealth could be transferred from one population to another by organized plunder, especially where that wealth was concentrated in a few hands. But the roots of popular wealth and prosperity are social, and they were destroyed when the societies that sustained them and gave them value were laid waste.

Id. at 220–21.

363. See PCHA GOLD TRAIN REPORT, *supra* note 319, at Pt. IV.

364. *Id.* Even though Zweig concedes that there was some “pilfering by American soldiers,” he nevertheless criticizes the PCHA for inflating the amount of theft committed by U.S. Army personnel. ZWEIG, *supra* note 320, at 219. Zweig first points out that the items taken by U.S. Army personnel were mostly “household goods,” which they needed to borrow when they were stationed temporarily in “Austrian homes that had usually been stripped bare by their owners prior to army personnel moving in” *Id.* at 155. He then explains that “when army officers took household items from the train’s cargo. . . . [t]he [U.S. Army] Property Control Office kept a detailed record, but the goods were rarely returned. As the quantities borrowed were a very small fraction of the overall cargo, these losses were not significant.” *Id.* Challenging directly the PCHA’s findings about the culpability of the U.S. Army in the theft of the Gold Train booty, Zweig concludes:

Nevertheless, in its 1999 Interim Report the Presidential Advisory Commission On Holocaust Assets in the United States accused the US army of large-scale larceny, an accusation that made front-page news in the *Washington Post* and the *New York Times* on 15 October

sold at U.S. Army Exchange stores.³⁶⁵ In short, the U.S. government's handling of the Gold Train and its valuables was far from perfect.

The Gold Train also contained over 1,000 paintings taken from Hungary.³⁶⁶ However, despite a 1952 U.S. State Department statement that the art belonged to middle-class Hungarians, the U.S. Army neither returned the artworks to their rightful owners nor to their place of origin.³⁶⁷ In the following year, a State Department representative recommended that all cultural property, including the paintings of Hungarian origin, be held indefinitely for eventual return to their rightful owners in Hungary.³⁶⁸ Nevertheless, the United States never informed the Hungarians about the paintings and, instead, transferred them into Austria's custody.³⁶⁹

1999. There is no evidence to support these charges; in fact the opposite is true. The Property Control Division of USFA went to great lengths to protect the cargo against theft. The charges by the Presidential Commission were not repeated in the Commission's Final Report in 2001.

Id. at 155. A contrary account is found in KENNETH D. ALFORD, *THE SPOILS OF WORLD WAR II: THE AMERICAN MILITARY'S ROLE IN STEALING EUROPE'S TREASURES* 6–16, 72–74, 85–86, 221–28 (1994) (Alford is an amateur historian focusing his research on wartime looting of Europe). Alford put the “1945 estimated value of the contents of the train [at the time it came into U.S. custody at]. . . \$206 million — which would translate to several billion dollars today.” *Id.* at 16. Zweig, in his study, states that Alford allowed him to examine Alford's “document collection” in the course of writing his book, but that he “strongly disagree[s]” with Alford's “interpretation of the[se] documents.” ZWEIG, *supra* note 320, at xiii.

365. At first, the plan to sell the items at the exchange stores was rejected because “it is believed there may be claims from original Hungarian owners for identifiable private property.” See PCHA GOLD TRAIN REPORT, *supra* note 319, at Pt. IV(2) (citing NARA, RG 260, Box 77, USACA Records, RD & R Division, Property Control Branch, Letter from RD&R Division Property Control Branch to the Chief of Legal Division, Dec. 8, 1945). Eventually, the Property Control Branch approved the sale of the items. *Id.* at Part VI.

366. *Id.*

367. See *id.* (citing NARA, RG 59, Box 16, Disposition of Art Objects and Scientific Works under USFA Control. From Walter Dowling, the Deputy High Commissioner to the Department of State, Jan. 12, 1951) (“Disposition of Art Objects and Scientific Works under USFA Control”).

368. *Id.*

369. *Id.*

2. Gold Train Litigation: *Rosner v. United States*

In May 2001, Hungarian Holocaust survivors filed a class action suit against the United States in the Southern District of Florida,³⁷⁰ alleging that the U.S. Army received their identifiable property from the Hungarian Gold Train³⁷¹ and made no attempts to return the property to the rightful owners.³⁷² According to one plaintiff's attorney, "[t]his is the first case of its type — a class action brought on behalf of Holocaust survivors that charges the U.S. government with improperly disposing of assets."³⁷³ The Holocaust survivors' complaint alleged three counts: (1) unconstitutional taking in violation of the Fifth Amendment of the U.S. Constitution; (2) breach of an implied-

370. See Complaint, at 1, *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002). The complaint was filed by twelve plaintiffs, seven of whom reside in Miami-Dade County, Florida.

371. Complaint, at 1–3.

The U.S. Army found documents on the Gold Train which listed the identities of an undetermined number of the owners of the valuables that had been forcibly placed on the Gold Train by Arrow Cross officials and Nazi officials. Many of the items on the train were in carefully locked containers with the names and addresses of the owners on the outside.

Id.

372. Complaint, at 3, *Rosner v. United States*.

The U.S. made no attempt to identify the rightful owners of the Gold Train property; it did not publish any notices in newspapers in Europe, the U.S. or Israel regarding the property, nor did it respond to repeated requests from the Hungarian Jewish Community Organizations for information about the property. It ignored identification of many items which would have made return of the property possible.

Id.

373. Henry Weinstein, *Hungarians Sue U.S. Over Seized Holocaust Loot Reparations: Plaintiffs Seek Payment for Assets Stolen by Nazis and Captured by Americans*, L.A. TIMES, May 8, 2001, at A14. Zweig has disputed the lawsuit's claims, stating that he believes the plaintiffs were suing the wrong government and that the real stolen treasure consisted of gold jewelry that was melted down and sent in trucks to Austria, where it was buried by Hungarian soldiers and later discovered by French troops. The gold was eventually returned to the Hungarian Communist government. See Tal Abbady, *Holocaust Survivors Sue U.S. Government*, AP ONLINE, Oct. 12, 2002, available at 2002 WL 101561328.

in-fact bailment contract; and (3) violation of conventional and customary international law.³⁷⁴

On August 28, 2002, federal judge Patricia Seitz, presiding over the case, granted in part and denied in part the U.S. Government's motion to dismiss.³⁷⁵ Judge Seitz first addressed the issue of the government's sovereign immunity and ruled that while the continued violation doctrine does not provide relief, the plaintiffs' claims could proceed under the equitable tolling doctrine.³⁷⁶ The plaintiffs alleged that the Government had ignored their repeated requests for information about their property and only in October 1999, when the PCHA released its report on the Gold Train, did the necessary facts arise to permit filing of a complaint.³⁷⁷ Judge Seitz accepted plaintiffs' argument that the government has kept them ignorant of vital information necessary to pursue their claims, "without any fault or lack of diligence on their part" and ruled that plaintiffs were entitled to the benefit of equitable tolling.³⁷⁸

374. *Rosner*, 231 F. Supp. 2d at 1204. The Government moved to dismiss the complaint on grounds that it was: (1) untimely and, therefore, barred by sovereign immunity; (2) an international law violation claim requiring a waiver of Congressional sovereign immunity; (3) failed to state a claim upon which relief could be granted, for both the Fifth Amendment and breach of implied contract claims. *Id.*

375. *Id.* The court ruled:

(1) based on the allegations in the Complaint, Plaintiffs' viable claims are not time-barred under the principles of equitable tolling; (2) to the extent that Plaintiffs seek non-monetary relief pursuant to the Administrative Procedure Act, the international law claim (Count III) is viable; (3) Plaintiffs' Fifth Amendment claim (Count I) fails to state a claim upon which relief can be granted, and thus, will be dismissed with prejudice; and (4) Plaintiffs' claim for breach of an implied-in-fact contract of bailment (Count II) does state a claim upon which relief can be granted.

Id. See also *Abbady*, *supra* note 373; Catherine Wilson, *Judge Lets Hungarian Jews File Suit*, AP ONLINE, Aug. 30, 2002, available at 2002 WL 26542071. Concerning the PCHA's two reports issued in 1999 and 2000, the survivors' attorney, Samuel Dubbin, concedes that the government's final report released in 2000 is less damning than the 1999 findings. See also *Abbady*, *supra* note 367.

376. *Rosner*, 231 F. Supp. 2d at 1206–10.

377. *Id.* at 1209.

378. *Id.* at 1208–09 ("The equitable tolling doctrine allows plaintiffs to sue after the expiration of the applicable statute of limitations, provided they have been prevented from doing so due to inequitable circumstances") (citing *Ellis*

With respect to whether sovereign immunity bars these claims, the court found that the Alien Tort Claims Act (“ATCA”) did not provide the necessary waiver of sovereign immunity because it is solely a jurisdictional statute,³⁷⁹ and that the Little Tucker Act also did not provide a waiver because a claim based on international law does not fall within the terms of the Act.³⁸⁰ The court did find, however, that the Administrative Procedure Act waived the sovereign immunity for plaintiffs’ international law claims for non-monetary relief of the return and accounting of all property.³⁸¹

In examining whether the political question doctrine bars these claims, the court held that although the courts usually defer military matters to the political branches, “such deference does not extend to all actions which could arguably be traced back to an exercise of military authority.”³⁸² The court further found that:

v. General Motors Acceptance Corp., 160 F.3d 703, 706 (11th Cir. 1998)); Justice v. United States, 6 F.3d 1474, 1475, 1479 (11th Cir. 1993) (stating that equitable tolling is applied when necessary to prevent an injustice).

379. The ATCA supplies federal courts with jurisdiction over tort claims brought by aliens for violation of international law. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”); Goldstar v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (“[T]he Alien Tort Statute has been interpreted as a jurisdictional statute only — it has not been held to imply any waiver of sovereign immunity.”).

380. *Rosner*, 231 F. Supp. 2d at 1210 (“Through passage of the Little Tucker Act [28 U.S.C. §1346(a)(2)] Congress has waived sovereign immunity for non-tort claims against the United States ‘founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.’”); *Phaidin v. United States*, 28 Fed. Cl. 231, 234 (1993) (“[T]he Tucker Act contains no language permitting this court to entertain jurisdiction over claims founded upon customary international law.”).

381. *Rosner*, 231 F. Supp. 2d at 1211. The APA waives the sovereign immunity of the United States for non-monetary suits against federal agencies under specified conditions. 5 U.S.C. § 702 (2000) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

382. *Rosner*, 231 F. Supp. 2d at 1212 (citing *Owens v. Brown*, 455 F. Supp. 291, 300 (D.D.C. 1978) (“Whether the deference due particular military determinations rises to the level of occasioning non-reviewability is a question

Plaintiffs' Complaint makes specific allegations regarding conduct that, although exercised by military personnel, is decidedly non-military in its nature. Accordingly, just as Plaintiffs' argument that the war function exception does not apply to orders coming from U.S. soil states too much, so too does the Government's attempt to bring all its actions with respect to the Gold Train within the shield of the "war function" exception.³⁸³

Plaintiffs also alleged that, in violation of the Fifth Amendment, the U.S. government took possession of plaintiffs' property from the Gold Train and used it for public purposes without compensating plaintiffs.³⁸⁴ The court, however, dismissed plaintiffs' Fifth Amendment Takings claim because the plaintiffs, being non-U.S. citizens and not having espoused any "voluntary association" with the United States, lacked the necessary U.S. connections at the time of expropriation.³⁸⁵

In their claim for breach of an implied-in-fact contract of bailment, plaintiffs alleged that the Government:

(1) accepted possession of Plaintiffs' property with the express knowledge that the property belonged to Plaintiffs; (2) never claimed to be the owner of the property; (3) took possession of the property with the express intent of undertaking to return the property to its rightful owners; (4) stored and guarded the property in warehouses for protection so that it could be returned to its rightful owners; (5) indicated, expressly and through applicable laws, that any identifiable property from the Gold Train would be returned in accordance with U.S. policy and custom; and (6) falsely declared that the property was unidentifiable, thus breaching the agreement.³⁸⁶

The court found, based on these allegations, that the plaintiffs alleged sufficient facts to survive a motion to dismiss and did not decide whether plaintiffs could eventually prove their claim.³⁸⁷

that varies from case to case and turns on the degree to which the specific determinations are laden with discretion and the likelihood that judicial resolution will involve the courts in an inappropriate degree of supervision over primary military activities.")).

383. *Id.*

384. *Id.*

385. *Id.* at 1214.

386. *Id.* at 1214–15.

387. *Id.* at 1215.

In a February 26, 2002 hearing, Judge Seitz again refused the U.S. government's request to dismiss the suit. At the hearing the judge reprimanded the U.S. Justice Department for "dragging [its] feet," and made it known that she found the government's conduct "unacceptable."³⁸⁸ She then ordered the parties to enter into jurisdictional discovery, and gave plaintiffs' lawyers "access to all Presidential records in the custody of the Archivist of the United States [that] pertain[s] in any way to the so-called 'Hungarian Gold Train' and/or the claims or defenses asserted in this action."³⁸⁹ Judge Seitz's rulings allowing the case to proceed were significant victories for plaintiffs. As of June 2003, the Hungarian Gold Train litigation continues.³⁹⁰

388. Malcolm Balfour, *Court OKs Holocaust Suit vs. U.S.*, N.Y. POST, Feb. 28, 2003, at 22.

389. See 2003 Order, *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002).

390. Following the Judge's ruling Eizenstat noted:

The Hungarian Jewish community is seeking justice for the Hungarian "gold train" incident A presidential commission appointed by Bill Clinton and ably led by Edgar Bronfman found that some of the items were used by high-ranking American military officers to decorate their homes, in a rare departure from the generally exemplary conduct of the American army in handling Nazi-looted assets. Despite repeated requests from the Hungarian Jewish community to be permitted to identify the stolen property, the bulk was apparently sold or otherwise distributed. Whatever the merits of the class action suit brought against the federal government in U.S. District Court in the Southern District of Florida . . . the American government is morally obliged to provide an accounting for what was lost, an apology if wrongdoing is found, and some token payment to the Hungarian Jewish community.

Stuart Eizenstat, *Justice Remains Beyond Grasp Of Too Many Holocaust Victims*, FORWARD, Oct. 18, 2002, available at <http://www.forward.com/issues/2002/02.10.18/oped1.html>. In April 2003, Eizenstat added: "This should be settled out of court. There should be some effort to return what can be found to the Hungarian Jewish community. And if it cannot be found, there should be a general payment to this community." Jay Weaver, *Holocaust Survivors Suing Over Lost Assets U.S. Captured from Nazi Train*, MIAMI HERALD, Apr. 7, 2003 at 1. Following this story, the *Miami Herald* published a lead editorial urging the U.S. government to settle the Hungarian Gold Train litigation. Editorial, *Settle "Gold Train" Case, Restitution Denied Holocaust Survivors*, MIAMI HERALD, May 11, 2003.

B. Holocaust Litigation against U.S. Corporations

Holocaust survivors and activists involved in the Holocaust restitution movement started to look at the role of the U.S. corporations after filing numerous lawsuits and achieving agreements with European defendants.³⁹¹ Soon after the end of World War II, U.S. government reports named various American companies as having profited from dealings with the Nazi regime. These companies include Chase Manhattan Bank, Standard Oil, Texaco, IBM, ITT, Ford Motor Co., and General Motors.³⁹² As Eizenstat points out in his memoir, many of these same companies, through their German subsidiaries, used slaves during the war.³⁹³

Many companies in Switzerland, Germany, Austria, and France have already acknowledged their egregious wartime behavior toward Jews. American companies, on the other hand, either continue to deny any dealings with the Nazis or attempt to rationalize their behavior. One excuse has been compulsion: that while doing business in Nazi Germany and occupied Europe, the companies were compelled to participate in the German wartime economy. American companies also assert that the U.S. parent companies lost all effective control over their European subsidiaries during the war. Last, the companies insist that their current corporate make-up has nothing to do with past activities, and should therefore be forgotten.

The following section examines U.S. litigation against American companies for their wartime behavior in Europe, as well as

391. See Pauline Jelinek, *Actions of U.S. Firms in Nazi Era Targeted*, COLUMBIA, Aug. 28, 2000, at E1 ("It's their turn. American companies were collaborating with Nazi Germany at a time when we were at war, because there was an ethos that demanded huge profits at the expense of everything else.") (quoting Elan Steinberg, World Jewish Congress official).

392. For a general discussion of this subject see CHARLES HIGHAM, *TRADING WITH THE ENEMY: AN EXPOSÉ OF THE NAZI-AMERICAN MONEY PLOT 1933-1949* (1983). Higham, a former *New York Times* writer and author of various biographies of Hollywood celebrities, was the first to write a popular treatment of the activities of American corporations in Nazi Germany and occupied Europe. An earlier, sensationalist account can be found in ANTHONY C. SUTTON, *WALL STREET AND THE RISE OF HITLER* (1976). The book jacket describes the author as a former research fellow at the Hoover Institution for War, Revolution and Peace.

393. EIZENSTAT, *supra* note 2, at 254.

claims against other American companies that may eventually lead to litigation.

1. Ford Motor Company

During World War II, Ford used slaves at Ford-Werke, A.G., Ford's German plant in Cologne, Germany.³⁹⁴ The slaves were civilians from Eastern Europe and the former Soviet Union that were dragooned into Germany and requisitioned by private companies from the German military.³⁹⁵

Ford's involvement first came to public light during a U.S. Senate subcommittee hearing in 1974.³⁹⁶ By 1939, Ford, along with General Motors ("GM"), attained control over 70% of the lucrative German market.³⁹⁷ With the outbreak of war, both companies repositioned themselves to provide supplies to the Nazi army.³⁹⁸ German and American archival documents demonstrate that while these companies were resisting requests to change their factories in the United States to wartime produc-

394. See FORD-WERKE REPORT, *supra* note 143, at 45. For a treatise on the subject, setting out the wartime histories of both Ford's Werke plant and General Motors' German Opel subsidiary and including recollections of some of Ford's and General Motors' still-living wartime slaves, see WORKING FOR THE ENEMY, *supra* note 19, at 135–48.

395. FORD-WERKE REPORT, *supra* note 143, at 45. See also WORKING FOR THE ENEMY, *supra* note 19, at 135–48.

396. Extracted from BRADFORD C. SNELL, AMERICAN GROUND TRANSPORT: A PROPOSAL FOR RESTRUCTURING THE AUTOMOBILE, TRUCK, BUS AND RAIL INDUSTRIES, REPORT PRESENTED TO THE COMMITTEE OF THE JUDICIARY, SUBCOMMITTEE ON ANTITRUST AND MONOPOLY, UNITED STATES SENATE 16–24 (1974):

Due to their concentrated economic power over motor vehicle production in both Allied and Axis territories, the Big Three inevitably became major factors in the preparations and progress of the war. In Germany, for example, General Motors and Ford became an integral part of the Nazi war efforts. GM's plants in Germany built thousands of bomber and jet fighter propulsion systems for the Luftwaffe at the same time that its American plants produced aircraft engines for the U.S. Army Air Corps. . . . Due to their multinational dominance of motor vehicle production, GM and Ford became principal suppliers for the forces of fascism as well as for the forces of democracy.

Id. See also WORKING FOR THE ENEMY, *supra* note 19, at 33–36 (same discussion).

397. Michael Dobbs, *Ford and GM Scrutinized for Alleged Nazi Collaboration*, WASH. POST, Nov. 30, 1998, at A1.

398. *Id.*

tions, their American managers were agreeing to military productions in German plants.³⁹⁹ Documents have shown that both parent companies were aware of their German subsidiaries' dealings and never intended to divest themselves of the German assets.⁴⁰⁰

When the U.S. Army liberated Ford-Werke, A.G., they discovered that the plant had been using slave labor.⁴⁰¹ A September 5, 1945, U.S. Army issued report stated that the Ford-Werke, A.G. plant also supplied the Nazi regime with military vehicles.⁴⁰²

On March 8, 1998, a class action suit was filed against Ford for the forced labor performed at Ford-Werke, A.G. between 1941 and 1945.⁴⁰³ The lead plaintiff, Elsa Iwanowa, was seventeen when in 1942 the Germans abducted her and 2,000 other teenage children to provide labor in Nazi Germany.⁴⁰⁴ At the plant, she was forced to drill holes into truck engines, working under severe inhumane conditions and without pay.⁴⁰⁵ At the case's first hearing on March 8, 1999, Ford stated that it did not owe anything to the laborers of its German plant.⁴⁰⁶ Ford allegedly admitted that they had control over the plant, but argued that they did not profit from it.⁴⁰⁷ The suit was dismissed in 1999 when the court ruled that such a claim should be resolved

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999).

404. *Id.* at 433. *See also* WORKING FOR THE ENEMY, *supra* note 19, at 239-49. In September 1995, Elsa Iwanowa and seven other former Ford slaves, all in their seventies, returned to the Ford-Werke plant in Cologne. They came at the city's expense, invited by the mayor of Cologne. "The men and women moved within the rattle and din of workers and machines, searching for remnants of anything they remembered. Deeply moved, they were escorted by Ford-Werke executives to a conference room. There, they were presented with sales-video tributes to the latest Ford models, cars with powerful engines and comfortable features." According to Iwanowa, "[Ford] didn't want to speak to us at all. They gave us nothing, nothing other than [a] pin." *Id.* Iwanowa "perceived it as a final indignity." *Id.*

405. *Id.* at 433-34.

406. *Id.* at 434.

407. *Id.* at 467-68.

by international treaties established between the two countries.⁴⁰⁸

Ford later retreated from its previous position that it had not profited from any forced labor in Germany⁴⁰⁹ and acknowledged that the plant had employed around 2,000 slave laborers.⁴¹⁰ Ford then issued a report based on its three and a half year study of its activities in Germany.⁴¹¹ Ford's internal probe examined its twelve-year involvement with the Third Reich, producing 98,000 documents located across some thirty public and private archival repositories in the United States, Germany, and the United Kingdom.⁴¹² The effort involved some forty-five researchers, historians, and translators.⁴¹³ Company historians found documents showing that Ford received dividends for its German subsidiary from 1940 to 1943.⁴¹⁴

Ford also donated the documents compiled for this project, along with a searchable database, to the Benson Ford Research Center at the Henry Ford Museum & Greenfield Village, where they will be available for research.⁴¹⁵ As discussed above, Ford also agreed to provide \$2 million to the U.S. Chamber of Commerce's American Industry Fund (but has yet to make the actual contribution), and its German subsidiary contributed

408. *Id.* at 490–91. On the same day, a different court dismissed similar claims against German companies. See BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 74–77.

409. See Edwin Black, *Ford's Better Holocaust Idea*, BUFFALO NEWS, Dec. 16, 2001, at H5; Jonathan Yardley, *Henry Ford and the Jews*, WASH. POST, Nov. 25, 2001, at T2. See also Ken Silverstein, *Ford and the Führer: New Documents Reveal the Close Ties between Dearborn and the Nazis*, NATION, Jan. 24, 2000, at 11.

410. Tom Brown, *Report Explains Ford's Role in Nazi Germany*, SAN DIEGO UNION-TRIB., Dec. 7, 2001, at A21.

411. For Ford's report, see Ford Motor Co., *Research Findings About Ford-Werke Under the Nazi Regime* (Dec. 6, 2001), at http://media.ford.com/events/fw_research.cfm [hereinafter Ford-Werke Research Findings].

412. *Id.*

413. See Black, *supra* note 409, at H5. See also Brown, *supra* note 410, at A21.

414. Dobbs, *supra* note 397, at A1. See also Brown, *supra* note 410, at A1; Black, *supra* note 409, at H5.

415. David Runk, *Ford Releases Nazi Labor Report*, ASSOCIATED PRESS, Dec. 6, 2001.

DM13 million to the German DM10 billion slave labor settlement.⁴¹⁶

2. J.P. Morgan and Chase Manhattan

In December 1998, a class of Jewish bank account holders sued American financial giants Chase Manhattan Bank ("Chase") and J.P. Morgan & Co ("J.P. Morgan") for having confiscated their assets during the German occupation of France.⁴¹⁷

Chase was one of the five American banks with branches in Paris when the Nazis took control.⁴¹⁸ Chase remained opened in Paris with branch manager Carlos Niedermann running the office. Niedermann began conducting business with the Nazis after the German takeover of Paris.⁴¹⁹ German accounts were opened at Chase's Paris branch, and Niedermann approved loans to German companies.⁴²⁰ In a letter to Chase U.S., Niedermann mentioned his friendship with the Nazis and potential business opportunities with the Third Reich.⁴²¹

The U.S. government was aware of Chase Manhattan's operations with Nazi Germany. In April 1945, the U.S. Treasury issued a 220-page report of its investigation of Chase.⁴²² The report concluded that Niedermann's superiors at Chase's New York headquarters were aware of the activities taking place in the Paris branch, but did nothing to halt its transactions with the Nazis.⁴²³

416. Pauline Jelinek, *U.S. Firms in Holocaust Spotlight*, DESERET NEWS, Aug. 28, 2000, at D8.

417. For a detailed discussion of this litigation, see BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 172–201. Eizenstat discusses his role in the settlement of this litigation and how it was achieved, in EIZENSTAT, *supra* note 2, at 314–37.

418. Chase Manhattan today is one of the world's largest banks. In 2002, it merged with J.P. Morgan, to become J.P. Morgan Chase & Co.

419. See Dateline NBC: Profile: Just Rewards? German Companies That Used Jewish Slave Labor Being Sued Now for Damages (NBC television broadcast, Nov. 10, 1998), available at 1998 WL 22610135 [hereinafter *Dateline: Paper Trail*]. Two of the other branches were closed and the Nazis shut down one branch.

420. See Silverstein, *supra* note 303, at 409.

421. See *Dateline: Paper Trail*, *supra* note 419.

422. Yamir Sheleg & Shlomo Shamir, *Chase Manhattan's Wartime Acts Probed*, HA'ARETZ (Israel), Aug. 11, 2000.

423. *Id*

The bank today maintains, however, that Chase U.S. could do nothing to prohibit the activities in Paris.⁴²⁴ Chase U.S. also claims that the Paris branch scaled back its involvement with the Third Reich.⁴²⁵ Its own internal probe has revealed only three accounts that were looted and eleven stolen safety-deposit boxes.⁴²⁶

J.P. Morgan was the other American bank to continue operations in Paris after the Nazi occupation. In order to continue business dealing with the Nazi regime, J.P. Morgan boasted of its anti-Semitic hiring policies to the Nazi authorities, including the absence of any Jewish partners.⁴²⁷ A U.S. Treasury report stated that J.P. Morgan also maintained a close relationship with the collaborationist French Vichy government.⁴²⁸

In September 2000, J.P. Morgan separately settled the litigation against it for \$2.75 million.⁴²⁹ Chase also settled in January 2000 as part of the overall French-American agreement effectuated by Eizenstat at the end of the Clinton Administration. As of June 2003, J.P. Morgan's distribution of proceeds in both settlements is still pending.⁴³⁰

3. IBM

Revelations about the role of computer giant IBM with Nazi Germany came out in 2001 through the publication of a single

424. *Id.*

425. *Id.*

426. *Id.*

427. See *Dateline: Paper Trail*, *supra* note 419. See also *U.S., French Banks Named in Holocaust Lawsuit*, CNN.COM, Dec. 24, 1998, at <http://www.cnn.com/US/9812/24/nazi.bank>. J.P. Morgan was also labeled as an "international Aryan organization." See *id.*

428. *Id.*

429. For a detailed discussion of the settlements see BAZYLER, HOLOCAUST JUSTICE, *supra* note 2, at 185–88, 192–98. Information about the J.P. Morgan settlement and distribution of the funds can be found at Barclays Bank and J.P. Morgan Co. French Bank Settlements, at <http://jpmorganfrenchclaims.org>.

430. See <http://jpmorganfrenchclaims.org> for more information including the Claim Forms and the Notice of Pendency of Class Action, Proposed Settlement of Class Action and Settlement Hearing. As of May 13, 2003, the toll free recording (1-800-714-3304) states that the program has not even begun.

book, *IBM and the Holocaust*.⁴³¹ The author, Edwin Black, a journalist and researcher who authored one previous study on the Holocaust,⁴³² is a son of Polish Holocaust survivors. Black first came upon the idea of researching IBM's business activities in Nazi Germany and occupied Europe during a visit with his parents to the U.S. Holocaust Memorial Museum in Washington D.C.⁴³³ There, prominently displayed for the last ten years of the Museum's existence, is an IBM Hollerith D-11 sorting machine used by the Nazi regime in 1933 to help conduct a national census that identified the Jewish citizens of Germany. The sorting machine used punch card technology created by IBM and was the precursor of the modern computer.⁴³⁴

According to Black's study, IBM was deeply involved with the Nazi regime through its German subsidiary, Dehomag.⁴³⁵ Nazi Germany was IBM's largest client outside the United States.⁴³⁶ In the book, Black produces powerful evidence demonstrating how IBM profited in assisting the Nazis to run a race war.⁴³⁷ Dehomag supplied the Nazis with custom-made punch cards and tabulating machines, which enabled the Nazis to identify and categorize their Jewish victims.⁴³⁸ Later, when the Nazis placed Jews and other victims in concentration camps, IBM technology made it possible to collect and store background data — including ethnicity — on the millions who came through the Nazi concentration camp system.⁴³⁹ According to Black, IBM was fully aware of the Nazis' use of its technology and ultimately collected the profits made by its German subsidiary during the war.⁴⁴⁰

431. EDWIN BLACK, *IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION* (2001) [hereinafter EDWIN BLACK, *IBM AND THE HOLOCAUST*].

432. EDWIN BLACK, *THE TRANSFER AGREEMENT: THE DRAMATIC STORY OF THE PACT BETWEEN THE THIRD REICH AND JEWISH PALESTINE* (1984)

433. EDWIN BLACK, *IBM AND THE HOLOCAUST*, at 11.

434. *Id.* at 8.

435. *Id.* at 9.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.* at 375–78.

In 2002, Black published a new edition of his book.⁴⁴¹ The new edition contains two additional chapters, in which Black lays out further evidence of IBM's collaboration with the Nazis. According to Black, after Nazi Germany's invasion of Poland in September 1939, IBM New York established a new subsidiary in occupied Poland — Watson Business Machines.⁴⁴² The new subsidiary was completely separate from IBM Germany's Dehomag and was directly controlled by IBM's headquarters in New York.⁴⁴³ Its sole purpose, Black claims, was to service the Nazi occupation of Poland,⁴⁴⁴ including the categorization of victims transported to Auschwitz.⁴⁴⁵

In the new edition, Black relates the recollections of Leon Krzemieniecki, a forced laborer for the Polish railway office in Krakow during the war. Krzemieniecki remembers fifteen machines in the railway office, each staffed by a female employee who tabulated information through these IBM machines.⁴⁴⁶ Three German officials supervised the operation.⁴⁴⁷ The collected information was then shipped off in secrecy to an undisclosed location. According to Black, Krzemieniecki now realizes that the office he worked in was used to coordinate the extermination of Jews and other victims at nearby Auschwitz.⁴⁴⁸ The machines, according to Krzemieniecki, bore the seal "Watson Business Machines" written in English.⁴⁴⁹

Black also alleges, based on documents he uncovered, that a senior IBM U.S. representative traveled to Europe to meet with executives there and arranged for a lease of machines to "calcu-

441. EDWIN BLACK, *IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION* (2002) [hereinafter BLACK, *THE STRATEGIC ALLIANCE*].

442. EDWIN BLACK, *IBM AND THE HOLOCAUST*, *supra* note 431, at 193.

443. *Id.*

444. Oliver Burkeman, *IBM "Dealt Directly with Holocaust Organisers" — Author Says US firm Had Control of Polish Subsidiary*, *GUARDIAN* (London), March 29, 2002, at P14 (According to Black, "IBM's new Polish company's sole purpose was to service the Nazi occupation during the rape of Poland.").

445. *Id.* (According to Black, IBM's punch card machines were used to "calculate exactly how many Jews should be emptied out of the ghettos each day.").

446. BLACK, *THE STRATEGIC ALLIANCE*, *supra* note 441, at 436.

447. *Id.*

448. *Id.* at 435–36.

449. *Id.* at 437.

late exactly how many Jews should be emptied out of the ghettos each day” and to transport them efficiently on railways leading to the camps.⁴⁵⁰

Black also claims that “IBM recovered all its Polish profits and machines.”⁴⁵¹ Black primarily blames Thomas J. Watson, the all-powerful chairman of IBM, for IBM’s activities in Nazi Germany and occupied Europe.⁴⁵² Watson’s credo, according to Black, was to make more money for the company, regardless of the means.⁴⁵³ According to Black, “Watson didn’t hate the Jews. He didn’t hate the Poles. He didn’t hate the British, nor did he hate the Americans. It was always about the money.”⁴⁵⁴

In this sense, Black’s accusations against IBM are akin to those being made today against multinationals doing business in the global economy: that the companies’ sole concern is the profit motive, and that they will do business with any regime, no matter how despotic or corrupt, if there is money to be made in the venture.⁴⁵⁵ Black perceives corporate activities during

450. *Id.*

451. *Id.* IBM disputed the findings in the new book stating, “We have seen no proof of that. . . . Facts which had been known for many years were used as the basis of allegations in the first book, and they seem to be used in similar fashion in the paperback. We’re not convinced that there are any new findings here.” See Burkeman, *supra* note 444.

452. See, e.g., BLACK, IBM AND THE HOLOCAUST, *supra* note 431, at 115–25.

453. *Id.* at 22.

454. Burkeman, *supra* note 444. For a contrary view of Watson, see Kevin Maney, *IBM Founder Wasn’t the Bad Guy the Book Portrays*, USA TODAY, Feb. 14, 2001, at 10B (“I’ve never come across the scheming, rotten, morally bankrupt opportunist that haunts practically every page of IBM and the Holocaust. . . . Watson certainly wasn’t immoral or so empty that all he cared about was money. When friends ask me what I find striking about Watson, one of my replies is always his decency.”) (Note: Author is writing biography of Watson).

455. See, e.g., *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2002) (American oil company accused of aiding and abetting use of slave labor in Burma; federal appeals court allows case to proceed forward); *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (2003) (Canadian oil company accused of international human rights violations resulting from its oil exploration activities in Sudan, including extrajudicial killing and enslavement; district judge allows case to proceed forward, denying defendant’s motion to dismiss); *Sinaltrainal v. Coca-Cola*, No. 01-03208-CIV (S.D. Fla. filed July 21, 2001) (American company accused of using of paramilitary death squads in Colombia to hinder trade unionist activities and alleged to have violated international human rights standards, such as murder, torture, kidnapping, unlawful detention, and violations of right to associate and organize; Defendants’ motion to dismiss pending); *Aguinda v. Texaco, Inc.*, 850 F. Supp.

the Holocaust as the birth of globalization. In Black's view, what we now term as globalization was initiated as a means to make money from the Nazi regime.⁴⁵⁶

282 (S.D.N.Y. 1994), vacated *sub nom.* and *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (American oil company accused of dumping toxic substances into local rivers and contaminating local property in Ecuador, resulting in physical injuries; case dismissed, on condition that Texaco submits to the jurisdiction in Ecuador.)

For a recent news story on the litigation against Texaco (now Chevron Texaco) see Abby Ellin, *Suit Says Chevron Texaco Dumped Poisons in Ecuador*, N.Y. TIMES, May 8, 2003, at C8 ("Group of American lawyers representing more than 30,000 indigenous people in Ecuador file \$1 billion lawsuit against Chevron Texaco Corp; suit is filed in Ecuador on behalf of 88 plaintiffs.").

For recent news stories on the Unocal litigation, see Lisa Girion, *Unocal Case Focuses on Liability Standards*, L.A. TIMES, June 18, 2003, available at <http://www.latimes.com/business/la-fi-unocal18jun18230417,1,5539385>.story; Lisa Girion, *Pipeline to Justice? A U.S. Appeals Court Offers Hope to Myanmar Farmers Who Accuse Unocal of Complicity in Human Rights Abuses*, June 15, 2003, available at <http://www.latimes.com/la-fi-unocal15jun15,1,4154758>.story; Lisa Girion, *1789 Law Acquires Human Rights Role*, NATION, June 15, 2003; Jason Hoppin, *9th Circuit Wrestles With ATCA Standards*, RECORDER, June 18 2003; Michael O'Donnell, *Capitalism vs. Conscience, Companies Abuse Human Rights and the Feds Don't Care*, June 9, 2003, available at <http://www.latimes.com/news/printedition/opinion/la-oe-odonnell9jun09,1,3136915>.story; Ka Hsaw Wa, *Court Is Villagers' Only Hope: The Justice Department and Unocal Oppose a Suit Brought by Alleged Victims of Abuse in Burma*, L.A. TIMES, June 9, 2003, available at <http://www.latimes.com/news/printedition/opinion/la-oe-wa9jun09,1,7077069>.story.

For recent law articles discussing potential corporate responsibility for human rights and environmental abuses, see, e.g. Tawny Aine Bridgeford, Note, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009 (2003); Terry Collingsworth, *Separating Fact from Fiction in the Debate over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563 (2003); Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TUL. L. REV. 1431 (2002); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002); Brett G. Scharffs & Stephen G. Wood, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531 (2002); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001); Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 BYU L. REV. 1139 (1999).

456. Dominic Rushe, *Wartime Nazi Ghosts Return to Haunt IBM*, SUNDAY TIMES (London), Mar. 31, 2002, at 10.

Jewish leaders in the United States, prompted by the publication of Black's book, have urged IBM to issue a formal apology akin to the apologies issued by various European companies confronted with their wartime connections to the Nazis. Malcolm Hoenlein, a vice-president of the Conference of Presidents of Major Jewish Organizations, declared that the new revelations "negate[d] all . . . excuses," urging IBM to review its role in light of such evidence.⁴⁵⁷

IBM has not issued an apology.⁴⁵⁸ Nor has it issued a point-by-point response to Black's allegations. Rather, IBM's replies have lacked specificity, referring generally to criticisms found in some published reviews of Black's book.⁴⁵⁹ For example, IBM's

457. Burkeman, *supra* note 444.

458. For the official responses by IBM to the book, see *IBM Statement on Nazi-Era Book and Lawsuit*, Feb. 14, 2001, available at <http://www-916.ibm.com/press/prnews.nsf/jan>, and *Addendum to IBM Statement on Nazi-Era Book and Lawsuit*, Mar. 29, 2002, available at <http://www-916.ibm.com/press/prnews.nsf/jan>.

459. For critiques of Black's book, both praising some of his findings but also finding fault with some of his conclusions, see, e.g., Saul Friedländer, *Was IBM Good for the Jews*, L.A. TIMES, Mar. 20, 2001, at 6; David Cesarani, *Tricky Trading with the Enemy*, TIMES (London) Higher Education Supplement, July 13, 2001, at 31; Gabriel Schoenfeld, *The Punch Card Conspiracy*, N.Y. TIMES, Mar. 18, 2001, at 14; Christopher Simpson, *Big Bad Blue*, WASH. POST, Mar. 18, 2001, at T7. One of the harshest critiques came from Holocaust historian Peter Hayes. Professor Hayes writes:

Black fosters a new myth — the automated Holocaust — to accompany discredited ones of the motorized German army and the synchronized German economy. Just as historians have shown that the bulk of Nazi forces moved by horse, wagon, and foot, and that its economic mobilization was a bumpy affair, historians of the Holocaust have long known it was administered by pen and paper, typewriter, and teletype.

See Peter Hayes, *Did IBM Really Cozy Up to Hitler?*, BUS. WK. ONLINE, Mar. 19, 2001, at http://www.businessweek.com/magazine/content/01_12/b3724036.htm. Hayes concludes his review by labeling the book a "deplorable publication." IBM, in its March 2002, press release, relies on Hayes' book review of Black's book to defend itself against Black's charges. See *Addendum to IBM Statement on Nazi-Era Book and Lawsuit*, *supra* note 458 ("Another assessment of the book by a well-regarded academic expert called the original charges "implausible" and the book "deplorable."). For another critical review by a well-respected Holocaust historian, see Omer Bartov, *Did Punch Cards Fuel the Holocaust*, NEWSDAY, Mar. 25, 2001, available at 2001 WL 9223175 ("While it is clear that modern technology helped the Nazis wage their war, just as it helped the Allies defeat Nazism, there is simply no evidence to show

spokesperson simply noted that Black's conclusions had been questioned by a number of historians and experts, and that these experts had raised "serious questions."⁴⁶⁰ In response to the new allegation that IBM collected all profits from its Polish subsidiary, the spokesperson replied that no proof of that existed and that IBM was "not convinced" that Black had made "any new findings."⁴⁶¹

While the new revelations and accusations about IBM's wartime role may be shocking, the truth will never fully be known until IBM opens its archives to outside historians for an independent critical review. In response to the latest furor, IBM claims that in 1999 it turned over records connected to its German subsidiary to a professor at New York University ("NYU").⁴⁶² Black maintains that this was done as a public relations ploy, when IBM learned of his work.⁴⁶³ Moreover, Black points out that the NYU professor has no expertise in World War II; rather, this professor specializes in ancient Jewish history.⁴⁶⁴ After having obtained access to these records, Black asserted that the records contained no information on IBM's business dealings in wartime Europe.⁴⁶⁵ IBM, therefore, unlike other German companies confronted with their wartime past, has not commissioned historians to produce an independent historical study of its dealings with the Nazis.

that Hollerith machines played a direct role in the Holocaust. To be sure, had it been possible, the Nazis would have gladly made use of them, and IBM might well have looked the other way. As we know, technology often has been used to serve evil ends. The lesson from Black's book, however, is that shoddy scholarship and sensational assertions seem to do very well in the current marketplace. That is not as bad as IBM helping the Nazis. But is rather depressing that a man who presents himself as the son of Polish survivors would join the growing list of Holocaust profiteers.").

460. Rushe, *supra* note 456, at 10 (quoting Carol Makovich, IBM spokeswoman). The spokesperson has also stated that: "[i]f any of the allegations in the book turn out to be true, we would condemn any actions that supported the Nazis." Michael Hirsch, *Dark Questions for IBM*, NEWSWEEK, Feb. 19, 2001, at 38.

461. Burkeman, *supra* note 444.

462. Michelle Kessler, *IBM Faces Lawsuit over Nazis' Use of Technology*, USA TODAY, Feb. 13, 2001, at B3.

463. *Id.*

464. *Id.*

465. Edwin Black, *The Ghosts in the Machine: New Data Show Extent of IBM-Nazi Link*, FORWARD, Mar. 29, 2002, at 1.

In February 2001, Michael Hausfeld, one of the leading plaintiffs' lawyers in Holocaust litigation against European companies, filed suit against IBM on behalf of five Jewish survivors.⁴⁶⁶ The suit was based upon Black's research and tracked the allegations in the book.⁴⁶⁷ Hausfeld and his team of lawyers were poised to obtain IBM's archival wartime records through pre-trial discovery. The threat of using American style broad judicial discovery, directed previously against European corporate defendants, was used against an American company.

Unfortunately, the suit went nowhere. Since the suit named both IBM U.S. and its German subsidiary as defendants, the German government and industry claimed that the filing of such a lawsuit violated the settlement agreement made to settle all war-related claims against German industry.⁴⁶⁸ The Germans insisted that they would not go forward with establishing and funding the German Foundation contemplated under the settlement if Hausfeld continued with his litigation.⁴⁶⁹ To keep the German settlement going, Hausfeld dropped the lawsuit.⁴⁷⁰ While it is now possible to resurrect the lawsuit, since the German Foundation is up and running, Hausfeld has not refiled the suit.

In January 2002, however, a new lawsuit was filed against IBM relying again on Black's research, accusing IBM of moral wrongdoing and "complicity . . . with the crimes against humanity."⁴⁷¹ Surprisingly, the suit was filed not in the United States, but in Switzerland, where IBM maintains its European headquarters.⁴⁷² Also, the plaintiffs are not Jews, but Roma, commonly known as Gypsies, likewise persecuted and marked for extermination by the Nazis.⁴⁷³

466. See Kessler, *supra* note 462.

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. Gypsy International Recognition and Compensation Action ("GIRCA"), at <http://www.gypsycompensation.org> (last visited June 21, 2003) [hereinafter GIRCA] (website maintained by GIRCA, the organization filing the suit). See also *Gypsies Plan to Sue US Giant IBM over Alleged Nazi Complicity*, AGENCE FRANCE-PRESSE, June 6, 2001, available at 2001 WL 2422721 [hereinafter *Gypsies Plan to Sue US Giant*].

472. *Id.*

473. See *id.*

The plaintiffs created an advocacy group specifically for the litigation, known as Gypsy International Recognition and Compensation Action (“GIRCA”), led by a Swiss Protestant pastor of Gypsy origin, May Bittel.⁴⁷⁴ Their lawyer is Geneva attorney Henri-Phillipe Sambuc, and the lawsuit was filed in a trial court (the Court of First Instance) in French-speaking Geneva, where IBM maintained its European headquarters during the wartime years.⁴⁷⁵ They claim damages in the amount of \$15 billion for IBM’s alleged role in the extermination of more than 600,000 Roma people by the Nazis during World War II.⁴⁷⁶ According to Pastor Bittel, GIRCA does not seek to profit from the Holocaust — its motivation, rather, is to expose IBM and to finally attain justice for the Roma people.⁴⁷⁷ Refko Kawczynski, chairman of the Roma National Congress, added “[a] lot of IBM’s money was generated by its activities in the Second World War It’s blood money. IBM shares have the smell of Auschwitz.”⁴⁷⁸ IBM replied that the suit was “without merit.”⁴⁷⁹ In February 2003, GIRCA won an initial victory when the Swiss court declined to dismiss the lawsuit.⁴⁸⁰ In May, 2003, however, the lawsuit was dismissed for lack of jurisdiction.⁴⁸¹ GIRCA now plans to appeal the dismissal.⁴⁸²

474. See GIRCA, *Who We Are: Introduction*, at <http://www.gypsycompensation.org/index.html>.

475. *Gypsies Plan to Sue US Giant*, *supra* note 471.

476. *Id.* The figure is based on 100,000 Swiss francs (approximately \$116,000), the maximum allowed under Swiss law, for each of the 1.2 million people believed to have been orphaned when their parents were killed by the Nazis.

477. Peter S. Green, *Gypsies’ Suit Against IBM Is Given Green Light by Swiss Court*, N.Y. TIMES, Feb. 5, 2003, at A5.

478. Roy Probert, *Roma Groups Take IBM to Court*, SWISS INFO, Mar. 18, 2002, at <http://www.swissinfo.org> (quoting Retko Kawczynski, Chairman, Roma National Congress).

479. *Id.* For a critique of the litigation and also Black’s book, see *Hollerith and the Holocaust*, ANALYSPPHERE, June 11, 2001, at <http://www.analysphere.com/11Jun01/hollerith.htm>; *Holocaust*, ANALYSPPHERE, Feb. 4, 2002, at <http://www.analysphere.com/04Feb02/politics.htm>.

480. Probert, *supra* note 478.

481. Jugement, Pouvoir Judiciaire, Tribunal de Première Instance, 7ème Chambre, No. JTPI/6469/2003 (May 28, 2003), GYPSY INTERNATIONAL RECOGNITION AND COMPENSATION ACTION (GIRCA) et INTERNATIONAL BUSINESS MACHINES (IBM), Cause No.c/1761/2002-7. For an article discussing the dismissal, see Victoria Arrowsmith, *Swiss court dismissed gypsies Holocaust case*

If the GIRCA litigation against IBM does eventually succeed, it will turn the Holocaust restitution movement on its head. Until now, every settlement of a Holocaust restitution claim came as a result of litigation initiated in the United States. In this case, however, the mantle has been taken up by a European lawyer. The lawsuit's demand for \$12–14 billion in damages appears to be more for shock value than a real settlement figure. If IBM is prodded into a financial settlement as a result of the GIRCA suit, the amount will probably be closer to the settlement amounts reached in the U.S. settlements discussed above.

4. Other American Corporations

The National Archives in College Park, Maryland contain tons of files on American companies doing business in Germany after the rise of Hitler.⁴⁸³ Some of the files deal with trade by American companies in Nazi-occupied Europe, both before and after the United States entered the war in December 1941. To date, these files have not been fully examined, and thus the potential moral culpability and legal liability of other American companies for their wartime activities remains unclear.

As research progresses, new information comes to light. For example, an investigative report by the *Nation* magazine revealed new facts about the American photo giant, Kodak Eastman Co. ("Kodak"). Like Ford and GM, Kodak's European subsidiaries used slave laborers during World War II. At least

against IBM, GLOBAL ETHICS MONITOR, at <http://www.globalethicsmonitor.com> (last visited June 21, 2003)

482. Communiqué de Presse No 4/Press Release No. 4, issued by GIRCA, June 2, 2003 (on file with the authors).

483. One of the authors of this article, Michael Bazylar, has personally seen the storage area containing the files on his visit to National Archives and Record's Administration ("NARA"), in College Park, Maryland on February 14, 2003. The area is reminiscent of the last scene from the film *Raiders of the Lost Ark*. Greg Bradsher, a senior archivist at NARA and director of its Holocaust-era Records Project, ironically noted to Bazylar that this is the typical reaction he gets when taking visitors to view the records area. For a discussion by Bradsher of his work on Holocaust-era records at NARA, see Greg Bradsher, *Turning History Into Justice: The National Archives and Records Administration and Holocaust-Era Assets 1996–2001*, in ARCHIVES AND THE PUBLIC GOOD: ACCOUNTABILITY AND RECORDS IN MODERN SOCIETY 177 (Richard J. Cox & David A. Wallace eds., 2002).

eighty slave laborers were used at its Stuttgart plant and over 250 at its Berlin-Kopenick factory.⁴⁸⁴

Documents from the National Archives also show that Kodak's subsidiaries traded with Nazi Germany after the United States entered the war.⁴⁸⁵ U.S. officials did not recommend that Kodak halt its business, but rather allowed it to continue in order to preserve the company's market position.⁴⁸⁶

Kodak's Swiss branch bought photographic supplies in 1942 and 1943 from Germany, occupied France, and Hungary.⁴⁸⁷ In March 1942, more than three months after the United States had declared war on Germany, the American Embassy in Madrid recommended to the Secretary of State that Kodak receive import licenses because:

Shutting off of German sources of supply would seriously embarrass the company without serving any useful purpose since the demand for services in the Spanish market which could not be met by Kodak would simply be taken over by its German and Italian competitors. The position of these competitors in this market would thereby be considerably strengthened and the recapture of the business by Kodak after the war greatly handicapped.⁴⁸⁸

The American Embassy in London described Kodak's 1943 transactions as "fairly substantial purchases from enemy territory."⁴⁸⁹ In November 1943, a U.S. vice consul in Switzerland also noted that "[t]he idea that he has been helping the enemy seems never to have occurred' to Kodak's Swiss Manager."⁴⁹⁰ The vice consul also stated: "I pointed out to him that our sole interest is to shut off every possible source of benefit to our enemies, regardless of what American commercial interests might suffer."⁴⁹¹ Yet, Kodak's London legal adviser told the British government in 1943 that Kodak branches were able to supply more customers as a result of being able to obtain goods

484. John S. Friedman, *Kodak's Nazi Connections*, NATION, Mar. 26, 2001, at 7. Kodak's German subsidiary is Kodak Holding GmbH, Stuttgart.

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.*

from Kodak factories in Germany, France, and Hungary — more than they would have been able to, had they been limited to purchasing only from England and America.⁴⁹²

Kodak did make a \$500,000 contribution to the German Foundation,⁴⁹³ at which time a Kodak spokesman stated: “I have every confidence that Kodak did not do business with any enemy country during the war and that it cooperated fully with U.S. government regulations and sanctions. At no time was Kodak in violation of any proscriptions from the U.S. or U.K. war offices.”⁴⁹⁴

Like Ford, its automaker counterpart, GM had at first vigorously denied that it assisted the Nazi regime in its war efforts.⁴⁹⁵ But the evidence pointed to other conclusions.⁴⁹⁶ As early as 1935, GM’s German subsidiary, Adam Opel A.G. (“Opel”), agreed to produce the “Blitz” truck that was later used for the Nazi’s several *blitzkrieg* attacks.⁴⁹⁷ Bradford Snell, researcher on American companies’ involvement with Nazi Germany, has stated: “GM was an integral part of the German war effort. The Nazis could have invaded Poland and Russia without Switzerland. They could not have done so without GM.”⁴⁹⁸

In late 1998, it appeared that GM would become the first American company to provide access to its wartime records. In

492. *Id.*

493. *Id.*

494. *Id.*

495. General Motors issued the following statement: “GM categorically denies that it aided the Nazis in World War II The stale allegations repeated in the *Washington Post* today were reviewed and refuted by GM 25 years ago in hearings before Congress, when more individuals with first-hand knowledge of the facts were available.” *GM, Ford Deny Collaboration with Nazis During WWII*, CNN.COM, Nov. 30, 1998, at <http://www.cnn.com/US/9811/30/autos.holocaust>.

496. See WORKING FOR THE ENEMY, *supra* note 19, at 33–81; Dobbs, *supra* note 397, at A1.

497. Dobbs, *supra* note 397, at A1. Apparently the term “Blitz” (lighting) was first coined for bicycles produced by Opel in the 19th century and had been in use for Opel trucks before Hitler came to power. See <http://www.opel.com> (official website of Adam Opel A.G.). The website also contains the corporate history of Opel, but no mention of the company’s involvement with the Nazi regime.

498. *Id.* See also WORKING FOR THE ENEMY, *supra* note 19, at 33–36 (discussing Bradford Snell’s delivery of a report in 1974 to the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly). For language from Snell’s report see *infra* note 395.

December 1998, GM announced that it was hiring Yale University historian Henry Turner to research its activities in Germany during World War II.⁴⁹⁹ According to GM chairman John F. Smith, “Dr. Turner’s work will help us achieve our goal of a complete accounting of GM’s and Opel’s activities during World War II and to assess our responsibilities.”⁵⁰⁰ By May 2003, more than four years after his commission, Dr. Turner has yet to publish his findings.⁵⁰¹ In December 1999, however, Opel A.G. stated that it would contribute to the German fund for Nazi slave laborers.⁵⁰²

V. CONCLUSION

The United States has led the effort to encourage European industry and European governments to both: (1) ferret out and recognize their activities during World War II that have caused harm to Holocaust victims; and (2) take steps to remedy injustices caused by these activities. Without the impetus from the federal, state, and local governments of the United States, the involvement of American judges and lawyers, and the passion brought by various Jewish and non-Jewish activists and organizations, “the unfinished business of World War II” would remain unfinished.⁵⁰³

However, while the United States has forced Europe to examine its ignoble past, the U.S. government and U.S. private entities have been unwilling to apply the same scrutiny to their own acts during and after World War II. Of course, the level of complicity by American actors with the Nazis is miniscule compared to the loathsome actions taken by the Germans, Austrians, French, and other Europeans during the war towards Jews and

499. *GM Opens Probe of its War-era Activities*, CHI. TRIB., Dec. 23, 1998, at 10 [hereinafter *GM Opens Probe*]; *GM To Study Its Nazi Activities*, AP ONLINE, Dec. 23, 1998, available at 1998 WL 25272700 [hereinafter *GM to Study Its Nazi Activities*]

500. *GM Opens Probe*, *supra* note 499; *GM To Study Its Nazi Activities*, *supra* note 499.

501. Apparently Dr. Turner will be issuing his findings as a book, entitled *GM and the Nazis*, soon to be published. For an already-published treatise on the subject, see *WORKING FOR THE ENEMY*, *supra* note 19.

502. *GM’s Opel Joins Nazi Slave Fund: Ford May Participate in Offering Back Pay for WWII Workers*, DETROIT NEWS, Dec. 14, 1999, at B1.

503. EIZENSTAT, *supra* note 2, title jacket.

other victims. Nevertheless, an injustice remains an injustice and requires both self-recognition and a remedy. This is especially so if it is an injustice committed by the lead enforcer of World War II restitution efforts. Work still needs to be done, both by the U.S. federal government and American private industry.⁵⁰⁴

A. Federal Government

Congress should resurrect the PCHA and allow it to finish its work. In the alternative, a Presidential Commission on Holocaust Restitution should be established, specifically to pick up the work of the PCHA.⁵⁰⁵ The mandate of the new commission should include:

- (1) An examination of all documents in the U.S. archives and agencies, including the vast collection of documents found at

504. In an e-mail to one of the authors, Herbert R. Reginbogin, a Holocaust historian who has lived and taught over the past thirty years in both the United States and Europe, pointed out a benefit to U.S. foreign relations from an ongoing continuing critical self-examination of America's wartime and postwar behavior.

[T]he United States government would be well advised to pursue the same standards of scrutiny for itself . . . This would not only close the records in the case of the United States and possible seized assets by the U.S. government which rightfully belong to Holocaust victims, but would raise our country's credibility in the eyes of our European neighbors whose mainstream conservative pro-American population has been alienated by the U.S. government's strong support for seeking justice in this matter. This would counter the voice of hypocrisy often heard when it comes to criticizing America's foreign policy.

E-mail from Herbert R. Reginbogin to Michael J. Bazylar, May 15, 2003 (on file with the authors).

505. Dr. Greg Bradsher, Director of the Holocaust-Era Assets Records Project at the National Archives, observes that if the PCHA is resurrected as a "scholarly commission," then "the work of the PCHA should be carefully studied and the errors they made should be avoided." E-mail from Greg Bradsher to Michael J. Bazylar, Apr. 17, 2003 (on file with the authors). For a more ambitious project, he recommends that a new commission "should be loosely modeled on the Department of State's Office of the Special Envoy for Holocaust Issues and the Department of Justice's Office of Special Investigations [which tracks still-living Nazi war criminals]. The proposed commission should have three major components: research and investigation, claims assistance, and foreign liaison and legal." *Id.* In either case, he concludes, "the mandate and scope of the new Commission should be absolutely and clearly defined." *Id.*

the National Records and Archive Administration, dealing with World War II;

(2) The power to subpoena records from private entities concerning their wartime activities and immediate postwar conduct, including the ability to examine the records of museums in the United States regarding how they acquired art that originated in Europe and records of American businesses that did business in Europe between 1933–1945;

(3) The creation of a claim process by which individuals having a claim against the U.S. government for wrongful activities during the war and afterwards may make a claim for restitution; and

(4) The creation of a federal fund for the payment of such claims.

The French experience presents a model for the establishment of such a secondary restitution commission in the United States. In March 1997, then French Prime Minister Alain Juppé created through a decree the Prime Minister's Office Study Mission into the Looting of Jewish Assets in France (“Mattéoli Commission”).⁵⁰⁶ The Mattéoli Commission’s task was to study, “the various forms of spoliation visited upon the Jews of France during World War II” and the postwar efforts to remedy such spoliation.⁵⁰⁷

The mandate of the nine-member commission was limited. Its job was only to determine what was taken from the Jews in France during wartime; it had no power to issue any remedy.⁵⁰⁸ After publishing its three reports — two interim and one final report — it ceased to exist. Before disbanding, however, the Mattéoli Commission recommended restitution in all cases where it had not yet occurred.⁵⁰⁹ To do so, it urged the establishment of a successor governmental commission to consider making payments to the victims of the spoliation.⁵¹⁰

506. *Id.* at 318. It was popularly known as the Mattéoli Commission, named after its chairperson, former cabinet minister and resistance fighter Jean Mattéoli.

507. *Id.* at 318.

508. *Id.* at 319.

509. *Id.* at 318.

510. *Id.* at 318, 319.

The French government followed that recommendation. In September 1999, the prime minister Lionel Jospin announced the creation of the "Commission for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force During the Occupation," otherwise known as the Draï Commission, after its chair, the noted French jurist Pierre Draï.⁵¹¹ For the last four years, the Draï Commission has been engaged in the process of restitution.

Likewise, in the United States, now that the PCHA has concluded its study mission, a Presidential Commission on Holocaust Restitution should be established to follow up on the findings of the PCHA and to issue restitution.

In addition to creating a post-PCHA commission, or in lieu thereof,⁵¹² the other task would be the appointment by President George W. Bush of a new presidential envoy on Holocaust issues, building on the achievements of Stuart Eizenstat and the other individuals who worked diligently on Holocaust issues during the Clinton Administration. Like Eizenstat, the envoy should be directly responsible to the President, and thereby carry the weight of the presidential office when doing his or her work. By reestablishing the position of a presidential envoy for Holocaust issues, the Bush Administration will make an important statement that it is fully committed to continue the policy of the Clinton years⁵¹³ in fettering out Nazi-stolen assets in

511. *Id.* at 319.

512. One possible danger of creating both a post-PCHA commission and a successor to Eizenstat is overkill, since existence of both could lead to infighting. To avoid this, the presidential envoy should be made chairperson of the commission.

513. For a recent article questioning the commitment of the Bush Administration to Holocaust restitution, see Nacha Cattan, *Administration Said To Be Blocking Restitution Push*, FORWARD, May 2, 2203, at 1. According to Eizenstat, Randolph Bell, the current State Department envoy on Holocaust issues, has not been given sufficient power. "Eizenstat said that although Bell is 'extremely dedicated' to restitution, he had not been granted the same power and access to the president that Eizenstat had before him. 'They haven't considered this a sufficiently important issue at the senior political level,' Eizenstat said, referring to the Bush administration." *Id.* Bell, for his part, defended the President. "This administration, like its predecessors, continues to support strongly those [restitution] agreements,' reached with Austria, Germany and France." *Id.* (brackets in original)

both Europe and the United States and to remedy any injustices stemming from the wartime era.⁵¹⁴

B. American Industry

As with the U.S. government, the level of wrongdoing by American corporations during World War II is miniscule compared to the activities of their counterparts in Europe. Nevertheless, American industry has been unwilling to step forward and examine and remedy their wrongful acts. The following must be done:

- (1) All American multinationals accused of having ties with the Nazi regime⁵¹⁵ should open their records to Holocaust historians and subject themselves to full, fair, and independent review of their wartime roles.⁵¹⁶
- (2) American multinationals, like their German counterparts, should create a fund akin to the fund created by German industry and government. The average age of Holocaust survivors today is eighty-two years old, and the survivors are dying at the rate of ten percent a year. Forcing Holocaust survivors

514. One area where much work still needs to be done in Europe is the restitution of properties taken from Jews in Eastern Europe during the war, which still have not been returned to their rightful owners or their heirs. A Bush envoy on Holocaust issues could speed up the resolution of this still outstanding problem.

515. To determine this information, Masurovsky suggests that the "U.S. Government should publish the list of every American company that engaged in transactions with the Axis powers and profited directly or indirectly from its discriminatory policies toward Jews and other victimized groups from 1933–1945." Masurovsky E-mail, *supra* note 307. Masurovsky points out that this information is available at the U.S. National Archives. *Id.*

516. The steps taken by the German media giant Bertelsmann can serve as a good model. Bertelsmann retained noted Holocaust historian Saul Friedländer to research and publish a study of the company's history during World War II. Friedländer accepted the assignment only on the following condition: full access to any records he requested; use of his own team of researchers; and Bertelsmann's receipt of the final report simultaneous with its publication. Bertelsmann, therefore, was not able to interfere or influence the findings issues by Friedländer and his team of researchers. Friedländer's Bertelsmann report was issued on October 7, 2002. Gunter Thielen, Bertelsmann, A.G., Chairman and CEO, Statement On the Occasion of the Independent Historical Commission's Final Report (Oct. 7, 2002), *available at* http://www.bertelsmann.com/news/press/press_item_content.cfm?id=6537. The Report can be located at http://www.bertelsmann.com/bag/history/report_uhk/report_uhk.cfm.

to proceed through the slow and painful track of litigation only prolongs and extends the injustice created by American companies' wartime complicity. The proposal to establish an American Industry Fund by the U.S. Chamber of Commerce was an excellent idea. No reason exists why European companies should be made to relinquish some of their wartime profits from dealing with the Nazis while American companies are allowed to get off scot-free. The creation of such a "mirror image" fund by the Chamber of Commerce fund in the United States, akin to the funds established by various European companies, should not have been abandoned. Such a fund should be created and put into place immediately by American companies sued for their wartime role. The Humanitarian Aid Foundation ("HAF"), Eizenstat's substitute for the Chamber fund, may turn out to be a suitable replacement for the moribund Chamber of Commerce initiative. As more U.S. companies are identified through historical research to have dealt with the Nazis, these companies should join HAF. To have proper support, however, the Chamber of Commerce should make HAF its own project.⁵¹⁷

517. One piece of the Holocaust restitution puzzle requiring further investigation is whether American banks, like banks in Switzerland and Israel (and other countries), are still holding moneys deposited with them by European Jews prior to the war, and have not returned to survivors or heirs. Eizenstat, in one of his public pronouncements on the creation of the PCHA, stated that this was an issue the commission would be looking into:

Third, we're setting up — the President has called for the establishment and Congress is now working on legislation which Senator D'Amato and Congressman Leach are co-sponsoring a presidential commission. The presidential commission would have members appointed by the President, the Senate and the House. It is charged specifically with looking at what role the US may have had in handling Holocaust-era assets — not only looted gold, but also assets from Holocaust victims who would have deposited not only in Swiss banks, but in American banks assets and then never recovered them. Under US law, under the law of most states in the union, unlike European law, where those looted assets remain in the bank, so we can trace them, as we are through the Volcker process. In the U.S., those looted assets — excuse me, those Holocaust-era assets, after 10 years, generally returned to the states, and therefore are not easily discoverable. We want to see what happened to those. So in all of those ways, we're trying to be self-analytic.

U.S. Dep't of State, Office of the Spokesman, On the Record Briefing by Under Secretary Stuart Eizenstat on Nazi Gold Effort, June 2, 1998, available at <http://www.state.gov/www/regions/eur/holocausthp.html> (emphasis added).

Irwin Nack, Investigative Counsel for the New York State Banking Department and expert in the field, disagrees with Eizenstat:

Eizenstat's comment . . . is incorrect and predicated upon the erroneous assumption that U.S. based banks did not return assets to Holocaust survivors or their heirs in the 10 year period after the war ended. I have not seen any claims by survivors or their heirs for assets held by U.S. based banks and as far as I know, none of the class action lawsuits have raised such claims or identified such claimants (I have seen some general inquiries). This is in marked contrast to the thousands of claims made against Swiss banks. It also completely ignores the regulatory framework banks were operating under during the war which would have rendered such conduct by U.S. based banks highly unlikely. Finally, to the extent assets are held by N.Y. State, contrary to Eizenstat's contradictory statement, they are easily discoverable. The N.Y.S. Comptroller has the records from that period and indeed, the Comptroller's database can be searched over the internet.

Nack also disagrees that further investigation is necessary:

The Presidential Commission did look into the issue and their report reflects this According to the report (page 15–16 of the Findings section), the PCHA went so far as to conduct a pilot project wherein 400,000 names were compared with the N.Y. State Comptroller's database of dormant accounts resulting in only 18 hits. I spoke with representatives of the PCHA at length about this very issue so I know they were looking at the issue. Moreover, as the one who headed N.Y. State's investigation into the wartime activities of Swiss banks operating in N.Y., I also looked into this issue (insofar as it was applicable to Swiss banks operating in N.Y. at the time). Thus, contrary to Eizenstat's assertion, the issue was certainly explored in depth. I'm sure this can also be confirmed by the NYS Comptroller.

E-mail from Irwin Nack to Michael J. Bazyler, May 28, 2003 (on file with the authors).

The PCHA also never examined the issue of American banks' dealings with the Nazis. Masurovsky recalls being asked to participate in a conference call with Ambassador Stuart Eizenstat, during which he stressed the importance of examining the roles of Chase and J.P. Morgan during the war. According to Masurovsky, Eizenstat's directive was handled as follows:

While the Commission's report was being finalized, the New York law firm of White & Case shipped approximately a dozen boxes of archival documents pertaining to Chase Bank's relations with Nazi Germany during the 1930s and 1940s. Rather than asking a research director or a qualified historian to examine the records, an intern with no background was assigned to review the content of these boxes.

Masurovsky reports that he took a quick look into one of the boxes with the intern's permission and found records on Aryanizations and on Chase's German railway bond business that it obtained from the Reich Ministry of Economy. Masurovsky E-mail, *supra* note 307.

(3) The American companies that profited from their dealings with the Nazis should issue formal apologies. German and Austrian companies apologized concomitant with the settlements of the claims against them. A formal apology should be issued by any American company found through historical research to have dealt with the Nazis.

So much has been accomplished by the United States. Now is the time to finish the job.

2003]

U.S. HOLOCAUST RESTITUTION

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APPENDIX

E-MAIL FROM KENNETH KLOTHEN, FORMER EXECUTIVE DIRECTOR OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES (PCHA), TO MICHAEL J. BAZYLER, JUNE 18, 2003, RESPONDING TO CRITICISM OF THE PCHA

I have reviewed the sections of your Article concerning the work of the Presidential Advisory Commission. Many of the criticisms you cite come from people who either have an axe to grind or who simply do not understand the decision that the U.S. Congress made in forming the Commission and giving it its mandate.

As a general matter, I am attaching a copy of a Keynote address I made at a recent conference entitled *Commissioning History: A Comparison of the U.S., German and Austrian Experiences*, held at the D-Day Museum in New Orleans. You may quote it.

First, the criticisms leveled by Mr. Greg Rickman: The “organizational difficulties” he cites were the normal delays incident to the FBI checks that had to be performed on the Commissioners appointed by the President. Just as any Presidential appointment must be investigated by the FBI, these Commissioners were subject to that process which took several months. It must be recognized that Mr. Rickman worked at the time for Senator D’Amato, a conservative Republican who had been a leader in the Whitewater investigation and in whose interest it was to criticize the Clinton White House. Mr. Rickman remained a Republican staffer after Senator D’Amato was defeated, moving to the staff of another conservative Republican, Senator Peter Fitzgerald. Mr. Rickman from the beginning was unhappy with the Clinton Administration’s successful attempts to focus the Commission’s mandate.

As to the issue of whether a broader mandate would have been better, see my keynote attached. Mr. Rickman’s claims that the Commission “delayed its own work through inaction” is unfounded, unsupported and untrue. Moreover, it smacks of revisionist history — when Mr. Rickman was a staffer in the Senate while the Commission was conducting its work, neither he nor the Senators he worked for voiced this, or any other, criticism of the Commission’s approach or results.

As to the criticism by Professor Zweig of the Commission's conclusions regarding the Hungarian Gold Train, it should be pointed out that the criticisms you cite were of the Commission staff's preliminary report on this research to the Commission — the Final Report by the Commission itself significantly amended the handling of this incident, in part in response to criticism of the preliminary staff report by Mr. Zweig. By the way, as you yourself point out Zweig's criticism was that the preliminary staff report on this matter was overly critical of the U.S. role — a charge entirely contradictory of that made later by Mr. Masurovsky of a Commission "whitewash" of that role.

The charge that "the Commission failed to examine the records of American museums" reveals a misunderstanding of the Commission's mandate and is, in any event, largely untrue. Museums in the U.S., unlike in most of Europe, are private institutions, and the Commission's mandate did not extend to examining either the records or the role of private sector entities. The country's most significant public museum — the National Gallery of Art — cooperated fully with the Commission and kept it apprised of its own work on determining the provenance of its collection. A considerable amount of research was also done in the archives of the Getty Museum and others.

The Commission staff also examined voluminous records relating to the Treasury's licensing of art importation during the war years, and was given access to classified FBI documents pertaining to investigations conducted by the FBI of suspected art smuggling. Not only did these documents not warrant conclusions about the magnitude of art smuggling; they did not in themselves indicate that such smuggling was likely to have occurred in significant volume.

The Commission did not believe that the historical record in this regard was complete enough to say that such smuggling had not been a problem. Apparently Mr. Masurovsky believes otherwise — but in the years since the Commission's report he, who works full time in the field of Holocaust assets restitution — has never brought forth any evidence to support his claims.

I do not know what is the source of the charge that "the PCHA neglected to review the vast array of documents found in the U.S. National Archives relating to World War II and the Holocaust." This is a patent absurdity — the PCHA had a staff of at least a dozen historians housed at the National Archives for over a year. They reviewed literally hundreds of thousands

of documents, most of which are referenced plainly in the Commission's Final Report, and copies of which are in the Clinton Library in Little Rock. This claim is so patently ridiculous and so demonstrably false that to repeat it would be unprofessional and negligent.

As to the balance of Mr. Masurovsky's claims: suffice it to say that Mr. Masurovsky was a disgruntled employee who bridled when the Commission's professional historians and economist questioned his conclusions about archival documents, which they did on a regular basis. Specifically, the claims made by Mr. Masurovsky regarding victim gold were not "suppressed" by the Commission; they were conclusively proved to be without foundation by Mr. Masurovsky's own colleagues on the Commission staff, among them Ms. Helen Junz, an internationally recognized expert on Holocaust financial assets who has worked, *inter alia*, for the Bergier and Volcker commissions.

Mr. Masurovsky's conspiracy-theory approach to history is perhaps best illustrated by the fact that his last request as an employee of the Commission — which was denied — was to be funded to go to Roswell, New Mexico to investigate reports of a secret cache of Holocaust gold kept by the U.S. Army at the White Sands Missile Range. Again, if his findings were so important, so revolutionary and so suppressed why has he not published them in a peer-reviewed journal (or anywhere else, for that matter) in the more than two years since the Commission finished its work?

Your claims — without cited authority — regarding the PCHA's alleged failure to make "critical inquiries" into, *inter alia*, the activities of U.S. banks and insurance companies are also untrue. With regard to banks, see the Commission's Final Report at page 15 that includes a description of the agreement reached with the New York Bankers Association regarding best practices for searches for dormant accounts, and its preliminary identification of such accounts in a data cross-match. With regard to insurance, this work was conducted by the ICHIEC and the NAIC; the PCHA regularly consulted with both organizations as well as with Insurance Commissioners in several states regarding the status of that work.

Finally, the database you discuss was indeed completed and turned over to the USHMM.

While in hindsight one might say that investigation into the role of the private sector should be undertaken, or that more time must be spent researching the additional hundreds of thousands of documents declassified since the Commission completed its work, this does not diminish the Commission's accomplishments. The fact that some people's pre-conceived notions about what the historical record *should* reveal were not supported by that record is not a whitewash; it is instead testimony to the fact that a Commission that included among its members some of the nation's most vigorous advocates for justice for Holocaust victims insisted on high standards of historical scholarship and proof. As I have said, the notion that a Commission chaired by Edgar Bronfman and including Stuart Eizenstat, Roman Kent (a survivor and vice chair of the American Gathering of Holocaust Survivors), Miles Lerman (a survivor and former Chair of the USHMC) and others would suppress evidence of U.S. mishandling of victims' assets is beyond absurd, it is insulting to the intelligence of the reader.

KEYNOTE ADDRESS, DELIVERED BY KENNETH KLOTHEN AT CONFERENCE, *COMMISSIONING HISTORY: A COMPARISON OF THE U.S., GERMAN AND AUSTRIAN EXPERIENCES*, HELD AT THE D-DAY MUSEUM IN NEW ORLEANS, NOVEMBER 2002.

Thank you, President Mueller, for that thorough and kind introduction.

First of all, I would like to thank the German Historical Institute, University of New Orleans and the D-Day Museum for not only inviting me to give this keynote address, but also permitting me to participate in all of the sessions of this timely and important gathering. It has been a chance to renew acquaintances with former colleagues and staff, and to meet others who continue to do important work in the areas of the history of looted assets and restitution policy.

That dyad — the *history* of spoliation and the *policy* of restitution — sets the stage for what I would like to talk about today.

Researchers, the press and others have often asked me how “politics” has affected the work of the various historical commissions. Indeed, this question has been considered here over the past few days. I think that an examination of the experi-

ence of the U.S. Commission may help us define what we mean by political influence on the process of “commissioning history,” and to decide whether that influence is positive, benign or negative.

In the interests of full disclosure, I want you to know a little about who you’re listening to here. I am the son of German Jewish Holocaust survivors, and terms such as forced labor, Aryanization, stateless persons and genocide were — and are — more than abstractions in my family. So, by the way, are terms such as reparations, restitution, and even reconciliation.

On top of that, I am someone who has spent a considerable part of his professional life in one political arena or another. I am an elected official, and I advise others. I was a political appointee in the Clinton administration. I work on campaigns. I actually watch C-Span. In my life, politics is not a dirty word.

Now, I’ve been far too absorbed in the compelling presentations here over the last several days to figure out exactly how these various elements of my own life color my thoughts on the topic tonight. Perhaps the psychologist on Professor Rathkolb’s team in Linz (oh, could we have used *him* on our Commission staff) could do so. I will simply leave it to you, as they say, to consider the source.

I also recognize that because the U.S. Commission ended its work almost two years ago, my remarks run the risk of not being about “the politics of memory,” but merely “memories of politics.” Nevertheless, I offer these remarks not as an old pol’s war stories, but as an attempt to assess how political concerns help or hinder the work of historical commissions.

In preparing for this talk, I turned to Webster’s Dictionary for a definition of the term “politics.” There I found the following: “that part of ethics that has to do with the regulation and government of a nation or state, the preservation of its safety, peace and prosperity...” and “the protection of its citizens in their rights, with the preservation and improvement of their morals.”

Nothing to raise a red flag there. But reading further, I found this alternative definition: “artful or dishonest management to secure the success of political candidates or parties; political trickery.”

My sense is that those professing concern about political influences on the process of commissions’ work are worried about the latter, and not the former, aspect of politics: that is, the

willingness to shape inquiries, shade results, and pre-determine findings in order to make a country's record during the Holocaust appear better or worse than it actually was. It is the presence or absence of this type of partisan, outcome-oriented politics that I suggest we look for in the story of the U.S. Commission.

The U.S. Holocaust Assets Commission Act of 1998, Public Law 105-186, was passed with unanimous bipartisan support in the Congress in the second term of the administration of President Bill Clinton. That unanimous support, however, masked some interesting political background: the bill creating the Commission had been sponsored and pushed by Senator Alfonse D'Amato, a New York Republican known equally for his pugnacious, partisan style and his attentiveness to his large Jewish constituency. To make matters more interesting, Senator D'Amato had recently chaired contentious hearings on the President and First Lady's involvement (long before coming to Washington) in a real estate venture known as Whitewater.

Nevertheless, members of the Clinton Administration's State and Justice Departments, under the leadership of Stuart Eizenstat, worked closely with Senator D'Amato's staff in shaping the legislation. In doing so, they pressed for a narrow mandate for the Commission. While earlier conceptualizations had imagined that a U.S. commission would be charged with examining the roles of all levels of government and the private sector in handling the looted assets of Holocaust victims, the Administration representatives argued that a governmental commission with limited resources of time and money could only be expected to thoroughly examine the actions of the federal government of the United States.

Ultimately, a compromise was reached and the Commission charged with conducting *original* research into the actions of the federal government, and *reviewing* the research of others into the actions of other levels of government and the private sector.

Was this an example of a political decision based on concerns over what might be found about the record of favored constituencies in the banking or other industries, or an attempt to insulate state governments from scrutiny? I think not, for several reasons.

First, consider a unique aspect of the U.S. Commission. It was very much *not* a commission of experts. The 21 Commis-

sioners were comprised, by statute, of Members of Congress, ex-officio representatives of four departments of the Executive Branch, and a variety of prominent private citizens appointed at the discretion of the President from very different walks of life. This group of non-experts was charged with conducting a historical research project, drawing conclusions from it about public policy and making recommendation to the President.

The limitations of this approach are, of course, many — and my former colleague Helen Junz and Gerry Feldman have noted only a few of them at this conference. But I would argue that this approach has some surprising strengths, and even that these strengths may in the end outweigh the weaknesses.

I hope I'm not disabusing any of the distinguished academics in this room of any cherished notions, but in American society (unlike, I believe, that of Europe) the findings of academic historians don't often enjoy a very high profile or get much political traction — Professor Hayes has said as much in an earlier session. I was intrigued by my friend Clemens Jabloner's comment that the Austrian Commission was not charged with making policy recommendations, but that its findings "speak for themselves." Maybe it's just because of the high degree of background noise from our widespread, diverse and troubled culture, but in shaping public policy on this side of the Atlantic almost nothing — least of all, I am afraid, the wisdom of historians — speaks for itself without the megaphone that a prominent advocate can provide.

This is certainly regrettable, but there are some compensations: the broad base of a citizen's commission as opposed to an expert's commission makes its findings more likely to gain public acceptance, and the inclusion of elected officials makes it easier for the Commission's policy recommendations to find a champion.

Second, there is the matter of the time and resources that conceivably could have been made available to the Commission. Under the most generous realistically possible time frame and budget (which I assure you the Commission did *not* receive) it would have been impossible to perform a thorough examination of the activities of the private and state governmental sectors. As it was, literally hundreds of thousands of documents bearing on the federal government's actions were being declassified annually. It was Ambassador Eizenstat's insight that a thorough review of this quantity of documents alone would be a Hercu-

lean task that led to the narrowing of the focus of the Commission's mandate. A broader mandate would have led to a shallower inquiry. Under the circumstances, I submit that the Clinton Administration's work with Senator D'Amato probably saved the project from irrelevance.

Let me address here the suggestion made by Helen Junz and others that the failure to empower the Commission to force the opening of private archives left a significant investigative avenue blocked. I agree. Indeed, Senator D'Amato originally envisioned giving the Commission subpoena power over private entities — and there were many, many times in the course of our discussions with the art dealers, museums, banking and industrial sectors when I would have loved to be able to use, or at least threaten to use, that power.

But — if I take a step back and ask myself whether I would want some *other* advisory commission made up of politicians and prominent citizens to be able to subpoena me or my business, I have a different reaction. That reaction, by the way, is not altered by the thought of a commission of academics armed with the same authority. Moreover, I can't help but think that the more adversarial tools are included in the armamentarium of a commission, the more adversarial the approach to a commission's work is likely to be. In terms of gaining widespread *social* acceptance of the Commission's findings, this could be a very mixed blessing indeed.

Despite the passage of the legislation with the type of mandate favored by the Administration, the White House was slow to name the private citizen Commissioners the President was entitled to appoint. It was rumored that the White House did not want to give Senator D'Amato a success to bring back to his constituents, although similar delays plagued (and in fact often plague, no matter what the party in power) other appointments. Nevertheless, after several months the President did ask Mr. Edgar Bronfman to chair the Commission and named the remaining private citizen Commissioners. The leaders of the two Houses of Congress named others, and representatives of the State, Treasury, Justice and Army Departments were appointed, as provided by the statute. The Commission was ready to begin work.

Except for one problem: money. This is something in the category of more than most people want to know about how our Federal government funds the executive branch, but suffice it to

say that our governing legislation provided that funds were to be passed through other agencies of government. Agencies of government being agencies of government, when the creation of the Commission was delayed at the White House the agencies simply spent the money designated for the Commission on other things. J.D. [Bindenagel, former U.S. State Department Special Envoy on Holocaust Issues], but I hope our first six month's funding from the State Department did something nice for some embassy somewhere, but the Commission never saw more than a third of it.

These and other bureaucratic issues aside, the Commission was able to begin its work. As Jonathan Petropolous mentioned in his remarks, we were immediately confronted with the need to have the Commissioners ratify a work plan that embodied a particular interpretation of the mandate, including as a threshold matter a broad definition of the term "victim of the Holocaust" to include anyone who was deprived of his or her civil or political rights on the basis of race, religion, ethnicity, disability or sexual orientation. This was an expansion of Senator D'Amato's original conception, and clearly raised the possibility of diffusion of our limited resources, but the Commissioners believed that an American commission in the 21st century could not pick and choose among persecuted groups.

While I sometimes jokingly referred to the process of getting agreement among twenty-one Commissioners — including four Members of Congress, the Deputy Secretary of the Treasury, the Chair of the Holocaust Memorial Council, and one of the richest men in the world — as the equivalent of herding cats with large egos, I must say that it is a tribute to the business sense and trust in his staff of Chairman Bronfman that he agreed that most research decisions would be staff-driven. The Commission therefore agreed that the staff would prepare a historical report which the Commission would vote to approve or disapprove, and from which (whether approved *or* disapproved) the Commissioners would craft policy recommendations to the President.

I think this decision was critical, and it helps to answer our question about political influences. It would have been an easy thing for the politicians and Administration policy makers to insist on controlling the research agenda, to seek to shape it to the narrow interests of constituents or interest groups. But that didn't happen; in fact, it was never even suggested. The

seriousness of the task at hand, and the fundamental integrity of the Commissioners, made this a non-issue.

There's a lesson here: policy makers can be convinced to let historians do their work unimpeded, and can base subsequent policy decisions on the raw material provided by scholars. In fact, they may even welcome the opportunity.

On the other hand, it is also true that the elected representatives on the Commission often had a hard time remembering the distinction between a review of the historical record and a search for assets that could be restituted (preferably, of course, to their own constituents). However, this pressure, if such it was, did not interfere with the proper function of the Commission, as it underscored the necessity of maintaining clarity with respect to the Commission's mandate in order not to raise false hopes among survivors and their heirs. Thus, the political impulse to look for potentially restitutable property helped the Commission by forcing it to keep the needs of survivors and heirs in mind, even though our mission was *not* to aid specific claims for restitution.

As the Commission's work progressed, our research staff made a series of interim reports to the Commissioners regarding their preliminary findings. One of these reports led to the only significant instance in which political appointees objected to the conclusions drawn by the research staff from the raw documentary material. It's worth examining in some more detail.

The research staff uncovered a number of documents, some previously known, others recently declassified, concerning the so-called Hungarian Gold Train. We have discussed this constellation of incidents several times at this conference, so I will not spend time describing it here. Suffice it to say that the personal and household belongings of a large segment of the murdered Hungarian Jewish population, along with other unidentifiable personal property, ended up falling into the hands of the U.S. Army in Austria, where the goods were warehoused.

It is undeniable that some goods from this train were soon requisitioned from the warehouse for the use of U.S. occupation forces and military government personnel. The staff reported these facts in a manner that was critical of the U.S. commander in Salzburg, General Harry Collins. The press jumped on these conclusions and proceeded to write stories that magnified not

only the facts of Collins' requisitions but also the level of criticism of the Commission staff's findings.

The staff of the Commissioner from the Department of Justice objected strenuously to this interim report as unfair to the U.S. Army (interestingly, the Army's own appointee to the Commission was much less vocal in his criticism of the staff findings). He believed that the report cast unfair aspersions on Collins, who had commanded the unit that liberated Dachau. The Assistant Attorney General announced that he would not join in the Commission's report if the section on the Gold Train was not substantially revised.

This development caused a great deal of soul searching on the part of those of us who were responsible for the completion of the Commission's mandate but not involved actively in the research. We were convinced of the facts as described by our research staff — and convinced that the dissenting Commissioner did not actually dispute those facts. We were also sure that the handling of the Gold Train property was illustrative of shortcomings in the United States' view of the status of recovered looted property, and were prepared to insist that the Commission not back away from citing those shortcomings.

What followed was a lengthy series of negotiations, between my deputy and I and our research staff, between me and staff to the Justice Department Commissioner, and among the Commissioners themselves. In the end, I became convinced that the focus on General Collins was misleading precisely because it de-emphasized the less explosive but ultimately more important issue of the overall failure of *all* the Allied governments to understand the unique and unprecedented aspects of the recovered assets of Holocaust victims. In the Commission's Final Report, the Gold Train incident was reported more as an example of problems encountered by the United States in cataloguing and safeguarding such assets, growing out of the more basic *policy* failure to understand their unique significance, than as an example of one individual's self-help and secondary theft.

Was this an example of political influence on the work and conclusions of the Commission? Yes — for there can be no doubt that the dissenting Commissioner, a high-ranking member of the Clinton Administration, was concerned for the reputation of a significant unit of the U.S. Army and, by extension, a major aspect of our country's record on restitution.

But at the risk of seeming overly defensive of our work I would argue this was not an example of a negative influence in the sense of the second definition of “politics” that I mentioned earlier. The Justice Department’s view was entirely consistent with the facts as they had been uncovered. It demanded a higher standard of historical proof than even some reasonable experts might insist on, but that is neither inappropriate nor necessarily beneficial to any particular constituency.

Neither do I think that the process that took place here — though we may legitimately label it political — is qualitatively different from the peer review process familiar to academics in any discipline. I believe it is often the case that a peer reviewer might insist on more or better proof for a proposition than its author believes necessary, because the reviewer comes at it from a different angle or a different set of priorities.

This leads me to another reaction to something that my friend Jonathan Petropolous — you can see that he maintains his reputation for provocative comments by provoking me regularly, and I thank him for that — said yesterday. In assessing the strictures imposed by the U.S. Commission’s mandate, Jonathan said that although they were neither good nor bad, they were something new to academic historians, whose work is not normally limited in scope at the outset of an investigation. With all due respect, I think that’s wrong. Any research undertaking is limited by some factors — time, money, currency, preconceptions about what sources are available, you name it. Perhaps many of these contextual limitations are taken for granted by the historian, and without a doubt in the Commission’s case they were all imposed by others. But I don’t think that creates a fundamental distinction between academic history and commissioned history.

In fact, I believe that the Gold Train incident strengthened our work by demonstrating that political differences had bases in principle and were not crude power plays, that they were resolvable by reference to the historical record, and that their resolution led to a more integrated narrative.

I suppose that if the goal of our historical enterprise was merely to report on who finished first, second and third in some hypothetical race; if we did not have to make normative judgments; we wouldn’t have to worry about these issues. But that’s not doing history, and it’s certainly not doing Holocaust

history, as several of our speakers have pointed out much more eloquently than I can.

I recall Professor Hayes' description of the dulling of the "moral nerve endings" of Degussa's top management by their own sense of victimization from the First World War. And Professor Ziegler's recollection of Stuart Eizenstat's suggestion that to achieve justice we need truth, and to achieve truth, knowledge — but that victims, governments and the Dresdner Bank all had different versions of the truth. And Ambassador Winkler's observation that the Austrian gold settlement was in part due to the presence of a new generation of political leadership that sought to inject moral notions of human rights and dignity into public policy. And Ambassador Bindenagel's moving characterization of the relief accorded by the German fund as a measure of justice combined with a measure of recognition.

These observations lead me to the conclusion that the purpose of all commissioned history is not mere reportage. Rather, it is to take a step perhaps to facilitate material restitution where that can be done, but *more importantly* to facilitate new social relations by making the *moral* restitution that occurs when a country or society faces and acknowledges its own actions and their effects.

To accomplish this worthy and necessary goal requires a political process — not, to be sure, in the second sense of Webster's definition, but certainly in the first. Face it: nothing else works. Not class action litigation. Not war. Not stonewalling. Not paternalism. Not even, I dare say, academic scholarship. As I believe Professor Barkan would tell us, how *much* of a measure of justice an action amounts to is a social construction. Social constructions are negotiated — you guessed it — socially. And social negotiation by another name is politics.

As in any other negotiation, in the negotiation over commissioned history no party will get everything that it wants. But the best aspect of politics — at least as conducted in the free societies in which we are privileged to live — is that the negotiation is always open, always looking both backward *and* forward. Mistakes can be corrected, shortcomings supplemented, new avenues opened, old ones revisited. So, I would argue in the end, what the process of commissioned history requires is *more* politics, perhaps *better* politics, but certainly not less politics.

In our own case, are there areas deserving of more detailed treatment? Of course. Does the private sector need to be pushed to make material on dormant securities, museum holdings and private art sales available? Absolutely. Does the shameful history of the U.S. refusal to open its doors to save European Jews and other persecuted groups from extinction need to be acknowledged? As soon as possible. Does the Defense Department need to review how it instructs its troops to treat cultural property they encounter in the course of armed conflict? Unfortunately, most urgently. The profile of the value of our historical effort must be kept high.

This leads me to the final point I would like to leave you with. It is essential that there be another stage of “commissioning history,” in which the work of all the historical commissions, from Argentina to the United States, is collected and integrated within the democratic context in which our work has been accomplished. If this can happen, the light of open inquiry can be shone on all the work that has been done, deficiencies corrected, records supplemented, understanding expanded. I therefore hope that the primary recommendation of the U.S. Commission — that our government create a Foundation to support continued research into asset restitution issues, including an attempt to synthesize of the work that has been done around the world by the twenty plus commissions like ours — will be realized. If this happens, we may soon be able to write a truly complete history of Nazi looting and the international community’s still incomplete efforts to make restitution.

But, if it is to happen, it can only happen through the messy, unsatisfying, disappointing but irreplaceable process of politics. I hope to see all of you in the future as that process unfolds.

Thank you.