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Could This Train Make It Through: The Law and Strategy of the Gold Train Case

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Note from the Field

Could This Train Make It Through: The Law and Strategy of the Gold Train Case

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I. INTRODUCTION

In 1944-45, the Nazis seized personal belongings of the Hungarian Jewish population and dispatched some of the most valuable of them on a train. The United States Army took control of this "Gold Train" and gave reassurances that it would keep the valuables safe. However, the items were plundered by individual soldiers, including officers, and diverted to various uses. After decades of dormancy, a Presidential Commission exposed the facts, but the government still did not right the wrong – until there was litigation.

The "Gold Train" case (*Rosner v. United States*[1]) represents a measure of justice for the victimized community of Hungarian Jewish Holocaust survivors. This case is one of the most successful human rights class actions ever brought against the United States. It teaches important lessons regarding future human rights cases, especially those against the United States. These lessons concern both the legal doctrines in such cases and strategic questions about how to mobilize the public's sympathy for human rights victims injured by the United States abroad.

Survivors and descendants of Hungarian Jews brought this class action

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1. Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (denying United States' motion to dismiss).

against the United States to seek restitution because their valuables were seized by the Nazis in 1945 and subsequently loaded on a train which came into United States Army control. The valuables were disposed of by grants to international organizations, sale, waste, and looting, rather than being returned to the owners. Strategically, Hungarian Jewry, as Holocaust-era victims, had the sympathy of American Jewry, a group whose voice would help bring about a just settlement.[2] The *Rosner* settlement obliged the United States to devote $25 million to the needs of this class of Holocaust victims.[3]

There is much more to the Gold Train case than meets the eye, and the litigation took many unanticipated turns over five years of preparation, research, litigation, negotiation, and settlement. Doctrinally and strategically the route to obtaining justice was anything but simple. The underlying events occurred in far flung locales - Hungary, Austria, France, London, New York, Budapest, Israel, and Washington, DC, among others – over 55 years before the case was brought. Both factual[4] and legal questions posed major challenges.[5]

There was never a guarantee of success; far from it. Few cases of this magnitude succeed against the United States.[6] The Department of Justice has a responsibility to protect the assets of the United States government against all defensible claims, no matter how compelling the facts.[7] The

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2. See Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 196-97 (2000) (discussing the reaching of settlements). Professor Bazyler has been an invaluable legal scholar of Holocaust class actions.

3. Settlement Agreement at 13, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859).

4. Relevant documents were scattered in many countries, were written in numerous languages, and were produced in an era of huge population shifts and changing political affiliations. The factual documents that provided the basis for the case ranged from handwritten notes to Army manuals, declassified State Department telegrams, receipts for property written in the Magyar language, and legal analyses written for private groups a half century ago. *See* First Amended Complaint at 1, 12, 13, 63, 64, *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859)(complaint discussing the contents of the otherwise undescribed documents).

5. The legal questions required expertise in many different subjects: international property and contract law, litigation against the Government, the laws of war, diplomatic history, art law, civil procedure, presidential archives, legal ethics, governmental budgets, communication with the public, and more.

6. *See, e.g., United States v. Caltex*, 344 U.S. 149 (1952); *El-Shifa Pharmaceutical Industries v. United States*, 55 Fed. Cl. 751 (2003).

7. The United States federal government enjoys sovereign immunity; it may not be sued without waiving its immunity or otherwise consenting to the lawsuit. *See* Gray v. Bell, 712 F.2d. 490, 506 (D.C. Cir. 1983). When sovereign immunity is overcome, a Judgment Fund exists for paying court judgments against certain federal agencies and Justice Department settlements. The Fund was established in 1956 by Congress and is intended to allow for "prompt payment of settlements and awards to claimants . . . upon certification that a court has handed down an award or that a settlement has been reached." The Judgment Fund is managed by a Department of Treasury bureau, Financial Management Service (FMS). *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-295R, THE JUDGMENT FUND: STATUS OF REIMBURSEMENTS REQUIRED BY THE NO FEAR ACT AND CONTRACT DISPUTES ACT (2008); THE JUDGMENT FUND, http://www.fms.treas.gov/judgefund/index.html (last visited Dec. 5th, 2011).

United States litigates vigorously, possessing unique defenses (from sovereign immunity to the political question doctrine), substantial litigation budgets, and top-flight legal talent with deep wells of institutional knowledge. And, of course, the case existed against the backdrop of the heroic role that the United States Army played in liberating Europe in World War II.[8] It is difficult to imagine a more worthy opponent than the United States.

As to doctrine, the defendant, the United States government, could cite precedent with appellate support in defending against a class of individuals who were neither citizens nor resident aliens, who were arguably without connections to the United States in 1945, and who were asserting claims from actions of the United States Army overseas in the immediate aftermath of war.[9] The defendant did succeed in having the constitutional claim dismissed.[10] Additionally, the Department of Justice employed its potent jurisdictional defense based on sovereign immunity[11] expecting either to knock off the case in district court or to kill it on interlocutory appeal.[12]

In 2001, Hungarian Jews began the *Rosner* class action in federal court in Miami, Florida. In 2002, the court made the key decision in the case. It allowed some of the plaintiffs' non-constitutional claims to stand, and allowed discovery as to these, while dismissing plaintiffs' constitutional claim. After the court ordered mediation, the court-appointed mediator, Fred Fielding, was able to bring the Justice Department to settle, including a settlement fund of $22 million for Hungarian Jewry.[13]

To sketch briefly this Article's parts, Part I discusses in more detail the

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8. United States District Judge Patricia A. Seitz presided over the case. Remarkably, Judge Seitz's father, Lt. Gen. Richard Seitz, was the youngest infantry battalion commander during World War II, a hero in the Battle of the Bulge. After a 35-year military career, Lt. Gen. Seitz retired as a three-star commanding general of the XVIII Airborne Corps and Ft. Bragg. *See* Gary Skidmore, *Retired General Shares Leadership Tips*, 1ST INFANTRY DIV. POST (Apr. 30th, 2009), http://www.1divpost.com/newsdetail.asp?article_id=2531.

9. Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint at 3, 11, 12, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002)(No. 01-1859). The defendant's second 12(b)(6) motion claimed that two postwar international agreements, the 1946 Treaty of Peace and a 1973 Executive Agreement, waived the plaintiffs' claims. *Id.* at 3. The plaintiffs argued that "neither pact was ever intended to address victims' claims." Plaintiffs' Opposition to Government's Motion to Dismiss under Rules 12(b)(1) and 12(b)(6) at 3, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002)(No. 01-1859). "[I]f the 1947 Treaty waived Hungary's claim to restitution of the Gold Train property one would have expected contemporaneous documents to mention this as the reason for the Government's refusal to restitute the property. But none do." *Id.* at 61.

10. *Rosner*, 231 F. Supp. 2d at 1214.

11. Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint at 15–18, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859).

12. The Bush Administration had taken high-level steps to signal that it would resist accountability for actions abroad. For example, the Clinton Administration had signed the Rome Treaty creating the International Criminal Court. The Bush Administration took a step disavowing that signature that the press dubbed President Bush's "unsigning" of the treaty. CHARLES TIEFER, VEERING RIGHT: HOW THE BUSH ADMINISTRATION SUBVERTS THE LAW FOR CONSERVATIVE CAUSES 173 (2004).

13. Settlement Agreement at 13, *Rosner v. United States*, 231 F. Supp. 2d 1202 (No. 01-1859).

facts and the procedural history of the case. In June 1998, Congress created the Presidential Advisory Commission on Holocaust Assets in the United States. In October 1999, the Commission's staff issued a "Progress Report on: The Mystery of the Hungarian 'Gold Train,'"[14] which, in effect, blew the whistle on the Gold Train episode.[15]

To summarize, as a part of the Holocaust personally managed by Adolph Eichmann, the Nazis deported hundreds of thousands of Hungarian Jews to death camps, looted the wealth of the Hungarian Jewish community, and sent quantities of valuable personal property and ceremonial objects on a train to Germany. The Army intercepted the train when hostilities ceased. Much of the wealth was looted, some disappeared, and some was used to reimburse those who paid for general relief for World War II's displaced persons.[16]

Plaintiffs filed *Rosner* as a class action for Jews deprived of their property. The case came to a decisive legal battle concerning the Justice Department's motion to dismiss, producing a key judicial opinion in 2002 from the United States District Court for the Southern District of Florida. The district court dismissed some claims, notably the constitutional takings claim, but it sustained other claims and rejected the Justice Department's motion for reconsideration.[17] Crucially, the decision not to dismiss was an interlocutory judgment, not a final one. As an interlocutory judgment, it was not appealable. The case would stay in the district court rather than being taken away to appellate courts that might be unfavorable venues.[18] A period of discovery of facts pertaining to jurisdiction preceded major settlement efforts by the plaintiffs. In the end, the plaintiffs achieved a settlement favorable to the Hungarian Jewish community.

Notwithstanding the plaintiffs' strong claim of wrongful injury, doctrinally, the Gold Train case faced powerful legal obstacles discussed in Part II. The Justice Department of the early 2000s espoused a comprehensive conceptual analysis, particularly as to the constitutional argument about a Fifth Amendment "taking."

The DOJ's constitutional argument against a takings claim could be labeled the "concentric circles of remoteness."[19] It opposed finding

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14. PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE US, PROGRESS REPORT ON: THE MYSTERY OF THE HUNGARIAN "GOLD TRAIN" (1999), *available at* http://pcha.ushmm.org/goldtrainfinaltoconvert.html.

15. Amateur historian Kenneth D. Alford conducted path-breaking research about the Gold Train, which he published in THE SPOILS OF WORLD WAR II (1994). A former property officer told Alford that "the only difference between the Germans and the Americans in looting was [that] the Germans keep very accurate records, and with the Americans it was free enterprise unchecked." Alford unearthed many valuable U.S. military documents. Michael Dobbs, *Report: U.S. Looted Train of Holocaust Goods*, WASH. POST, Oct. 15, 1999, at A23 (quotation omitted).

16. First Amended Complaint at 46-52, 60-70, 93-99, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859).

17. *Rosner*, 231 F. Supp. 2d at 1215.

18. *Id.*

19. The Department sought to analogize the case against it to the cases in which it had scored victories in the past. *Id.* at 1212, *citing* Johnson v. Eisentrager, 339 U.S. 763 (1950).

constitutional rights for extraterritorial aliens and ideally limited rights to either citizens abroad or aliens in the country.[20]

This issue had significance for the development of human rights law during the 2000s when there was intense legal interest in whether the Constitution applied extraterritorially or gave protections to aliens.[21] Within that debate, the Gold Train plaintiffs did have responses to the Justice Department's "concentric circles of remoteness" defense. For example, many valuable objects on the Gold Train would rightfully belong to individuals who were, currently, United States citizens or residents who had immigrated or who had inherited from 1945 victims. Yet, the district court dismissed the constitutional takings claim. Though an obstacle to future types of cases that might depend upon a broadly inclusive theory of constitutional taking, it fortunately was not a fatal blow to the Gold Train case.[22]

Plaintiffs' key response put forth other legal claims that did not run head-on into the "concentric circles of remoteness." Instead, it mobilized other factual aspects of the Gold Train matter in order to pierce the Army's shield of sovereign immunity. One aspect was the claim formulated as a violation of the Administrative Procedures Act which waives sovereign immunity.[23] The other was the implied-in-fact contract of bailment claim, the relevant version of the contract exception to sovereign immunity.[24]

Part III examines the legal strategy. Had the plaintiffs done nothing more than present legal arguments, the case would have squandered pressure on the defendant to settle, because of delay and loss of public interest. The Administration had powerful reasons to stand behind the Justice Department's position. Even without appeals, the case lasted for

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20. For the Gold Train case, the Department's analysis placed the plaintiffs outside a series of abstract concentric circles: the facts occurred in a foreign country; they occurred to non-citizens; these non-citizens arguably had no contemporary connection to the United States; and the actions were those of the Army at the war's end. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss Under Fed R. Civ. P 12(b)(1) and 12(b)(6) at 13-16, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859).

21. *See* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992).

22. Plaintiffs alleged that the U.S. government violated the Fifth Amendment by "[taking] possession of plaintiffs' private property and [using] it for public purposes without providing any compensation to plaintiffs" (Complaint at 34, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859)). Defendants argued that a "substantial connection to the United States is an essential prerequisite to a claim of entitlement to the protections of the U.S. Constitution" and "during the time of the seizure and disposition of that property, Plaintiffs allege no connection to the United States beyond having close relatives who were U.S. citizens (Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss Under Fed R. Civ. P 12(b)(1)and 12(b)(6) at 13-14, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859))."

23. *Rosner*, 231 F. Supp. 2d at 1211-12.

24. *Id.* at 1214-15. Because these claims depended on the specific facts, they required the full processes of discovery and trial. They could not be decided just on summary judgment motions. The defendants could not just obtain a quick final judgment on such motions and then exile the case to the netherworld of the appellate process with its succession of delays for consideration, before possibly pro-Executive panels, and at best a remand years later, still without a trial.

years, in contrast to other Holocaust-victim cases which tended to settle at an early stage. As noted by Morris A. Ratner, who participated in a number of Nazi-era class cases or group settlements, the other "Nazi-era cases settled at a relatively early stage of litigation." For example, "[t]he Swiss banks litigation . . . settl[ed] after briefing and argument but before any ruling on motions to dismiss the pleadings."[25]

Specifically, the Department of Justice's tough stance in the case was predicated on its serious responsibility to protect the United States Treasury[26] and the government's desire not to face liability for its actions in national security affairs.[27] Plaintiffs made several strategic moves in this case, including successfully researching the case despite the challenges posed by the twin problems of the destruction of documentation together with the scattering of the Jewish Community caused by the combination of the Holocaust and the passage of decades. In other strategic moves, plaintiffs chose to file the case in Miami, and also made it difficult for the Justice Department to stall the case in appellate proceedings for threshold issues, rather than merits. The case's scheduling created opportunities[28] for a media[29] and settlement strategy.[30]

Finally, Part IV discusses the implications for future human rights cases, particularly those against the United States. Other human rights victims suing the United States may not have the extraordinarily high level of public sympathy compared to Holocaust-era victims. On the other hand, they will hopefully not face the intensity of resistance of the early 2000s Department of Justice and gain some benefit from the Guantanamo-related cases in the Supreme Court. To the oft-asked question of whether human rights victims should favor a litigation strategy or a strategy of public and governmental pressure, this case suggests that they should use both strategies together.[31] A human rights class action benefits greatly from help

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25. Morris A. Ratner, *Factors Impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview*, 58 N.Y.U. ANN. SURV. AM. L. 623, 624 & n.2 (2003).

26. See DOJ's press releases to find some where they protect the Treasury or the taxpayer. List of Press Releases, U.S. DEPT. OF JUSTICE, http://www.justice.gov/opa/press-releases.html.

27. In the early 2000s, after 9/11, the Department's strenuous defense of the Gold Train case rose in importance Now, the Justice Department seeks with more urgency to be able to act without liability, both in overseas national security action and against aliens. *See, e.g.*, Rachel Ward Saltzman, Note, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439 (2010) (discussing the Justice Department position denying government liability for torture).

28. David Hess, *The Gold Train*, NAT'L. J., Jan. 31, 2004.

29. *See, e.g.*, Adam LeBor, *US Must Pay for Train Loot*, BUDAPEST SUN ONLINE, Aug. 9, 2001.

30. Plaintiffs pushed hard, over resistance, for mediation, and the choice of mediators moved settlement forward. The structure of settlement also preserved the settlement's terms from effective challenge by individuals who might try to interfere after the litigation and negotiation had succeeded. Final Order and Judgement at 18, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859),

31. Victims who are overseas aliens require not only a strong argument supporting the legal basis for their claims in court, but also a convincing strategy for engaging the public. Neither the legal basis by itself, nor the public appeal, need be so overwhelming as to succeed alone, but both need enough concrete strength for the defendant to appreciate the justness of

from outside the court to facilitate settlement. Future human rights plaintiffs may seek the most promising combination of approaches—a coupling of: (1) fact-dependent jurisdictional issues to save the case from death at the threshold or through appellate proceedings; and, (2) some kind of leverage for settlement. The Gold Train case demonstrates a possible route to success.

Observers might initially think this depended upon the pure abstract focused right to constitutional redress of aliens complaining of an extraterritorial wrong by the United States. However, the Gold Train case actually shows that an overall legal and public strategy, making the most of persuasive facts and non-constitutional theories, is what obtained the fair outcome the victims deserved.

II. FACTUAL BACKGROUND AND PROCEEDINGS

A. The Gold Train Factual Background

In 1944-45, toward the end of World War II, Germany invaded Hungary. The pro-Nazi Hungarian government seized the personal valuables of the Jewish population. The stolen items were loaded onto a train of over forty cars bound for Germany. In May 1945, after the end of the war, the United States Army accepted custody for this "Gold Train" in Austria and, several months later, moved its assets to storage facilities. Although it was later disputed by the Justice Department, evidence gathered by the plaintiffs revealed that an Army officer gave reassurances that their valuables on the Gold Train would be safe and eventually returned to the owners.[32]

Because Army personnel stored the confiscated items in containers with the owners' names and addresses, the Hungarian Jews believed at the time that these items could indeed be identified and would be returned. The community made repeated requests for this return after the seizure. However, the United States government declined to return the contents to its owners, and instead it sold, requisitioned, and donated the items. Instead it even tolerated extensive looting by individual soldiers and officers.[33]

The facts concerning this episode remained largely undisclosed to the world for many years. As with other aspects of compensation for Holocaust losses, the issue lay dormant until the 1990s. Many cases were brought to light toward the end of the decade, including actions against Swiss banks that had pocketed the unclaimed accounts of the deceased. The success of

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the cause.

32. First Amended Complaint at 64–67, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859).

33. First Amended Complaint at 93-95, 119-128, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859).

these actions made redress imaginable for the wrongs of that era.[34]

Within a few years of the revival of interest in compensating Holocaust-era victims, the new investigative and legal spotlight turned to those aspects implicating the American government and American companies.[35] In June 1998, Congress created the Presidential Advisory Commission on Holocaust Assets in the United States. In December 2000, the Commission's staff issued a report that exposed some of the stark facts of the Gold Train episode.[36] In particular, it brought forth key documents that had been classified or otherwise unavailable and that highlighted the nature of the United States' participation in the deprivation of Hungarian Jewry's property heritage. Yet, thereafter, the government showed no intention of making amends voluntarily; and, in fact, it later disavowed its own report in the Gold Train litigation.[37] The plaintiffs thus filed the *Rosner* class action.[38]

B. Proceedings in the Gold Train Class Action

In 2001, the *Rosner* plaintiffs brought a class action lawsuit regarding the Gold Train on behalf of Hungarian Jews and their descendants. The choice of forum was the result of months of careful research. In general, the Tucker Act requires that plaintiffs present claims against the United States in the Article I Court of Claims based in Washington, DC. However, lacking a robust Rule 23 alternative, that court does not permit opt-out class actions analogous to FRCP 23(b)(3). It also lacks the ability to formulate any injunctive relief, which plaintiffs' counsel believed might be necessary later on or to entertain an Administrative Procedure Act ("APA") claim. Claims under the Federal Torts Claims Act (*e.g.*, for conversion), for their part, must be presented to the Department of Justice on an individual basis before a claimant can proceed to court.

Given these complexities, plaintiffs determined to place primary reliance on the "Little Tucker Act,"[39] which permits plaintiffs to pursue claims for up to $10,000 in the United States district courts and to proceed

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34. Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 6 (2000). Professor Bazyler has been an invaluable legal scholar of Holocaust class actions.

35. *Id.*

36. PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES, PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS' ASSETS SR-113-SR117 (2000). A large part of the Gold Train story had been told by Kenneth Alford, an amateur historian in his 1994 book The Spoils of World War II: the American Military's Role in Stealing Europe's Treasures. Mr. Alford's little-noticed but explosive research foreshadowed the Progress Report.

37. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss Under Fed. R. Civ. P 12(b)(1) and 12(b)(6) at 3-4 n.2 and 10 n.6, Rosner v. United States, 231 F. Supp.2d 1202 (S.D. Fla. 2002) (No. 01-1859).

38. The arguments presented are not, of course, to be laid at the feet of any particular official or attorney, all of whom were consummate professionals. The Justice Department's position was an institutional one.

39. *See* 28 U.S.C. § 1346(a)(2) (2006).

under FRCP Rule 23. Given that a large number of class members could not be identified at the outset, an opt-out class action was the only attractive vehicle. The countervailing consideration of limiting claims to $10,000, while significant, seemed less important.[40]

Additionally, affected plaintiffs lived across the world. A group of Miami-based survivors approached class counsel; and, for a number of reasons, the Miami forum seemed like an attractive alternative. First, other courts, particularly the United States District Court in the Eastern District of New York, had disposed of many Holocaust claims, and Florida courts might view the case with a fresh eye. In addition, a high profile case involving claims against the United States, which would understandably arouse Jewish interest, might attract attention among the press, the public, and policymaking circles.[41]

The Justice Department resisted the suit by disputing the historical record of the episode. Also, the Justice Department asserted every defense available concerning the immunity of the government to suits by overseas victims.[42] It presented its defenses as jurisdictional and absolute.

The steps in the *Rosner* case represented a complex path toward the justice that the plaintiff class sought. After the complaint came initial cross-motions decided by the key opinion in the case, the case's only published opinion. Writing for the Court, Judge Patricia A. Seitz, upheld the complaint on numerous grounds.[43] The Court's path included dismissing the central legal claim—that the Army had made an unconstitutional taking in confiscating the Gold Train assets.[44] Still, the Court provisionally recognized the merit of other claims, such as the defendant's breach of an implied contract of bailment with the plaintiffs, and allowed the case to proceed through limited discovery.[45]

Because of the Justice Department's continuing resistance, the Gold Train class action required a sustained effort and a succession of alternative

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40. Class members with larger claims could opt-out and present them individually in the Court of Claims. In actuality, none presented an individual claim.

41. In his 2001 study of the "Israel Swing Factor," Jeffrey S. Helmreich calculated that the Jewish swing vote "represent[ed] up to two percent of the electorate in states like Florida and Pennsylvania. In both cases, a shift of that amount (or less) would have changed the result in that state and, in all probability, single-handedly crowned the American president." Jeffrey S. Helmreich, *The Israel Swing Factor: How the American Jewish Vote Influences U.S. Elections*, 446 JERUSALEM LETTER/VIEWPOINTS (JERUSALEM CTR. FOR PUB. AFFAIRS), Jan. 15, 2001, http://www.jcpa.org/jl/vp446.htm. The Jewish vote remained crucial when President Bush ran for re-election against Senator John Kerry in 2004. The Florida polls forecasted another close contest, unsurprising considering that a mere 537 votes separated Bush and Former Vice President Al Gore in 2000. The *St. Petersburg Times* estimated that there would be 500,000 Jewish voters at the polls on Election Day and reported that, "[o]ther than Florida's Hispanic votes, the Bush-Cheney campaign is targeting no demographic group more aggressively than Florida's Jewish population." Adam C. Smith, *Bush Zeroes In On Jewish Vote*, ST. PETERSBURG TIMES, July 22, 2004, www.sptimes.com/2004/07/22/Worldandnation/Bush_zeroes_in_on_Jews.html.

42. *See supra* notes 5 and 11.

43. Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002).

44. *Id.* at 1213-1214.

45. *Id.* at 1218.

arguments and case strategies beyond those of many other Holocaust-victim class actions.[46] The court's opinion created both complex problems for plaintiffs as well as opportunities. The court recognized that plaintiff's actions were unlike ordinary claims for monetary damages in many respects, and it was troubled by a lack of specificity in plaintiffs' original complaint concerning the tie between the named plaintiffs and the property on the Gold Train.[47] Because Nazis and their collaborators had taken elaborate steps to eliminate indications of legitimate ownership, establishing an Article III standing requirements was problematic.

At the same time, the court's ruling prompted an avalanche of communications—approximately 7,000 potential class members from across the globe contacted class counsel.[48] The combination of the Court's opinion and the wave of contacts created a tremendous opportunity.

Historical research showed that a number of Gold Train items had been sold at Parke-Bernet Galleries in New York in 1948.[49] Class counsel purchased the auction catalogues from a dealer in New Jersey. After confirming that these catalogues indeed described Gold Train property, class counsel created a searchable website containing verbal descriptions and photographs. Class counsel then notified thousands of class members about the website so they could attempt to identify their property. Although it seemed like trying to find a needle in a haystack, a few class members came forward with compelling proof that their family property was on the train.[50] These revelations bolstered the complaints and the process served as the selection basis for class representatives in an amended complaint.

The court's opinion and the wave of contacts greatly legitimated the plaintiffs' claims. Yet the defendant still had potent means of defense. There was no doubt that the government could prolong the case past the lifetimes of most Holocaust survivors by exercising all available rights. In addition, the government's substantial defenses raised the possibility that, in the end, the Holocaust survivors would be disappointed. Hence, this case cried out for mediation.

The national media played an important role in garnering attention that may have contributed to the drive for settlement. At this point, the interest of the media all along, spurred in part by the plaintiffs' public media

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46. Bazyler, *supra* note 2.

47. *Id.* at 1205 n.2.

48. Declaration of Jonathan W. Cuneo in Support of Class Counsel's Joint Petition for an Award of Attorneys Fees and Expenses at 10, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859).

49. First Amended Complaint at 146 - 148, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859).

50. Class counsel's fear of multiple or unsupported claims for the property did not pan out. The survivors who examined the catalogue materials conducted themselves with integrity, precision, and restraint. There was never more than one claim of potential ownership for a piece of property. *See generally* Declaration of Jonathan W. Cuneo in Support of Class Counsel's Joint Petition for an Award of Attorneys Fees and Expenses, Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (No. 01-1859)(describing the merits of plaintiffs' case).

strategy, proved important.

Before the case even started, the Presidential Advisory Commission on Holocaust Assets in the United States issued an interim report in October of 1999 that featured the Gold Train story that led to a front page *New York Times* story.[51] It was this particular public disclosure that alerted survivors to contact law firms to seek possible redress. The case thus commenced against a backdrop of official action, public disclosure, and media interest.

This case was a public dispute in that it involved the conduct of the Army, Washington decision-makers, and official policies in the post-war world. A successful claim against the United States would be paid by the Treasury. Petitioning the government through all available means under the First Amendment was appropriate in every respect since an alternative method to achieve recovery would have been a private bill in the United States Congress. Congress, which controls the federal purse strings, also has a legitimate role in overseeing and sharing policy views with the Department of Justice in its civil litigation positions.[52] In this case, counsel determined that political action might be beneficial given the Government's inclination to exhaust every defense before evaluating the case for settlement. Considering the relatively short remaining expected life span of many survivors, using political tools to supplement courtroom strategy was prudent and appropriate.

When filed, class counsel gave a copy of the complaint to reporters and disseminated it to interest groups, including prominent veteran reporter Henry Weinstein of the *Los Angeles Times*.[53] In September 2002, after Judge Seitz upheld the complaint, class counsel again distributed a copy of her order to reporters and permitted interviews with survivors.[54] That triggered thousands of communications to class counsel and enabled them to compile at least a partial class list with over 7,000 names. When the evidence was fully amassed and the case was fully ready for trial on the jurisdictional issues, several editorial boards of major newspapers urged the United States to consider settling the case.[55]

One purpose of this activity was to build a public record for legislators with oversight responsibility as well as senior decisionmakers at the

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51. Tim Golden, *GI's are Called Looters of Jewish Riches*, N. Y. TIMES, Oct. 15, 1999.

52. Similarly, Congress passed legislation to fund the so-called "Black Farmers" settlement in a bill introduced by Senator Barack Obama. Food, Conservation and Energy Act of 2008, Pub. L. 110-234, May 22, 2008. Thus, there is a direct unique interplay between public attention and government litigation.

53. Henry Weinstein, *Hungarians Sue U.S. Over Seized Holocaust Loot*, L.A. TIMES, May 8, 2001.

54. After the Court dismissed the government's claim that the lawsuit was "decades too late," Plaintiffs David and Irene Mermelstein told their compelling story to an Associated Press reporter. Tal Abbady, *Hunting the Gold Train*, HERALD TRIB., Oct. 13, 2002. *See also* Ann O'Neill, *Progress Made on Holocaust Suit: U.S. Troops Accused of Looting Train Carrying Valuables Stolen By Nazis*, FLA. SUN SENT., Oct. 13, 2004.

55. Editorial, *Justice for 'Gold Train' Victims*, N. Y. TIMES, Aug. 9, 2004; Editorial, *Promptly Settle 'Gold Train' Suit*, S. FLA. SUN SENT., July 23, 2004; Editorial, *Promptly Settle 'Gold Train' Case*, FT. LAUDERDALE SUN-SENTINEL, July 23, 2004, at 24A; Editorial, *Settle 'Gold Train' Case, Restitution Denied Holocaust Survivors*, MIAMI HERALD, May 11, 2003.

Department of Justice and the White House. It was an attempt to influence Washington decision-makers instead of the Court. It was also part of an overall strategy which succeeded, with vital cooperation from many actors, in obtaining a fair settlement for the victims.

To promote settlement, class counsel took several steps, including furnishing class members with the names of Members of Congress so that they could advocate on their own behalf.[56] In one instance, a letter from a class member to Senator Rick Santorum prompted the Justice Department to express interest in a potential resolution of the case.[57]

Starting with a resolution by the City Council of New York, a small political movement grew to persuade the senior level officials of the Department of Justice to examine the case carefully to see if it merited mediation and settlement. That movement grew as members of Congress, including Senators Hillary Clinton, Charles Schumer, and Trent Lott as well as Representatives John Conyers, Jr. and José Serrano asked the Department of Justice to consider the settlement option.

At a hearing on March 15, 2004, Judge Seitz ordered the parties to engage in mediation.[58] After much back and forth about the identity of the mediator, the parties settled on Fred F. Fielding, former White House Counsel to Presidents Reagan and Bush, as mediator.

Class counsel believed that the evidence they had amassed was overwhelming, that their chances of surviving a renewed motion to dismiss were great, and that they had a reasonable opportunity to certify a class. Given these dynamics, presentation of the facts to an authoritative figure such as Fielding could sway the government.

Besides assisting settlement, media also functioned as an investigative tool. The information necessary to prosecute the case was not found exclusively in the defendant's files. Plaintiffs needed information from Holocaust survivors and possible witnesses dispersed all around the world. Such survivors and witnesses would be alerted either by American press available internationally such as *New York Times*, or by international press with a definite interest in the case such as the Hungarian and Israeli press.

Framing the message presented separate challenges. Class counsel consulted with experts in message framing. Perhaps the most significant challenge was to avoid risking antagonism from the Court by making it

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56. Class counsel did not furnish draft letters. Appealing to Members of Congress to contact the Department of Justice is particularly appropriate in a case such as this. In contrast, in a dispute between private parties, claims against the government involve the Treasury of the United States, over which Congress has ultimate control. U.S. CONST. art. I, § 10, cl.7. Congress has in place an entire mechanism for the presentation of Congressional action on private claims against the Treasury. Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985). Indeed, until 1886 Congressional action was the only way that claimants could assert non-Constitutional money claims against the United States. *Id.* at 659 (describing Congressional action in 1886).

57. Decl. of Jonathan W. Cuneo in Supp. of Class Counsel's Joint Petition for an Award of Attorneys Fees and Expenses at 31, Rosner v. United States, 231 F. Supp. 2d 1202 (No. 01-1859).

58. Rosner v. United States, No. 01-1859 (S.D. Fla. March 16, 2004) (Docket No. 90) (ordering parties to engage in mediation).

appear that counsel were trying to influence judicial decisionmaking outside the courtroom. Fortunately, there was an elegant and simple solution: let the plaintiffs and the evidence speak directly for themselves in the media, rather than through counsel.

The second challenge was avoiding inappropriate overstatement. The topics are solemn and exist where hyperbole has no place. The Holocaust involved mass murder and genocide; a wave of suits in the late 1990's suits pointed out that this historic crime was complex and required complicity by major institutions who had engaged in fifty years of forgetting.

While life and death, freedom and slavery were at stake during the Holocaust, the Gold Train was not a case focused on the events of the Holocaust itself. This case was very different. It involved the post-Holocaust and post-war disposition of property—property of both monetary value and cultural significance—by Allied forces whose sacrifices during the war helped put an end to the horrors of the Holocaust.[59]

Understandably reticent to challenge authority, many survivors were profoundly patriotic, extremely grateful to the United States, and sensitive to pejorative stereotyping about using the court system to recovery money. An overly aggressive strategy could have split the class and undermined the case. Nuance in messaging was important: the essence of the plaintiffs' position was that American soldiers did not leave their families in the United States and spill their blood on European battlegrounds in World War II so that their officers could loot the belongings of Nazi victims.

There has been a creative tension in human rights controversies between what may be distinguished, roughly, as litigation and group-oriented but non-litigative negotiation. For example, the original commitment of Germany to pay both individual Holocaust survivors and the State of Israel came through the negotiation of the 1952 Luxembourg Agreement, not through litigation.[60] If media and political figures alone could consistently deliver group justice, class actions would be unnecessary. However, instances like the Gold Train show that sometimes justice is not forthcoming without vigorous litigation.

Ultimately, the plaintiffs and the United States reached a class settlement that the district court approved. The Settlement Agreement created a Settlement Fund of $25.5 million, of which at least $21 million would be disbursed for social services and humanitarian relief to Hungarian victims of Nazi persecution. Other amounts went to an archive concerning disposition of the Gold Train property. And the United States acknowledged its role in the Gold Train episode.[61]

The district court considered objections by persons who wanted direct payments for their property, rather than broader relief for the class of Hungarian Nazi victims. It rejected these objections, recognizing the

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59. Henry Weinstein, *Hungarian Holocaust Survivors Win Round in U.S. Court / 13 Suing American Government Over Disappearance of 'Gold Train' Valuables*, S.F. GATE, Sept. 2, 2002.

60. Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152, 1152 (2004).

61. Settlement Agreement at 13, *Rosner v. United States*, 231 F. Supp. 2d 1202 (No. 01-1859).

practical problems associated with direct payments, such as the scarcity of physical records linking the survivors to their possessions.[62]

III. LEGAL ISSUES

Sovereign immunity looms as an enormous barrier to suing the United States for damages for any human rights issue.[63] It was used in particular by the Justice Department in the 2000s to insulate the Executive Branch from claims brought by improper detainees and other alleged human rights victims.[64]

Every suit for monetary damages against the United States runs up against this barrier, and may proceed only if the plaintiffs successfully invoke at least one of the narrow and specific exceptions or waivers to sovereign immunity. Because of this, the legal contest over the Gold Train case did not primarily concern the merits of the victims' post-Holocaust claim, even though hearings limited to jurisdiction had aspects involving the merits. The legal contest focused on the duels over specific exceptions or waivers to sovereign immunity.

Plaintiffs named three specific exceptions to the U.S. government's sovereign immunity defense. First and broadest in constitutional significance, plaintiffs contended that the Army had effected a "taking" pursuant to the Fifth Amendment. Second, plaintiffs argued that the Army had acted beyond military authority and thereby had fallen out of the APA's "military authority" exception.[65] Third, plaintiffs argued that the Army had an implied-in-fact contract in bailment with the victims by undertaking to safeguard and return their property.[66] This falls within the contract exception to sovereign immunity.

The Department of Justice used its overall position favoring Executive protection against lawsuits about national security matters for shaping its approach to to the first and second exceptions above—the taking and the inapplicability of the APA military authority exception. This stance of immunity for the Justice Department parallels the Executive Branch's stance in cases concerning legal rights of detainees in the Bush Administration's "Global War on Terror."[67] The Gold Train case, rooted in the post-Holocaust era of the mid-1940s, accidentally stumbled into the big

62. Final Order and Judgment at 14, *Rosner v. United States*, 231 F. Supp. 2d 1202 (No. 01-1859).

63. For a sophisticated treatment, see Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992).

64. *See, e.g.*, Laura N. Pennelle, *The Guantanamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?*, 36 CAL. W. INT'L L.J. 303, 330 n.183 (2006); Irena Nikolic, Comment, *The Viability of Guantanamo Bay Detainees' Alien Tort Statute Claims Seeking Damages for Violations of the International Law Against Arbitrary Detention*, 17 SETON HALL L. REV. 893, 922 n.181 (2007).

65. 5 U.S.C. 701(b)(1)(G) (2006).

66. *Rosner*, 231 F. Supp. 2d at 1214.

67. "The Bush Administration has consistently argued that sovereign immunity, which includes military authority, bars judicial review of claims brought by detainees . . . against U.S. officials." Nikolic, *supra* note 64, at 922.

legal issues of the 2000s.

If the case had occurred ten years earlier, the Justice Department might have taken a more restrained approach. However, when it arrived the Department of Justice understandably took a strong position.

A. The Takings Claim

Plaintiffs made the straightforward claim that the Army's taking of the Gold Train property violated the Fifth Amendment of the U.S. Constitution. Courts deem the Fifth Amendment to have an automatic waiver of sovereign immunity.[68] The Justice Department attacked the straightforward constitutional claim with the concentric circles of remoteness analysis. This defense argues for the elimination of military accountability for actions in a foreign country when troops are placed there for specific military reasons. The concentric circles of remoteness defense was applied to non-citizen detainees as well as Gold Train victims. It greatly diminished the United States' vicarious liability to human rights plaintiffs, regardless of whether they are Hungarian Jews or detainees today.

The first concentric circle of remoteness originates from the fact that the military action took place overseas. The alien property complaint alleging United States liability occurred in occupied Austria, which would require an extraterritorial application of the U.S. Constitution. The judiciary is reluctant to apply the Constitution extraterritorially to claims by foreign nationals.

When the Rehnquist Court moved jurisprudentially in a more conservative direction after the 1980s, this reluctance took a particular form. In the 1990 case of *United States v. Verdugo-Urquidez*, the Rehnquist Court declined to apply the Fourth Amendment's warrant requirement to a Mexican government search of a Mexican citizen's Mexican residence.[69] The plurality opinion espoused a strong anti-extraterritoriality sentiment. [70] Though *Verdugo-Urquidez* could be narrowed and distinguished,[71] the lower courts took the decision as a real sign of the direction the law was headed. The *Rosner* district court cited and discussed the extraterritorial location of the Gold Train incident as a reason for dismissing the constitutional takings claim.

The second concentric circle of remoteness originates from the fact that the plaintiffs were Hungarian at the time of the action. They were neither

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68. First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 315-316 & n.9 (1987).

69. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (The opinion is a four-Justice plurality; Justice Kennedy concurred and filed a separate opinion.).

70. *Id.*

71. "We think that the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritoriality require rejection of respondent's claim. At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States . . . ." *Id.* at 274. This differs from refugees entrusting property to the Army.

U.S. citizens nor resident aliens. Judicial willingness to apply the Constitution diminishes further when an overseas claim is brought by a foreign national.[72]

The second concentric circle defense is diminished by the fact that the Gold Train victims were refugees from enemy expropriation and extermination. For the Justice Department, one of the strongest recent precedents was the Federal Circuit's dismissal of a case brought by a factory in Sudan attacked by the United States for an asserted link with Al Queda.[73] However, in that case, the Justice Department maintained that the factory was tied to an enemy. The Gold Train victims were an entirely different kind of foreign national. The Gold Train victims belong in a category that surely deserved the description "friendly aliens,"[74] as opposed to "enemy aliens."[75] A previous court, found a taking by the U.S. Army in post-war Austria not far in time or space from the Gold Train, and said that "Austria was not, at the time in question, enemy territory . . . . [T]here were no enemy activities in Austria."[76] That court's finding provides a strong reason for distinguishing cases that the Justice Department cites that refuse to award damages for asserted takings to those who are possibly enemy aliens.

The third concentric circle of remoteness originates from the Department of Justice's assertions that the action lacked "substantial connections" to the United States. This standard came from *Verdugo-Urquidez,* a case involving extraterritorial application of the Fourth Amendment.[77] There is no powerful reason to apply it to Fifth Amendment takings. The narrow application of *Verdugo-Urquidez* became clearer later in the Guantanamo[78] case of *Boumediene.*[79]

Further substantiating the narrow application of *Verdugo-Urquidez,* the Fourth Amendment warrant requirement that the Court refused to apply to domestic Mexican actions is relatively unique to American law. It does not have strong support in the law of other nations. In contrast, the rule against uncompensated property expropriations has had general support throughout the developed world.[80] Applying the exclusionary rule for

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72. *See, e.g.,* Atamirzayeva v. United States, 524 F.3d 1320 (Fed. Cir. 2008) (Uzbecki citizen lacked sufficient connection to the United States to recover under the Takings Clause even though her cafeteria was razed at the behest of the United States Embassy).

73. El-Shifa Pharm. Indus. Co. v. United States (*El-Shifa I*), 55 Fed. Cl. 751 (2003).

74. Andreas Paraud, Comment, *Foreign Nationals and Principles of Extraterritoriality: Why* Atamirzayeva v. United States *Was Decided Incorrectly,* 59 CATH. U. L. REV. 559, 576-577 (2010).

75. Ilana Tabacinic, Note, *The Enemy-Property Doctrine: A Double Whammy?,* 62. MIAMI L. REV. 601, 615-19 (2008).

76. Seery v. United States, 127 F. Supp. 601, 605-06 (Ct. Cl. 1955).

77. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

78. *Boumediene* held that the Suspension Clause of the Constitution has full effect at the Guantanamo Bay Naval Station, even though "Guantanamo Bay is not formally part of the United States." Boumediene v. Bush, 553 U.S. 723, 753 (2008).

79. Paraud suggests that *Boumediene* renders "incongruous" the notion that the "substantial-connection" test applies to takings. Paraud, *supra* note 74, at 578-579.

80. *See, e.g.,* Peter Charles Choharis, *U.S. Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract,* 80 S. CAL. L. REV. 1 (2006).

warrant requirements to searches of Mexican premises would have been far more questionable than applying the widely supported takings principles to the Gold Train incident.

Plaintiffs had solid precedent supporting their argument against the Department of Justice's concentric circles defense. First, the concentric circles of remoteness analysis need not produce a result in opposition to the plaintiffs' goals. It was axiomatic that takings protections applied extraterritorially to a United States citizen's property. Additionally, the Court has held that the Fifth Amendment takings protection applied to aliens'[81] property within the United States.[82] Thus, since takings protections may apply extraterritorially, and may apply to an alien within the U.S., to afford takings protections to the Gold Train plaintiffs simply required melding these two rules.[83]

Further, the "substantial connections" requirement mentioned in *Verdugo-Urquidez* referred to a Mexican defendant whose only dealings with the United States were related to the government's investigation and prosecution of him.[84] In contrast, as discussed below, the Hungarian Jews did have a connection with the United States. They were the benefactors of an implied contract—covering the whole property—with the United States. They were not an adversary to the U.S., like Verdugo-Urdiquez. They had received understandings, albeit indirectly, from the Army about their property. They had not only the property connection but also the dealings connection.

Second, a group of post-World War II precedents—neither the first[85] nor the last war to raise the issue—supported a constitutional takings claim for the Gold Train plaintiffs. The classic case, *Turney v. United States*, found takings liability to a Philippine company for radar in the Philippines taken after the war.[86] A Supreme Court case also arising from the Philippines in World War II, although turning on another and unrelated takings question, seemed to express the contemporary sentiment on the whole issue of takings abroad: "No rigid rules can be laid down to distinguish compensable losses from non-compensable losses. Each case must be judged on is own facts."[87]

Just as *Turney* seemed a confirmation of takings rights abroad at the end of World War II, a similar confirmation of such rights seemed to occur in the 1980s regarding takings in the course of American actions in Central

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81. "[T]he Constitution's . . . substantive guarantees of the Fifth and Fourteenth Amendments. . . . [protect] persons as well as citizens." *Boumediene*, 553 U.S. at 743.

82. Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931).

83. The melding of these two points is exactly how *Turney* applied takings protection to alien property overseas. Turney v. United States, 115 F. Supp. 457, 464 (Ct. Cl. 1953).

84. U.S. v. Verdugo-Urquidez, 494 U.S. 259, 260, 271 (1990).

85. Key cases came out of the War of 1812, *see, e.g.*, Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch.) 191 (1819); and out of an 1850 Nicaraguan fracas, *see* Mrs. Perrin's Case, 4 Ct. Cl. 543 (1868); Wiggin's Case, 3 Ct. Cl. 412 (1867).

86. Turney v. United States, 115 F. Supp. 457, 464 (Ct. Cl. 1953).

87. United States v. Caltex, 344 U.S. 149, 155 (1952).

American conflicts.[88] A commentator concluded: "Aliens, as well as U.S. citizens, may be able to claim the protection of the just compensation clause against the United States' uncompensated use or destruction of their property in foreign jurisdictions."[89]

Recent cases supported *Turney*.[90] Significantly, the *El-Shifa* opinion debated *Turney* and declined to hold that it was no longer good law;[91] thereafter, after one moment of hesitation,[92] the Federal Circuit prescribed that, on the extraterritoriality for aliens of the constitutional takings protection, "*Turney* is binding on us . . . ."[93]

An interesting scholarly debate broke out in the 2000s over *Turney*. One well-regarded forum published a note, "Time to Overturn *Turney*,"[94] and cited *Rosner*.[95] The more persuasive arguments[96] supported the continued viability of *Turney*. Among other points, one of the Supreme Court's Guantanamo cases, *Boumediene*,[97] lent a degree of support for *Turney*. *Boumediene* held that the Suspension Clause of the Constitution has full effect at the Guantanamo Bay Naval Station, even though "Guantanamo Bay is not formally part of the United States."[98] The support might not be overwhelming, but it sufficed to counter any automatic assumption that *Verdugo-Urquidez* had settled the extraterritoriality issue *sub silentio* for the entire Constitution.[99]

As a pure matter of law, the Court's rejection of the constitutional takings claim looks like a total defeat for the plaintiffs. However, this abstraction did not govern a real-life litigative struggle like the Gold Train case, which became a human rights milestone. The facts drove the case—the post-Holocaust claim of the Hungarian Jewish community—to justice. The Gold Train case needed some legal basis for a claim, not necessarily a constitutional one, to stay viable, to provide a forum for the powerful facts, and to provide the opportunity to seek settlement creatively. The Department of Justice had no need to appeal the two non-constitutional

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88. Remsen M. Kinne IV, *Making America Pay: Just Compensation for Foreign Property Takings*, 9 B.C. THIRD WORLD L.J. 217-218 (1989).

89. *Id.* at 247.

90. Langenegger v. United States, 756 F.2d 1565, 1570-71 (Fed. Cir. 1985).

91. El Shifa Pharmaceutical Indus. v. United States, 378 F.3d 1346,1352 (Fed. Cir. 2004).

92. A judge in the Court of Claims found "the authority of *Turney* has been severely undercut" but found it binding nonetheless. El-Shifa Pharmaceutical Indus. v. United States, 55 Fed. Cl. 751, 763-64 (2003).

93. Atamirzayeva v. United States, 524 F.3d 1320, 1327 (Fed. Cir. 2008).

94. Paul A. LaFata, *Time to Overturn* Turney, 15 WM. & MARY BILL RTS. J. 335 (2006).

95. *Id.* at 365 n.60: "*Rosner v. United States*, 231 F. Supp.2d 1202, 1214 (S.D. Fla. 2002)(denying alien takings claim over foreign property, implicitly finding no cause of action for such a foreign taking, and disallowing alien to convert the claim into one by a resident alien for lack of substantial connections)."

96. Paraud, *supra* note 74, 578-579.

97. *See* Boumediene v. Bush, 553 U.S. 723, 770 (2008) (deeming it not conclusive that the deprivation of rights occurred to noncitizens, and, at a location "in territory over which another country maintains *de jure* sovereignty").

98. *Id.* at 753.

99. For a discussion of how *Boumediene* narrows *Verdugo-Urquidez*, see Paraud, *supra* note 74, at 561.

claims but instead could use them for the purpose of settlement.

B. The Administrative Procedure Act

The Administrative Procedure Act waives sovereign immunity for non-monetary relief. Plaintiffs sought an accounting and return of their property. Here the Department of Justice's line of argument relied upon the statutory preclusion from judicial review of "military authority exercised in the field in time of war or in occupied territory." [100]

From the Department of Justice's perspective, it rested exclusively in the hands of the Executive Branch to decide what lay in the sphere of the exercise of military authority. Deciding this issue, the Department of Justice argued, was a "political question."[101] Like the Department of Justice's position as to the concentric spheres of remoteness, this position did not merely contest the issue on the merits. Rather, the Department of Justice sought to oust the judiciary of subject-matter jurisdiction.

The Department of Justice considered this so crucial that it not only argued this in its motion to dismiss, but also featured it in a motion to reconsider the district court's ruling on this point. The Department of Justice drew on the *El-Shifa* case, which had denied takings compensation because the question of whether to deem this an act of war against an enemy was a political question.[102] Other opinions did not find political questions in similar matters.[103]

Stepping back, the Department of Justice's claim that the boundary of military authority was a political question connected with the Department's broader position. That position was its resistance throughout the Bush Administration to recognition of judicial oversight of the Administration's uses of the military affecting human rights. The single issue with the most prominent stance of the Department of Justice through the 2000s was the legal rights of the Guantanamo-era detainees. Those detainees were generally housed at "Guantanamo Naval Station," a military facility, and the Bush Administration wanted to try those detainees in commissions that were military in nature.

As is familiar to the reader of *Rasul*,[104] *Hamdi*,[105] and *Boumediene*,[106] the Department of Justice fought the issue of jurisdiction in those cases by taking the purist stance of disputing any role for the Judiciary. Rather, the

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100. 5 U.S.C. §701(b)(1)(G) (2006).

101. For background, see John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000).

102. *El-Shifa Pharmaceutical Indus. v. United States*, 378 F.3d 1346, 1355-1370 (Fed. Cir. 2004).

103. Langenegger v. United States, 756 F.2d 1565, 1568-1570 (Fed.. Cir. 1985).

104. Rasul v. Bush, 542 U.S. 466 (2004).

105. Hamdi v. Rumsfeld, 542 U.S. 507 (2004). To be precise Hamdi is a U.S. citizen who was captured in Afghanistan and detained in a naval brig in Charleston, South Carolina. It is simpler to call them all the Guantanamo-era cases (because readers know them as terrorist detentions during the period of time in which Guantanamo is the symbol for such detentions).

106. Boumediene v. Bush, 553 U.S. 723 (2008).

Department of Justice meant to deny the judicial branch the authority to review these military actions.

Scholars have made the point that for this decade the line between administrative law and military authority is a central focus in the confrontation between the Department of Justice and human rights plaintiffs. As stated in Kathryn Kovacs authoritative 2010 article, *A History of the Military Authority Exception in the Administrative Procedure Act*, on issues related to civil liberties and international law, "the War on Terror ignited a firestorm of commentary. . . .The APA may provide an avenue to judicial review for individuals detained by the military."[107]

An earlier survey of issues, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, begins, "On May 8, 2002, Jose Padilla, an American citizen . . . was arrested . . . . At the heart of the debate over the President's wartime authority lies the question of the degree of deference that courts must afford the Executive's factual determinations and conclusions in wartime . . ." Thus, this issue in the Gold Train case connected with Department of Justice's most prominent struggles of the era.

Did the Department of Justice have any choice but to found its position on jurisdictional arguments relating to its pro-Executive power viewpoint on national security? For one thing, the courts have precedent on the issue of the APA and the military authority exception. The Department of Justice could have argued from that precedent. Furthermore, some elements of the case offered grounds for argument on the merits. The Gold Train incident occurred in Austria, which was "occupied territory" in APA language. Additionally, Army officers had used the term "requisition" in connection with the Gold Train, which could be interpreted as military authority.

The Department of Justice could have argued that the Army had exercised military authority in its overall handling of the train as part of the occupation, including the orderly disposition of much of its contents. To do so, the Department of Justice could characterize the looting as an irregularity that occurred in the course of a proper activity by an army of occupation.

Even if the court refused to lump the looting in with the rest of the Army's activity, such an approach by the Department of Justice would have provided it with a litigation benefit. That approach would have kept the court's focus on why it should let the government invoke, at the threshold, the APA exemption for the more orderly Army activity. That way, the Department of Justice might have persuaded the court on the case's outset to dismiss challenges to all the Army's more orderly activity, such as properly conducted auctions and use of the proceeds to repay the contributors to refugee assistance. Proceeding this way would have narrowed the scope of the case to just the looting. The United States had a much smaller stake, both morally and practically, in defending disorderly

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107. Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673 (2010).

looting by individual soldiers and officers motivated only by personal greed.

On one portion of this issue, the *Rosner* court went along with the Department of Justice. Plaintiffs argued that the supervisory role of the military headquarters back in the United States in the Gold Train matter meant that the "war function" exception from the APA did not apply because the exception is only for "military authority exercised *in the field.*" However, the *Rosner* court agreed with the government that "virtually all military action will be traceable, at some level, back to United States soil. Thus, to allow the exception that Plaintiffs advocate would essentially swallow the 'war function' rule."[108]

On the central aspect of this crucial issue, the *Rosner* court refused to accept Department of Justice's position. This concerned whether the Army's actions—the looting—fit the exception for military authority. Here was a subtle movement by the district court, which showed its neutrality between the parties. The court had just ruled against the plaintiffs as to the "headquarters exception." Now it continued: "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."[109]

The court stood tough against the Department of Justice's demand for deference to the Executive Branch on the issue of military authority. It decided that the facts of the Gold Train looting did not fit the exception from APA coverage for military authority. The court thereby drew something of a distinction between takings (which can occur in a situation where proper military order is being followed), and APA violations not falling in the military authority exception (which occur when proper military order is *not* being followed). Since the alleged facts showed proper military order not being followed, plaintiffs' APA claim fell within the court's jurisdiction.

Next came another subtle movement by the district court. On reconsideration, the Department of Justice pressed hard on the issue of the APA's military authority exception. The court did not choose to make extensive law at that time. Rather, it noted that the issue had arisen in one of the Guantanamo Bay cases then at the district court (which subsequently became the first Supreme Court Guantanamo Bay case, *Rasul v. Bush*) and indicated it was not eager to get entangled with issues being dealt with elsewhere in that way.

Was the military authority exception up for interpretation? The *Rosner* court notes the absence of legislative history behind the military authority exception. However, the court ignores the elaborate negotiations between the Department of Justice and of the Army that occurred before the APA

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108. Rosner v. United States, 231 F. Supp. 2d 1202, 1211 n.13 (S.D. Fla. 2002).
109. *Id.* at 1212.

emerged in Congress,[110] including negotiation over the military exception.[111]

The military would have preferred a version of the law that exempted whole military departments from the APA.[112] However, this was more than the non-military Executive officials involved in the drafting would give. The choice of the term military authority involved a functional analysis of the nature of the activity - the nature of what the Department of the Army was doing—rather than simply ending the inquiry upon finding the activity was housed in the Department of the Army. The APA did not require that the exercise of military authority occur in the face of an enemy. Thus, the plaintiffs accurately argued that the U.S. Army's mishandling of the plaintiffs' belongings was not exempt by the APA. The Department of Justice could have counter-argued that "in the field" or in "occupied territory" in this instance involved the disposition of the enemy's own spoils of war. However, the case was settled before the APA issue was fully resolved.

C. Implied Contract

The plaintiffs' APA claim had a drawback. The APA does not provide monetary relief. Plaintiffs' APA claim sought only an accounting and a return of their property. However, this relief fell far short of just compensation.

In an effort to gain just compensation, the plaintiffs' also alleged a breach of an implied contract of bailment. The Department of Justice recognized the strength of this claim. In response, their motion for reconsideration predominately focused on the bailment claim.

Often, claims involving a breach of an implied contract of bailment,[113] consist of individuals seeking compensation for items left with customs officers and not returned.[114] In this context, the Supreme Court has ruled on the implied contract of bailment.[115] The Court's opinions dwell on the factual details of individual cases[116] and do not address the larger principles underlying these claims—Constitutionality of actions in a post-war environment.

Yet there is some significance in the Department of Justice's strenuous

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110. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

111. Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673 (2010). Ms. Kovacs has carefully marshaled this background. She is an appellate attorney in the Environment Division of the Department . Her work has balance and persuasiveness.

112. *Id.*

113. *See* Hoffmann v. United States, 53 F. Supp. 2d 483 (D.D.C. 1999)(resolved an issue about a famous photographer of Hitler's on the basis of bailment arguments).

114. Ronald L. Cornell, Jr., Note, *Property Damage Claims Against the Customs Service: Are There Adequate Remedies?*, 22 VAND. J. TRANSNAT'L L. 385 (1989).

115. Kosak v. United States, 465 U.S. 848 (1984).

116. Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980).

resistance to this claim. The Tucker Act waives sovereign immunity for the U.S. government if it has "any express or implied contract."[117] The Supreme Court interpreted the waiver of sovereign immunity to apply to two types of contract claims. The Court held that Congress waived sovereign immunity for express contract claims and implied-in-fact contract claims. However, Congress did not waive immunity for quasi-contracts or implied-in-law contract claims.[118] The Court explained that both express and implied-in-fact contracts are true contracts, but that, despite its name, implied-in-law contracts are not contracts at all, but a species of restitution. Whereas express or implied-in-fact contracts rest on a promise, restitution rests on natural justice or equity, not a promise. The Court concludes by explaining that Congress only waived sovereign immunity for promise-based claims, not for claims based upon natural justice.

While those contractual distinctions may seem clear, from a perspective of cultural understanding, implied-in-fact contract claims actually occupy something of an in-between position between express contract and restitution claims. Similar to express contracts, implied-in-fact contracts indicate an obligation. However, the sense of obligation does not derive from an express promise. The obligation derives from a contextual understanding of a factual situation, which is similar to the equitable basis for restitution. Honorable parties may not recognize a difference between a contextual understanding of what was undertaken, and a contextual understanding of what should be undertaken. Thus, the U.S. government may be liable for an implied contract.[119] The content of the implied contract is dependent upon the meaning of governmental actions within a given cultural context. This particularly applies to the government's treatment of property. The concept of property as a key human right is not unique to the Gold Train case. Property issues have been the subject of human rights studies in a multitude of countries, including Cuba,[120] Israel,[121] Bosnia,[122] and others.[123]

The United States government was seen in the world as fair and just at the time of the Gold Train incident. Its officers' words of reassurance to refugees about respectful handling of their property would be heard as trustworthy and serious. For the United States, the action of taking responsibility over property, coupled with words of undertaking, creates an

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117. 28 U.S.C. § 1346(a)(2) (2006).

118. Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939).

119. Willard L. Boyd III, *Implied-in-Fact Contract: Contractual Recovery Against the Government Without an Express Agreement*, 21 PUB. CONT. L.J. 84 (1991).

120. Daniel A. Espino, *Step-Down Restitution: A Proposal for an Equitable Resolution to Confiscated Cuban Property* 32 NOVA L. REV. 423 (2008).

121. Michael Kagan, Article, *Restitution as a Remedy for Refugee Propperty Claims in the Israeli-Palestinian Conflict*, 19 FLA. J. INT'L L. 421 (2007).

122. Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U. J. INT'L L. & POL. 441 (2005).

123. Megan J. Ballard, *Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations*, 28 BERK. J. INT'L L. 462 (2010).

implied-in-fact contract—including when those words of undertaking are stated overseas to a "friendly" alien.

In the Supreme Court's words, "a meeting of minds" in an implied-in-fact agreement is "not embodied in an express contract," but "is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."[124] The key phrases—"inferred," "from conduct," "light of surrounding circumstances," and "tacit"—show the extent to which surrounding cultural expectations provide meaning to the conduct that determines whether an implied-in-fact contract exists.[125] Indeed, one pair of legal commentators familiar with claims against the United States argued that even promissory estoppel fits the implied-in-fact contract theory.[126] The trial court in *Rosner* identified a channel by which the Congress extends rights, through its statutory waiver of sovereign immunity, to extraterritorial aliens.

The bailment claim encompassed two challenging aspects. The first centered on identifying the property on a class-wide basis. In order to assert the bailment claim on a class-wide basis, class counsel retained Hungarian Holocaust experts who conducted extensive archival work in the National Archives of Hungary. Based on that archival research, the experts concluded with more probability than not that the property of the residents of approximately 40 communities in Hungary was on the Gold Train at the time it was seized. Those findings bolstered an opinion by then-Harvard Professor Arthur R. Miller that the court had sufficient evidence for it to certify a class.[127]

The plaintiffs' second challenge concerning their bailment claim centered on issues surrounding the contracting authority of the Army officers who took possession of the Gold Train. Through the research of transcripts of post-War trials in the United States and in Hungary, class counsel found evidence that the Army officers who took possession of the Gold Train had promised safekeeping of the property. As for their contracting authority, the plaintiffs relied on President Roosevelt's declaration that the allies would protect the oppressed peoples of Europe after the Germans invaded Hungary in 1944.[128]

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124. Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923).

125. Another way of putting it: "The intent of a federal agency to contract should be judged . . . . [by a standard which] bases the entity's intent to contract on the reasonable perceptions of the other party. Would the actions taken by the entity's representatives indicate to the other party an intent to contract?" Michael C. Walch, Note, *Dealing with a Not-So-Benevolent Uncle: Implied Contracts with Federal Government Agencies*, 37 STAN. L. REV. 1367, 1387 (1985).

126. Willard L. Boyd III & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U.L. REV. 605, 622 (1991).

127. *See* Declaration of Jonathan W. Cuneo in Support of Class Counsel's Joint Petition for an Award of Attorneys Fees and Expenses at 72, Rosner v. United States, 231 F. Supp. 2d 1202 (No. 01-1859).

128. The German invasion of Hungary prompted President Roosevelt's first significant statement about the Holocaust in a message to Congress dated March 24, 1944. President Roosevelt stated: "In one of the blackest crimes of all history—begun by the Nazis in the day of

Based on the plaintiffs' evidence, the *Rosner* court identified a tacit understanding of the implied-in-fact contract and a context that implied obligation. Thus, the court held that in this context, the complaint had stated facts supporting a waiver of sovereign immunity. This meant that the plaintiffs had access to a full remedy. The *Rosner* court's decision to leave alive the claim of an implied-in-fact contract was no small matter. The court allowed the Gold Train victims their rights to a day in court.

The *Rosner* court, by directing the case to proceed as to the implied-in-fact contract for bailment, made a subtle statement about human rights. By pushing the bailment claim forward, the court forced the U.S. government to actively consider settling with plaintiffs. The court's ruling created a likelihood of fact discovery and trial deadlines, pressuring the government to avoid these by settling. [129]

IV. CONCLUSION: FUTURE IMPLICATIONS

Some may say the Gold Train case was one-of-a-kind when it comes to human rights and the actions of the United States. They may consider a Holocaust-era case unique. More often, the United States is charged with allegedly injuring a group of people while in the context of a struggle with a wartime enemy.

Contract-based claims will not often be available. APA claims for an accounting or for return of the property will not usually apply. There may not be a politically effective American community to work with, the way Holocaust-era victims were able to call upon the sympathies of the community of American Jews. In short, the contexts, both doctrinal and strategic, that worked in *Rosner* are infrequently available.

Still, the *Rosner* case offers hope for the viability of future human rights cases against the United States. First, sovereign immunity presents a strong, but not impassable, barrier to human rights cases against the United States. Although the Department of Justice succeeded in eliminating the takings claims, it did not succeed in its quest to have the *Rosner* court treat military authority exception in the APA as a political question. Nor did it succeed in

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peace and multiplied by them a hundred times in time of war—the wholesale systematic murder of the Jews of Europe goes on unabated every hour. As a result of the events of the last few days hundreds of thousands of Jews, who while living under persecution have at least found a haven from death in Hungary and the Balkans, are now threatened with annihilation as Hitler's forces descend more heavily upon these lands. That these innocent people, who have already survived a decade of Hitler's fury, should perish on the very eve of triumph over the barbarism which their persecution symbolizes, would be a major tragedy. It is therefore fitting that we should again proclaim our determination that none who participate in these acts of savagery shall go unpunished." President Franklin D. Roosevelt, Statement on Victims of Nazi Oppression (Mar. 24, 1944).

129. Specific controversies in recent years illustrate how the surrounding conditions of hostilities would influence what kind of discovery and deadlines a court might impose or allow. For example, questions about victims from the missile strike on the pharmaceutical factory at El-Shifa in Sudan occurred in the context of the struggle with Al Queda, and questions about victims of interrogation practices at Abu Ghraib occurred in the context of the Iraq war.

denying legal rights to Guantanamo detainees, as the Court held in *Rasul*[130] and *Boumediene*.[131] Thus, even though the *Rosner* court ruled against the constitutional takings claim, it kept the case alive using other theories. The balanced ruling of the *Rosner* court offers hope that future cases may receive similar balanced rulings.

Second, the various items discussed in the section on strategy have positive implications for the future. Sustained efforts pay off. By managing research about the distant place in which a human rights violation occurs, the plaintiffs "own" the facts. By working with immigrant communities in the United States, the plaintiffs project their voice through public forums, and gain leverage with public opinion. Moreover, alternative dispute resolution may benefit the plaintiffs. Judges enjoy resolving cases through mediation because often the end result is as just and fair as a judicial resolution.

Favorable law and the plaintiffs' multi-pronged strategy enabled this train to reach the light at the end of the tunnel. Hopefully this case provides insight for future human rights claims against the United States.

130. Rasul v. Bush, 542 U.S. 466 (2004).
131. Boumediene v. Bush, 553 U.S. 723 (2008).