

Appendix 6 — *Present Status of Restitution Legislation in Austria, Oct. 27, 1948*; USACA Legal Div. Admin. Branch; National Archives, Silver Spring, Maryland

1. Legal Div. USACA D/USACA Co. 27 Oct 1948 1. Pursuant to your request made at our recent conversation, I am setting forth on outline of the present status of the restitution laws. To date, there have been passed:

a. *Law No. 10* (1945), which required the present owners of aryanized or confiscated property to register this property with the Austrian authorities;

b. *Law No. 156*
(26 July 1946):

First Restitution Law, – dealing with restitution of alienated property then being administered by the Austrian State or Land Governments. (Law No. 189), published 1 September 1947, extended the term for registration of claims under this law;

c. *Law No. 53*
(27 March 1947):

Second Restitution Law, – concerning restitution of alienated property title to which had passed from the German Reich to the Austrian State;

d. *Law No. 54*
(27 March 1947):

Third Restitution Law, – providing for restitution of real and personal property then in the hands of private persons, corporations, etc.

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e. *Law No. 55*
(27 March 1947):

Property Restoration Law, – providing for restitution of property of democratic organizations which had been dissolved or driven underground during the Anschluss;

f. *Law No. 143*
(8 August 1947):

Fourth Restitution Law, – providing for re-registration of business firm names which had been deleted or changed under Nazi pressure.

2. a. PROBLEM:

Recent developments indicate that the Austrian Government has had a change of heart which threatens defeat for pending restitution legislation. The Fifth Restitution Law, designed to restore tenancy rights and first drafted in 1947, has not yet, after extensive revision, emerged from special committee for Parliamentary consideration. There is every reason to believe that the Government's unconscionable procrastination over this long-overdue law in part of its effort to curry the favor of former Nazis for the 1949 elections. Without some appropriate action on the part of the U.S. Element, it can be expected that the Fifth Restitution Law will die stillborn.

b. DISCUSSION: Until recently, the record of the Austrian Government on restitution has been satisfactory, although, because of the complicated economic problems raised at every turn, progress was necessarily slow.

The issue was first attacked by the Provisional Government through Law

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No. 10 of 1945. This statute required the registration of all property and property rights which had been seized after 13 March 1938, whether arbitrarily or under the sanction of law, for any of the Nazi-inspired reasons of race, national interest, etc. Among the acts passed pursuant to Law No. 10, the most significant was the Third Restitution Law (No. 54/47) – 27 March 1947) which dealt with the restoration to their former owners of alienated property, both real and personal. The most recent of these ordinances, the Fourth Restitution Law (No. 10437 - 8 August 1947) provided for the re-registration of the former names of business firms which had been changed or deleted under Nazi pressure.

In spite of these measures, much injustice and hardship is endured by persons who had, under the Anschluss, lost their tenancy rights in apartments, business establishments and garden plots. This situation the Fifth Restitution Law was designed to correct. Extensive revisions having been made, the bill is in its third draft; yet one and one-half years after the submission of the first draft for concurrence of the Austrian authorities, there is still no sign of impending Parliamentary action. The first draft of this bill, the work of the Ministry of Social Administration, was rejected unanimously by all other Austrian ministries on the ground that, far from restoring former tenancy rights, it would serve merely to legalize occupancy by the Aryanizers.

Not until September of last year was a second draft circulated. Embodying a number of the recommended changes, this draft was approved by most of the governmental agencies on condition that various other

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revisions be made. The bill has since been in the hands of a special committee composed of representatives of the two majority parties, with the expectation that a bi-partisan third draft would be presented to Parliament before the close of its summer session. No action has yet been taken in spite of repeated statements from the Austrian Government that the bill would be passed by this last summer.

The delay is explained by two inter-related facts: One is that, by the recent Amnesty Law and various other Governmental actions, less-implicated Nazis have been freed from existing atonement measures. The other is that 1949 is an election year. A reliable estimate places the number of less-implicated Nazis at around 450,000 and their family voting strength very greatly increases this number. The victims of Nazi aggression who now remain in Austria are considerably fewer in number. It is therefore apparent why a piece of legislation whose effect would be to take property from a large block of the voting population is not being pushed by the majority parties. It is not surprising that, in this election atmosphere, the earlier promise of these parties to restore all Nazi-fostered losses is forgotten.

Whatever the political reasons for the shelving of the restitution law, the fact remains that three-and-one-half years after the liberation of Austria, victims of expropriation are still awaiting return of their rightful dwelling and business places. The injustice of the situation is emphasized by the fact that while many of these people exist under intolerably crowded and unsanitary conditions, the Aryanizers of their property continue to occupy their unreturned dwellings.

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c. RECOMMENDATIONS:

In the light of the facts outlined above, it is recommended that appropriate measures be taken to facilitate passage of the Fifth Restitution Law by the Austrian Government. It would seem proper to go over the matter with Chancellor Figl and emphasize that the main concern for the U.S. Element is with the restitution of property to victims of Nazi oppression and not with the protection of former Nazis. Should this approach fail to produce action, it would then be in order to bring this matter to the attention of AC, with a view to having instructions issued to the Austrian Government pursuant to the provisions of Article 1 (a) of the Control Agreement.

JOHN H. CORRIDON
Colonel JAGD
Chief, Legal Div

**Appendix 7 — Paul Kesaris and Joan Gibson eds.,
Minutes of Telephone Conversations of John Foster Dulles
and of Christian Herter (1953-1961), John McCloy,
Sept. 11, 1953, Reel 1, Frame 530 (Microform 1980)**

FRIDAY, SEPT. 11, 1953

4:45 p.m.

TELEPHONE CONVERSATION WITH MR. McCLOY

Mr. McCloy telephoned to say how pleased he was with the German elections, the Secretary thought he was entitled to a great deal of credit, which Mr. McCloy modestly disclaimed, but they agreed that it was remarkable.

McCloy is attending the International Bank meeting and said he had tried to get Phleger on this problem, but he brought out that the Germans had been doing a good job on reparations claims for Nazi victims, and the Austrians have done nothing, and since the Finance Minister, Kamitz, of Austria is here he just wanted to suggest that someone call him in and sort of let him know that it would relieve some bitterness and bring about support of our policies, and help generally with the Jewish organizations.

He is going to Europe the end of the month and would like to see the Secretary, the Secy suggested he call while he was in New York next week. He also mentioned that he had dined with Connell, new Cdr. of the Legion, who said that the Secretary made a tremendous hit and stole the show at St. Louis.

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NOTE: Re Para. 2 – I telephoned Mr. Merchant who said he was dining with the Austrian tomorrow night, the attorney who is representing the Jewish groups in Austria, Mr. Ruben, had already suggested the above. The dinner is in honor of the Finance Minister, so he will talk to both of them about it, and asked that we let Mr. McCloy know this. I will take a copy of this to New York to remind the Secy.

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Appendix 8 — Secretary of State John Foster Dulles letter to Senator Irving Ives, May 16, 1958, American Jewish Committee Papers, YIVO Institute for Jewish Research, Record Group 347.17.10/GEN-10, Box 277, Folder: “Aust-Claims Com. Rest & Indem 1954-58”

MAY 16, 1958

Dear Irv:

Thank you for your letter of May 6, 1958 about Caroline Simon's interest in the claims of Austrian persecutees under Article 26 of the Austrian State Treaty.

I have been encouraged by the fact that some progress has recently been made on a few categories of claims under Article 26, and I had already planned to discuss this matter with Chancellor Raab when I meet with him next week.

Sincerely yours,

JOHN FOSTER DULLES
John Foster Dulles

The Honorable
Irving M. Ives,
United States Senate

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IRVING M. IVES
NEW YORK

UNITED STATES SENATE
WASHINGTON, D.C.

2 June 1958

Mrs. Caroline K. Simon, Vice President
The American Jewish Committee
386 Fourth Avenue
New York 16, New York

Dear Caroline:

Enclosed is a copy of a letter I recently received from Foster Dulles, which is self-explanatory and with which I am sure you will be pleased.

With very best regards, I remain

Sincerely yours,

s/ Irving M. Ives
IRVING M. IVES

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ADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON 25, D.C.

DEPARTMENT OF STATE
WASHINGTON

MAY 26, 1958

Dear Irv:

In my letter to you of May 16, 1958, I told you that I would raise with Chancellor Raab the obligations which Austria undertook under Article 26 of the State Treaty with regard to persecutees living abroad.

During the Chancellor's call on me on May 19, I discussed our interest in a prompt and satisfactory settlement of Austria's obligations. Chancellor Raab assured me that Austria would meet its obligations under Article 26 and that upon his return to Austria, he would personally review the status of the negotiations with the United States, the United Kingdom and France.

You may wish to pass the above information on to Caroline Simon.

Sincerely yours,

JOHN FOSTER DULLES
John Foster Dulles

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The Honorable
Irving M. Ives,
United States Senate

Appendix 9— *Memorandum of Conversation, May 19, 1958, reprinted in For. Rel. 1958-1960, (1993), IX, 769-70*

MEMORANDUM OF CONVERSATION

DATE: May 19, 1958

SUBJECT: Article 26 Claims

PARTICIPANTS:

Austria

His Excellency, Julius Haab, Chancellor of Austria
His Excellency, Dr. Wilfried Platzer, Ambassador of
Austria
The Honorable Dr. Friedrich Meznik, Chief of the Press
Bureau, Austrian Federal Chancellery
Dr. Paul Zedtwitz, Counselor, Embassy of Austria
Dr. Erich Haider, Special Assistant to the Chancellor

United States

The Secretary
Mr. H. G. Torbert, Jr., Director, Western Europe
Mr. R. D. Kearney, Assistant Legal Adviser, European
Affairs
Mr. F. L. Chapin, Austrian Desk

Chancellor Raab said that the Austrian Government had already agreed to pay 550 million schillings or approximately \$21 million, for the Jewish Aid Fund which had been set up several years ago. Then the Jewish groups had made

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additional claims based on Article 26. He had agreed to see the Jewish leaders on May 20 and would see what could be done about settling the claims. There had to be some end, however, to the claims.

The Secretary said that the United States had proposed a formula for settlement of the claims which would result in the payment of approximately \$5 million or less than \$200 each for the 30,000 claimants around the world. He scarcely needed to recall to the Chancellor the large measure of sympathy in the United States for the claimants. He believed it would be an advantage to Austria to settle the matter; he was glad that the Chancellor was meeting with a delegation of Jewish leaders; and he hoped that the Chancellor would be able to give them some satisfaction.

Chancellor Raab

Chancellor Raab inquired about the \$5 million figure and was informed that it represented the United States estimate of the total of all categories of claims. If the negotiations now in progress between the two governments resulted in a satisfactory settlement, the United States would be prepared to deliver a formal note stating that the United States would no longer intervene diplomatically on behalf of claimants under Article 26. Chancellor Raab broke in to say that Austria was ready to settle the claims under Article 26 and reiterated there must be an end to the Jewish claims. The Secretary pointed out that the settlement would eliminate further representation by the United States Government, but the Government could not prevent private persons from

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advancing claims or arguing with the Austrian Government. The important thing would be that the United States would not support any such action after a satisfactory settlement was reached.

Chancellor Raab said that he would be glad to look into the negotiations and see what could be done about them. Austria was drafting war damage compensation laws, and the Jewish emigrants would be treated in the same manner as Austrian nationals in Austria with regard to any such compensation.

Appendix 10 — Memorandum from Ely Mauer to Mr. Nager, Nov. 28, 1960; ACT OF STATE, Record Group 59/250/67/03/07; National Archives, Silver Spring, Maryland

To: L – Mr. Hager

From: L/E – Ely Maurer

Subject: Background to Department Issuance of the “Bernstein Letter”.

You have asked that I furnish you with a memorandum setting out the background of the Department’s issuance of the so-called “Bernstein letter”. This was the letter of April 13, 1949 from Mr. Tate, Acting Legal Adviser, to Bennet, House & Courts, attorneys for Bernstein in the case of *Bernstein v. N.V. Nederlandsche-Amerikaanach, etc.* (Holland-America Line), then pending in the New York federal courts. The letter is attached (Tab A).

The background is best set forth in narrative fashion. I think that the most important point to notice is that the letter was issued as the culmination of an already matured and enunciated Department policy which had been developing over a period of years with respect to this particular problem of the recognition of German confiscatory and discriminatory laws, decrees and acts.

A. Previous Governmental Actions

The Executive Branch had participated in or issued, during the period 1943 to 1947, a number of declarations, statements, directives, and military government laws condemning the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the

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Germans on the countries or peoples subject to their control. These are referred to in paragraph 1, items (a) through (h) of the “Bernstein letter”.

Two of these items might be described briefly. The first one is the Inter-Allied Declaration on Axis Acts of Dispossession which was issued in London in January, 1943 by 18 Allied countries, including the United States. The Declaration issued a warning to present and future holders of such property that the Governments involved intended to defeat the Axis dispossessions of property and reserved all rights to invalidate any transfers of such property. The Declaration reads in relevant part:

“The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece; India; Luxemburg; the Netherlands; New Zealand; Norway; Poland; the Union of Soviet Socialist Republics; Yugoslavia; and the French National Committee:

“Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

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“Accordingly, the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected. . . .”

The second item is Military Government Law No. 59 on the Restitution of Identifiable Property which was issued by the U.S., U.K. and France in Germany in November, 1947. This law provided for the undoing of forced transfers and the restitution of identifiable property to persons wrongfully deprived of such property within the period from 1933 to 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. Restitution was to take place, in general, despite the existence of purchasers in good faith.

B. Return of Vested Property by Office of Alien Property

The general problem involved in the Bernstein cases first arose for the Department in 1945 in the context of the work of the OAP, which had been seizing German assets. The

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Germans had, of course, either under the purported authority of their confiscatory or discriminatory laws, or without the benefit of such laws, seized large amounts of property from peoples subject to their control, and particularly from persons of the Jewish faith. The questions thus arose as to whether the OAP should retain such property as against the original owners on the basis that the property had, through seizure by the German Government, become "German". In addition, there was the question of returning property seized by the OAP which belonged to "technical" enemies, that is, persons who were located in areas conquered by the Germans. Thus, in a letter (Tab B) of June 29, 1945 to Congressman Sumners, Chairman of the House Committee on the Judiciary, signed jointly by the Acting Secretary of State (Grew), the Attorney General (Biddle), and the Alien Property Custodian (Markham), legislation was proposed to permit the return of such property. This letter stated:

"The President, or such officer or agency as he may designate, would be required, before making any return of property, to determine that the claimant had owned the property immediately prior to vesting. It is contemplated that in determining who was the actual owner at that time, consideration will be given to the question whether any property claimed had been transferred to enemy ownership under duress. If such were the case the non-enemy who was forced to make the transfer would normally be recognized as the true owner immediately prior to vesting."

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Congressman Sumners on July 10, 1948 introduced a bill, H.R. 3750, reflecting the views of the Administration. Hearing were held on the bill and then a new bill was introduced, H.R. 4571, on December 4, 1951, in substitution of H.R. 3751, and containing certain changes not pertinent here. This bill was enacted into law March 8, 1946 (P.L. 322, 79th Cong., 2d Sess., C. 83) as an amendment to Section 32 of the Trading with the Enemy Act. Section 32(a)(1), which is pertinent here, reads as follows:

“SEC. 32. (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine —

“(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and . . .”

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In the House and Senate Reports on the bill appears this statement (H. Rept. 1269, 79th Cong., 1st Sess., p. 4; S. Rept. 920, 79th Cong., 2d Sess., pp. 3-4):

“In construing who was the ‘owner’ immediately prior to vesting, acts of enemy governments which sought to divest nonenemies of their property or rights, either directly or by purported confiscation or by the exercise of duress upon the owner, would be ignored and the victim of such an act would be regarded as the ‘owner’ for purposes of this statute.”

In addition, the OAP requested a statement of policy by the Department of State with respect to Section 32(a)(1) and a letter (Tab C) was transmitted to the Alien Property Custodian (Markham) by the Under Secretary of State (Acheson) on March 15, 1946 confirming the construction of Section 32(a)(1) reflected in the Congressional Reports.

It should be pointed out that this construction of Section 32 covered property which had been in Germany at the time of confiscation and had later come to the United States, as well as property which had been in the U.S. at the time of the confiscation.

C. Bernstein I case.

Subsequent to this development the first *Bernstein* case was decided by the Court of Appeals for the Second Circuit.

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Bernstein was the sole owner of several shipping companies, the Arnold Bernstein Line and the Red Star Line. He was of the Jewish faith and had come to the U.S. from Germany in the early 1930's, at which time he had applied for naturalization. He was not, however, naturalized until 1940. In 1937, prior to his American naturalization, he revisited Germany on business. While in Germany he was taken forcibly into custody by persons described in his first suit as "Nazi officials" on various charges of violating certain German foreign exchange laws and imprisoned in Hamburg until July, 1939. These "Nazi officials" allegedly compelled him under duress to execute documents purporting to transfer the stock of his various companies to one Marcus Boeger, whom Bernstein described in his first suit as a "Nazi designee". Boeger took possession of the two companies' assets, including the vessels S.S. "Gandia", the S.S. "Penland", and the S.S. "Westerland". Boeger subsequently transferred the "Gandia" to Van Heyghen Freres, a Belgian scrap concern, and the "Penland" and "Westerland" to the Holland-America Line, a Dutch concern. Both purchasers allegedly had full knowledge of the duress to which the plaintiff had been subjected.

The first Bernstein case concerned his suit against Van Heyghen Freres, the purchaser of the "Gandia". Defendant paid approximately \$90,000 for the vessel and shortly thereafter had it insured for about \$350,000. The vessel passed on time charter to the British Minister of War Transport, was sunk during the war, and about \$400,000 was paid over as insurance proceeds to another Belgian corporation acting as defendant's agent in England. This agent also did business in New York where the plaintiff in 1946

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served upon it in a state court proceeding an attachment of the insurance proceeds as a debt owing the defendant. In his complaint the plaintiff sought damages for conversion and detention of the vessel, or, alternately, recovery of the vessel's insurance proceeds and earnings while in the defendant's possession, as money had and received by the defendant for plaintiff's use.

The federal district court in New York, to which the case was removed on defendant's application, vacated the attachment and dismissed the complaint on the theory that the extortion was by "the German Government under the Nazi regime", that the defendant, accordingly, held as transferee of a foreign sovereign, and that, as the confiscation was within German territory, it was "not subject to review in our courts" and the court, therefore, would not review defendant's title. In other words, the court refused to question the legality of the German Government's confiscation on the basis of the "Act of State" doctrine.

The Court of Appeals for the Second Circuit, in a two to one opinion by Judge Learned Hand, affirmed the District Court decision, the majority holding that the plaintiff's allegation as to "Nazi officials" and description of Boeger as a "Nazi designee" conclusively connoted the alleged duress as official and the appropriation of plaintiff's assets by Boeger as a governmental "confiscation", and hence bound the court, in the absence of explicit action by the Executive removing this restraint, to follow the established judicial doctrine that a court will not pass upon the validity of the acts of officials

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of another state. *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947) (*Bernstein I*) The Court said:

“. . . We have repeatedly declared for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such. We have held that this was a necessary corollary of decisions of the Supreme Court, and if we have been mistaken, the Supreme Court must correct it.

“Thus the case is cleared for the second question: whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine which we have just mentioned, does not apply. . . .

“This the plaintiff acknowledges as generally true, but he says that it presupposes that the state of the forum has not acted to relieve its courts of restraint upon the exercise of their jurisdiction; and that our own government has already so acted. This is the remaining and the critical issue in the case; and we have to examine what those actions have been. . . .

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“. . . the only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; some positive evidence of such an intent being necessary. . . .

The Court, after an examination of relevant actions by the Executive, including the various declarations and Military Government laws and orders applicable to occupied Germany, held that the Executive Branch had not in fact taken such explicit action.

Judge Clark, dissenting, argued that the actions of the Executive Branch as regards this type of situation were in fact sufficient to lift the restraint of the “Act of State” doctrine as applied to this case. He said:

“. . . if the policy of our Executive is one of non-recognition of Nazi oppression and of restitution to the Jews I think we are bound to observe it in our courts. And all the indications I have seen so far tend to support a finding that such is the policy of the United States. Indeed, without a clear showing to the contrary, I should think the classic excoriation of the Nazi leaders for these very acts, among others, made by the American prosecutor at Nuremberg, must be accepted by us as the authentic voice of our Executive.” (at p. 255).

A petition to the Supreme Court for a writ of certiorari was denied (332 U.S. 772).

*Appendix 10**D. Recognition of Certain Debt Claims by the Office of Alien Property*

Following the decision in *Bernstein I*, the problem of Nazi confiscation came to the Department once more in the context of the work of the OAP, but now with respect to certain debt claims. It appeared that there were on file with the OAP a number of debt claims asserted under Section 34 of the Trading with the Enemy Act, as amended, seeking payment of deposit accounts out of the vested assets of the German banks of deposit. Those accounts had been turned over by the banks to the German Government pursuant to confiscatory decree directed against Jews. These decrees provided that the banks were discharged of their obligations to the depositors. The claimants before the OAP were the successors in interest of the former owners of the accounts.

Section 34(a) of the Trading with the Enemy Act provides that: "Any defense to the payment of such [debt] claims which would have been available to the debtor shall be available to the [Alien Property] Custodian." Under this provision, if the German decrees were to be considered to have effected a valid transfer of the accounts to the German Government and a discharge of the banks' obligations to their depositors, they constituted a defense available to the banks and hence payment of the claims should be opposed by the OAP.

Faced with this situation, and with *Bernstein I* in mind, Mr. Schlesinger, Chief of the Claims Branch of OAP, sent a letter of October 12, 1948 to Mr. Gross, the Legal Adviser, in which he stated that he would "appreciate any information you can give me as to the policy of the United States in this

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regard so that this Office can most effectively assist in the implementation thereof". (Tab D)

A letter of reply of December 9, 1948 (Tab E) (cleared by L – Mr. Tate) was sent to Mr. Schlesinger by Mr. Surrey, Assistant Legal Adviser for Economic Affairs. The letter stated that the U.S. Government had consistently opposed the recognition of German confiscatory and discriminatory laws, decrees and acts, citing references, and went on as follows:

“Accordingly, the Department of State is of the view that it is against the policy of this Government to accord any validity to the German confiscatory and discriminatory laws, decrees and acts insofar as they may be concerned in the consideration of claims filed against vested German assets. The Department, therefore, recommends that these laws, decrees, and acts should not be used as a defense by your office to any claims filed against such assets.

“In reaching this conclusion, the Department has considered the cases cited in your letter, and in particular the *Bernstein* case. In the *Bernstein* case, the court rested on what it stated to be the assumed executive policy, without, however, benefit of any indication from the executive branch as to what was in fact the executive policy. The problem raised by your inquiry is concerned with the establishment of an executive policy with

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respect to defenses which may be presented against claims under section 34(a) of the Trading with the Enemy Act.

In the event that the Office of Alien Property adopts the policy proposed, this Department would have no objection to a public release announcing such policy, but would appreciate an opportunity of reviewing such release in advance of publication. Should the OAP desire to consider further the adoption of the proposed policy, the appropriate personnel of the Department will be available for discussion of the problem.”

E. *Bernstein II case*

The next development in this matter was the handing down by the Court of Appeals for the Second Circuit of its decision in the first phase of *Bernstein II*.

In addition to his suit against Van Heyghen Freres, Bernstein had also brought suit for conversion and other relief against the N.V. Nederlandsche-Amerkaansche Stoomvaart-Maatschappij (the Holland-America Line), which had purchased the assets of his Red Star Line, including the S.S. “Penland” and S.S. “Westernland”, from Boeger, the “Nazi assignee”. The complaint in this suit included causes of action for the recovery of insurance moneys paid to Holland-America in connection with the loss of one of the vessels and for the recovery of the proceeds of the sale of the other.

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After his failure in the Van Heyghen suit (*Bernstein I*), Bernstein amended his complaint in the Holland-America suit to omit his former allegations of duress by Nazi officials and attempted to set forth duress in very general terms and without revealing the source. The District Court, among other actions, dismissed this amended complaint (76 F. Supp. 335, 79 F. Supp. 38). The dismissal of the amended complaint, among other questions*, was considered by the U.S. Court of Appeals for the Second Circuit in *Bernstein v. N.V. Nederlandsche-Amerikaansche, etc.*, 173 F.2d 71 (2d Cir. 1949). In its opinion in that case, the court held (at pp. 75-76) that because of its decision in the *Van Heyghen* case and Bernstein's former flat allegations that the duress was caused by Nazi officials, any amendment must contain an allegation that the duress was not caused by the action of such officials and in addition should specify with reasonable detail the persons by whom, and the manner in which, the duress was exercised, which the amended complaint did not. However, the court held that under certain circumstances, Bernstein could file a further amended complaint alleging duress in accordance with the above requirements, and remanded the case to the District Court.

After losing the first phase of *Bernstein II*, Mr. Bennet, of Bennet, House & Coutts, attorneys for Bernstein, came to the Department in person and asked if the Department had

* There were also questions concerning the applicability of the New York Statute of Limitations to the action, the right of Bernstein to intervene as a party-plaintiff in his capacity as temporary New York receiver of the Red Star Line, and a third party complaint by the defendant against the Chemical Bank & Trust Company as warrantor.

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any views to express in this particular matter. This was, of course, at a time when we had already come quite a long way in connection with this problem. After internal discussion, it was decided to write a letter to Bernstein's attorneys, which would meet the problem raised by the court in *Bernstein I* by stating that:

“The policy of the Executive, with respect to claims asserted in the U.S. for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of the Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.”

Such a letter was sent on April 13, 1949 (Tab A). Copies were sent to the attorneys for Holland-America Line and to New York Federal District Court Judge Ryan. The letter was also published as Press Release 296 of April 27, 1949 and in 20 Department of State Bulletin 592 (1949).

Following the issuance by the State Department of its Press Release 296 on April 27, 1949, releasing the text of the Bennet, House & Couts letter of April 13, 1949, Bernstein filed with the Second Circuit a petition to amend the mandate it had handed down in its prior decision at 173 F.2d 71 (*Bernstein II*, 1st phase).

In *Bernstein v. N.V. Nederlandsche-Amerikaansche, etc.*, 210 F.2d 375 (2d Cir. 1954) (*Bernstein II*, 2nd phase), the

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Court granted this petition. After citing and quoting in part the State Department's letter, the court said:

“In view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on the acts of officials in Germany during the period in question. See 173 F.2d at pages 75-76. This will permit the district court to accept the Release in question in evidence and conduct the trial of this case without regard to the restraint we previously placed upon it.”
(at p. 376)

It was reported in the New York Times sometime later that the *Bernstein* case was settled on terms considered favorable by the Bernstein lawyers. In any event, no further decisions on this matter were handed down.

Appendix 11 — Letter from David L. Bazelon, Director, Office of Alien Property, and Assistant Attorney General, Department of Justice, to Seymour J. Rubin, Esq., Mar. 3, 1949 (copy on file in court papers of Judge Charles E. Clark, Yale University Library, Manuscripts and Archives, Group No. 1344, Box 45, Folder 182)

OFFICE OF ALIEN PROPERTY
Department of Justice
Washington 25, D.C.

Mar 4, 1949

Seymour J. Rubin, Esq.
Attorney at Law
1822 Jefferson Place, N.W.
Washington 6, D.C.

Dear Mr. Rubin:

This is with reference to your letter of December 15, 1948, concerning the question whether this Office should utilize German discriminatory decrees as a defense to debt claims asserted under section 34 of the Trading With the Enemy Act, as amended. The Department of State has advised this Office that the Government of the United States has consistently opposed the recognition of German confiscatory and discriminatory laws, decrees and acts, and in this connection it referred to the Inter-Allied Declaration on Axis Acts of Dispossession of January 4, 1943; the Gold Declaration of February 22, 1944; Law No. 1 of the Allied Control Council; Military Government Law No. 1 (implementing certain provisions of J.C.S. 1067); and Military Government Law No. 59 dealing with Restitution of

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Appendix 11

Identifiable Property. Accordingly, the Department of State was of the view that it is against the policy of this Government to accord any validity to the German confiscatory and discriminatory laws, decrees and acts insofar as they may be concerned in the consideration of claims filed against vested German assets. The Office of Alien Property, therefore, will not assert as a defense to debt claims filed under Section 34, decrees, laws and regulations of the former government of Germany, enacted or promulgated during the period between January 30, 1933 and May 8, 1945, which discriminated against individuals because of membership in a political, racial or religious group.

I might add that the Department of State in reaching its conclusion gave consideration to the *Bernstein* case (163 F.2d 246 (C.A.2d, 1947)), and in this connection pointed out that there the court rested on what it stated to be the assumed executive policy, without, however, benefit of any indication from the executive branch as to what was in fact the executive policy.

Sincerely yours,

/signed/ David L. Bazelon
David L. Bazelon
Assistant Attorney General
Director, Office of Alien Property

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Appendix 12 — Secretary of State Frank B. Kellogg letter and certification of excerpt of Geneva World Economic Conference Report July 7, 1927, in [same as immediately above, except] Folder 41-124(3)

DEPARTMENT OF STATE

Washington

In reply refer to
So. 311.5154 L 49/ –

July 7, 1927.

The Honorable

The Attorney General.

Sir:

I have the honor to refer to your letter of July 7, 1927, regarding the action which has been instituted in the District Court of the United States for the Southern District of New York against Deutches Kalisyndikat Gesellschaft et al, on the ground that the operations of the defendants are in violation of the Sherman Anti-Trust Act and the anti-trust provisions of the Wilson Tariff Act.

I am pleased to inform you that the records of the Department do not disclose that Jean Le Cornec, Pierre Gide, René Gide, or Walter B. Howe are members of the diplomatic or consular service of the French Government in the United States. The Société Commerciale des Potasses d'Alsace, to which you refer, does not of course have any diplomatic or consular status in this Country.

Appendix 12

I would state, however, that the Department, on April 12, 1927, received from the French Ambassador, a note bearing that date, with respect to the service of a subpoena on April 7, 1927, in the Southern District Court of New York on Mr. Jean Le Cornec, Director General of the Société Commerciale des Potasses d'Alsace, and others, and urging that this Department bring to the attention of the Department of Justice the representations of the French Ambassador set forth in his note. A copy of the Ambassador's note was sent to you with this Department's letter of April 12, 1927, which was acknowledged by you on April 20, 1927.

I had previously been informed by your Department that the proceedings, in connection with which the above mentioned note of the French Ambassador was addressed to me, were brought by your Department to enjoin alleged violations of the Sherman Act and the anti-trust provisions of the Wilson Tariff Act, in connection with the importation and distribution of potash in this Country, and that it had been urged in that suit that sovereign immunity should extend to the defendants on the ground that they are acting as representatives of the French Government in the commercial undertaking referred to.

With respect to your inquiry concerning the views of this Department regarding the matter, I have to inform you that it has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, and individuals doing business here, and should conform to the laws of this country governing such transactions.

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Appendix 12

I have the honor to be, Sir,

Your obedient servant,

Frank B. Kellogg.

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Appendix 12

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

Washington, D.C., July 7, 1927.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed papers are a true copy of the original letter, which is on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

s/ [illegible]
Assistant to the *Attorney General*.

REPRÄSENTANZEN IM AUSLAND

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