

## Dreyfus v. Von Finck: Expropriation - Federal Question Jurisdiction - Military Law 59

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**EXPROPRIATION — FEDERAL QUESTION JURISDICTION — MILITARY LAW 59 — POST-WAR LAW PROVIDING FOR RESTITUTION OF IDENTIFIABLE PROPERTY SEIZED BY NAZI GOVERNMENT IS NOT “LAW” FOR PURPOSES OF FEDERAL QUESTION JURISDICTION — *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir.), cert. denied, 429 U.S. 835.**

Plaintiff, in this most unusual case, was a former citizen of Germany<sup>1</sup> who had been compelled to leave his homeland by the Nazis on account of his Jewish origin. For well over twenty-eight years the plaintiff, Willy Dreyfus, had sought restitution from the defendant, Augustus von Finck and his West German banking firm, Merck, Finck & Co., alleging that the Nazis coerced him into selling his banking house<sup>2</sup> to the defendants for substantially inadequate consideration.<sup>3</sup> The involuntary transaction resulted in a net loss to the plaintiff of over one and one-half million dollars.<sup>4</sup>

In 1948, a settlement was reached which provided for the payment of additional compensation to the plaintiff,<sup>5</sup> but the defendants repudiated that agreement before actual settlement was made. Accordingly, plaintiff brought an action in the Restitution Court, administered by the United States Military Command in Germany,<sup>6</sup> to compel payment. The Restitution Court awarded judgment to Dreyfus. In 1950, defendants appealed to the Court of Restitution Appeals where the decision of the lower court was affirmed and the case remanded for enforcement proceedings.<sup>7</sup> On remand, the Restitution Court, (which had been renamed the “Restitution Chamber”), refused to enforce the appellate decision and plaintiff appealed. At oral argument before the Court of

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1. Plaintiff is presently a citizen of Switzerland. 534 F.2d 24 (2d Cir. 1976).

2. Dreyfus was the principal owner of J. Dreyfus & Co., a banking firm in Berlin, Germany, founded by his family in 1868.

3. This inequitable transaction was forced upon him “because [the] plaintiff was Jewish and under the Nuremberg Laws and other decrees of Hitler could no longer own or operate a bank in Germany . . . [nor] receive fair, adequate and appropriate compensation [for a sale thereof to the defendants].” *Dreyfus v. von Finck*, Civ. No. 73-5271, at 5 (S.D.N.Y., filed May 20, 1974).

4. Petitioner’s Brief for Certiorari at 4, *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir. 1976), cert. denied, 429 U.S. 835.

5. *Id.*

6. See note 21 *infra.*

7. See note 4 *supra.*

Restitution Appeals in 1951, plaintiff's counsel announced that the parties had concluded a second settlement and the appeal was summarily dismissed.<sup>8</sup>

In 1973, however, plaintiff brought an action in the United States District Court for the Southern District of New York<sup>9</sup> claiming that his attorney entered into the 1951 settlement without Dreyfus' knowledge or approval, that the settlement was fraudulent in nature, and that the consideration for the settlement was inadequate.<sup>10</sup> Dreyfus alleged jurisdiction under 28 U.S.C. §§ 1331 and 1350,<sup>11</sup> asserting violations of his rights by the defendant under public international law and four treaties: the Hague Convention of 1907 No. 4,<sup>12</sup> the Treaty of Versailles,<sup>13</sup> the

8. *Id.* at 5.

9. Civ. No. 73-5271 (*see* note 3 *supra*). After an ex parte hearing before Judge Brieant, plaintiffs obtained an order attachment, pursuant to NEW YORK CIV. PRAC. § 6201(1), in the amount of \$150,000 and levied on defendants' bank accounts in New York. The order was vacated after defendants posted bond. Judge Brieant noted that: "[J]urisdiction over the defendant is probably quasi in rem, extending only to the amount of the attachment. . . ." (*Id.* at 2.)

10. Petitioner's Brief for Certiorari at 8, *Dreyfus v. von Finck*.

11. 28 U.S.C. § 1331 (1970) provides: "The district courts shall have original jurisdiction of all civil cases wherein the matter in controversy exceeds the sum or value of \$10,000. . . . and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1350 (1970) provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Dreyfus also alleged jurisdiction under 28 U.S.C. § 1332 (1970) but conceded at oral argument that, since all parties were aliens, there was no diversity of citizenship. 534 F.2d at 27.

12. The Hague Convention, No. 4, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (1907).

Dreyfus contended that Article 46 of the Hague Convention of 1907, to which the United States and Germany were parties, contained provisions creating personal rights. Article 2 of the Convention states specifically that it is applicable only to the contracting parties and affords no rights to individuals. This treaty, therefore, does not grant any private rights under which Dreyfus' claim could have been sustained. Art. 46 provides: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected. Private property cannot be confiscated."

13. *Treaties, Conventions, International Acts, Protocols, and Agreements, 1910-1923*, S. Doc. No. 348, 67th Cong., 4th Sess., 3307 (1923).

The Treaty of Versailles, to which the United States was not a signatory, was later incorporated by reference in the Treaty of Berlin, to which the U.S. was a party and which was subsequently enacted into positive law by an Act of Congress. The state of war declared to exist on Apr. 6, 1917, S.J. Res. 1 (1917) 65th Cong.

Kellogg-Briand Pact,<sup>14</sup> and the Four Power Occupation Agreement.<sup>15</sup> The district court granted defendant's motion to dismiss the complaint under F.R.Civ.P. 12(b)(6)<sup>16</sup> finding that plaintiff enjoyed no personal right of action under any of the treaties cited

1st Sess., 40 Stat. 1 (1917), between Germany and the United States was ended by a joint resolution of Congress, S.J. Res. 16 (1921) 67th Cong. 1st Sess., 42 Stat. 105 (1921).

The pertinent incorporation section of the Treaty of Berlin, 42 Stat. 1939 at 1942 (1921) stated: "Germany undertakes to accord to the United States . . . all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has been ratified by the United States."

Dreyfus contended that he could avail himself of enumerated rights under the Treaty of Versailles. These provisions provided in part for systematic recovery for victims of German war crimes, [Versailles Treaty, arts. 227-30 in Treaties, Conventions, International Acts, Protocols, and Agreements, *see* note 13 *infra*]; German acceptance of responsibility for damage to Allied countries and their nationals. [*Id.* at 3419 art. 231]; and the presentation of complaints by Allied nationals to an arbitral tribunal for damage sustained in Germany. [*Id.* at 3470 art. 300]. None of the Versailles articles are self-executing because they do not purport to intervene on behalf of German nationals who have claims against their own government. In other words, private rights created by this treaty apply to the nationals of Allied countries only.

14. The Kellogg-Briand Pact, 46 Stat. 2343, 94 L.N.T.S. 57 (1928):

#### Outlawry of War.

##### Article I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

##### Article II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

The Kellogg-Briand Pact, signed by the United States and Germany was a prophylactic measure to restrain acts of international belligerency and to encourage resolution of disputes by pacific means. The treaty was merely a compact among nations; it did not confer rights upon individuals.

15. Agreement on Central Machinery in Germany, T.I.A.S. No. 1520 (1945).

The Four Power Occupation Agreement provided for enforcement of the joint occupation and control of Germany by the Allied nations. It was strictly an administrative mechanism to coordinate actions by Allied Commanders-in-Chief in their respective zones of occupation. The agreement made no mention of private injuries, reparations, restitution, or tribunals for redress of private rights.

16. Although defendants originally pleaded lack of personal and subject matter jurisdiction, the court noted that this was erroneous and treated their motion as a F.R. Civ. P. 12(b)(6) motion. Civ. No. 71 73-5721, at 4. *See* note 4 *supra*.

and that plaintiff's claim under international law was defeated by the Act of State doctrine<sup>17</sup> which precluded judicial inquiry into

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17. Basically, the Act of State doctrine is a corollary to traditional choice of law rules and provides that United States courts will not challenge the validity of the legislative and administrative acts of recognized or existing foreign states when such acts are directed at persons or property located within the territorial jurisdiction of the acting State. *See* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Cf.*, *Alfred P. Dunhill of London, Inc. v. Republic of Cuba*, 96 S. Ct. 1854 (1976).

The Act of State doctrine is far from absolute, however. The "Bernstein Exception" evolved from two related cases decided in the second circuit. In *Bernstein v. von Heygen Frers, S.A.*, 163 F.2d 246 (2d Cir. 1946), *cert. denied*, 332 U.S. 772 (1947), plaintiff's complaint, that he was coerced to transfer his business interests to a Nazi designee, was dismissed by Judge Learned Hand who noted that United States courts will not pass upon the validity of official acts within another state. Subsequent to the court of appeals decision, the plaintiff was able to secure an expression of policy from the Department of State relieving American courts from restraint in passing upon acts of Nazi officials. The views set forth by Jack B. Tate, Acting Legal Advisor, stated that: "It is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property and, . . . to relieve American courts from any restraint upon the exercise of their jurisdiction upon the validity of the acts of Nazi officials." 20 State Dep't Bull. 582-93 (1949).

The Second Circuit, acting upon the State Department letter, stated that it would amend its mandate in the case by striking out all restraints placed on the lower court providing in essence that the Act of State doctrine is inapplicable where the Executive has clearly indicated that it does not object to a court's examination of the validity of a foreign state's act, particularly with reference to Nazi actions. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 735 (2d Cir. 1954).

In *Banco Nacional de Cuba v. First National City Bank*, 442 F.2d 530 (2d Cir. 1971), the Second Circuit stated that "Bernstein arose out of a unique set of circumstances calling for special treatment, and hence should be narrowly construed and, insofar as possible, limited to its facts." *Id.* at 534. Among the unique circumstances cited by the second circuit was the fact that the Nazi Government no longer existed, and the acts which predicated Bernstein's complaint had been condemned throughout the world. *Id.* *See* *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

The district court in *Dreyfus* noted the plaintiff's tort claim is analogous factually and legally to the claim pleaded in the Bernstein case. *See* note 3 *supra*. While there is a strong argument to be made that *Dreyfus* cannot be compartmentalized under the Act of State doctrine, that idea is wholly academic after the denial of certiorari. In *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (1966), the plaintiff brought an action to replevy a Chagall painting seized by Nazi agents in Belgium. The court held the Act of State doctrine inapplicable because the confiscating government was neither extant nor recognized at the time of the suit.

The corollary derived from *Menzel* is that a United States court is not to be precluded by the doctrine from inquiring into the validity of the acts of foreign gov-

the validity of the alleged involuntary transfer of his banking interests.

After the district court dismissed the amended complaint,<sup>18</sup> plaintiff appealed to the United States Court of Appeals for the Second Circuit,<sup>19</sup> held: affirmed.<sup>20</sup>

On appeal to the Second Circuit, plaintiff argued *de novo* that Military Government Law 59 afforded him additional grounds for relief.<sup>21</sup> Judge Van Graafeiland rejected arguments based on

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ernments no longer extant or recognized by the United States Government either at the time the act in question occurred or at the time of suit. This principle would seem to bar application of the Act of State doctrine in the *Dreyfus* case as well. A United States court would, therefore, not have been precluded from inquiring into the validity of the "creeping expropriation" of the Dreyfus property in 1938 by the Nazi government. It is uncontrovertible that in 1938 nonrecognition extended to Nazi Germany, the time of the act; continued through the initial filing of the complaint in United States District Court in 1973; and to the present, where there is no effort to rescind nonrecognition and validate retroactively the acts of the defunct regime.

Therefore, the factual elements peculiar to Dreyfus alone would seemingly preclude any assertion that the United States courts are constrained from inquiring into the validity of the German "creeping expropriation" of 1938.

18. Plaintiff moved for reargument and rehearing, pursuant to Rule 9(m) of the General Rules of the Southern District of New York; this motion was granted on June 24, 1974. An amended complaint was filed on July 24, 1974. Defendants moved to dismiss the amended complaint under F.R. Civ. P. 12(b)(6) on Sept. 11, 1974 and the motion was granted by the Court. *Dreyfus v. von Finck*, Civ. No. 73-5271 at 1, (S.D.N.Y., filed Jan. 2, 1975).

19. Appeal was filed on Feb. 18, 1975. On May 15, 1975, plaintiff moved for remand to the district court because counsel, in preparing appellate briefs, concluded that Military Law 59, Restitution of Identifiable Property, 12 Fed. Reg. 7983 (1947), might furnish an additional basis for jurisdiction to the district court. In the interest of expeditious resolution, defendants stipulated that they would not object to the circuit court's review of this additional contention. It is on this basis that the question of Military Law 59 was before the court.

20. 534 F.2d 24, 31.

21. Military Law 59, 12 Fed. Reg. 7983 (1947), was promulgated to facilitate the prompt restitution of identifiable property lost or taken during World War II. In order to initiate claims for restitution, a written petition had to be filed with a Central Filing Agency which forwarded the claim for determination to the appropriate Restitution Agency [arts. 55, 56, 58]. If no objection was raised against the petition, an order was issued granting the relief prayed for [art. 62]. If, however, an objection was made, the Restitution Agency attempted to reach an amicable settlement. If such an accord could not be reached, the conflict was then referred to the Restitution Chamber [art. 63], which adjusted the legal relations of the parties in interest according to the provisions of Military Law 59 [art. 67]. Appeals from the Chamber originally went to a Board of Review [art. 68]. In 1950, this Board was replaced by the Court of Restitution Appeals [15 Fed. Reg. 1547 (1950)] whose decisions were not subject to further review [15 Fed. Reg. 1548 (1950)].

Military Law 59 on the grounds that the court had no jurisdiction to vindicate rights created by military law inasmuch as such rights could not be said to have arisen under "the Constitution, laws, or treaties of the United States."<sup>22</sup> With respect to plaintiff's other assertions, Judge Van Graafeiland agreed with the lower court that since plaintiff's complaint set forth at least a colorable claim under the four cited treaties and under the law of nations, jurisdiction was invoked properly under §§ 1331 and 1350.<sup>23</sup> On the merits, the Second Circuit ruled that plaintiff was not vested with rights under any of the treaties upon which he relied.<sup>24</sup> Further, plaintiff's claim under the law of nations was rejected for the reason that "violations of international law do not occur when the aggrieved parties are nationals of the acting state."<sup>25</sup> The Second Circuit concluded that Military Law 59 was not a "law" of the United States for purposes of federal question jurisdiction.<sup>26</sup> The court reasoned that the term "laws" within the meaning of § 1331 refers principally to laws of statutory origin.<sup>27</sup> The court did acknowledge that the term has been expanded to include federal common law as well.<sup>28</sup>

Military Law 59 was promulgated pursuant to the general authority delegated to the Commanding General of the United States Armed Forces in Germany<sup>29</sup> under a valid exercise of the "foreign relations" power vested in the President by the United

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22. 534 F.2d 29.

23. *Id.* at 27.

24. *Id.* at 30.

25. *Id.* at 31.

26. *Id.* at 28.

27. See *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); *Bell v. Hood*, 327 U.S. 678 (1945). Under the criteria delineated in *Bell*, Dreyfus' complaint is not "wholly insubstantial or frivolous" such that jurisdiction could be denied. Where a cause of action is created by federal law, it "arises under the . . . laws . . . of the U.S." within the meaning of § 1331; the suit arises under the law which creates the cause. *American Well Works Co. v. Layne and Bowler Co.*, 241 U.S. 257 (1916). See also *Madsen v. Kinsella*, 343 U.S. 341 (1952), *reh. denied*, 356 U.S. 952 (1957).

28. See *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

29. See *United States Area of Control, Proclamation No. 1*, 12 Fed. Reg. 6997 (1945). The President established through the Commanding General of the United States Forces, Military Government Courts in the nature of military commissions.

More specifically, Military Government Courts, as distinguished from courts-martial, were given jurisdiction over all persons, including civilians subject to military law and over offenses under the laws of the occupied territory. *United States Military Government Ordinance No. 2, Military Government Courts*, 12 Fed. Reg. 2190-91 (1946).

States Constitution.<sup>30</sup> The Second Circuit ruled that this type of executive action did not qualify as a “law” of the United States for § 1331 purposes.<sup>31</sup>

The case law cited by the court in support of this position appears to be unconvincing. The most recent decision relied upon by the court was a 1973 Seventh Circuit case, *Stevens v. Carey*,<sup>32</sup> in which a federal civil service employee brought an action against his federally-recognized union for reinstatement as a union member and other relief. In that case, plaintiff contended that defendants had deprived her of her right to participate in union affairs in violation of an executive order. She alleged jurisdiction under § 1331 on the grounds that executive orders, like congressional enactments, have the full force and effect of “laws . . . of the United States.” The court impliedly held that executive orders are the equivalent of “laws” only when issued pursuant to statutory authority providing for presidential implementation.<sup>33</sup> However, the court did not expressly foreclose the possibility that executive orders issued without statutory authority could qualify as “laws” under § 1331. Rather, the court appears to have based its conclusion on the view that the particular executive order in question did not explicitly confer jurisdiction upon the United States district courts to vindicate the collective bargaining rights of federal employees.

*Stevens*, in concert with other similar decisions cited by the court in *Dreyfus*,<sup>34</sup> involved executive orders which essentially

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30. The two constitutional sources of the “foreign relations” power as they relate to the Executive may be found in U.S. Const. art. II, § 2, cl. 1: “The President shall be Commander in Chief of the Army and Navy of the United States. . . .” and cl. 2: “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . and . . . shall appoint ambassadors and other public ministers and consuls. . . .” See generally L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 39-54 (1972).

31. 534 F.2d at 29.

32. 483 F.2d 188 (7th Cir. 1973).

33. *Id.* at 190.

34. See *National Ass'n of Internal Revenue Employees v. Dillon*, 123 U.S. App. D.C. 58, 356 F.2d 811 (D.C. Cir. 1966); *Manhattan-Bronx Postal Union v. Gronouski*, 121 U.S. App. D.C. 321, 350 F.2d 451 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *McDaniel v. Brown & Root, Inc.*, 172 F.2d 466 (10th Cir. 1949); *Crabb v. Welden Bros.*, 164 F.2d 797 (8th Cir. 1947); *Sweet v. B. F. Goodrich Co.*, 68 F. Supp. 782 (N.D. Ohio 1946), *appeal dismissed on other grounds*, 174 F.2d 1022 (6th Cir. 1949) (*per curiam*); *Lodge 1647 and Lodge 1904 American Fed. of Gov't Employees*

dealt with "housekeeping" functions strictly within the purview of the executive department. It did not address the question of whether an executive order might have the status of law when promulgated pursuant to a specific grant of *constitutional* authority, as had been the case with Military Law 59.

Executive orders may carry the full force and effect of law if they are issued pursuant to statutory or *constitutional* authority.<sup>35</sup> In the instant case, Military Law 59 was promulgated by the Commanding General of Occupied Germany in the exercise of powers delegated to him directly by the President of the United States as Commander-in-Chief. The Supreme Court had recognized, in *Madsen v. Kinsella*,<sup>36</sup> that in the absence of congressional attempts to limit the President's power as Commander-in-Chief of the Army and Navy, the President by virtue of his inherent constitutional authority may prescribe jurisdiction and procedure for military commissions in territory occupied by the Armed Forces of the United States.<sup>37</sup> Furthermore, it is now generally recognized, that congressional authorization is not a necessary prerequisite to issue executive orders in furtherance of American foreign policy and to direct the course of the international relations of the United States.<sup>38</sup>

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v. McNamara, 291 F. Supp. 286 (M.D. Pa. 1968); Canal Zone Central Trade Labor Union v. Fleming, 246 F. Supp. 998 (D. Canal Zone 1965), *rev'd on other grounds*, 383 F.2d 110 (5th Cir. 1967).

35. See *Legal Aid Society of Alameda Co. v. Brennan*, 381 F. Supp. 125 (N.D. Cal. 1974); *Worthy v. Herter*, 106 U.S. App. D.C. 158, 270 F.2d 905 (D.C. Cir. 1959); *cf.*, *Traylor v. Safeway Stores, Inc.*, 402 F. Supp. 871 (N.D. Cal. 1975).

36. 343 U.S. 362 (1952). This case concerned the jurisdiction of a civilian citizen of the United States who was the defendant wife of a member of the United States Armed Forces charged with murdering her husband within the United States area of control in Germany. The Supreme Court affirmed the court of appeals action discharging the writ of habeas corpus on the grounds that jurisdiction of the United States Courts of the Allied High Commission for Germany had been established by executive decree.

37. The *Dreyfus* court cited the case of *Rose v. McNamara*, 126 U.S. App. D.C. 179, 375 F.2d 924 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 859 (1967), in support of the dubious proposition that the President may establish tribunals in occupied territory only in those instances where he has been expressly authorized to do so by congressional mandate. That case did not, however, purport to assess the validity of an executive order creating a military or quasi-military tribunal where the Executive's authority derives exclusively from the terms of Article II of the United States Constitution such as was the case, arguably, with the order giving rise to Military Law 59.

38. See, e.g., *MacEwen v. Rush*, 228 F. Supp. 306 (E.D. Pa. 1964), *aff'd*, 344 F.2d 963 (3d Cir. 1965).

The Restitution Courts established under Military Law 59 derive their constitutional authority from the executive orders which established the Military Government Courts.<sup>39</sup> These executive orders were issued pursuant to constitutional authority<sup>40</sup> and thus, should have the force and effect of “law” under § 1331. The court of appeals may have acted prematurely in refusing to recognize the status of restitutionary tribunals as § 1331 “law” courts — courts whose legal authority stems from executive decrees exercised in accordance with the President’s inherent constitutional power to wage war and direct the foreign relations of the U.S.

On the merits, the plaintiff presented a substantial claim for relief under Military Law 59. That ordinance provided, in particular, for the speedy restitution of identifiable property wrongfully taken under the auspices of the Nazi regime.<sup>41</sup> Additionally, it included a lucid definition of acts constituting confiscation,<sup>42</sup> a presumption of confiscation in favor of the claimant,<sup>43</sup> and gave the restitution courts power to rescind any duressful transfer of property.<sup>44</sup>

The factual situation in *Dreyfus* was not a case of first impression for the courts created under Military Law 59. In *Osthoff v. Hofele*,<sup>45</sup> the Court of Restitution Appeals upheld the compensation claims of a former furniture store owner who, despite his wife’s membership in the Nazi party, was compelled to settle his business for less than a fair market price as a result of the German authorities’ refusal to grant him an operating license because of his “pro-Jewish” attitude. In *Poehlmann v. Kulbacher Spinnerei*

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39. Note 29 *supra*. See also Exec. Order No. 10,062, 14 Fed. Reg. 2965 (1949), by which the President vested the authority of the United States Military Government in a civilian acting as the United States High Commissioner for Germany: he possessed “authority, under immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction of the President) to exercise all of the governmental functions of the United States in Germany (other than the command of troops). . . .”

40. See note 30 *supra*.

41. Military Law 59, 12 Fed. Reg. 7983 (1947).

42. *Id.* art. 2.

43. *Id.* art. 3.

44. *Id.* art. 4.

45. 1 U.S. Ct. Restitution App. Rep. 111 (1951).

A.G.,<sup>46</sup> the same court upheld restitution in favor of a hotel owner who sold his business because of a series of officially sanctioned boycott pressures, resulting from his marriage to a Jew. These cases indicate that involuntary sales for less than adequate consideration and transfers resulting from official pressure short of actual force are the kind of wealth deprivations which are compensable under Military Law 59.<sup>47</sup>

The Second Circuit hinted that even if Dreyfus could have overcome the jurisdictional barrier to his claim under Military Law 59 he would have been barred by the special limitations provision in the statute, not to mention the affirmative defense of laches in resuscitating his claim in United States federal court. The statute of limitations under Military Law 59 required petitions for restitution to be submitted to the Central Filing Agency on or before December 31, 1948.<sup>48</sup> Plaintiff filed within the statutory period and, thus, would not have been barred by the statute of limitations. Article 57 of Military Law 59 stipulated that "any claim within the scope of this law may be prosecuted only under provisions and within the periods of limitation, set forth in this law." It might have been argued that by voluntarily dismissing his action in 1951, the plaintiff relinquished all rights to restitution under Military Law 59, since any attempt to renew his petition thereafter would not meet the limitations requirement of article 57. It is, however, well established that a court of equity will not dismiss a claim because of statute of limitations, where the expiration of the plaintiff's claim was brought about by the fraudulent act of the party pleading limitation in bar.<sup>49</sup> Since Dreyfus alleged that the 1951 settlement was procured through the fraudulent devices of the defendant, the statute of limitations would not have presented an insurmountable obstacle to plaintiff's

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46. 3 U.S. Ct. Restitution App. Rep. 701 (1952).

47. Wealth deprivation describes a "public or publicly authorized imposition of a wealth loss, (or blocking of a wealth gain), at whatever time, by whatever means, with whatever intensity and for whatever claimed purpose; involving the denial of a *quid pro quo* to the party who sustains the deprivation." See Weston, "Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriations," 16 VA. J. INT'L L. at 103 (1975).

48. Military Law 59, art. 56.

49. See *McCarthy v. Cahill*, 249 F. Supp. 194 (D.D.C. 1966); See also *Wu v. Keeny*, 384 F. Supp. 1161 (D.D.C. 1974); cf., *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946).

claim. Even so, Dreyfus would still have had to overcome the equitable defense of laches, inasmuch as a period of 22 years transpired between the date of the settlement and the commencement of his suit in federal court. It is uncontroverted that an attorney of record may not compromise the final disposition of the case without express authority from the client.<sup>50</sup> While there is no fixed period within which a person must assert his claim or be barred by laches, the length of time depends upon the facts and circumstances of the particular case. A mere delay in asserting a right does not of itself constitute laches. The delay must work to the disadvantage and prejudice of the defendant.<sup>51</sup> It remains sound judicial policy that whether or not laches attaches is a question of fact for the jury, and that the final determination is based upon the equities of the individual situation, adduced from all the evidence at trial.<sup>52</sup>

An analysis of Military Law 59 as "law" under § 1331 reveals that the Second Circuit's affirmance of the 12(b)(6) dismissal was premature. The plaintiff presented a legal claim entitling him to judicial relief. The court improvidently granted the defendants' 12(b)(6) motion, failing to construe the complaint in a light most favorable to the plaintiff, as is normally required.<sup>53</sup>

It is unlikely that American courts will confront many more lawsuits arising out of events similar to those which gave rise to the *Dreyfus* litigation. Thus, it may be that the principal case will have historical interest only.

Nevertheless, the Second Circuit's disposition of the issues in *Dreyfus* on jurisdictional grounds was tenuous at best. Simply, it was a procedural maneuver to mollify, if not entirely to circumvent, the more subtle and emotional issue of German war-time reparations and its effect upon contemporary relations between West Germany and the United States. Finally, the

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50. See *Thomas v. Colorado Trust Deed Fund, Inc.*, 366 F.2d 126 (10th Cir. 1966); *Whitehead v. Eagle-Pincher Co.*, 258 F. Supp. 308 (N.D. Okla. 1966).

51. See *Lake Development Enterprises v. Kojetinsky*, 210 S.W.2d 361 (Mo. App. 1966).

52. See *Siemens Aktiengesellschaft v. Beltone Electronics Corp.*, 381 F. Supp. 47 (N.D. Ill. 1974).

53. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975).

court of appeals was clearly incorrect in stating by way of *dicta* that adjudication of Dreyfus' claim would have been barred, in any event, by the political question doctrine.<sup>54</sup>

*Gilbert J. Genn*

54. The Second Circuit asserted that in times of war, executive decisions are generally political and military in nature and consequently, are not judicially reviewable. See *United States v. Shaughnessy*, 177 F.2d 436 (2d Cir. 1949), *cert. denied*, 338 U.S. 948 (1950); *DaCosta v. Laird*, 448 F.2d 1368, 1370 (2d Cir. 1971) (*per curiam*), *cert. denied*, 405 U.S. 979 (1972); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd by order*, 411 U.S. 911 (1973). Arguably, the court failed to recognize the different aspects of the doctrine in the areas of domestic and foreign relations. The domestic version of the political question doctrine was first adumbrated in *Marbury v. Madison* where Chief Justice Marshall said:

By the Constitution of the United States, the President is vested with certain political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his act . . . still there exists, and can exist, no power to control that discretion. The objects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

1 Cranch (5 U.S.) 137, 165 (1803).

Further amplification continued on the *Marbury* theme throughout the 19th and early 20th centuries. See *Cohens v. Virginia*, 6 Wheat (19 U.S.) 264; *Foster v. Neilson*, 2 Pet. (27 U.S.) 253 (1829); *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 120 (1831); *Cuther v. Borden*, 7 How. 1 (1849); *In re Baiz*, 135 U.S. 403 (1890); *Field v. Clark*, 143 U.S. 649 (1892); *Coleman v. Miller*, 307 U.S. 433 (1939).

In *Nixon v. Herndon*, 273 U.S. 536 (1927), the Supreme Court added a caveat to this line of domestic cases by cautioning that the mere infusion of the political process into the issues of a law suit does not preclude federal court jurisdiction because of the political question doctrine. Justice Holmes speaking for a unanimous court commented:

The question that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years. . . . *Id.* at 540.

In *Baker v. Carr*, the Supreme Court proceeded to formulate criteria for determining whether an issue constituted a political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards

for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment for multifarious pronouncements by various departments on one question. 369 U.S. 186 at 217 (1962).

Subsequent affirmance of the six point "Baker test" came in *Powell v. McCormack*, 395 U.S. 486 (1969). In that case, Congressman Adam Clayton Powell contested his exclusion from the 90th Congress due to alleged misconduct; holding, that the question involved was not political by virtue of the Constitution under the "textual commitment" test of *Baker*. The House of Representatives has the right to exclude a member if he does not satisfy one of the tests under art. I, § 2, cl. 2.

However, in *United States v. Curtiss-Wright Export Corp.*, the Court declared that even without specific constitutional authorization, the political branches of government would possess extensive powers not subject to scrutiny by the judiciary in the field of foreign relations. *Curtiss-Wright* and those of a like genre reveal that the courts may be more circumspect in reaching the merits of conduct in foreign relations than when purely internal questions are involved. See *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *C & S Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

When applied in the foreign affairs context, the political question doctrine reflects policies different from those which underlie its domestic counterpart. Four criteria are especially relevant in determining whether to apply the foreign affairs branch of the political question doctrine in any given case. First, a court must consider whether the nature of the case would require the court to examine extraordinarily large amounts of data or statistics in reaching its decision. The sheer volume of information to be assayed may, from a logistical standpoint, render the dispute inappropriate for judicial treatment. Similarly, the nature of the data itself may take the case beyond the competence of the bench, even assuming that expert witnesses are available to interpret the information. *Atlee v. Laird*, 347 F. Supp. 689, 702. So too, in certain instances, the information necessary in reaching that reasoned judgment should remain confidential. However, if the court is constrained from evaluating all the facts because of the confidentiality of the information, any adjudication on the merits could profoundly affect the nation's international posture. See *C & S Airlines v. Waterman S.S. Corp.*, 333 U.S. at 111. Secondly, a court should take into consideration its ability to evaluate and predict the international consequences of judicial intervention. Where the potential effects of adjudication on international relations are serious and the ultimate results uncertain, a court should probably refrain from exercising jurisdiction. See *Oetjen v. Central Leather Co.*, 246 U.S. at 311. Thirdly, the general absence of established legal standards in the area of foreign relations may render a particular controversy unsuitable for judicial resolution. *Id.* Finally, and most importantly, a court must discern to what extent the resolution of foreign affairs-related disputes to be decided has been textually committed by the Constitution to the discretion of the political branches of government. The court must in all such cases assess whether judicial intervention will seriously disturb the distribution of functions among the coordinate branches of government with regard to the conduct of foreign relations. This analysis is not inconsistent with the Court's discussion of foreign relations in *Baker* at 211-12:

There are sweeping statements to the effect that all questions touching foreign relations are political questions . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of possible consequences of judicial action.

See also Powell at 518. See generally Tigar, *Ask A Political Question, You Get A Political Answer*, 62 CALIF. L. REV. 1344 (1974); Note, 17 U.C.L.A. L. REV. 1135 (1970); Yokota, *Political Questions and Judicial Review: A Comparison*, 43 WASH. L. REV. 1031 (1968); Scharpf, *Judicial Review and the Political Questions: A Functional Analysis*, 75 YALE L.J. 517 (1966); A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

The Second Circuit, in *Dreyfus*, relied predominantly on purely "domestic" cases to justify its conclusion that judicial review would be precluded by the political question doctrine. The proper approach would have been to follow the analysis outlined in *Powell v. McCormack* in which the Supreme Court focused on the four criteria mentioned above in deciding whether the political question doctrine required avoidance in a foreign affairs case. A more appropriate analysis when dealing with foreign policy adjudication is to focus primary attention of the first three criteria outlined above which raise grave questions when interfaced with the foreign affairs area. See *Atlee* at 703.

Applying these criteria to the facts of *Dreyfus*, it is clear that the political question doctrine would not prevent the court from entertaining *Dreyfus'* claim for restitution. There was no need for the court to assimilate any great amount of data to decide the plaintiff's claim for compensation. No more data analysis would be required than that in an ordinary domestic breach of contract suit. Secondly, the impact of judicial intervention in international relations would be minimal. The longstanding policies of both the U.S. and German governments favor the payment of *Wiedergutmachung* ("reparation") to victims of the Nazi holocaust. Any judgment against a West German national requiring the latter to pay additional compensation for property involuntarily transferred at the behest of the Hitler regime would be unlikely to endanger United States-West German relations. Recently, however, deportation proceedings were instituted against Karlis Detlavs for his alleged fraudulent procurement of a United States entry visa in 1950. He is charged with participation in executing Jews at the Riga-Dwinsk Ghettos and in the Pogulanka Woods in 1941. See *Detlavs v. Immigration and Naturalization Service*, Civ. No. 77-1776 (D. Md., filed Oct. 25, 1977).

Thirdly, there is no problem with identifying and applying settled principles of law, since plaintiff's only viable claim for relief is founded in the provisions of Military Law No. 59 which sets forth in relatively clear terms the prerequisites for restitution. Finally, the traditional judicial concern of interference with the prerogatives of the political branches in the conduct of foreign relations should not present any obstacles to adjudication in *Dreyfus*. The State Department has stated on at least one prior occasion that it sees no reason to bar judicial resolution of claims arising out of Nazi confiscation for fear of encroaching upon the Executive Branch in the area of foreign affairs. See "Tate Letter," note 17 *supra*.