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## COMMENT

# The German Foundation Agreement: A Nonexclusive Remedy and Forum

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## INTRODUCTION

From 1938 to the end of World War II, the Nazis massacred more than six million Jews.<sup>1</sup> Genocide, however, was not the Nazis' only crime; the Holocaust was also one of the greatest thefts in history.<sup>2</sup> The Nazis stole an estimated \$320 billion worth of assets from the Jewish population and enslaved eight to ten million people.<sup>3</sup> Although German companies reaped tremendous profit from slave labor during World War II, these companies failed to acknowledge their role in the Holocaust and compensate survivors for their wrongdoing.<sup>4</sup>

While post-war treaties provided compensation for many concentration camp survivors, those agreements specifically excluded the claims of Holocaust slave laborers.<sup>5</sup> With the rise of Communism, the focus shifted to stimulating and maintaining German economic growth. In 1953, the Allies, the West German government, and various other nations suspended reparations talks and signed the London Debt Agreement. That agreement put a moratorium on collecting German debts incurred throughout the war and suspended *all* legal claims arising out of the Holocaust, including those brought in U.S. courts.<sup>6</sup> In 1990, East Germany, West Germany, and the Allies signed the Two-Plus-Four Treaty, which courts interpreted as lifting the moratorium.<sup>7</sup> This ushered in a wave of litigation naming defendants for their participation in the Holocaust.

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<sup>1</sup> MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS, at xi (2003); Alan Abrahamson, *Holocaust Victims' Kin Urged to Pursue Assets*, L.A. TIMES, July 14, 1998, at A3.

<sup>2</sup> See BAZYLER, *supra* note 1, at xi; Abrahamson, *supra* note 1.

<sup>3</sup> See Michael Bazylar, *Nuremberg in America: Litigating the Holocaust in the U.S. Courts*, 34 U. RICH. L. REV. 1, 191 (2000); Abrahamson, *supra* note 1.

<sup>4</sup> See STUART EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II, at 206-09 (2003) (detailing profits reaped by German companies from forced labor and how no postwar program ever provided compensation for this work); Bazylar, *supra* note 3, at 193; *infra* text accompanying note 32.

<sup>5</sup> See Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. ON LEGIS. 1, 31-34 (2002).

<sup>6</sup> See Graham O'Donoghue, Note, *Precatory Executive Statements and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation*, 106 COLUM. L. REV. 1119, 1125-26 (2006).

<sup>7</sup> See *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 454 (D.N.J. 1999).

In 1998, Swiss banks agreed to a \$1.25 billion class action settlement, which was a tremendous victory for Holocaust survivors.<sup>8</sup> Shortly thereafter, slave laborers began to sue German companies (and American companies with German operations) for restitution, seeking compensation and damages for pain and suffering.<sup>9</sup> German companies, however, were reluctant to recognize and rectify their use of forced labor for economic profit.<sup>10</sup> Yet the threat of judgment prompted many corporations to enter into negotiations with American representatives to settle these claims and avoid litigation in U.S. courts.<sup>11</sup>

In 2000, the United States and Germany concluded negotiations with the Agreement Concerning the Foundation “Remembrance, Responsibility, and the Future” (“Foundation Agreement”).<sup>12</sup> Although representatives from many nations participated in the talks, the Foundation Agreement is a compromise between the United States and Germany.<sup>13</sup> It establishes a voluntary fund financed by German industries and the German government.<sup>14</sup> Survivors worldwide who were victims of the Holocaust’s forced labor regime may apply to receive a disbursement from this fund as compensation.<sup>15</sup> In exchange, the U.S. Department of State (“State Department”) agreed to file a Statement of Interest (“SOI”) urging dismissal in every case filed in American courts by a claimant eligible for a Foundation payment. Some courts have interpreted these SOIs as precluding survivors from bringing civil claims against German companies. As this Comment argues, this effectively robs Holocaust survivors of their day in court.<sup>16</sup>

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<sup>8</sup> See Bazyler, *supra* note 3, at 194.

<sup>9</sup> See *Iwanowa*, 67 F. Supp. 2d at 432.

<sup>10</sup> See Bazyler, *supra* note 3, at 193-94.

<sup>11</sup> See *id.* at 196.

<sup>12</sup> Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.-F.R.G., July 17, 2000, 39 I.L.M. 1298, 1298-99 [hereinafter Foundation Agreement].

<sup>13</sup> See BAZYLER, *supra* note 1, at 79.

<sup>14</sup> See Foundation Agreement, *supra* note 12, at 1300-01. The U.S. also entered into similar agreements with France and Austria. See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 408 (2003).

<sup>15</sup> Foundation Agreement, *supra* note 12, at 1300-01.

<sup>16</sup> See Si Frumkin, *Why Won’t Those SOB’s Give Me My Money*, in *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* 92, 95 (Michael J. Bazyler & Roger P. Alford eds., 2006) (“I never authorized any Jewish organization to negotiate for my father or me. . . . We want direct confrontation and compensation to be decided in court, on our behalf, by a jury of our peers.”); Melvyn I. Weiss, *A Litigator’s Postscript to the Swiss Banks and Holocaust Litigation Settlements*, in *HOLOCAUST RESTITUTION*, *supra*, 103, 112 (“[A] strong legal system and unimpaired citizens’ access to justice . . . are the fundamental elements of freedom and liberty.”).

The Foundation Agreement neither expressly nor impliedly mandates dismissal of Holocaust claims.<sup>17</sup> Rather, the pledge of the Executive Branch to encourage the dismissal of Holocaust claims through SOIs has unduly prejudiced Holocaust victims.<sup>18</sup> The judiciary should refrain from deferring to Executive Branch statements that seek to bar Americans from U.S. courts.<sup>19</sup>

Part I first describes the background and negotiations that led to the Foundation Agreement. It then explains how the Foundation Agreement has operated. Part II discusses judicial deference to the Executive Branch and analyzes the split between the Third and Eleventh Circuits in their interpretation of the Foundation Agreement and the role of the political question doctrine. Finally, Part III criticizes the Third Circuit's deference to the Executive Branch for three reasons. First, the language of the Foundation Agreement does not bar litigation. A literal reading of the text supports the proposition that survivors may either collect under the Foundation Agreement or litigate their Holocaust claims (although they must choose between the two options). Second, the negotiations leading up to the Foundation Agreement reveal that the United States did not intend to prohibit litigation. Finally, the SOIs filed by the State Department are unduly prejudicial and implicate constitutional concerns.

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*But see* Anthony Sebok, *Un-Settling the Holocaust (Part II): The Legal Effect of the Forced Labor Agreement*, FINDLAW, Aug. 29, 2000, <http://writ.news.findlaw.com/sebok/20000829.html> (arguing Holocaust victims do not have legal cause of action under treaties signed between 1946 and 1990). *See generally* discussion *infra* Part III (arguing Foundation Agreement does not preclude litigation despite courts' interpretation otherwise).

<sup>17</sup> *See Garamendi*, 539 U.S. at 440-41 (Ginsburg, J., dissenting) (reflecting Foundation Agreement does not necessarily preclude litigation); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 76 (2d Cir. 2005) (Straub, J., dissenting) (arguing SOI does not necessarily demand dismissal and holding otherwise is contrary to constitutional precedent); Sebok, *supra* note 16 (stating Foundation Agreement does not legally protect Germans from lawsuits); discussion *infra* Part III.A-B.

<sup>18</sup> *See* John Gibeaut, *Foreign Fight*, A.B.A. J., July 2005, at 29, 33, available at [http://www.abajournal.com/magazine/foreign\\_fight](http://www.abajournal.com/magazine/foreign_fight) (noting trend of international defendant companies to seek State Department SOIs that outline American foreign policy interests favorable to defendant's case and success of this tactic); Adam Lebor, *The Final Insult*, TIMES (London), Oct. 28, 2000, at 24 (quoting survivor, "What we are getting now is charity. We are not getting our legal rights."); discussion *infra* Part III.C. *See generally* Deborah Pearlstein, *The Constitution and Executive Competence in the Post-Cold War World*, 38 COLUM. HUM. RTS. L. REV. 547 (2007) (arguing against unconstrained executive in foreign affairs because it has curtailed individual constitutional rights).

<sup>19</sup> *See generally* discussion *infra* Part III (arguing Foundation Agreement does not bar litigation and courts should refrain from this interpretation because it results in over-deferential judiciary and prejudice towards Holocaust victims).

These arguments support the conclusion that the Foundation Agreement is an optional remedy, but not an exclusive one.

### I. BACKGROUND

The Foundation Agreement represents Germany's desire to resolve Holocaust claims and the United States' desire to facilitate compensation for Holocaust victims.<sup>20</sup> In exchange for German government and corporate contributions to the Foundation Fund ("Fund"), the United States agreed to file an SOI in each case brought in U.S. courts against a German corporation related to its participation in the Holocaust. To date, American courts have followed the recommendations outlined in the SOIs and have dismissed Holocaust claims.<sup>21</sup> Some victims, however, have expressed dissatisfaction with the Foundation Agreement and view litigation as a better option.<sup>22</sup>

This background section consists of five parts. Subpart A chronicles the circumstances during and after World War II that precipitated the need for compensation. Subpart B describes the negotiations that led to the Foundation Agreement. Subpart C discusses the German insistence that the United States proscribe all Holocaust litigation, and the problems encountered therewith. Subpart D lays out the terms of the final agreement, and lastly, Subpart E examines the current state of the Foundation Agreement.

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<sup>20</sup> See Bazylar, *supra* note 3, at 194 (noting fear of American litigation prompted German companies to compensate slave laborers); Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 815-16 (2002) (noting "major role" litigation played in persuading establishment of Foundation Agreement); Declaration of Stuart E. Eizenstat, Deputy Sec'y of the Treasury & Special Representative of the President and Sec'y of State on Holocaust Issues, 1-2, available at <http://www.state.gov/documents/organization/6532.doc>.

<sup>21</sup> See *In re Nazi Era Cases Against German Defendants Litig.*, 196 F. App'x 93, 102 (3d Cir. 2006) (dismissing plaintiff's Holocaust-era claim because it presented nonjusticiable political question); *Whiteman*, 431 F.3d at 73-74 (affirming dismissal of Nazi-era claims against Austria on political question grounds due to U.S. statement of interest). *But see* *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 366 (3d Cir. 2006) (allowing plaintiffs to pursue claims for interest due on funds collected under Foundation Agreement); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236-39 (11th Cir. 2004) (finding no political question despite statement of interest filed by U.S. government, but dismissing case on grounds of international comity).

<sup>22</sup> See EIZENSTAT, *supra* note 4, at 339-43 (reflecting on weaknesses of Foundation Agreement); Frumkin, *supra* note 16, at 95; Lebor, *supra* note 18, at 24 (reporting dissatisfaction of many survivors with Foundation Agreement, finding it inadequate and insulting).

A. *Historical Background of Holocaust Victims' Claims*

The Nazis committed one of the worst atrocities against humankind.<sup>23</sup> Some German corporations took advantage of the mass enslavement, reaping tremendous revenue from slave labor and uncompensated medical experimentation.<sup>24</sup> During the Holocaust, these companies bid for enslaved laborers to increase their production and profit.<sup>25</sup> One study documented that of the 20,000 German companies that used slave labor, the most exploitative ones used slaves from concentration camps such as Buchenwald, Mauthausen, Dacau, and Auschwitz.<sup>26</sup> But German companies were not the only entities that utilized slave labor. Every segment of German society, from schools and hospitals to personal households, used captive foreign labor for even menial tasks.<sup>27</sup>

During negotiations to settle the war, the Allies required the new West German government to compensate the victims of Nazi persecution.<sup>28</sup> Since the 1950s, the German Republic has paid \$60 to \$80 billion to its Jewish victims under reparations programs.<sup>29</sup> The Federal Compensation Law of 1956 required the West German government to compensate their own persecuted nationals.<sup>30</sup> In addition, West Germany signed a number of bilateral treaties, agreeing to pay damages to those foreign nationals that fell victim to human rights violations committed by the Nazis.<sup>31</sup> These treaties, however,

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<sup>23</sup> Letter from Stuart Eizenstat, Deputy Sec'y of the Treasury and Special Representative of the President and Sec'y of State for Holocaust Issues, to Joe Biden, Chairman of Senate Foreign Relations Comm. (Apr. 5, 2000), available at <http://www.ustreas.gov/press/releases/ls526.htm> ("The Holocaust was not only the worst genocide in history, but also perhaps history's greatest theft.").

<sup>24</sup> See Gross, 456 F.3d at 366; BAZYLER, *supra* note 1, at 59-60; Bazyler, *supra* note 3, at 191 (estimating between eight and ten million people were forced to work in factories in Germany and Nazi Europe); Benjamin Mason Meier, *International Protection of Persons Undergoing Medical Experimentation: Protecting the Right of Informed Consent*, 20 BERKELEY J. INT'L L. 513, 521-22 (2002); Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615, 617 (2003) (reporting "[f]our patterns of exploitative behavior by private entities"); Declaration of Stuart E. Eizenstat, *supra* note 20, at 1.

<sup>25</sup> See *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 433 (D.N.J. 1999).

<sup>26</sup> See BAZYLER, *supra* note 1, at 60.

<sup>27</sup> *Id.*

<sup>28</sup> See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 404 (2003).

<sup>29</sup> See BAZYLER, *supra* note 1, at 61; Bazyler, *supra* note 3, at 193 n.791.

<sup>30</sup> See Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503, 507 (2002).

<sup>31</sup> See *id.*

did not address many claims and specifically excluded all victims of slave and forced labor.<sup>32</sup>

The rise of Communism changed the focus. Concerned that prolonged reparations would hinder Germany's economic growth, the Allies suspended reparation talks in favor of economic growth.<sup>33</sup> As a result, in 1953, the United States, the Federal Republic of Germany ("F.R.G."), and seventeen other nations signed the London Debt Agreement.<sup>34</sup> Structured as an "international bankruptcy workout plan,"<sup>35</sup> the London Debt Agreement put a moratorium upon all remaining claims against the German government and companies until a final reparations treaty was signed.<sup>36</sup>

Following the collapse of the Soviet Union, in 1990 the F.R.G, the German Democratic Republic, France, the United Kingdom, the Soviet Union, and the United States signed the Two-Plus-Four Treaty.<sup>37</sup> Courts interpreted that treaty as the final peace agreement, signaling the end of the London Debt Agreement's moratorium.<sup>38</sup> As a result, the 1990s ushered in a series of Holocaust claims in U.S. federal courts, naming the governments and companies of Switzerland, Austria, France, and Germany as defendants.<sup>39</sup> U.S. courts had jurisdiction over the defendant companies because most had major operating offices in the U.S.<sup>40</sup> In response to the flood of litigation,

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<sup>32</sup> See Bazylar, *supra* note 3, at 193 (noting slave labor victims faced "Catch-22" type of situation" because German government blamed German companies for their labor and German companies blamed German government for Holocaust); Otto Graf Lambsdorff, *The Negotiations on Compensation for Nazi Forced Laborers, in HOLOCAUST RESTITUTION*, *supra* note 16, at 170, 171 ("Restitution of property and compensation to victims of the Nazi-regime began immediately after Germany's surrender. However, compensation for forced labor was expressly excluded."); Vagts & Murray, *supra* note 30, at 508.

<sup>33</sup> See Neuborne, *supra* note 24, at 813 n.62; Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 125 n.148 (2002).

<sup>34</sup> See Ramasastry, *supra* note 33, at 125 n.148.

<sup>35</sup> Neuborne, *supra* note 20, at 813 n.62.

<sup>36</sup> See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 403-04 (2003).

<sup>37</sup> *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 454 (D.N.J. 1999).

<sup>38</sup> *Id.*; see Neuborne, *supra* note 20, at 813 n.62.

<sup>39</sup> See Bazylar, *supra* note 3, at 6; Neuborne, *supra* note 20, at 795; see also HOLOCAUST RESTITUTION, *supra* note 16, at xiii-xviii. In contrast, only ten lawsuits were filed in American courts between 1945 and 1995, due in part to uncertainty surrounding whether American courts could hear claims regarding human rights violations committed abroad. Bazylar, *supra* note 3, at 7.

<sup>40</sup> See Vagts & Murray, *supra* note 30, at 511.

foreign defendants sought alternative resolutions and initiated negotiations with the United States.<sup>41</sup>

### *B. The Foundation Agreement Negotiations*

In 1998, Swiss banks agreed to a \$1.25 billion settlement in a class action lawsuit arising from their participation in the Holocaust.<sup>42</sup> That settlement ended a two-year battle over lost or stolen bank assets. As a direct result of that unprecedented settlement, Holocaust victims filed the first lawsuit in U.S. courts against a German defendant for its use of slave labor during the Holocaust.<sup>43</sup> The plaintiffs named Ford Motor Company and Ford Werke A.G., its German subsidiary, claiming unjust enrichment, compensation, and damages for pain and suffering.<sup>44</sup> The lawsuit accused the defendants of profiting from the use of slave labor.<sup>45</sup> Afterwards, more Holocaust victims initiated claims in federal district courts against German companies for their use of slave labor.<sup>46</sup> Although these companies successfully defended themselves, the threat of continued litigation in the wake of the Swiss settlement made them extremely nervous that they would be faced with multiple billion dollar settlements.<sup>47</sup> Both the German government and German companies were eager to put an end to Holocaust-related litigation.<sup>48</sup>

In response to the flood of litigation, in 1999 the German Chancellor publicly announced his intention to create a general fund to compensate Holocaust victims.<sup>49</sup> This Fund was an essential component of the Foundation Agreement; its creation was contingent on assurances that litigation would cease. American government officials, trial lawyers representing the victims, German company

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<sup>41</sup> See Bazylar, *supra* note 3, at 196 (“German Chancellor Gerhard Schroeder made it obvious that the fund was being created as a means to shortcut lawsuits filed against German industry in the U.S.”); Declaration of Stuart E. Eizenstat, *supra* note 20, at 2.

<sup>42</sup> See Neuborne, *supra* note 20, at 807-08.

<sup>43</sup> See BAZYLAR, *supra* note 1, at 63; Deborah Sturman, *Germany’s Reexamination of Its Past Through the Lens of the Holocaust Litigation*, in HOLOCAUST RESTITUTION, *supra* note 16, at 215, 215.

<sup>44</sup> *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 432 (D.N.J. 1999).

<sup>45</sup> *Id.* at 433; see Bazylar, *supra* note 3, at 203.

<sup>46</sup> See BAZYLAR, *supra* note 1, at 64; Bazylar, *supra* note 3, at 207.

<sup>47</sup> See BAZYLAR, *supra* note 1, at 69-70.

<sup>48</sup> See *id.*; see also Declaration of Stuart E. Eizenstat, *supra* note 20, at 2.

<sup>49</sup> See BAZYLAR, *supra* note 1, at 70; Roger Cohen, *German Companies Adopt Fund for Slave Laborers Under Nazis*, N.Y. TIMES, Feb. 17, 1999, at A1.

heads, American Jewish leaders, and other foreign representatives all attended the discussions to negotiate terms agreeable to all parties.<sup>50</sup>

The German government and German companies agreed to contribute to the Fund, from which victims could apply to receive compensation.<sup>51</sup> American representatives and victims' attorneys argued with German government and company heads over an appropriate size for the Fund.<sup>52</sup> German companies suggested \$1.7 billion.<sup>53</sup> American lawyers proposed \$20 billion.<sup>54</sup> The drastic difference in the amounts resulted in an impasse.<sup>55</sup>

Meanwhile, on September 13, 1999, two federal judges dismissed five slave labor suits, including the one against Ford.<sup>56</sup> Those dismissals impaired the ability of victims' lawyers to negotiate a higher Fund amount.<sup>57</sup> The threat of litigation was important to protect victims' interests, as it prompted the creation of the Foundation Agreement in the first place.<sup>58</sup> Thus, the dismissals were a tremendous setback for the victims in the restitution negotiations.<sup>59</sup> If the dismissals had come down after the establishment of the Foundation Agreement, it is likely the final amount of the Fund would have been higher.<sup>60</sup> Ultimately, the parties settled on a total of 10 billion Deutsche Marks (around \$5 billion).

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<sup>50</sup> See BAZYLER, *supra* note 1, at 72; Declaration of Stuart E. Eizenstat, *supra* note 20, at 3. Although representatives of many nations participated in the negotiations, the U.S. and Germany were the only signatories to the Foundation Agreement. Foundation Agreement, *supra* note 12, at 1298.

<sup>51</sup> See Sean D. Murphy, *Implementation of German Holocaust Claims Agreement*, 97 AM. J. INT'L L. 692, 692 (2003). Initially, the plan proposed to distribute payments from the Fund after September 1, 1999. Various obstacles and disagreements during the negotiations, however, prevented the drafters of the Foundation Agreement from meeting that deadline. See BAZYLER, *supra* note 1, at 72-89.

<sup>52</sup> Declaration of Stuart E. Eizenstat, *supra* note 20, at 5.

<sup>53</sup> BAZYLER, *supra* note 1, at 72-73.

<sup>54</sup> *Id.* at 73.

<sup>55</sup> See *id.* at 74.

<sup>56</sup> See Bazylar, *supra* note 3, at 209.

<sup>57</sup> Michael Bazylar & Amber Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT'L L. 683, 695 (2003).

<sup>58</sup> See Bazylar, *supra* note 3, at 232 ("[T]he dismissals of the . . . lawsuits appeared to significantly shift the offensive pressure of Holocaust claimants and their lawyers . . .").

<sup>59</sup> See BAZYLER, *supra* note 1, at 74-77.

<sup>60</sup> See *id.* at 77. See generally Bazylar, *supra* note 3, at 232-37 (arguing dismissals were in error).

*C. The Requirement of Legal Peace*

From the beginning, the German companies and government agreed to finance the Fund in exchange for an American pledge.<sup>61</sup> German corporations required that the Foundation Agreement establish “legal peace.”<sup>62</sup> Legal peace included the complete dismissal of all pending Holocaust claims against German defendants and immunity from future slave labor litigation in American courts.<sup>63</sup> Until the United States guaranteed legal peace, German companies refused to contribute to the Fund.<sup>64</sup>

The task of accomplishing immediate legal peace through Executive Branch action proved difficult because complete dismissal of pending claims intruded upon traditional territory of the Judicial and Legislative Branches.<sup>65</sup> One district court judge made this problem a reality, refusing to grant a voluntary dismissal of an action against German banks.<sup>66</sup> This refusal threatened to unravel the entire Foundation Agreement because the Germans insisted on the dismissal of all pending suits as a condition of the Foundation Agreement. Two months of criticism, however, prompted the judge to allow a conditional dismissal.<sup>67</sup> Still, this was not enough for the parties. On appeal, the Second Circuit Court of Appeals remanded the case, directing immediate and absolute dismissal.<sup>68</sup>

In addition, the Germans insisted upon something the United States would not guarantee — preclusion of all future lawsuits.<sup>69</sup> American

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<sup>61</sup> See BAZYLER, *supra* note 1, at 83.

<sup>62</sup> See Declaration of Stuart E. Eizenstat, *supra* note 20, at 17.

<sup>63</sup> BAZYLER, *supra* note 1, at 83.

<sup>64</sup> See *id.* at 100 (“As a condition for payment of any funds, the Germans insisted that . . . they be assured of protection from any such lawsuits in the future.”).

<sup>65</sup> See *id.* at 84 (“Satisfying the two ‘legal peace’ conditions imposed by the Germans proved harder than anticipated.”); Lambsdorff, *supra* note 32, at 177 (“It took a full ten months after the German and U.S. governments signed an executive agreement in Berlin on July 17, 2000, to reach [an agreement regarding the Statement of Interest].”).

<sup>66</sup> See BAZYLER, *supra* note 1, at 84-87; see also Adler & Zumbansen, *supra* note 5, at 16-20; Neuborne, *supra* note 20, at 826-27.

<sup>67</sup> See Adler & Zumbansen, *supra* note 5, at 19-20.

<sup>68</sup> See BAZYLER, *supra* note 1, at 87; Adler & Zumbansen, *supra* note 5, at 21.

<sup>69</sup> See Eric Rosand, *Resolving Holocaust Claims at the End of the 20th Century: The U.S. Government’s Role*, 8 ILSA J. INT’L & COMP. L. 373, 375 (2002) (detailing reasons why United States declined to concede Germans’ desire to dispose of all lawsuits); Gideon Taylor, *Where Morality Meets Money*, in HOLOCAUST RESTITUTION, *supra* note 16, at 163, 167 (detailing American refusal to accept provision banning claims for Holocaust compensation against German government); *The Supreme Court, 2002 Term — Leading Cases*, 117 HARV. L. REV. 226, 234-35 (2003) [hereinafter *Supreme*

representatives were not sure that the Executive Branch had the power to bar litigation against foreign nationals (as opposed to foreign nations).<sup>70</sup> In addition, the United States did not want to adopt a position that completely banned valid claims from their courts.<sup>71</sup>

The parties ultimately reached a compromise.<sup>72</sup> The United States pledged to file a general Statement of Interest (“SOI”) in every future case involving Holocaust reparations.<sup>73</sup> Although courts often attach great weight to these SOIs, they are merely advisory.<sup>74</sup> The Foundation Agreement requires a standard SOI, which states that it is in “foreign policy interests” for the Foundation Agreement to be “the exclusive forum and remedy” for all Holocaust claims pertaining to slave labor.<sup>75</sup> These SOIs urge courts to dismiss any claim against a German defendant whenever there is a valid legal basis for doing so.<sup>76</sup> The language cautions, however, that foreign policy interests themselves do not provide an adequate legal basis.<sup>77</sup>

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Court] (describing American hesitancy and suspicion of Germans during negotiations for legal peace).

<sup>70</sup> See BAZYLER, *supra* note 1, at 84 (describing Germans’ surprise upon learning U.S. Executive Branch did not have authority to ban future lawsuits); Ronald J. Bettauer, *The Role of the U.S. Government in Recent Holocaust Claims Resolution*, 20 BERKELEY J. INT’L L. 1, 6 (2002) (observing there was no precedent for settling claims against foreign private entities by executive agreement and such method could be subject to challenge); Lambsdorff, *supra* note 32, at 177 (noting U.S. government was concerned that SOI could result in class action for breach of American citizens’ property rights); Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT’L L.J. 1, 5 (2003) (“[S]ole executive agreements have not been used to terminate litigation against private parties.”); Edmund L. Andrews, *Talks with Germany on Fund for Victims of Nazi Slave Labor Are Snagged by a Legal Issue*, N.Y. TIMES, June 3, 2000, at A6 (“American officials . . . agree in principle [with banning lawsuits] but say the American government does not have the power to simply bar future lawsuits.”).

<sup>71</sup> See EIZENSTAT, *supra* note 4, at 269; *supra* note 69 and accompanying text.

<sup>72</sup> See BAZYLER, *supra* note 1, at 84 (noting Count Otto Graf Lambsdorff’s acknowledgement that courts would not hear 97% of Holocaust cases).

<sup>73</sup> Foundation Agreement, *supra* note 12, at 1300; see BAZYLER, *supra* note 1, at 84. Generally, the State Department files an SOI when it has a special interest in a case. These statements apprise the overseeing court to a particular action or recommendation endorsed by the Executive. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 259 (2d Cir. 2007); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1197 (9th Cir. 2007).

<sup>74</sup> See *Sarei*, 487 F.3d at 1204-05.

<sup>75</sup> Foundation Agreement, *supra* note 12, at 1303.

<sup>76</sup> See *id.* at 1304 (listing legal hurdles in Holocaust claims including “justiciability, international comity, statutes of limitation, jurisdictional issues, forum non conveniens, difficulties of proof, and certification of a class of heirs”).

<sup>77</sup> See *id.* (pronouncing that United States takes no position on merits of legal

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D. The Berlin Accords

On December 17, 1999, the parties finalized the terms of the Foundation Agreement in three documents, collectively known as the Berlin Accords.<sup>78</sup> The Berlin Accords are composed of the Joint Statement of Principles, the Executive Agreement, and the Foundation Law.<sup>79</sup> The United States and Germany formalized the Foundation Agreement on July 17, 2000.<sup>80</sup>

The Joint Statement of Principles concluded the negotiations and reinforced both nations' support for the Foundation Agreement. It outlines the terms and underlying intentions embodied in the Agreement.<sup>81</sup> Finally, the Joint Statement provides a general overview of Fund distribution.<sup>82</sup>

The Executive Agreement is the principal document, generally synonymous with the Foundation Agreement. Both the Joint Statement of Principles and the Executive Agreement extol the goal of legal peace in the creation and implementation of the Foundation Agreement.<sup>83</sup> The Executive Agreement also memorializes the Foundation Agreement and outlines the German and American commitment to its execution.<sup>84</sup> The Executive Agreement includes the SOI requirement for each slave labor claim filed in U.S. federal courts.<sup>85</sup> It lists American foreign policy interests in resolving claims through the Fund rather than litigation.<sup>86</sup> These interests include cooperation with Germany and maintaining good relations with Israel and other Western, Central, and Eastern European nations.<sup>87</sup> The

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claims or arguments advanced by plaintiffs in Holocaust cases and that American policy interests do not themselves provide independent legal basis for dismissal).

<sup>78</sup> See Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation "Remembrance, Responsibility and the Future" (July 17, 2000), <http://germany.usembassy.gov/germany/img/assets/8497/jointstatement.pdf> (last visited Oct. 19, 2008) [hereinafter Joint Statement]; *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 368 (3d Cir. 2006); Neuborne, *supra* note 20, at 824-25.

<sup>79</sup> See *Gross*, 456 F.3d at 368; BAZLYER, *supra* note 1, at 82.

<sup>80</sup> See Foundation Agreement, *supra* note 12, at 1300; BAZLYER, *supra* note 1, at 82; Declaration of Stuart E. Eizenstat, *supra* note 20, at 5.

<sup>81</sup> Joint Statement, *supra* note 78; see *Gross*, 456 F.3d at 368.

<sup>82</sup> Neuborne, *supra* note 20, at 824-25.

<sup>83</sup> See Foundation Agreement, *supra* note 12, at 1298-1300; Joint Statement, *supra* note 78, at subdvs. 4(b)-(c).

<sup>84</sup> Foundation Agreement, *supra* note 12, *passim*.

<sup>85</sup> *Id.* at 1300, 1303-04.

<sup>86</sup> *Id.* at 1303-04.

<sup>87</sup> *Id.*; see also Declaration of Stuart E. Eizenstat, *supra* note 20, at 14-16

Executive Agreement also sets a deadline for claimants to apply for a payment from the Fund.<sup>88</sup> If a victim opts to pursue restitution through the Foundation Agreement, they waive any valid legal claim against German companies for Holocaust reparations.<sup>89</sup>

Finally, the Foundation Law establishes the Foundation Agreement as a legal entity and codifies the agreement into German law.<sup>90</sup> Under the Foundation Law, the German government and German industries were obliged to contribute DM 10 billion (around \$5 billion) to the Fund.<sup>91</sup> Restitution payments range from DM 5,000 to 15,000 (\$2,500 to \$7,500) per claimant.<sup>92</sup> The amount of compensation depends on the severity of the victim's condition during the Holocaust.<sup>93</sup>

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(elaborating on interest in maintaining good relations with Germany due to its importance as political and economic ally).

<sup>88</sup> See, e.g., Declaration of Stuart Eizenstat, *supra* note 20, at 11 (“In most cases, applicants have until April 2001 to apply . . . .”); INT’L ORG. FOR MIGRATION, FACT SHEET: GENERAL INFORMATION ON THE GERMAN FORCED LABOUR COMPENSATION PROGRAMME (2004), available at [http://www.compensation-for-forced-labour.org/pdf/Factsheet\\_03\\_04\\_%20e.pdf](http://www.compensation-for-forced-labour.org/pdf/Factsheet_03_04_%20e.pdf) (noting extended filing date of December 31, 2001 for claims under Foundation Agreement).

<sup>89</sup> Foundation Agreement, *supra* note 12, at 1302-03.

<sup>90</sup> See *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 369 (3d Cir. 2006); Declaration of Stuart E. Eizenstat, *supra* note 20, at 5.

<sup>91</sup> See *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 432-33 (D.N.J. 2000), *aff’d* by 196 F. App’x 93 (3d Cir. 2006).

<sup>92</sup> Foundation Agreement, *supra* note 12, at 1301; see Neuborne, *supra* note 20, at 800; Declaration of Stuart E. Eizenstat, *supra* note 20, at 7.

<sup>93</sup> Foundation Agreement, *supra* note 12, at 1301; see BAZYLER, *supra* note 1, at 60-61. In the litigation that led up to the Foundation Agreement, plaintiffs’ lawyers defined slave laborers as “concentration camp inmates earmarked for extermination” while forced laborers were “conquered civilian population and prisoners of war.” BAZYLER, *supra* note 1, at 60-61 (quoting STUART E. EIZENSTAT & WILLIAM Z. SLANEY, U.S. DEP’T OF STATE, PRELIMINARY STUDY ON U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II, at iv (1997), available at [www.state.gov/www/regions/eur/rpt\\_9705\\_ng\\_links.html](http://www.state.gov/www/regions/eur/rpt_9705_ng_links.html)); see also Declaration of Stuart E. Eizenstat, *supra* note 20, at 7 (defining slave laborers as “those who were intended to be literally worked to death” and forced laborers as “those for whom living conditions were somewhat less harsh”). Although the signatories initially intended the Fund to cover only slave laborers, last minute compromises allocated more than \$500,000 to other causes. See BAZYLER, *supra* note 1, at 80. This included insurance claims covered by the International Commission on Holocaust Era Insurance Claims (“ICHEIC”). See *id.* These compromises reduced the total amount available for slave and forced laborers. See *id.*

*E. The Foundation Today*

As of June 13, 2007, 1.7 million Holocaust victims have received nearly \$5 billion from the Foundation Agreement.<sup>94</sup> The United States and German governments have both lauded the accomplishments of the Foundation Agreement.<sup>95</sup> Scholars also applaud the Foundation Agreement as compensating a large number of survivors, a result that would have been impossible through litigation.<sup>96</sup> In addition, it has provided a measure of justice to Holocaust survivors.<sup>97</sup> Finally, the Foundation Agreement provides a cooperative and diplomatic model to rectify other mass human rights violations.<sup>98</sup>

Despite this approval, however, many commentators criticize it as an insufficient remedy on several grounds.<sup>99</sup> First, although no amount could ever truly compensate victims for the horrors of the Holocaust, commentators and victims find Fund payments inadequate.<sup>100</sup> Additionally, some argue that Germany and the United States created the Foundation Agreement for their own economic and political interests, not the victims' interests.<sup>101</sup> Another criticism

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<sup>94</sup> *Germany: Chancellor Merkel Praises Work of Organization That Paid Compensation to Forced Labourers of Nazi Regime*, U.S. FED. NEWS, June 16, 2007, available at 2007 WLNR 11201637 [hereinafter *Germany*].

<sup>95</sup> See Declaration of Stuart E. Eizenstat, *supra* note 20, at 14 (“The United States . . . believes the Foundation is fair under all the circumstances.”); *Germany*, *supra* note 94 (reporting German Chancellor praised work of Foundation Agreement).

<sup>96</sup> See generally Vagts & Murray, *supra* note 30 (arguing that Foundation Agreement provided quick relief to largest number of survivors).

<sup>97</sup> See Lambsdorff, *supra* note 32, at 179; Taylor, *supra* note 69, at 167-68.

<sup>98</sup> See EIZENSTAT, *supra* note 4, at 350-54.

<sup>99</sup> See Neuborne, *supra* note 20, at 831 (“The fact is that alternative forums [to American courts] are simply inadequate to give the victims a fighting chance at justice.”); Lebor, *supra* note 18, at 24 (reporting on Foundation Agreement and concluding it was in best interest of politics, not victims). See generally Morris A. Ratner, *The Settlement of Nazi-Era Litigation Through the Executive and Judicial Branches*, 20 BERKELEY J. INT’L L. 212 (2002) (arguing Swiss settlement model is better equipped to protect victims and ensure fairness).

<sup>100</sup> See BAZYLER, *supra* note 1, at 101 (“I have rarely met a survivor, Jewish or non-Jewish, satisfied with these amounts.”); Adler & Zumbansen, *supra* note 5, at 29 (quoting survivor, “To me this is partial back pay—very little, very late”); see also Declaration of Stuart E. Eizenstat, *supra* note 20, at 14 (lamenting that no sum of money could ever compensate Holocaust victims); Symposium, *Holocaust Restitution: Reconciling Moral Imperatives with Legal Initiatives and Diplomacy*, 25 FORDHAM INT’L L.J. 223, 244 (2001) (opining compensation and restitution is fundamentally impossible task); *Germany*, *supra* note 94 (quoting Chancellor Angela Merkel, “No sum of money can make good the human suffering inflicted”).

<sup>101</sup> See Roman Kent, *It’s Not About the Money: A Survivor’s Perspective on the German Foundation Initiative*, in HOLOCAUST RESTITUTION, *supra* note 16, at 205, 205-

suggests that the Foundation Agreement lacks structural safeguards because the parties to the Foundation Agreement did not submit the proposals to public scrutiny or participation.<sup>102</sup> Also, critics claim the Foundation Agreement has allowed the contributing companies to escape moral responsibility for their participation in the Holocaust.<sup>103</sup> Accordingly, these scholars conclude that resolution through the courts provides better protection of due process rights and fairness.<sup>104</sup>

## II. STATE OF THE LAW

Plaintiffs with international claims generally face tremendous difficulties getting U.S. courts to consider their claims.<sup>105</sup> Courts are traditionally deferential to the foreign policy interests of the Executive and Legislative Branches.<sup>106</sup> And courts are particularly reluctant to intrude on foreign affairs, generally deferring to executive policy.<sup>107</sup>

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06 (commenting that German and American interests in negotiations were not motivated by moral or humanitarian purposes, but by business); Ratner, *supra* note 99, at 231 (stating executive had multiple objectives during negotiations and was “undoubtedly affected by its ongoing diplomatic relations”); Symposium, *supra* note 100, at 240 (arguing United States made deal to eliminate problems interfering with international trade and avoid public relation disaster).

<sup>102</sup> See Adler & Zumbansen, *supra* note 5, at 22-24; Ratner, *supra* note 99, at 224 (“The Executive Agreement settlements have instead been implemented through boards often consisting of a majority of persons who represent the interests of entities other than the victims of Nazi persecution.”).

<sup>103</sup> See Adler & Zumbansen, *supra* note 5, at 5-6.

<sup>104</sup> See Ratner, *supra* note 99, at 231. *But see* Declaration of Stuart Eizenstat, *supra* note 20, at 12-14 (discussing advantages of establishment of Fund, including timely payment to survivors who are elderly and dying at accelerated rate, comprehensively providing benefits to all victims, and allowing for relaxed standards of proof).

<sup>105</sup> See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 136 (2d ed. 1996) (“In foreign affairs, scrutiny of governmental actions by the courts results only infrequently in vindicating the individual’s claim.”); K. Lee Boyd, *Are Human Rights Political Questions?*, 53 *RUTGERS L. REV.* 277, 280-81, 290 (2001) (discussing recent trend of courts to defer to political branches in context of international human rights claims). With respect to the Holocaust, plaintiffs have been equally as unsuccessful.

<sup>106</sup> See *Alperin v. Vatican Bank*, 410 F.3d 532, 549 (9th Cir. 2005) (“[T]he management of foreign affairs predominately falls within the sphere of the political branches and the courts consistently defer to those branches.”); HENKIN, *supra* note 105, at 132-33 (noting courts’ reluctance to curb political branches in area of foreign affairs, willingness to presume constitutional validity of their actions and interpretations, and courts’ development of doctrines of special deference to those branches); CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 245, 357 (2d ed. 2005); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 *MINN. L. REV.* 71, 81 (2000) (“In reality . . . Congress and the courts rarely affect the customary international

Subpart A describes the courts' traditional deference to the Executive Branch in the area of foreign affairs. Subpart B then discusses the Third Circuit's holding in *Gross v. German Foundation Industrial Initiative*, dismissing a Holocaust claim on grounds of the political question doctrine. Finally, Subpart C concludes with the Eleventh Circuit's decision in *Ungaro-Benages v. Dresdner Bank*, which reached the opposite conclusion, holding that Holocaust claims do not present a political question.

A. *Judicial Deference to the Executive Branch in Foreign Affairs*

Separation of powers principles and a lack of judicial expertise in foreign affairs counsel courts to avoid adjudicating cases concerning international claims.<sup>108</sup> As a result, courts rarely substantively address international claims.<sup>109</sup> Scholars argue that courts should refrain from adjudicating international claims because of the "uniqueness of foreign affairs."<sup>110</sup> In addition, the political process is somewhat self-regulating, which eliminates the need for active judicial review.<sup>111</sup>

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lawmaking sphere . . . . These are areas where the President holds primary constitutional authority."); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 943 (2004) ("Since the early nineteenth century, American courts have developed special doctrines of abstention and deference to ensure minimal judicial intervention in foreign affairs disputes.").

<sup>107</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (recognizing President's "vast share of responsibility for the conduct of our foreign relations"); MASSEY, *supra* note 106, at 357 ("The President's unilateral power of action is greatest in the field of foreign affairs.").

<sup>108</sup> See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (expressing idea that courts may lack "judicially discoverable and manageable standards" in context of some issues, including foreign disputes); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); see also *Ku*, *supra* note 106, at 131 (noting critics of expanded role of judicial review base beliefs on judicial incompetence and procedural safeguards already in place). *But see Ku*, *supra* note 106, at 138-41 (arguing for more active role of judges in adjudicating international issues because they are uniquely situated as best "referee").

<sup>109</sup> See generally *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding executive transfer of claim against Iranian government to independent tribunal); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (upholding President's power to issue proclamations regarding foreign affairs upon general grant of authority by Congress); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (finding President's blockade of southern ports constitutional).

<sup>110</sup> Nzelibe, *supra* note 106, at 944.

<sup>111</sup> See John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 295, 300 (1996). *But see* Ratner, *supra* note 99, at 231 ("[T]he early indication is that the settlements achieved through the Judicial Branch are better at guaranteeing the due process rights of and fairness to

In particular, courts cite the political question doctrine as a rationale for judicial deference.<sup>112</sup> The Supreme Court first articulated the political question doctrine in *Baker v. Carr*.<sup>113</sup> In that case, the Court set forth a test to determine whether a political question exists.<sup>114</sup> If so, the case is nonjusticiable, meaning a court may not consider its merits. The *Baker* Court articulated six factors in evaluating the justiciability of a case.<sup>115</sup> Among the listed factors, courts should consider whether the Constitution commits the issue to another branch, whether courts would express disrespect towards another branch by adjudicating the issue, or whether different governmental branches might conflict over the issue.<sup>116</sup> Thus, the political question doctrine restrains courts from inappropriately interfering with the other branches of government.<sup>117</sup> Courts often struggle to apply the *Baker* test and pinpoint exactly which factors are at issue in a given case.<sup>118</sup> Nonetheless, courts regularly cite the political question doctrine when declining to hear difficult politically charged cases.<sup>119</sup>

*Dames & Moore v. Regan* illustrates the wide scope of executive authority in the context of foreign affairs and the courts' hesitance to

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victims who are the intended beneficiaries of these settlements.”).

<sup>112</sup> See 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugo., 218 F.3d 152, 160-61 (2d Cir. 2000); HENKIN, *supra* note 105, at 143 (“[T]he courts have elevated judicial abstention to a principle that courts will not decide political questions . . .”).

<sup>113</sup> *Baker*, 369 U.S. at 217.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (“[The political question doctrine] is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government . . .”).

<sup>118</sup> See *Nixon v. United States*, 506 U.S. 224, 228-29 (1993) (commenting political question factors often blend into and support one another); MASSEY, *supra* note 106, at 106-07 (“These types of political questions do not often come purely in their prudential form; they are usually hybridized with the other strands.”); Nzelibe, *supra* note 106, at 951-67 (arguing Supreme Court has not articulated coherent set of factors to guide political question analysis).

<sup>119</sup> See generally *Goldwater v. Carter*, 444 U.S. 996 (1979) (concluding challenge to President's unilateral termination of treaty presents political questions); *Ludecke v. Watkins*, 335 U.S. 160 (1948) (finding termination of war is inherently entrusted to Executive); *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005) (listing political question cases); HENKIN, *supra* note 105, at 145 (“The doctrine of political questions is constitutionally significant only as an ordinance of extraordinary judicial abstention. . . .”); *Boyd*, *supra* note 105 (arguing political question doctrine supports “pervasive negative attitude toward the [J]udicial [B]ranch's application of human rights law as U.S. law”).

question it.<sup>120</sup> *Dames & Moore* involved an executive order issued during the Iranian hostage crisis.<sup>121</sup> The order transferred American claims against Iran to an independent tribunal and extinguished American courts' jurisdiction over Iranian assets that could be used to secure judgment in any of these claims.<sup>122</sup> The U.S. Supreme Court upheld the President's order because it fell within the Executive's constitutional powers.<sup>123</sup> The Court based its conclusion on the "broad scope for executive action" and congressional acquiescence in allowing the Executive to settle claims against foreign nations.<sup>124</sup>

The *Dames & Moore* decision also implies judicial approval of executive agreements.<sup>125</sup> Executive agreements are international agreements made by the President without the advice and consent of the Senate.<sup>126</sup> The *Dames & Moore* Court held that although Congress had not delegated specific authority to the President to take such action, in the realm of foreign affairs congressional silence with respect to executive conduct generally signified congressional approval.<sup>127</sup> Thus, the Court upheld executive agreements, even those that extinguished claims of American nationals, as a legitimate exercise of executive power.<sup>128</sup> To date, Presidents have used executive agreements (and courts have impliedly consented to this use) to settle claims arising out of international disputes.<sup>129</sup>

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<sup>120</sup> See Bradford R. Clark, *Domesticating Sole Executive Agreement*, 93 VA. L. REV. 1573, 1611-12 (2007) (discussing Court's holding in *Dames & Moore* and suggesting decision reflected "Court's discomfort with second-guessing the President's resolution of 'a major foreign policy dispute' — an area in which courts traditionally defer to the political branches"); *supra* notes 121-124 and accompanying text.

<sup>121</sup> 453 U.S. 654, 662 (1981).

<sup>122</sup> *Id.* at 665-66.

<sup>123</sup> *Id.* at 688.

<sup>124</sup> *Id.* at 677, 681-82.

<sup>125</sup> *Id.* at 679-80 (discussing use of executive agreements to settle international disputes and, at times, without either consent or regard for claimants' interests).

<sup>126</sup> MASSEY, *supra* note 106, at 376-77. There is no express or implied Constitutional authority for sole executive agreements. See HENKIN, *supra* note 105, at 215, 219. Over time, legislators have periodically questioned this power and attempted to limit it. See *id.* at 219, 222, 224. The Supreme Court has accepted them as the law of the land, in particular those "relating to recognition of a foreign government or establishing or resuming diplomatic relations, and agreements to settle claims." *Id.* at 221, 228. As a result, this undefined power to enter into executive agreements may "tempt activist" Presidents into far-reaching undertakings." *Id.* at 224.

<sup>127</sup> *Dames & Moore*, 453 U.S. at 678-79.

<sup>128</sup> *Id.*

<sup>129</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) ("Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice . . .").

While *Dames & Moore* is illustrative of general Supreme Court jurisprudence in the realm of foreign affairs, *American Insurance Ass'n v. Garamendi* focused more narrowly on the jurisprudence concerning the Foundation Agreement.<sup>130</sup> *Garamendi* involved a California statute that required all insurance companies registered in the state to disclose its insurance policies sold between 1920 and 1945.<sup>131</sup> The statute also allowed residents to sue these companies in state court for defaulted insurance claims committed during the Holocaust.<sup>132</sup> Meanwhile, in 1998 U.S. and European insurance companies established the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), a fund to which Holocaust survivors and their heirs could apply to collect unpaid insurance claims.<sup>133</sup> The Foundation Agreement stipulates that the ICHEIC will process all such insurance claims.<sup>134</sup> Thus, the Court concluded that the Foundation Agreement preempted the California law.<sup>135</sup> Specifically, the Court found that the California law intruded upon the Executive's power to conduct foreign policy.<sup>136</sup> In its conclusion, the Court upheld the Foundation Agreement as a permissible executive agreement.<sup>137</sup> *Garamendi* held that the disclosure requirement undercut the Executive's authority and resulted in inconsistent American policies with respect to the processing of insurance claims.<sup>138</sup> It did not, however, address whether a court could adjudicate a claim under the Foundation Agreement.<sup>139</sup>

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<sup>130</sup> *Id.* at 415, 420.

<sup>131</sup> *Id.* at 408-10.

<sup>132</sup> *Id.* at 409-10.

<sup>133</sup> The International Commission on Holocaust Era Insurance Claims, About ICHEIC, <http://www.icheic.org/about.html> (last visited Nov. 11, 2008).

<sup>134</sup> Foundation Agreement, *supra* note 12, at 1299; *see Garamendi*, 539 U.S. at 407.

<sup>135</sup> *Garamendi*, 539 U.S. at 420.

<sup>136</sup> *Id.* at 427 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000)).

<sup>137</sup> *Id.* at 420.

<sup>138</sup> *Id.* at 423-24.

<sup>139</sup> *Id.* at 440 (Ginsburg, J., dissenting); *see also* *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 381 (3d Cir. 2006) (explaining *Garamendi* did not apply to present case because "Supreme Court did not venture outside the confines of its preemption analysis to address questions of justiciability").

B. *The Third Circuit's Approach to the Foundation Agreement: Invoking Political Question Doctrine*

In *Gross v. German Foundation Industrial Initiative*, the Third Circuit implied that the Foundation Agreement raised political question issues.<sup>140</sup> The *Gross* plaintiffs alleged that the terms of the Foundation Agreement entitled them to receive four percent interest on all Fund payments collected.<sup>141</sup> The Third Circuit found that the specific issue of interest did not implicate the political question doctrine.<sup>142</sup>

In reaching this conclusion, the court distinguished the plaintiffs' interest claim from other claims it dismissed under the political question doctrine.<sup>143</sup> The Third Circuit held the interest dispute was a matter of contract interpretation, and accordingly did not present a political question.<sup>144</sup> The court indicated, however, that if the United States had filed an SOI, *Gross* would be nonjusticiable.<sup>145</sup> Thus, the court implied that an SOI would implicate the political question doctrine.<sup>146</sup>

The case of *In re Nazi Era Cases Against German Defendants Litigation* confirmed this Third Circuit approach.<sup>147</sup> In *Nazi Era Cases*, a Holocaust survivor sued various German companies.<sup>148</sup> The plaintiff alleged that during his internment, the Nazis forced him to undergo injections as part of a medical experiment, resulting in permanent sterilization.<sup>149</sup>

The Third Circuit dismissed the *Nazi Era Cases* claim as a nonjusticiable political question.<sup>150</sup> The court found that adjudicating the claim would express a lack of respect to the Executive Branch.<sup>151</sup> In reaching its conclusion, the court considered the Executive's interest and longstanding history in resolving all Holocaust claims through "intergovernmental negotiation."<sup>152</sup> The court viewed the SOI

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<sup>140</sup> 456 F.3d at 390-91.

<sup>141</sup> *Id.* at 371-72.

<sup>142</sup> *Id.* at 378.

<sup>143</sup> *Id.* at 380.

<sup>144</sup> *Id.* at 386-91.

<sup>145</sup> *Id.* at 385.

<sup>146</sup> *Id.* at 389-91.

<sup>147</sup> 196 F. App'x 93, 101-02 (3d Cir. 2006).

<sup>148</sup> *Id.* at 94.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 99.

<sup>151</sup> *Id.* at 98.

<sup>152</sup> *Id.* at 98-99.

as evidence of the Executive's interest in the claim.<sup>153</sup> Thus, the court expressly held that the SOI implicated a nonjusticiable political question.<sup>154</sup>

C. *The Eleventh Circuit's Approach to the Foundation Agreement: Cases Are Justiciable*

On the other hand, the Eleventh Circuit found that claims involving the Foundation Agreement did not present a nonjusticiable political question.<sup>155</sup> In *Ungaro-Benages v. Dresdner Bank*, the plaintiff claimed that a German bank stole her family's share in a machinery manufacturing company.<sup>156</sup> The court found the case justiciable.<sup>157</sup> The Eleventh Circuit relied on the Foundation Agreement's text, specifically focusing on the section that provides that the SOI itself does not provide a legal basis for dismissal.<sup>158</sup> While courts must be deferential to the interests expressed by the Executive Branch, the *Ungaro-Benages* court held that the district court complied with the terms of the Foundation Agreement when it adjudicated the case on its merits rather than dismissing on political question grounds.<sup>159</sup> Thus, the analyses of the Eleventh and Third Circuits conflict.

Ultimately, the Eleventh Circuit dismissed the case on international comity grounds.<sup>160</sup> Unlike the political question doctrine, international comity is an abstention doctrine.<sup>161</sup> It recognizes a court's jurisdiction over a case but allows the court to defer to the judgment of another forum.<sup>162</sup> In so holding, the Eleventh Circuit weighed the strength of the American and German governments' interest in deferring to the Foundation Agreement and evaluated the adequacy of the Fund as an alternative remedy.<sup>163</sup>

Although the court ultimately dismissed the case, the Eleventh Circuit's reasoning differs from the Third Circuit's reasoning in one very important aspect — whether the court had jurisdiction over the

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<sup>153</sup> *Id.* at 101-02.

<sup>154</sup> *Id.*

<sup>155</sup> *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235 (11th Cir. 2004).

<sup>156</sup> *Id.* at 1230.

<sup>157</sup> *Id.* at 1235.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1236 n.12.

<sup>160</sup> *Id.* at 1239-40.

<sup>161</sup> *Id.* at 1237. "Abstention doctrines are prudential doctrines and this court is not obligated under American statutory law to defer to foreign courts." *Id.* at n.13.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1239-40.

claim at all. This article falls in line with the Eleventh Circuit's analysis, arguing that the Foundation Agreement does not preclude litigation. Moreover, in evaluating the justiciability of the petitioner's claim, the Eleventh Circuit gave appropriate weight to the State Department's SOI and declined to invoke the political question doctrine.

### III. ANALYSIS

The Eleventh Circuit is correct: claims for Holocaust reparations do not present nonjusticiable political questions for three reasons. First, although it seeks to discourage litigation, the language of the Foundation Agreement nevertheless permits future legal action.<sup>164</sup> Second, the negotiations reveal that the United States did not intend to preclude litigation.<sup>165</sup> Finally, although SOIs filed by the State Department are entitled to due consideration, extreme judicial deference to these SOIs, treating them as virtually dispositive, is dangerous and prejudicial.<sup>166</sup>

#### A. *The Text of the Foundation Agreement Allows Judicial Remedy*

The text of the Foundation Agreement envisions a victim's ability to litigate.<sup>167</sup> The Foundation Agreement outlines the American commitment to legal peace — the State Department's obligation to file an SOI in each Holocaust claim naming a German defendant for its use of slave labor.<sup>168</sup> But the language of the SOI itself expressly states that the SOI cannot serve as a basis for dismissal.<sup>169</sup> If Germany and the

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<sup>164</sup> See *infra* Part III.A.

<sup>165</sup> See *infra* Part III.B.

<sup>166</sup> See *infra* Part III.C.

<sup>167</sup> See *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 79 n.22 (2d Cir. 2005) (Straub, C.J., dissenting) (implying majority and dissent agreement that text of Austrian agreement, modeled on Foundation Agreement, does not provide basis for dismissal); *Ungaro-Benages*, 379 F.3d at 1234 (“[B]y its own terms, the [A]greement does not provide a basis to dismiss or suspend litigation against German companies stemming from their actions during the National Socialist era.”); Sebok, *supra* note 16 (“[N]othing in the [Foundation Agreement] prevents a victim of Germany's forced labor program from filing a lawsuit in federal court tomorrow.”).

<sup>168</sup> Foundation Agreement, *supra* note 12, at 1300, 1303-04; see also *supra* notes 72-77 and accompanying text.

<sup>169</sup> Foundation Agreement, *supra* note 12, at 1304 (“The United States takes no position here on the merits of the legal claims or arguments advanced by plaintiffs or defendants. The United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal . . . .”); see Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The*

United States intended to require dismissal, they would have used mandatory language in the SOI.<sup>170</sup> Instead, the SOI states that victims “should” pursue restitution through the Foundation Agreement.<sup>171</sup> Thus, the SOI is merely advisory.<sup>172</sup>

The text of the Foundation Agreement also implies that U.S. courts can hear Holocaust claims.<sup>173</sup> The Foundation Agreement states that all recipients of a Fund payment waive the ability to bring a claim in court.<sup>174</sup> One may infer from this language that victims have viable, justiciable claims.<sup>175</sup> Otherwise, there would be no need to waive rights. A victim relinquishes her claim only if she chooses to collect from the Fund.<sup>176</sup> Thus, a Fund payment and a legal claim are

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*Supreme Court’s Vision of the Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637, 707 (2005) (“Indeed, the language of the Agreement seemed to imply that the States need not regard the Agreement as preemptive.”); *see also supra* notes 76-77 and accompanying text.

<sup>170</sup> *See generally* Foundation Agreement, *supra* note 12, at 1303-04; *Ungaro-Benages*, 379 F.3d 1227 (finding no political question because plain text of Foundation Agreement anticipates litigation and Executive opted not to outright settle claims although it had power to do so); EIZENSTAT, *supra* note 4, at 270-73 (detailing negotiations surrounding content of SOI and explaining he desired ambiguous and neutral language).

<sup>171</sup> Foundation Agreement, *supra* note 12, at 1303; *see also* Bettauer, *supra* note 70, at 9 (reflecting on new method of settling international disputes by settling for political rather than legal commitments and using language that participants “will” take various steps as opposed to “shall”).

<sup>172</sup> *See* *Am. Ins. Ass’n. v. Garamendi*, 539 U.S. 396, 440 (2003) (Ginsburg, J., dissenting) (“The United States has agreed to file precatory statements . . . but the German Foundation Agreement confirms that such statements have no legally binding effect . . . .”); Neuborne, *supra* note 20, at 824 n.101 (describing SOIs as having no “preclusive effect”); Roger M. Witten, *How Swiss Banks and German Companies Came to Terms with the Wrenching Legacies of the Holocaust and World War II*, in *HOLOCAUST RESTITUTION*, *supra* note 16, at 80, 89 (noting Foundation Agreement does not prevent class actions and eligible claimants remain technically free to sue); Declaration of Stuart E. Eizenstat, *supra* note 20, at 6 (“The Executive Agreement negotiated is not a government-to-government claims settlement agreement, and the United States has not extinguished the claims of its nationals or anyone else.”).

<sup>173</sup> Foundation Agreement, *supra* note 12, at 1302-03; *see also* Witten, *supra* note 172, at 89 (“[A]ny person receiving a payment from the German Foundation automatically gives a blanket release in favor of all German companies (and others) on all issues arising from World War II and the Nazi era . . . .”). *See generally* Wuerth, *supra* note 70, at 10 (contrasting German and Swiss settlements and concluding Foundation Agreement does not extinguish legal claims).

<sup>174</sup> *See* Foundation Agreement, *supra* note 12, at 1302.

<sup>175</sup> *See id.*; *see also* Witten, *supra* note 172, at 89; Declaration of Stuart E. Eizenstat, *supra* note 20, at 6.

<sup>176</sup> *See* Foundation Agreement, *supra* note 12, at 1302; *see also* Witten, *supra* note 172, at 89.

mutually exclusive remedies.<sup>177</sup> But *both* are possible remedies for Holocaust victims. The Foundation Agreement simply requires victims to choose between a Fund payment and a legal claim.<sup>178</sup> Therefore, the text of the Foundation Agreement does not preclude litigation.<sup>179</sup>

One may argue that the text requires victims to pursue their claims through the Foundation Agreement.<sup>180</sup> The Foundation Agreement repeatedly references the Fund as the “exclusive remedy and forum.”<sup>181</sup> The text, however, stipulates that courts may only dismiss claims on a “valid legal ground.”<sup>182</sup> Moreover, it expressly states that neither the Foundation Agreement itself nor American foreign policy interests constitute a basis for dismissal.<sup>183</sup> As the language advises, dismissal is only appropriate when a court finds that ordinary legal procedure bars the case, including, for example, justiciability, international comity, statutes of limitation, jurisdictional issues, forum non conveniens, difficulties of proof, and certification of a class of heirs.<sup>184</sup> Accordingly, the text of the Foundation Agreement does not require dismissal.<sup>185</sup>

#### *B. The Intent Behind the Foundation Agreement Allows Judicial Remedy*

In addition to the Foundation Agreement’s text, its negotiations reveal that the United States did not intend to preclude future

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<sup>177</sup> See Foundation Agreement, *supra* note 12, at 1302.

<sup>178</sup> See *id.* at 1302, 1304.

<sup>179</sup> *Id.* at 1304 (stating United States takes no position on legal merits of claims); see *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 80 (2d Cir. 2005) (Straub, C.J., dissenting) (“In fact, the history of the settlement negotiations confirms that the Executive’s refusal to waive all existing and potential claims against Germany (and, by dint of the parallel language in the two agreements, Austria) was an *intentional part of its foreign policy.*”); Sebok, *supra* note 16 (reporting that under text of Foundation Agreement, litigants are free to file suit against German corporations).

<sup>180</sup> Foundation Agreement, *supra* note 12, at 1298-1300 (making repeated references that it would be in American foreign policy interests that Foundation Agreement be exclusive remedy and forum, and pledging to that effect to file SOI in every case arising out of Holocaust).

<sup>181</sup> *Id.* at 1299-1300, 1303.

<sup>182</sup> *Id.* at 1303-04.

<sup>183</sup> *Id.* at 1304; see BAZYLER, *supra* note 1, at 84.

<sup>184</sup> Foundation Agreement, *supra* note 12, at 1304; see BAZYLER, *supra* note 1, at 84.

<sup>185</sup> See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 440 (2003) (Ginsburg, J., dissenting) (distinguishing Executive Agreement that established Foundation Agreement from previous ones and concluding “German Foundation Agreement confirms that [SOIs] have no legally binding effect”); see also BAZYLER, *supra* note 1, at 84.

litigation.<sup>186</sup> German parties were committed to establishing legal peace before they contributed to the Fund.<sup>187</sup> Despite German pressure to agree to such terms, the United States refused to prohibit litigation.<sup>188</sup> In so doing, the United States intended to allow survivors to pursue valid legal claims.<sup>189</sup>

Another indication of the intent of the United States to permit litigation is the limited nature of the Fund.<sup>190</sup> Once the money is entirely distributed, a survivor or heir has no option but to pursue restitution through litigation.<sup>191</sup> Prohibiting litigation could result in the compensation of some victims and not others.<sup>192</sup> Additionally, the Foundation Agreement does not cover those survivors who performed forced labor for non-corporate institutions and households.<sup>193</sup> Taken together, this produces an inherently unfair result.<sup>194</sup>

One may argue that American negotiators intended to bar litigation through the SOI.<sup>195</sup> American representatives were unsure whether they had the power to ban future litigation directly.<sup>196</sup> The U.S.

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<sup>186</sup> See *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 80 (2d Cir. 2005) (Straub, C.J., dissenting) (“In fact, the history of the settlement negotiations confirms that the Executive’s refusal to waive all existing and potential claims against Germany . . . was an *intentional part of its foreign policy.*”); Rosand, *supra* note 69, at 375; Taylor, *supra* note 69, at 167.

<sup>187</sup> See BAZYLER, *supra* note 1, at 83-84, 100.

<sup>188</sup> See Rosand, *supra* note 69, at 375; Taylor, *supra* note 69, at 167; *Supreme Court*, *supra* note 69, at 234-35.

<sup>189</sup> See EIZENSTAT, *supra* note 4, at 269; Taylor, *supra* note 69, at 167; *see also* Rosand, *supra* note 69, at 375; *Supreme Court*, *supra* note 69, at 234-35.

<sup>190</sup> See Foundation Agreement, *supra* note 12, at 1303; Declaration of Stuart E. Eizenstat, *supra* note 20, at 10-11; INT’L ORG. FOR MIGRATION, *supra* note 88.

<sup>191</sup> See *generally* Declaration of Stuart E. Eizenstat, *supra* note 20, at 10-11 (declaring deadline for applicants to apply for payment through Fund).

<sup>192</sup> See, e.g., *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1239 (11th Cir. 2004) (“In creating a comprehensive compensatory scheme for all remaining victims of the Nazi era, the Foundation Agreement may end up favoring the monetary interests of some American victims more than others.”).

<sup>193</sup> See Adler & Zumbansen, *supra* note 5, at 26.

<sup>194</sup> See *generally* Ratner, *supra* note 99 (preferring class action settlement over Foundation Agreement because former is better equipped to ensure fairness and uniformity to victims).

<sup>195</sup> See EIZENSTAT, *supra* note 4, at 220 (explaining U.S. Executive could only prohibit lawsuits with consent of Congress, “which would be next to impossible to achieve”); Lambsdorff, *supra* note 32, at 177 (“We were convinced that this precedent would serve as an effective deterrent to any future lawyer who considers basing another individual or collective suit on facts already covered by the Foundation.”); Sebok, *supra* note 16 (“Yet the U.S. State Department insisted to the Germans that the agreement was . . . almost as good as a settlement.”).

<sup>196</sup> See BAZYLER, *supra* note 1, at 84; Bettauer, *supra* note 70, at 6; *Supreme Court*,

government had never before prohibited litigation against a foreign defendant.<sup>197</sup> Taking such an unprecedented step was not clearly lawful and the Executive Branch did not believe it had such authority.<sup>198</sup>

Additionally, the United States was interested in the outcome of these negotiations because of its relationship with Germany.<sup>199</sup> Germany's status as an ally encouraged the Americans to satisfy, to the extent possible, the German demand for legal peace.<sup>200</sup> In addition, the deadline on the Foundation Fund evidences the American interest in settling these cases quickly and absolutely.<sup>201</sup> The United States had an interest in resolving these claims in a timely matter due to the political and economic upset a drawn-out and uncertain process would cause.<sup>202</sup> Thus, the SOI was the most effective way to concede to the Germans without expressly banning litigation.<sup>203</sup>

Nonetheless, past Presidents have willingly taken unprecedented steps to resolve international claims. For example, as previously discussed, *Dames & Moore* addressed the President's unauthorized agreement with Iran, transferring American claims out of U.S. courts.<sup>204</sup> Likewise, *United States v. Belmont* addressed a presidential agreement with the Soviet government that assigned Soviet claims against American citizens to the U.S. government.<sup>205</sup> During the Civil War, President Lincoln ordered a naval blockade of Southern ports.<sup>206</sup>

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*supra* note 69, at 234-35.

<sup>197</sup> See sources cited *supra* note 196.

<sup>198</sup> See sources cited *supra* note 196.

<sup>199</sup> See generally Foundation Agreement, *supra* note 12, at 1304 (stating American interest in resolving issues with its political and economic ally, Germany); Declaration of Stuart E. Eizenstat, *supra* note 20, at 16 (elaborating on interest in maintaining good relations with Germany).

<sup>200</sup> See Ratner, *supra* note 99, at 231; Symposium, *supra* note 100, at 240.

<sup>201</sup> See Declaration of Stuart E. Eizenstat, *supra* note 20, at 13-14.

<sup>202</sup> See sources cited *supra* note 196.

<sup>203</sup> See, e.g., BAZYLER, *supra* note 1, at 84 (detailing SOI was next best solution because United States did not have power to expressly ban future litigation without consent of Congress); Lambsdorff, *supra* note 32, at 176 (acknowledging international reparations agreement would have been rejected by Senate). *But see* Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 79 (2d Cir. 2005) (Straub, C.J., dissenting) (“[T]he United States *could have* guaranteed dismissal of domestic claims against Austria by entering into a settlement agreement or treaty.”).

<sup>204</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 664-65, 672-74 (1981).

<sup>205</sup> 301 U.S. 324, 326-27 (1937).

<sup>206</sup> *The Prize Cases*, 67 U.S. (2 Black) 635, 641 (1863).

More importantly, however, the Court has upheld these unprecedented agreements.<sup>207</sup> This tradition of judicial deference has resulted in an ever-expanding range of permissible executive conduct in the context of foreign affairs.<sup>208</sup> If the Executive expressly precluded litigation in the interest of foreign affairs, courts would likely uphold such a commitment.<sup>209</sup>

C. *Courts Should Treat Mandatory Statements of Interest Filed by the U.S. Government as Advisory*

While SOIs filed by the U.S. government do not require dismissal, they almost always produce it.<sup>210</sup> Courts have often found that a government-issued SOI implicates the political question doctrine.<sup>211</sup> Courts should refrain from making this determination, however.<sup>212</sup>

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<sup>207</sup> *Dames & Moore*, 453 U.S. at 672-74; *Belmont*, 301 U.S. at 330; *Prize Cases*, 67 U.S. at 668. *But see* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654-55 (1952) (Jackson, J., concurring) (finding President did not have authority to seize private property in absence of express constitutional or congressional approval).

<sup>208</sup> *See Whiteman*, 431 F.3d at 75-76 (Straub, C.J., dissenting) (concluding majority's deference creates broad doctrine mandating dismissal whenever Executive supports dismissal on foreign policy grounds); Clark, *supra* note 120, at 1617 (speculating increase in presidential attempts to alter preexisting legal rights due to Court's approval of sole executive agreement); cases cited *supra* note 207.

<sup>209</sup> *See Republic of Austria v. Altmann*, 541 U.S. 677, 714 (2004) (Breyer, J., concurring) (listing instances in which it is permissible and appropriate for United States to file SOI); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415-16 (2003) (noting Executive Agreement that authorized Foundation Agreement differed from previous executive agreements because it addressed claims against corporations, not foreign governments, and concluding "the distinction does not matter . . . [;] diplomatic action settling claims against private parties may well be just as essential"); cases cited *supra* note 207.

<sup>210</sup> *See Ratner*, *supra* note 99, at 227; Witten, *supra* note 172, at 89 ("[The U.S. government SOI] has brought dismissal of all cases that have reached a decision . . ."); *see, e.g., Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005) (finding State Department's SOI implicates political question and dismissing case on that ground).

<sup>211</sup> *See, e.g., Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005) (reasoning that judicial intrusion "would impinge upon the ability of the President to conduct the foreign relations of the United States" based on interests set forth in "thorough and persuasive" SOI); *Mujica*, 381 F. Supp. 2d at 1194 (finding proceeding with litigation would express lack of respect to Executive based on State Department's SOI); *see also O'Donoghue*, *supra* note 6, at 1149 (contrasting *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), with German cases and finding SOI plays critical role in application of political question doctrine).

<sup>212</sup> *See Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1205 (9th Cir. 2007) (suggesting courts must look for basis other than issuance of SOI); Wuerth, *supra* note 70, at 55-62 (arguing rather than automatically deferring to government issued SOIs, "[c]ourts should focus first on the constitutional text and actors").

The SOI is a diplomatic tool often used by the Executive urging dismissal in cases involving foreign affairs. For example, Derek Baxter, Assistant General Counsel for the International Labor Rights Fund, authored an article documenting the increased use of SOIs filed by the State Department in cases involving the Alien Tort Statute.<sup>213</sup> As he explains, the problem with SOIs filed by the State Department is not the statements themselves, but the weight courts attach to them. In general, courts have heeded the “recommendations” outlined in State Department SOIs.<sup>214</sup> In the case of Holocaust claims, the courts’ deference to these SOIs has virtually extinguished legal redress as an option for survivors.<sup>215</sup>

Excessive deference to SOIs is improper for several reasons. First, judicial deference regarding requests of the Executive Branch undermines separation of powers principles.<sup>216</sup> That deference weakens the autonomy of the judiciary while increasing the power of the Executive.<sup>217</sup> Additionally, the failure of courts to adjudicate Holocaust cases impermissibly broadens the scope of executive power in the realm of foreign affairs.<sup>218</sup> The courts’ deference to the SOI creates an attractive

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<sup>213</sup> Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department “Statement of Interest” in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 811 (2006).

<sup>214</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (proposing that when government issues SOI, “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy”).

<sup>215</sup> See *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 73-74 (2d Cir. 2005) (dismissing Holocaust claims against Austria and Austrian entities based on SOI filed by State Department and modeled on Foundation Agreement language); Adler & Zumbansen, *supra* note 5, at 3 (“Since passage of the Foundation Law, virtually all lawsuits pending in United States courts involving claims arising out of slave or forced labor during the Third Reich have been dismissed.”).

<sup>216</sup> See generally THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 8-9, 156-59 (1992) (arguing for more active role of judiciary in realm of foreign affairs); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 75 (1990) (observing Framers rejected option of centralizing foreign affairs powers in Executive alone); Baxter, *supra* note 213, at 809-11, 835-36, 844-45 (examining growing trend of State Department intervention with SOIs and arguing courts should review such cases critically).

<sup>217</sup> See Baxter, *supra* note 213, at 815-22; Clark, *supra* note 120, at 1584 (noting subject matter of Foundation Agreement is typically settled by traditional treaties and because of this, Foundation Agreement may be inconsistent with Treaty and Supremacy Clauses).

<sup>218</sup> See *Republic of Austria v. Altmann*, 541 U.S. 677, 736-37 (2004) (Kennedy, J., dissenting) (disagreeing with majority’s holding that “[e]xecutive statement may well be entitled to deference, and so may well supersede federal law that gives courts jurisdiction”). See generally Baxter, *supra* note 213 (examining recent trend of State Department SOIs and resulting expansion of executive power); Wuerth, *supra* note 70, at 3-4 (criticizing SOIs because: (1) they were agreed to without normal

precedent in resolving other international claims that the Executive may then later exploit.<sup>219</sup> Finally, the SOIs preclude Holocaust claims, creating devastating losses for victims.<sup>220</sup> The SOI has effectively left Holocaust survivors without the option to pursue litigation.

As the Third Circuit's decision demonstrates, the Foundation Agreement SOIs essentially allow the Executive to dictate the outcome of a case before it is heard on its merits. The court's finding of a political question based on the SOI filed by the State Department left the petitioner with only one option — the Foundation Agreement's Fund.

The Foundation Agreement is essentially a compromise between American foreign policy interests and compensation for Holocaust survivors.<sup>221</sup> Understandably, foreign policy interests are entitled to due respect and courts are willing to defer to those interests.<sup>222</sup> This deference, however, has cost victims their day in court.<sup>223</sup> The dangers of incorporating the SOI as a tool in the international realm beg the judiciary to tread cautiously before dismissing claims outright.<sup>224</sup>

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congressional approval measures; (2) judicial deference to SOIs will likely amount to constitutional acceptance; and (3) although attractive, they set dangerous future model in resolving private litigation in foreign affairs context).

<sup>219</sup> See *Altmann*, 541 U.S. at 737 (Kennedy, J., dissenting); Baxter, *supra* note 213, at 815-22; Clark, *supra* note 120, at 1617 (“[A]lthough unilateral presidential attempts to alter preexisting legal rights have been rare, they are likely to become more frequent now that the Court has unequivocally endorsed inherent executive power to make sole executive agreements with the force of federal law.”); Wuerth, *supra* note 70, at 55; *Supreme Court*, *supra* note 69, at 234-35.

<sup>220</sup> See generally Boyd, *supra* note 105 (arguing judiciary is well suited to determine human rights claims, despite its traditional, and increasing, reluctance to do so); Ratner, *supra* note 99, at 230-32 (concluding settlements achieved through class actions are better equipped to ensure due process and fairness to victims than are arrangements like Foundation Agreement); Weiss, *supra* note 16, at 112 (contending right to litigation provides individuals necessary tools in obtaining liberty and justice).

<sup>221</sup> See *Supreme Court*, *supra* note 69, at 235 (describing competing desires of Germans and Americans and that “a compromise saved the agreement”).

<sup>222</sup> See *Altmann*, 541 U.S. at 702 (observing SOI issued by State Department would “well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy”); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (recognizing “premier role” held by Congress and President in foreign relations and when it is appropriate to intervene); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 69 (2d Cir. 2005) (deferring to U.S. SOI).

<sup>223</sup> See Frumkin, *supra* note 16, at 95. *But see* Sebok, *supra* note 16 (claiming United States and its allies extinguished all claims of Holocaust victims in treaties signed between 1946 and 1990).

<sup>224</sup> See *Altmann*, 541 U.S. at 738 (Kennedy, J., dissenting) (“The Court . . . injects great prospective uncertainty into our relations with foreign sovereigns.”); Lambsdorff, *supra* note 32, at 177; Wuerth, *supra* note 70, at 55 (arguing courts’ deference to SOI based on “flimsy and incoherent doctrine” results in confusing precedent with respect to

## CONCLUSION

This Comment has traced the roots and development of the Foundation Agreement and detailed its criticism and accomplishments. U.S. courts' deference to the Executive Branch's Foundation Agreement commitment has resulted in the dismissal of the majority of Holocaust claims.<sup>225</sup> This suggests that U.S. courts are predisposed to conclude that the Foundation Agreement is the "exclusive remedy and forum" for Holocaust claims.

Judicial deference to the Executive Branch has precluded Holocaust victims from choosing their preferred method of recovery.<sup>226</sup> The American drafters of the Foundation Agreement, however, did not intend to bar victims' claims.<sup>227</sup> The language of the Foundation Agreement and the negotiations for legal peace both reveal that this was not the intended result.<sup>228</sup> SOIs have blinded judges to valid legal claims asserted by Holocaust victims and robbed these claimants of their day in court.<sup>229</sup> In some respects, judicial interpretations of the Foundation Agreement has impinged on American justice and replaced it with a payment of \$7,500.<sup>230</sup> After surviving the Holocaust, victims can see this limited type of "justice" as only another injustice among the worst this world has witnessed.<sup>231</sup>

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constitutional issues raised by litigation in context of foreign affairs).

<sup>225</sup> See Lothar Ulsamer, *German Economy and the Foundation Initiative*, in HOLOCAUST RESTITUTION, *supra* note 16, at 181, 187 (stating to date, SOIs have been successful in urging courts to dismiss Holocaust cases against German defendants); discussion *supra* Part II.A; *supra* note 210 and accompanying text.

<sup>226</sup> See, e.g., Frumkin, *supra* note 16, at 95 (expressing anger and frustration with Holocaust settlements and desire for "direct confrontation and compensation to be decided in court").

<sup>227</sup> See discussion *supra* Part III.B.

<sup>228</sup> See discussion *supra* Part III.A-B.

<sup>229</sup> See *supra* note 210 and accompanying text.

<sup>230</sup> Cf. Foundation Agreement, *supra* note 12, at 1301 (allotting \$7,500 for each slave laborer and \$2,500 for each forced laborer).

<sup>231</sup> See Weiss, *supra* note 16, at 112 ("[A]ny attempt to constrict access to the American court system . . . should be resisted as an attack on a cornerstone of America's greatness.").