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## An Analysis of the \$1.25 Billion Settlement Between the Swiss Banks and Holocaust Survivors and Holocaust Victims' Heirs

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# An Analysis of the \$1.25 Billion Settlement Between the Swiss Banks and Holocaust Survivors and Holocaust Victims' Heirs

"The Nazi genocide was the greatest mass murder in history. What we have come to realize was that this was also the greatest robbery in history."<sup>1</sup>

Elan Steinberg<sup>2</sup>

Although Switzerland called itself a neutral country during World War II, there have been several discoveries in recent years that have led the world to believe Swiss neutrality was mendacity. While Europe was being devastated, an enormous amount of looted treasure was accumulating in the vaults of the Swiss National Bank.<sup>3</sup> Elan Steinberg of the World Jewish Congress summarized the role of the Swiss during World War II:

The fact of the matter is that the role of the Swiss Government - the Swiss Establishment - during the Second World War could hardly be called neutral. They were collaborators with the Nazis at the political, social and economic level. They did not partake in the murders (of Jews)—let us not exaggerate that—but to suggest that without Switzerland the Nazi war machine could function as smoothly and as long as it did is to ignore the realities of history.<sup>4</sup>

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1. See Alissa Kaplan, *Details Emerge on Assets Fate, The Profits of Plunder* (visited Nov. 2, 1998) <<http://abcnews.com/sections/world/dailynews/neutrals1031.html>>.

2. Elan Steinberg is the head of the World Jewish Congress. The World Jewish Congress has led efforts to recover property, money, art and other looted items for holocaust victims.

3. JEAN ZIEGLER, *THE SWISS, THE GOLD, AND THE DEAD 70* (John Brownjohn trans., Harcourt Brace & Company) (1997).

4. See *Breaking the Code* (PBS television broadcast, Nov. 1996), <[http://www.pbs.org/newshour/bb/europe/november96/swiss\\_accounts\\_11-19.html](http://www.pbs.org/newshour/bb/europe/november96/swiss_accounts_11-19.html)>.

Immediately following WWII, survivors of the Holocaust unsuccessfully attempted to find family members and reclaim their personal property.<sup>5</sup> The property the Holocaust survivors were searching for was looted from their homes and the corpses of their family members by Nazi soldiers. The camp commandant at Auschwitz, Rudolf Franz Ferdinand Hoss, was guilty of the deaths of more than 2.5 million people, primarily of Jewish decent.<sup>6</sup> Hoss described how gold was taken from the victims of the gas chambers at the Nuremberg War Crime Tribunal:<sup>7</sup>

It took between three and fifteen minutes, depending in weather conditions, to kill the people in the death chambers. We knew when the people were dead because their cries ceased. We usually waited half an hour before opening the doors and removing the corpses. Once the bodies had been hauled out, our special squads removed their rings and extracted the gold from the teeth of the cadavers. An improvement on Treblinka was that we constructed gas chambers capable of accommodating 2,000 people at once, whereas the ten gas chambers at Treblinka held only 200 people apiece.<sup>8</sup>

Following the war, many survivors and heirs of Jews killed in the Holocaust attempted to recover assets that were voluntarily deposited into Swiss bank accounts.<sup>9</sup> When attempting to recover money or jewels deposited into the Swiss bank accounts, bank officials told them that they either could not find their account or demanded a death certificate for account holders that were killed in the Holocaust.<sup>10</sup>

Immediately following the war there were several attempts by the United States to aid the Holocaust victims in recovering property held in the Swiss banks. The Swiss apprehensively relinquished a small portion of the money deposited into the banks. But with the beginning of the Cold War and other events, the issue of Nazi Gold<sup>11</sup> and the Swiss bank accounts were

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5. Jennifer A. Mencken, *Supervising Secrecy: Preventing Abuse Within bank Secrecy and Financial Privacy Systems*, 21 B.C. INT'L & COMP. L. REV. 461,462 (1998).

6. See ZIEGLER, *supra* note 3, at 114.

7. *Id.*

8. *Id.* at 114-115.

9. Verona Dobnik, *Octogenarian Holocaust Survivors Race Time to Claim Settlement*, DAILY REC., Sept. 30, 1998, at 5b.

10. See *id.*

11. "Nazi Gold" is a term used by the author to identify looted gold or gold

forgotten.<sup>12</sup> However, in recent years with the worries that many Holocaust survivors are aging, the debate over Nazi Gold reignited.<sup>13</sup>

In 1996, the United States and Swiss Government began to research the whereabouts of the assets of the Jews and established numerous committees.<sup>14</sup> The committees concluded that Switzerland was Germany's principal banker during the Second World War.<sup>15</sup> In addition, the research led to allegations that several other neutral countries were trading partners with Germany during World War II.<sup>16</sup> However, Germany's financial relationship with the Swiss banks reached a level that exceeded them all.<sup>17</sup>

In order to assure that aging Holocaust survivors would have the opportunity to see justice,<sup>18</sup> three separate lawsuits were filed in 1997 to recover assets of the Jews.<sup>19</sup> The lawsuits filed in federal court in the Eastern District of New York were subsequently consolidated in 1997 by Judge Edward Korman.<sup>20</sup> On August 12, 1998, after several attempts by the Swiss banks to rid themselves of the lawsuits, a settlement in the amount of \$1.25 billion was reached. The money will aid needy holocaust survivors worldwide and Holocaust victims' families.

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taken by the Nazis from the eleven territories they occupied during World War II.

12. Greg Bradshear, *Searching for Documents on Nazi Gold* (visited Nov. 6 1998) <http://www.nara.gov/nara/research/nazigold.html>.

13. The average age of the Holocaust survivors 81 years of age as of 1998. See Dobnik, *supra* note 9.

14. There are also investigations in many other countries throughout the world to recover the Jewish assets. However, for the purposes of this paper the author focuses on the investigations in the United States and Switzerland.

15. See Kaplan, *supra* note 1.

16. See *id.* Sweden, a neutral country, was one of Germany's largest trading partners during the war. *Id.* They supplied Germany with iron ore and ball bearings, among other goods. *Id.* Portugal supplied Germany with vital minerals. See Kaplan, *supra* note 1.

17. See Kaplan, *supra* note 1.

18. William Slany, *U.S. And Allied Efforts To Recover And Restore Gold And Other Assets Stolen Or Hidden By Germany During World War II, Forward And Executive Summary To The Preliminary Study* (visited Oct. 13, 1998) <<http://www.ita.doc.gov/media/assets1.html>>.

19. Susan Orenstein, *Gold Warriors, The inside story of the historic \$1.25 billion settlement between Holocaust victims and the Swiss banks*. AM. LAW., Sept. 1998, at 62, 64-66.

20. See Anita Ramasatry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325, 373, 376 (1998).

To many of the people involved in the lawsuit, the recovery of lost assets was not the primary concern. Ernest Michel, who was arrested by the Nazis at the age of sixteen and escaped from a death march six years later, stated, "to me this whole matter is not about money, but a recognition that European countries . . . stole money from the Jews who were killed."<sup>21</sup>

In addition to the \$1.25 billion settlement, Swiss banks together with private sector businesses contributed \$183 million to a special Holocaust fund to assist needy Holocaust survivors.<sup>22</sup> The Swiss government also proposed a solidarity foundation with an endowment of \$4.7 billion that would assist humanitarian causes around the world.<sup>23</sup>

As a result of the settlement, the Swiss government has attempted to resuscitate their image. However, many years will pass before the wounds created by their predecessors will completely heal.

This comment will discuss the actions taken by Switzerland and the Swiss Banks during and after World War II. Furthermore, this comment will examine the lawsuits against the Swiss Banks and the settlement provisions that resulted. Part II outlines how the assets reached the Swiss banks and why Nazi Germany chose to place their loot into Swiss bank accounts. Part III details the efforts of the United States and Switzerland to solve the Nazi Gold crisis. Part IV will seek to briefly outline the complaints filed against the Swiss banks and the preliminary negotiations to reach a settlement. Part V will discuss the settlement of the lawsuit. Part VI examines whether the settlement was the proper method of resolving the Nazi Gold Crisis. Part VII proposes a possible scheme to disburse the settlement money to the proper claimants. Part VIII proposes changes that are needed in Swiss banking laws to ensure that a crisis similar to the Nazi Gold issue does not occur again. Part IX examines the further declassification of World War II documents and proposes a safeguard against possible negative effects of declassification.

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21. See Dobnik, *supra* note 9.

22. *Steps taken by Switzerland in Connection with the Problem of Unclaimed Assets and Nazi Looted Assets* (visited Nov. 23, 1998) <[http://www.switzerland.taskforce.ch/done2\\_e.html](http://www.switzerland.taskforce.ch/done2_e.html)> [hereinafter *Steps Taken*].

23. *Policy paper* (visited Oct. 8, 1998) <[http://www.swissemb.org/press/html/pp980220-switzerland\\_wwii.html](http://www.swissemb.org/press/html/pp980220-switzerland_wwii.html)>.

## II. Confiscation of Jewish Property: A Historical Overview

The gold and money deposited into Swiss banks during World War II can be traced to several sources including: the teeth and wedding rings of gas chamber victims,<sup>24</sup> plundered towns and national treasuries of Nazi occupied territories<sup>25</sup> and money deposited by Jews. This section outlines the role of Germany and Switzerland and the complexities of why and how the money reached the Swiss banks during World War II.

### A. *The Nazi Plunder*

Upon invading a town or city, Nazi soldiers would plunder "property, movable and immovable, communal and individual, public and private: innumerable synagogues, houses, apartments, yeshivot (rabbinical academies), schools, hospitals, mikavot (ritual bath houses), factories, orphanages, workshops, old age homes, stores and land."<sup>26</sup> The value of the items that were stolen from the Jews is estimated to be between \$12 billion and \$32 billion.<sup>27</sup> In addition, the Nazis took gold from the governments of Nazi occupied territories.<sup>28</sup>

### B. *Swiss Banks Received Assets from Jews Before and During the War*

Swiss banks also received money directly from Jews or agents of Jews (non-looted gold). Prior to an invasion by Nazis, some Jews deposited their wealth into Swiss bank accounts to insure that they or their families would have money at the end of the war.<sup>29</sup> However, family members encountered a major obstacle when they attempted to recover assets placed in bank accounts following the war. Swiss bank officials claimed they could not find the accounts or demanded the death certificate of the account holders.<sup>30</sup> The family members of the victims were not able to

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24. See Mencken, *supra* note 5, at 464.

25. Stephen A. Denburg, Comment, *Reclaiming Their Past: A Survey of Jewish Efforts to Restitute European Property*, 18 B.C. THIRD WORLD L.J. 233, 235 (1998).

26. See *id.*

27. See *id.* After the war many Holocaust survivors discovered that their property had been seized by the state or private citizens. See *id.* In some countries when Jews attempted to reclaim their property they were killed. See *id.*

28. See Slany, *supra* note 18.

29. See *Breaking the Code*, *supra* note 4.

30. See Dobnik, *supra* note 9.

provide the bank officials with a death certificate because the Nazis did not distribute death certificates for the people killed at concentration camps.<sup>31</sup>

*C. Estimated Figures of Looted and Non Looted Gold Switzerland Received from Nazi Germany.*

In a 1997 report, Stuart Eizenstat estimated that Switzerland received as much as \$414 million, \$3.5 billion in today's value, in looted and non-looted gold from the Nazi Germany.<sup>32</sup> The report estimated that of the \$414 million Switzerland received, \$185 to \$289 million was looted.<sup>33</sup> However, in 1998 the Bergier Commission increased those numbers in a report.<sup>34</sup> The Bergier Report estimated that \$440 million in gold, \$4 billion in today's value, was transferred to Swiss Banks.<sup>35</sup> Of the \$440 million, the Bergier Commission estimated that \$316 million, \$2.7 to 2.8 billion in today's dollars was looted.<sup>36</sup>

1. *Why did the nazis loot the gold?*—The looted gold was not only used by Nazi leaders for their personal use, but was used to finance the German war effort during World War II.<sup>37</sup> After the gold was looted, the Nazis would smelt the gold into gold bars.<sup>38</sup> The German Reichsbank, the central bank of the German state, then incorporated the smelted gold bars into its gold reserves.<sup>39</sup> As Germany's trading partners began to refuse to accept the German Reichsmark, the Reichsmark became worthless.<sup>40</sup> Therefore, in order to buy supplies necessary to sustain the German war effort, Germany had to utilize the gold in the German Reichsbank to exchange for supplies or Swiss Francs.<sup>41</sup> The Nazis traded for Swiss Francs because the Swiss

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31. See *Breaking the Code*, *supra* note 4.

32. See *On-the-Record briefing upon the release of the Report, U.S. and Allied Wartime and Postwar relations and negotiations with Argentina, Portugal, Spain, Sweden and Turkey on Looted Gold and German External Assets and U.S. Concerns about the fate of the Wartime Ustasha treasury*, (visited Oct. 13, 1998) <[http://www.state.gov/www/policy\\_re1998/980603-eizenstat\\_nazigold.html](http://www.state.gov/www/policy_re1998/980603-eizenstat_nazigold.html)> [hereinafter *Briefing*].

33. See *id.*

34. See *id.*

35. See *id.*

36. See *id.*

37. See Slany, *supra* note 18.

38. See *id.*

39. See *id.*

40. See *id.*

41. See *id.*

Franc was accepted worldwide.<sup>42</sup> The Swiss Franc was used by the Germans to obtain materials from other neutral countries such as Argentina, Spain, Portugal and Turkey.<sup>43</sup>

During World War II, the Swiss not only played a critical banking role for the Nazis, but also manufactured and allowed Nazis to use Switzerland as a thoroughfare.<sup>44</sup> The Swiss provided Nazi Germany with a large number of boats to ship goods and supplied Germany with military arms, ammunition, aluminum, machinery and precision tools, as well as agricultural products.<sup>45</sup> In addition, the Swiss allowed the use of their railways to link Germany and Italy for the transport of coal and other goods.<sup>46</sup>

*D. Why Did the Nazis Choose the Swiss Banks to Deposit Their Loot?*

Swiss banking laws during World War II encouraged the Nazis to place their plunder into Swiss bank accounts.<sup>47</sup> Swiss banking laws are notorious for protecting Swiss bank clients' identity by issuing an account number instead of using a name.<sup>48</sup> Only the account holder is able to receive or retrieve information concerning the account. Therefore, Swiss banks enable war criminals to place their wealth in a safe place because it is difficult to investigate the account.<sup>49</sup>

Swiss lawmakers promulgated the Federal Law relating to Bank and Savings Banks (laws) in November of 1934.<sup>50</sup> Article 47<sup>51</sup> of the banking laws is the foundation of the secrecy in the

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42. See Slany, *supra* note 18.

43. See *id.*

44. See *id.*

45. See *id.*

46. See *id.*

47. See Ramasastry, *supra* note 20, at 333.

48. *Id.* at 343.

49. *Id.* at 33.

50. ISABEL VINCENT, HITLER'S SILENT PARTNERS, SWISS BANKS, NAZI GOLD, AND THE PURSUIT OF JUSTICE 61 (1997).

51. Article 47(a) of the Swiss Federal banking Statute states:

Whoever discloses a secret that was entrusted to him, or of which he has knowledge in his capacity as a member of an organ of the bank, as an employer, agent, liquidator, trustee, observer of the Banking Commission, or director or as an employee of a chartered accounting or audit firm, and whoever instigates another to such violation of the professional secrecy shall be punished by way of imprisonment or by a fine . . .

Bankengesetz [hereinafter BG] [banking Statute] art. 47, RS 952.0 (Switz.).



Swiss banks.<sup>52</sup> According to the laws, "bankers have a duty of confidentiality with respect to their customers names, the banker's relationship with the customer, the type of bank account, the transactions that take place with the account and any information supplied by the customer in connection with the account."<sup>53</sup> Under Article 273 of the Swiss Penal Code,<sup>54</sup> it is a crime to divulge information concerning an account to a foreign government.<sup>55</sup> If a banker violates the duty of confidentiality the banker could be subject to civil liability in both contract and tort.<sup>56</sup> According to 47(b) any banker or employee of the bank that violates the confidentiality could be liable for a fine of up to 20,000 francs or imprisonment up to six months in jail, or both.<sup>57</sup> In addition, anyone who attempts to induce a person to commit any such offense shall be liable for the same punishment.<sup>58</sup>

There are several instances when a bankers duty of confidentiality is not absolute;<sup>59</sup> the secrecy can be waived by the customer, the bank official can divulge information to Swiss government officials, in criminal proceedings secrecy can be set aside and the secrecy cannot hinder a foreign investigation.<sup>60</sup> In addition, in 1990 the Swiss enacted Article 305 of the Swiss Penal Code<sup>61</sup> to deal with money laundering.<sup>62</sup> The law requires a banker

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reprinted in Ramasastry, *supra* note 20, nn. 5.

52. See Ramasastry, *supra* note 20 at 340.

53. See *id.*

54. Article 273 states:

Any person who seeks to discover a manufacturing or business secret with a view to making it available to a foreign official or private organization or to a foreign private enterprise or to agents thereof or any person who makes available a manufacturing or business secret to a foreign official or private enterprise or to the agents thereof shall be punished by imprisonment or in a serious case to "reclusion." The judge may, in addition, impose a fine.

Schweizerisches Strafgesetzbuch (Swiss Penal Code) art. 273, reprinted in Ramasastry, *supra* note 20, nn. 49.

55. See Ramasastry, *supra* note 20, at 340.

56. See *id.*

57. See VINCENT, *supra* note 50, at 61.

58. See *id.*

59. See Ramasastry, *supra* note 20, at 341.

60. *Id.*

61. Article 305 of the Swiss Penal Code states:

. . . any person who professionally accepts, keeps on deposit, manages or transfers assets belonging to a third party, and fails to establish with due diligence the identity of the beneficial owner, shall be punished by imprisonment up to one year,

to ascertain a customer's identity and to take action if it appears that the person is attempting to store proceeds from an illegal activity.<sup>63</sup>

Swiss bank accounts maintained by dictators are not uncommon because of the secrecy afforded to them by the banking laws.<sup>64</sup> Several dictators in the 20th century have maintained Swiss bank accounts.<sup>65</sup> In June 1997, Swiss banking officials found \$3.4 million in six Swiss banks under the name of former Zaire Dictator Mobutu Sese Seko.<sup>66</sup>

In recent years, the Swiss have made attempts to be more cooperative when tracing the accounts of dictators.<sup>67</sup> As a result, the Swiss government has frozen the assets of dictators from the Philippines, Haiti, Panama and Romania.<sup>68</sup> However, the Swiss still require the country seeking to freeze the accounts to have a criminal trial in their home country.<sup>69</sup> Then they must fight their way through the Swiss Courts.<sup>70</sup>

*E. Did the Swiss Know of the Origins of the Gold They Received From Nazi Germany?*

During and immediately following World War II, the Swiss denied that they had knowledge of the origins of the gold they received from Nazi Germany. Eventually, however, the Swiss admitted to having had knowledge of the origins of the gold they received from Nazi Germany.

Based on the discovery of several documents, it is possible that the Swiss National Bank knew as early as 1939 that some portion of the gold it received from the German Reichsbank was obtained through illegal sources.<sup>71</sup> First, the German Reichsbank's gold reserve was very low at the beginning of the war.<sup>72</sup> As

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detention, or fine. Schweizerisches Strafgesetzbuch (Swiss Penal Code) art. 305, reprinted in Ramasastry, *supra* note 20, at 344.

62. See Ramasastry, *supra* note 20, at 344.

63. See *id.*

64. See *id.* at 346.

65. See *id.*

66. See *id.* at 347.

67. See Ramasastry, *supra* note 20, at 348.

68. See *id.*

69. *Id.*

70. *Id.*

71. Mencken, *supra* note 5, at 464.

72. Slany, *supra* note 18.

a result, European bankers and Swiss officials knew exactly how much gold Germany had in its reserves prior to the war.<sup>73</sup> Second, the only method by which Germany could obtain wealth was through illegal activities because the German Reichsmark was worthless due to the war.<sup>74</sup>

### III. Attempts Since World War II to Recover Assets

During World War II, the Allied powers attempted to negotiate with the Swiss to terminate their financial relations with the Germans.<sup>75</sup> Immediately following World War II, negotiations began to recover Jewish assets from the Swiss banks.<sup>76</sup> The negotiations resulted in several denials of the origins of the gold they received from Germany and the existence of Jewish accounts.<sup>77</sup> The Swiss also made several attempts to hide the situation rather than dealing with the problem they created.

For almost 50 years Swiss banks and the Swiss government carried on business as usual. They ignored requests to identify bank accounts held by Jews and to pay reparations to the Allies that were required under several agreements.<sup>78</sup> However, since 1996, there have been several investigations by various groups in the United States and Switzerland to uncover the mystery of Nazi Gold.<sup>79</sup>

This section outlines the investigations of the Nazi gold issue from approximately 1940 to 1998. Although it may appear that some of the actions may have been politically motivated, the result of the investigations and media coverage helped fuel the concern over the assets of Holocaust victims that eventually led to the settlement.

#### *A. Requests for the identification of Bank Accounts During and Following World War II*

During World War II, the Allies made several attempts to stop Germany from trading and trafficking in looted gold and hard

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73. Mencken, *supra* note 5, at 464.

74. Slany, *supra* note 18.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. There have been several investigations made by various nations of their role with Germany during World War II. Several of the countries have negotiated or have started to negotiate the return of Jewish assets to their rightful owners.

currency with any neutral countries by instituting economic blockades.<sup>80</sup> In 1943, the United States and the Allies formed a declaration that warned neutral countries that transfers of property from Germany to other countries would not be recognized and would be declared invalid.<sup>81</sup> In 1944, the United States, Britain and the Soviet Union decided that they would not buy gold from any nation that had not discontinued relations with Germany and the Axis Powers.<sup>82</sup> However, "through much of the war the United States and its allies could not enforce a fully effective blockade against Germany."<sup>83</sup> This was due, in part, to the reluctance of Switzerland to adhere to the economic blockades.<sup>84</sup>

The next attempt by the United States and the Allied powers to deny a safe place for German assets was known as the Safehaven Program.<sup>85</sup> The Safehaven Program was formally launched in July of 1944.<sup>86</sup> The goal of the program was to preclude a Nazi resurgence after the war and to ensure that German assets were available for the reconstruction of Europe and reparations to the Allies.<sup>87</sup> The program called for neutral countries to immediately prevent any disposition, transfer, or concealment of looted gold or other assets from occupied countries."<sup>88</sup>

Switzerland's close financial ties with Germany made its participation in the Safehaven program crucial to the program's success.<sup>89</sup> However, the United States and the Allies decided not to take extreme measures to force Switzerland to comply with the

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80. See Slany, *supra* note 18. The object of the economic blockades was to stop the flow of German assets from Germany that were aiding their war effort. *Id.* Germany relied on the raw materials they purchased from neutral countries. *Id.* Therefore, by stopping the flow of assets, Germany's capacity to continue to wage war would be diminished. *Id.*

The United States and its allies were not only concerned with placing economic blockades between Switzerland and Germany. *Id.* They were concerned with other major trading partners with Germany, such as, Sweden, Portugal, Spain, and Turkey. See Slany, *supra* note 18.

81. See Slany, *supra* note 18

82. See *id.*

83. See *id.*

84. See *id.*

85. See *id.*

86. See Slany, *supra* note 18.

87. See *id.*

88. See *id.*

89. See *id.*

Safehaven program.<sup>90</sup> The Allies hoped that Switzerland would voluntarily comply with the program. However, during this time period the Swiss never voluntarily complied with any of the Allies proposal to end relations with Germany.

A potential breakthrough with the Swiss developed in 1945 when negotiations between the Swiss and the Allies began.<sup>91</sup> The negotiations initially led to the Swiss government's agreement to comply with some of the Safehaven Program objectives.<sup>92</sup> However, following a discussion with a German Reichsbank official,<sup>93</sup> the Swiss decided not to support the Program's efforts.<sup>94</sup> Through 1945, Switzerland demonstrated an unwillingness to comply with any of the proposals made by the United States and the Allies to turn over German assets.<sup>95</sup>

In November and December of 1945 eighteen nations convened for the Paris Reparations Conference.<sup>96</sup> The United States and the Allies agreed on several policies for the collection and distribution of looted monetary gold, and the liquidation of German Assets located in neutral nations.<sup>97</sup> The Allies established The Tripartite Gold Pool into which the Allies would collect looted gold located in Germany and neutral nations.<sup>98</sup> The gold then would be distributed to the nations from which it was looted.<sup>99</sup> The fund was to be co-managed by the United States, Britain and France and coordinated by the Tripartite Gold Commission.<sup>100</sup> However, the Paris reparations Conference did not include Germany's key repository during the war: Switzerland.

In early 1946 Swiss officials were invited to Washington, D.C. to review the policies discussed at the Paris Reparations Conference.<sup>101</sup> The goal of the meeting was to stop a Nazi

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90. *See id.*

91. *See id.*

92. *See Slany, supra* note 18.

93. The official the Swiss met was the Reichsbank Vice President Emil Puhl. *See id.*

94. *See Slany, supra* note 18.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See Slany, supra* note 18.

100. *See id.*

101. *See id.* The United States, Britain and France extended the invitation to Switzerland. *Id.* France and Britain's objectives were to revive commerce with Switzerland as quickly as possible. *Id.*

resurgence by eliminating German assets in Switzerland.<sup>102</sup> However, the Swiss refused to admit they had received illegal gold from Germany during the war.<sup>103</sup>

Throughout the negotiations the Swiss based their arguments upon Swiss and international law.<sup>104</sup> The Swiss argued that according to international law Germany was a conquering nation and was entitled to the looted gold from the national treasuries as war profits.<sup>105</sup> As a result, the Allies were reduced to appealing to the moral obligations of the Swiss.<sup>106</sup> The Swiss rejected this notion and denied that they had any moral obligation to help rebuild Europe.<sup>107</sup> These divergent opinions resulted in an impasse in negotiations.

In May 1946 the negotiations resumed with a two part proposal by the Swiss.<sup>108</sup> After lengthy and difficult negotiations the Swiss government and the Allies entered into the Allied-Swiss Washington Accord on May 25, 1946.<sup>109</sup> The accord required Switzerland to transfer 250 million Swiss Francs (\$58.1 million) in gold to the Allies and to liquidate all German assets.<sup>110</sup> Fifty percent of the liquidated German assets would be used to rebuild Europe.<sup>111</sup> A portion of the fifty-percent would also be used to aid stateless Holocaust victims.<sup>112</sup> In addition, the Swiss agreed to identify heirless Swiss bank accounts that would be used to benefit needy Holocaust survivors.<sup>113</sup>

Although the Swiss promptly transferred the 250 million Swiss Francs (\$58.1 million) in gold to the Allies,<sup>114</sup> the Washington Accord was neither “promptly nor fully implemented.”<sup>115</sup> In 1952, after a lengthy effort, the Allies and the Swiss

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102. See Slany, *supra* note 18.

103. See *id.*

104. See *id.*

105. See *id.*

106. See *id.*

107. See Slany, *supra* note 18.

108. See *id.*

109. See *id.*

110. See *id.* The \$58.1 million in gold was to be given to the Allies was far less than the estimated \$185-\$289 million that was estimated to have been looted. *Id.*

111. See Slany, *supra* note 18.

112. See *id.*

113. See *id.*

114. The 250 million francs in gold was implemented into the Tripartite Gold Pool for the redistribution to the claimant countries. See Slany, *supra* note 18.

115. See Slany, *supra* note 18.

renegotiated the Washington Accord.<sup>116</sup> The negotiations resulted in a final agreement concerning the terms of the liquidation of German assets.<sup>117</sup> The new agreement required the Swiss to pay far less than the original amount established in the 1946 Washington Accord.<sup>118</sup> In addition, the Swiss made only token attempts to make payments to help stateless Holocaust victims between 1947 and 1951.<sup>119</sup>

It was not until 1962 that the Swiss made a concerted effort to implement the side agreement made at the 1946 Washington accord.<sup>120</sup> The Swiss identified only \$2 million dollars located in dormant bank accounts; most of the money did not make its way to relief organizations until the 1970's.<sup>121</sup>

The beginning of the Cold War and the restitution of one portion of the gold to the Tripartite Gold Commission in the 1950's led to a diminished interest in the Nazi Gold issue.<sup>122</sup> According to Greg Bradsher,<sup>123</sup> "for almost 40 years there was not much interest in the Nazi looted assets and almost no research" on the issue.<sup>124</sup>

#### *B. Recent Attempts in the United States to recover the Nazi Gold*

After many years of dormancy, the Nazi Gold issue was rekindled in March 1996. This section outlines the attempts by Senator Alfons D'Amato and the United States government to recover the Nazi Gold.

1. *The efforts of Senator Alfons D'Amato.*—In March 1996 Senator Alfons D'Amato (R-NY), Chair of the United States Banking Committee,<sup>125</sup> decided to renew the investigation into

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116. *See id.*

117. *See id.*

118. *See id.* The Swiss and the Allies agreed to a lump sum payment of \$28 million. *Id.* The \$28 million was dispersed to several groups, approximately \$17 million went to the reconstruction of Europe. *Id.*

119. *See Slany, supra* note 18. Over a six-year period the Swiss made \$4.7 million (31 million in today's value) in advancements to needy Holocaust victims. *See id.*

120. *See Slany, supra* note 18.

121. *See id.*

122. *See Bradsher, supra* note 12.

123. Greg Bradsher is the Assistant Chief, Archives II Textual Reference Branch at the National Archives and Records Administration.

124. *See Bradsher, supra* note 12.

125. The chairman of the Senate banking Committee is an influential political figure. The chairperson yields a substantial amount of power the Finance Committee.

Jewish assets held in the Swiss banks.<sup>126</sup> Senator D'Amato began to renew interest in the Nazi Gold issue after speaking with the head of the World Jewish Congress.<sup>127</sup> Senator D'Amato's goal was to attract as much media attention to the Nazi Gold issue as possible and to publicize the actions of the Swiss Banks. In 1996, Senator D'Amato contended that the Swiss banks misrepresented the actual amount of gold that was in their possession.<sup>128</sup> He also threatened to reopen the negotiations that led to the 1946 Washington Accord.<sup>129</sup> Senator D'Amato also demanded that the dormant accounts belonging to Holocaust victims be returned and he pleaded to American cities and states to boycott Swiss banks.<sup>130</sup>

2. *Investigation by the United States Government.*—On October 6, 1996, the United States government announced that it would begin its own investigation into the Nazi Gold issue.<sup>131</sup> The investigation's principal goal was to find the whereabouts of the Nazi war profits.<sup>132</sup> Stuart Eizenstat was appointed as the coordinator of the investigation under the Secretary of Commerce for International Trade Special Envoy of the Department of State on Property Restitution in Central and Eastern Europe.<sup>133</sup>

As a result of the investigation, Stuart Eizenstat's committee published two reports in two years (Eizenstat Reports).<sup>134</sup> The first Eizenstat Report was released in May 1997 and focused on how the Nazi's plundered the gold, the Swiss' role and the efforts of the United States and Allied countries to make assets available to needy Jews following World War II.<sup>135</sup> The second, and final, report of the committee was released in June 1998. The report publicized the role of several neutral countries in aiding the Nazi war effort and added clarity the first report.<sup>136</sup>

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126. See Bradsher, *supra* note 12.

127. See *id.*

128. ZEIGLER, *supra* note 3, at 25.

129. *Id.*

130. VINCENT, *supra* note 50, at 237-241.

131. *Chronology: Unclaimed assets/Switzerland and the Second World war* (visited Oct. 8, 1998) <[http://www.parliament.ch/E/Nachrichty\\_Detailed%20Overview\\_1994-1996.htm](http://www.parliament.ch/E/Nachrichty_Detailed%20Overview_1994-1996.htm) [hereinafter *Chronology*].

132. See *id.*

133. See *id.*

134. The two reports were prepared by historian William Z. Slany, the Department of State's Chief Historian, and experts from eleven government agencies.

135. *Briefing*, *supra* note 32.

136. *Id.*



The reports were based on 15 million pages of declassified documents in the national Archives and Records Administration that were available to the public.<sup>137</sup> The records contained documents from the Department of State, Department of Defense, Treasury Department, and Commerce Department.<sup>138</sup> The documents also included several reports from the Justice Department and wartime agencies such as the Foreign Economic Administration and the Office of Strategic Services.<sup>139</sup>

In addition to the 15 million declassified pages of documents, nearly one million additional pages of documentation were declassified for the Eizenstat investigation.<sup>140</sup> These documents were from the Treasury Department, Central Intelligence Agency and National Security Agency.<sup>141</sup>

*B. Recent Attempts in Switzerland to Acknowledge Their Past.*

Criticism from the world forced the Swiss to take action to acknowledge their past actions. When the issue of the Nazi Gold resurfaced in 1996 the Swiss reacted in a “legalistic and at times awkward manner.”<sup>142</sup> However, among the neutral countries that were involved with Nazi Germany during World War II, Switzerland has taken the lead in reviewing their role and establishing funds for survivors and their heirs.<sup>143</sup> The Swiss banks, the Swiss government, and private industries have formed committees to investigate the whereabouts of Holocaust victims’ assets. The Swiss have begun to acknowledge their role during World War II and have made several humanitarian attempts to reconcile their involvement with Nazi Germany. This section outlines the efforts by Switzerland to find dormant bank accounts

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137. See *Testimony before the Subcommittee on Government management, Information and Technology of the House Government Reform and Oversight Committee* (visited Nov. 24, 1998) [http://www.state.gov/www/policy\\_remarks/1998/980714\\_slany\\_nazi.htm](http://www.state.gov/www/policy_remarks/1998/980714_slany_nazi.htm) [hereinafter *Testimony*]. This investigation represented the largest investigation ever undertaken using the National Archives records.

138. See *id.*

139. See *id.*

140. See *id.*

141. See *id.*

142. Charles Poncet, *Switzerland: Decree on the Legal investigation of the Assets Deposited in Switzerland After the advent of the National-Socialist Regime and Decree on the Special Fund for Needy Victims of the Holocaust*, INT’L LEGAL MATERIALS, Sept. 1997, at 1272, available in WL 36 I.L.M. 1272.

143. See Kaplan, *supra* note 1.

and the humanitarian attempts by the Swiss government.

1. *The Volcker Committee*.—In April 1996, the Swiss Bankers Association (SBA) sent a letter to the World Jewish Restitution Organization (WJRO) and the World Jewish Congress (WJC) to reaffirm their dedication to locate dormant bank accounts belonging to Holocaust victims.<sup>144</sup> As a result, on May 2, 1996, the WJC, the WJRO and the SBA signed a Memorandum of Understanding and established the “Independent Committee of Eminent Persons,” better known as the Volcker Committee.<sup>145</sup> Paul J. Volcker, the former chairman of the United States Federal Reserve Board, was appointed to direct the committee.<sup>146</sup>

The goal of the committee was to identify the unclaimed dormant bank accounts of Holocaust victims held by the Swiss Banks.<sup>147</sup> To accomplish its goal, the committee planned to use several accounting firms to audit the Swiss banks.<sup>148</sup> The auditors had access to all relevant files in the banks regarding dormant accounts and other assets and financial instruments deposited before, during and immediately after World War II.<sup>149</sup> The audit would cover the effectiveness of the Swiss Bankers Association and the approach of individual banks regarding unclaimed assets from the period before 1945.<sup>150</sup> Initially, the final report was to be made public at the end of 1998, however the deadline was extended to the beginning of 1999.

2. *The Federal Decree on the Historical and Legal Investigation into the Fate of Assets That Reached Switzerland as a Result of the Nazis*.—As a result of a bill introduced by the Swiss Federal Council,<sup>151</sup> on December 13, 1996, the Federal Assembly of the Swiss Confederation issued a federal decree to investigate the fate of assets deposited in Swiss Banks by the Nazis.<sup>152</sup> As a result, an investigation began on December 14, 1996 with the unanimous passage of the Federal Decree on the Historical and Legal Investigation into the Fate of Assets that reached Switzerland as a result of the National Socialist regime (Federal

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144. See VINCENT, *supra* note 50, at 200.

145. *Id.*

146. *Policy paper, supra* note 23.

147. See *Steps Taken, supra* note 22.

148. See *id.*

149. See VINCENT, *supra* note 50, at 200.

150. See *Steps Taken, supra* note 22.

151. The Swiss Federal Council is the Swiss government.

152. See Poncet, *supra* note 142.

Decree).<sup>153</sup> The commission was chaired by Professor J.F. Bergier and was composed of nine members, eight historians and one legal expert (Bergier Commission).<sup>154</sup> The investigation included an attempt to ascertain the steps taken by Swiss bank officials to locate dormant accounts since 1945.<sup>155</sup>

The investigation was to focus on the fate of assets forwarded to a "third party entrusted, to banks, insurance companies, lawyers, notaries, fiduciaries, portfolio managers, or to other persons or groups of persons having residence or headquarters in Switzerland or were acquired by such persons or received by the Swiss National Bank."<sup>156</sup> The assets investigated belonged to either Nazi Germany or Jews who deposited assets into the Swiss banks.<sup>157</sup> The Federal Decree also stated that the investigators were to have access to all relevant documents that would aid them in the discovery of the fate of the assets.<sup>158</sup> The Federal Decree also provided that anyone who destroyed relevant documents or makes them less accessible to investigators would be punished.<sup>159</sup>

An interim report by the Bergier Commission appeared in May of 1998. The report concluded that the Swiss National Bank had several objectives when they received gold from Nazi Germany.<sup>160</sup> The primary objective of the Swiss National bank was to maintain an "adequate gold reserve to assure the convertibility the Swiss franc, to safeguard Switzerland's supply of food and other essentials, and to ensure that the country's financial services industry would continue to function."<sup>161</sup> A second objective was to create a strong relationship with Germany in order to insure that financial relations between the countries would continue after the war.<sup>162</sup>

3. *The Decree on the Special Fund for Needy Victims of the Holocaust.*—On February 26, 1997, the Swiss Federal Council in agreement with the WJRO created The Swiss Fund for Needy

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153. See *Chronology*, *supra* note 131.

154. See *Steps Taken*, *supra* note 22.

155. See Poncet, *supra* note 142.

156. See *id.*

157. See *id.*

158. See *id.*

159. See *id.*

160. *Independent Commission of Experts, Conclusion* (visited Nov. 23, 1998) <[http://www.uek.ch/e/ml/gold\\_ez.htm](http://www.uek.ch/e/ml/gold_ez.htm)>.

161. See *id.*

162. See *id.* The report also concluded that the transactions between the United States and Switzerland was of a legal fashion and was intended for humanitarian purposes. See *id.*

Victims of the Holocaust.<sup>163</sup> The committee appointed to organize the fund was quite diverse in its makeup and its directors consisted of four Swiss and three members recommended by the WJRO.<sup>164</sup> The objective of the fund was to support “persons in need who, for racial, religious, political or other reasons, were persecuted or became victims in another way of the Holocaust/Shoa, as well as their descendents in need.”<sup>165</sup> The payments were set to occur at one time or in regular payments to Jews who were in particular need of financial support.<sup>166</sup> Those in need would have to request payments through an organization responsible for helping Holocaust victims in need of financial support.<sup>167</sup>

The total endowed fund amounted to \$183 million,<sup>168</sup> consisting of contributions from public and private contributors from Switzerland.<sup>169</sup> The first payments from the fund were made in November of 1997 to several victims of the Holocaust.<sup>170</sup> By the end of June 1998, about 30,000 to 40,000 Jews, primarily from Hungary and Latvia received aid through the fund.<sup>171</sup>

#### IV. The Complaints and the Initial Negotiations for a Settlement Between the Swiss Banks and the Holocaust Victims and Families.

In 1996 and 1997, three separate class action lawsuits were filed in the Eastern District of New York. All of the claims filed named United Bank of Switzerland, Credit Suisse and the Swiss Bank Corporation as defendants. Holocaust survivor, Gizella Weissshaus filed the first suit on October 2, 1996 seeking to recover \$20 billion in damages.<sup>172</sup> The complaint sought an accounting of

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163. See Poncet, *supra* note 142. Auditors will assure that the fund is being used for its intended purpose. See *id.* The auditors will submit a yearly report to the Swiss federal council. See *id.*

164. See Poncet, *supra* note 142.

165. See *id.*

166. See *id.*

167. See *id.*

168. See *Steps Taken*, *supra* note 22.

169. John Schermtz & Mike Meier, *Switzerland Takes Several Actions to Address Issues of Nazi Assets Deposited in that Country and the Interests of Needy Holocaust Victims*, INT'L L. UPDATE, Feb. 1998, available in WL 35 I.L.M. 1276-78.

170. See *Steps Taken*, *supra* note 22.

171. See *id.*

172. See Orenstein, *supra* note 19, at 65. The complaint described how Weissshaus and other holocaust victims tried to “secrete and/or deposit monies, jewelry, and other items of valuable personal property in the banks, and later,

the assets put into accounts by Jews and the property that was stolen from them.<sup>173</sup> The plaintiffs stated six causes of action: breach of contract, accounting, breach of fiduciary duty, conversion, conspiracy and unjust enrichment.<sup>174</sup> A second lawsuit was filed by another holocaust victim, Jacob Friedman, on October 22, 1996.<sup>175</sup> The complaint alleged that the banks violated international law and exceeded the claims of a neutral country.<sup>176</sup> In addition, the plaintiffs contended that not only did the banks keep assets deposited by Jews, but also they knowingly receive illegal gold from the Nazis.<sup>177</sup> On January 29, 1997, a third suit was filed on behalf of the World Council of Orthodox Jewish Communities.<sup>178</sup> Brooklyn Federal District Judge Edward Korman consolidated the three lawsuits on March 7, 1997.<sup>179</sup>

In July 1997, the plaintiffs and the Swiss banks argued before Judge Korman on a dismissal motion.<sup>180</sup> The Judge never ruled on the motion leaving the two sides to negotiate a settlement.<sup>181</sup> The first major development in the negotiations took place in March 1998.<sup>182</sup> The sides agreed on the general terms of a settlement that stated that any agreement would need approval from the Swiss, American and Israeli governments as well as the World Jewish Congress.<sup>183</sup> The agreement also created a "rough justice fund," which would cover all legal claims against the banks and could be used to supplement the investigation into dormant bank accounts in Swiss banks.<sup>184</sup>

A second major development in the negotiations did not take place until June 1998 when the two sides met in Manhattan.<sup>185</sup> During the sessions, the Swiss offered \$530 million and the plaintiffs made a counteroffer of \$1.5 billion.<sup>186</sup> As a result of the

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how they were stripped of jewelry and other family heirlooms made of gold, silver and diamonds that they had sewn into their clothing. *See id.*

173. *See* Orenstein, *supra* note 19, at 65.

174. *See* Ramasastry, *supra* note 20, at 374.

175. *See* Orenstein, *supra* note 19, at 65.

176. *See id.*

177. *See id.*

178. *See id.* at 66.

179. *See* Ramasastry, *supra* note 20, at 376.

180. *See* Orenstein, *supra* note 19, at 66.

181. *Id.* at 66.

182. *Id.*

183. *Id.*

184. *Id.*

185. *See* Orenstein, *supra* note 19, at 67.

186. *Id.*

discrepancy between the offers, the negotiations between the attorneys and the Swiss banks reached an impasse in July 1998.<sup>187</sup> In order to force the Swiss banks into a settlement, several state governments threatened to impose sanctions against three Swiss banks: Credit Suisse, Swiss Bank Corporation and Union Bank of Switzerland.<sup>188</sup> In total 20 American states and more than 30 American cities threatened boycotts<sup>189</sup> and sanctions against the Swiss banks if a settlement was not reached by September 1, 1998.<sup>190</sup>

New York State and New York City threatened to bar short-term investments with the banks.<sup>191</sup> The state treasurer of California announced that it would not do business with subsidiaries of Swiss banks in the United States.<sup>192</sup> The New Jersey Legislature considered passing a bill that would require the state to divest nearly \$66 million invested with Union Bank of Switzerland until the assets were returned to Holocaust survivors and descendants.<sup>193</sup>

## V. The Settlement

On August 12, 1998, the Credit Suisse Bank and the Union Bank of Switzerland, the Holocaust victims and the World Jewish Congress reached a \$1.25 billion settlement. The settlement ended the threatened boycotts by the states and American cities, which were a major catalyst to reaching settlement. The agreement is designed to be the final negotiation regarding the issue since all claims brought against the banks are included in the settlement.<sup>194</sup> In addition, the plaintiffs group renounced all claims against the Swiss National Bank, the Swiss government and private Swiss companies.<sup>195</sup>

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187. *Id.*

188. *Id.*

189. *See Swiss Banks pay \$1.25 Billion*, NAT'L L.J., Aug. 24, 1998, at A14.

190. *See Orenstein, supra* note 19, at 67.

191. Verena Dobnik, *Threats of Economic Sanctions Against the Swiss banks Spread Across U.S.*, DAILY REC., July 10, 1998.

192. John Hiscock, *Swiss Banks are Shunned in America* (visited Oct. 8, 1998) <[wysisyg://15/http://www.telegraph...9999999&pg=et/98/7/3/wbank03.html](http://www.telegraph...9999999&pg=et/98/7/3/wbank03.html)>.

193. *See Dobnik, supra* note 191.

194. Devlin Barrett, *Swiss will pay \$1.45 to Nazi Victims*, (visited Oct. 8, 1998) <<http://www.nypostonline.com/news/4648.htm>>.

195. *US Class Actions: Banks reach a Settlement*, (visited Oct 8, 1998) <<http://www.csg.ch/news/980813-w.html>>. Claims brought against Swiss insurance companies are excluded from settlement. *Id.*

The \$1.25 billion includes reparations for the bank accounts and the money looted by the Nazis.<sup>196</sup> The payments are to be made in four installments over the course of three years. The first payment of \$250 million will be made within 90 days of the court's approval of the settlement.<sup>197</sup> The second payment will be \$333 million and will be dispersed on the one year anniversary of the original payment.<sup>198</sup> The third payment will be \$333 million and will be made on the second anniversary of the first payment.<sup>199</sup> The final payment will be of the remainder of the balance and will be made three years after the first payment.<sup>200</sup> The settlement also stated that the banks would not be responsible for the payment of any legal fees or any costs associated with notice or other aspects of the settlement process.<sup>201</sup>

The Union Bank of Switzerland and Credit Suisse expected several private industries and the Swiss Central Banks to help contribute to the settlement fund.<sup>202</sup> However, two weeks after the settlement, the Swiss Central Bank denied the request from the two banks to contribute to the settlement fund.<sup>203</sup> Although the Swiss Central Bank praised the settlement, they disputed the jurisdiction asserted by the United States courts and believed that all previous claims were settled by the 1946 treaty (Washington Accord).<sup>204</sup>

## VI. Was the Settlement the Proper Method of Resolving the Nazi Gold Issue?

The 1946 Washington Accord resulted in \$58 million dollars in gold to be turned over to the Allies and required the Swiss to liquidate fifty percent of all German assets in their possession.<sup>205</sup> The dollar figure of the 1946 settlement is worth more than the \$1.25 billion settlement in 1999 dollars. However, the agreement

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196. Michel Hirsh, *After 50 years, a deal. (Swiss Banks agree to make Payments to Holocaust Victims)*, NEWSWEEK, Aug. 24, 1998, at 41.

197. See *Transcript of Settlement before the Honorable Edward R. Korman, United States District Judge*, (visited Oct. 8, 1998) <<http://www.giussani.com/holocaust-assets/documents/settlement.html>>.

198. See *id.*

199. See *id.*

200. See *id.*

201. See *id.*

202. See *Swiss Central Bank refuses to Pay into Settlement*, DAILY REC., Aug. 24 1998, at 2A.

203. See *id.*

204. See *id.*

205. See Slany, *supra* note 18.

was never fully implemented by the Swiss and had to be renegotiated in 1952 in order for full compliance.<sup>206</sup> Many have believed that the Swiss never actually intended to follow the 1946 Washington Accord.<sup>207</sup> There are several indications that the renegotiations of the Washington Accord would have produced the same result.

When the issue of Nazi Gold resurfaced in 1996 the Swiss reacted very slowly.<sup>208</sup> They initially refused to approach the situation in a humanitarian manner in the same way they did during the negotiations of the Washington Accord. In addition, the Swiss National Bank's attitude toward contributing to the settlement indicated that they were not ready to their mistakes, during and following World War II. The legalistic approach they adopted, combined with the attitude of the Swiss National Bank would have made negotiations to amend the Washington Accord unsuccessful. Therefore, it is apparent that the most effective method to finalize the Nazi Gold issue was to settle it through the court system.

#### VII. A Proposed Scheme to Assure Fairness to All Groups in the Disbursement of the \$1.25 Billion

The disbursement of the \$1.25 billion to the rightful owners is convoluted. It is easy to look sympathetically on the plight of Holocaust victims and demand answers to the problem quickly. The answers, however, will not evolve quickly because of the complexity of the issues.

Three groups have possible claims to portions of the settlement fund. The first are survivors of the Holocaust who have a claim to accounts that have been identified (survivors). The second are heirs of the rightful owners of accounts that have been identified (heirs). The third are organizations that believe they have a right to claim accounts that have been identified and do not have rightful owners or heirs (heirless accounts).

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206. *See id.*

207. *See id.*

208. *See Poncet, supra* note 142.



*A. The current Problems Associated with the Disbursement of the Settlement*

Several individuals and groups have suggested conflicting plans to distribute the money.<sup>209</sup> One plan suggests that the money, including heirless accounts, should be given only to the survivors and heirs.<sup>210</sup> But the World Jewish Restitution Organization (WJRO) presented a plan to distribute the money not only to the survivors and heirs, but also to groups such as the WJRO.<sup>211</sup> Alternatively, one of the attorneys involved in the litigation suggested that the settlement be distributed to only the 31,000 members of the class action suit.<sup>212</sup>

Due to the variety of settlement distribution proposals, the emphasis has shifted away from assuring that the money is placed in the proper hands. Rather, the primary issue in the discussions has been how the money would be distributed. Abraham Foxman, National Director of the Anti-Defamation League, has stated, "I'm very concerned that the last sound bite of the century not be about Jews and money. Six million Jews died because they were Jews, not because they had money. In a way it is a desecration of the memory."<sup>213</sup>

*B. Proposal*

The issue of Nazi Gold will not come to a conclusion for the Holocaust victims without the adoption of a uniform plan for settlement distribution. This uniform plan should allow each group of potential claimants to have independent control over the allocation of the money. Accordingly, the groups distribute the money in a way similar to that of the Tripartite Gold Commission. Since there are three potential groups that can claim a right to the money, three pools of money should be established. The first pool should be created for payments to survivors. A second part of the settlement should be reserved for the heirs of account holders. And a third fund should be created for claims to heirless accounts. This use of the financial settlement would assure that claimants of all identified accounts would receive a portion of the settlement and that additional funds would be available for any accounts

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209. See Orenstein, *supra* note 19, at 68.

210. See *id.*

211. See *id.*

212. See *id.*

213. See *id.*

discovered in the future. Additionally, this plan provides for the WJRO's concerns that heirless accounts would otherwise fail to be acknowledged.

Three separate committees would manage each pool of money. Requests by potential claimants for a part of the settlement would be made to the appropriate committee. The committee would arbitrate disputes over claims to the money and make all final decisions. In addition, a time limit should be placed on the number of years during which one could claim ownership of money. Any unclaimed funds would be disbursed to humanitarian causes around the world upon the expiration of the time limit.

1. *The Survivors' Pool.*—The Volcker Committee, which has identified several million dollars that were in dormant accounts in the Swiss banks,<sup>214</sup> will aid in the distribution of money to the survivors. Living claimants with identified accounts will likely receive settlement money from the pool in a timely manner. A committee with representation by all participating countries would facilitate notification to survivors and assure repayment of their accounts.

2. *The Heirs' pool.*—The distribution of money to heirs appears would appear to be an effortless task, however, there is often little or no proof of a bank account's existence. Most claimants will make claims based on family "legends or myths."<sup>215</sup> The claimants were told by their fathers or relatives that money existed in accounts in Switzerland, but were never given proof of the existence of the accounts.<sup>216</sup> There is a high probability that it will be impossible to trace all of the unclaimed accounts to heirs thereby preventing a return of all assets to the proper individuals. A proper method to trace heirs would be to utilize information that is uncovered by the Volcker Committee, the Bergier Commission, and the Eizenstat reports. With the information in these reports, the Swiss government, the United States government and the Jewish organization could create a neutral and objective review committee. The sole purpose of the committee would be to identify the rightful heirs of the accounts after requests by potential heirs are made. The use of a

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214. See Slaney, *supra* note 18.

215. See Orenstein, *supra* note 19, at 68.

216. See *id.*

committee would result in a unified approach to requests by potential heirs and would minimize complaints of wrongdoing and supervision of the investigations.

3. *The Heirless Accounts' Pool.*—The WJRO has already created a plan to return the heirless accounts.<sup>217</sup> Because the WJRO was given permission by the Israeli government to negotiate as the legal heir to the six million Jews killed in the Holocaust,<sup>218</sup> the WJRO should have the claim of right to heirless accounts. The first step of the plan includes returning money to the individuals in need of the money.<sup>219</sup> The rest of the money would be used to further Jewish purposes throughout the world.<sup>220</sup>

This seems to be a strong plan to assure the heirless account money will reach the hands of the people in need of aid. An organization such as the WJRO or the World Jewish Congress can quickly identify those who need the financial support. In addition, they will be able to assure that any remaining money will be placed in the control of worthy organizations. Such organizations could educate the world about the Holocaust or establish scholarship funds for underprivileged Jews throughout the world. The most effective means of reaching the most Jews in need would be to utilize an organization like the WJRO.

#### VIII. The Effect the Settlement May Have Swiss Bank Secrecy.

In recent years, Swiss bank secrecy laws have been challenged with the advent of the Nazi Gold issue. As a result of Article 5 of the Federal Decree, which allows the auditors of the Bergier Commission to have access to all relevant documents that would aid them in the discovery of the fate of the assets,<sup>221</sup> some believe the end of bank secrecy is near. However, there will have to be more action by the Swiss to assure that illegal funds from dictators will not be placed into Swiss banks. Although the abolishment of Swiss bank secrecy laws is impossible, there are mechanisms that could be used to decrease the amount of illegal funds entering Swiss banks.

A. *Proposal.*—The Federal Decree must be amended to allow future investigations of Swiss bank accounts when illegal

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217. *See id.*

218. *See id.*

219. *See id.*

220. *See Orenstein, supra* note 19, at 68.

221. *See Poncet, supra* note 142.

funds are transferred. Article 11 of the decree states that, "This decree is subject to optional referendum, as provided by 89(2) of the Constitution an audit has effect until December 31, 2001. This article appears to allow the Swiss government to have the ability to change, abolish or allow the decree to expire in 2001."<sup>222</sup> Therefore, to enable investigations into illegal funds transferred beyond 2001, either another law must be passed or the current Federal Decree must be extended.

An extension of the Federal Decree is unlikely because the Swiss banks desire to maintain the current level of secrecy. This level of secrecy assures account holders that their money is safe from investigation. Therefore, the amount of business the Swiss banks enjoy will not be adversely affected so long as the current level of secrecy is afforded to future account holders. The Swiss appear to take action when they are pressured. Therefore, in order for bank secrecy to be diminished, the people who benefited from the current Federal Decree must continue to pressure the Swiss allow investigations into their banks.

Another measure that must be taken by Swiss banks is to stringently enforce Article 305 of the Swiss Penal Code<sup>223</sup> which guarantees that illegal funds will not enter their banks. Although these laws have been passed, Swiss banks have been known to ignore some of the nation's banking laws. For example, following the passage of Article 4 of the Federal Decree, a law which makes it illegal to destroy documents relating to the Nazi Gold issue,<sup>224</sup> a night guard in the Union Bank of Switzerland discovered boxes of records in the bank's shredding room.<sup>225</sup> These boxes contained numerous documents relating to the Nazi Gold issue.<sup>226</sup> Article 305 requires Swiss Banks to investigate prospective account holders; this law, if observed, would deter anyone from attempting to place illegal funds into Swiss Bank accounts. Nazi Gold type problem could be resolved if the banks complied with Article 305 and other relevant laws.

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222. *See id.*

223. *See supra* text accompanying note 61.

224. *See Poncet, supra* note 142.

225. Eric Carpenter, *Hero in Nazi bank case moving to O.C.*, ORANGE COUNTY REG., Nov. 19 1998, available in 1998 WL 21280181.

226. *See Poncet, supra* note 142.

### IX. A possible Safeguard Against Negative Effects of Further Declassification of Documents?

Every time investigators looked at World War II documents, they found more "incriminating evidence relating to the private actors who either assisted Nazi Germany or profited from the Holocaust."<sup>227</sup> This may be an indication that more litigation that could occur as more documents are uncovered.<sup>228</sup> There is also a concern that disclosure of more World War II documents will crowd courthouses with more war-based claims.<sup>229</sup> There are already claims against German insurers that allegedly colluded with the Nazis and robbed Jews of insurance benefits worth billions of dollars.<sup>230</sup> In addition, there are documents that indicate that several companies including a German division of Ford used wartime slave laborers.<sup>231</sup>

On October 8, 1998, President Clinton signed the Nazi War Crimes Disclosure Act (NWCDA).<sup>232</sup> A major part of the NWCDA is the requirement that the United States government "disclose information about individuals who participated in Nazi War Crimes, what their relationship was to U.S. agencies, if any, and what they received, if anything, in return for cooperation."<sup>233</sup> The NWCDA will certainly lead to a great deal of embarrassment for the United States and it could result in litigation against the United States.

### X. Conclusion

Although the Swiss have rectified the situation with the Jewish community, the effects of these policies will linger for generations. The Swiss have created wounds that will take a long time to heal. However, the attempts by the Swiss to compensate Jews will begin the process of healing. The settlement hopefully

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227. Josh Karlen, *Not Really Over, WWII Suits Clog Courts worldwide, Document Releases Sparked Litigation: More on the Way*, NAT'L L. J., Aug. 31, 1998, at A1.

228. *See id.*

229. *See id.*

230. *See id.*

231. *See id.*

232. Associated Press, *Law Allows Scholar's Probe the U.S. Government and then Protected a War Criminal During the Cold war, A Historian Believes*, GREENSBORO NEWS & REC., Oct. 10, 1998, at B2A, available in, 1998 WL 19937403.

233. *A Good Act, Congress OKs U.S. Files on Nazis*, COLUMBUS DISPATCH, Aug. 11, 1998, at 06A, available in 1998 WL 16491332.

will not create more problems for the Jewish community. The possibility that the disbursement of funds could be as emotional as the settlement process is high. Therefore, three pools of money will satisfy the needs of all individuals or groups involved in the litigation.

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