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June 2021

Case Guelph Treasure – Alan Philipp, Gerald G. Stiebel and Jed R. Leiber v. Germany and Prussian Cultural Heritage Foundation

Alan Philipp – Gerald G. Stiebel – Jed R. Leiber – Germany/Allemagne – Prussian Cultural Heritage Foundation – Artwork/oeuvre d'art – Nazi-looted art/spoliations nazies – Negotiation/négociation – Conciliation – Institutional facilitator/facilitateur institutionnel – Judicial claim/action en justice – Judicial decision/decision judiciaire – Expropriation – Jurisdiction/conflit de juriction – State immunity/immunité des Etats – State responsibility/responsabilité internationale des Etats – Ownership/propriété – Ongoing dispute/litige en cours

A collection of medieval ecclesiastical art is claimed by the heirs of three Jewish dealers, who allege that the collection was sold under duress during the Nazi era. After an unsuccessful conciliation in front of Germany's Advisory Commission, the claim is being litigated before the courts of the United States. On 3 February 2021, the Supreme Court of the United States ruled in favour of Germany on the interpretation of the expropriation exception in the Foreign Sovereign Immunities Act.

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I. Chronology[1]

Nazi-looted art – Ongoing dispute

- **5 October 1929**: Three art dealer firms, owned by Jewish residents from Frankfurt am Main and united in a consortium, purchased a collection of 82 medieval works of ecclesiastical art (known as "Guelph Treasure") from the Princely House of Braunschweig-Lüneburg, for 7.5 million Reich marks.
- **By 1931**: The dealer firms sold 40 individual items to museums and individuals in Europe and the United States (US) for a total price of approximately 2.7 million Reich marks.
- **14 June 1935**: The dealer firms sold the remaining 42 objects to Dresdner Bank (which was secretly acting on behalf of the State of Prussia, of which Hermann Göring was Prime Minister) for a total price of 4.25 million Reich marks (later reduced by 100.000 Reich marks as provision). These pieces were shipped from Amsterdam (where they had been stored) to Berlin.
- **After 1945**: The US took possession of the 42 objects forming the Guelph Treasure while occupying Germany at the end of the Second World War and handed it over in trust first to the German State of Hessen and then to the German State of Lower Saxony.
- **1963**: The Guelph Treasure was taken over by the Prussian Cultural Heritage Foundation (hereinafter "SPK"), an instrumentality of the Federal Republic of Germany; since that time, the collection has been displayed at the Museum of Decorative Arts in Berlin.
- **2008**: Two US citizens (Alan Philipp and Gerald G. Stiebel) and a citizen of the United Kingdom (Jed R. Leiber), tracing their lineage to the dealers who had formed the consortium, first approached the Prussian Cultural Heritage Foundation; they demanded that the 42 pieces of the Guelph Treasure in its possession be returned to them, arguing that their ancestors sold them under duress.
- **November 2010**: The SPK informed the claimants that its investigation on the 1935 sale did not demonstrate that the Guelph Treasure had been sold under duress.[2]

[1] For an overview of the facts of the case, see Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi persecution, Especially Jewish Property (hereinafter "Advisory Commision"), 'Recommendation in the Matter of the Heirs of Hackenbroch and Others v. Stiftung Preußischer Kulturbesitz (Prussian Cultural Heritage Foundation)', 20 March 2014, https://www.beratende-kommission.de/Content/06_Kommission/EN/Empfehlungen/14-03-20-Recommendation-Advisory-Commission-Guelph-Treasure.pdf;jsessionid=FC004D95F75CD228B78D06B4E653924A.m1?__blob=publicationFile&v=7; *Alan Philipp et al. v. Federal Republic of Germany et al.*, No. 248 F. Supp. 3d 59 (US District Court for the District of Columbia 31 March 2017), 64-67; *Alan Philipp et al. v. Federal Republic of Germany and Stiftung Preussischer Kulturbesitz*, No. 894 F.3d 406 (US Court of Appeals for the D.C. Circuit 10 July 2018), 409-410; and *Federal Republic of Germany et al. v. Alan Philipp et al.*, No. 19-351, 592 US (2021) (Supreme Court of the United States 3 February 2021), 1-4. For further information see Prussian Cultural Heritage Foundation, 'Dossier: The Guelph Treasure', accessed 14 June 2021, https://www.preussischer-kulturbesitz.de/newsroom/dossiers-and-news/all-dossiers/dossier-the-guelph-treasure.html?L=1.

[2] Prussian Cultural Heritage Foundation, 'Findings of the Provenance Research Regarding the Sale of the Guelph Treasure in 1935', accessed 7 June 2021, https://www.preussischer-kulturbesitz.de/newsroom/dossiers-and-news/all-dossiers/dossier-the-guelph-treasure/findings-of-the-provenance-research-regarding-the-sale-of-the-guelph-treasure-in-

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- **2012**: The heirs and the SPK agreed to submit their dispute to the German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property (hereinafter "Advisory Commission").
- **20 March 2014**: The Advisory Commission issued its recommendation, concluding that the 1935 sale of 42 pieces of the Guelph Treasure was not a compulsory one due to persecution.[3]
- **24 February 2015**: The three heirs filed suit against the Federal Republic of Germany and the SPK in the US District Court for the District of Columbia.
- **31 March 2017**: Aside from a few uncontested issues, the District Court for the District of Columbia denied the motion to dismiss filed by the defendants.[4]
- **10 July 2018**: A three-judge panel of the Court of Appeals largely affirmed the District Court's judgment, allowing the lawsuit to proceed against the SPK but ordering the District Court to dismiss the lawsuit against the Federal Republic of Germany.[5]
- **18 June 2019**: The Court of Appeals voted by majority to deny the defendants's petition for rehearing *en banc*.
- **2 July 2020**: The US Supreme Court granted a petition for a writ of certiorari.
- **3 February 2021**: The US Supreme Court unanimously vacated the 2018 judgment of the Court of Appeals and remanded the case for further proceedings.[6]

II. Dispute Resolution Process

Conciliation – Institutional facilitator – Judicial claim – Judicial decision – Negotiation

- The first phase of the dispute, between 2008 and 2012, saw direct negotiations between the SPK and the heirs of the dealers who had sold the Guelph Treasure in 1935. The institution conducted extensive research to establish the historical circumstances of the 1935 sale,[7] but it did not prove possible to reach an agreement with the claimants.
- The second phase of the dispute, between 2012 and 2015, was characterized by the activation of a conciliation procedure. In effect, in 2012, the SPK and the claimants agreed to bring the matter in front of the Advisory Commission. For the following two years, the

1935.html?L=1&tx_gdcookieconsent_cookieconsent%5Baction%5D=consent&tx_gdcookieconsent_cookieconsent%5Bcontroller%5D=CookieConsent&cHash=05c7c4c5ba2815d0f7470a67c23d484d.

[3] Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property, 'Recommendation in the Matter of the Heirs of Hackenbroch and Others v. Stiftung Preußischer Kulturbesitz (Prussian Cultural Heritage Foundation)', 3.

[4] 248 F. Supp. 3d 59 (D.D.C. 2017), 87.

[5] 894 F.3d 406 (D.C. Cir. 2018), 418.

[6] 592 US (2021), 15-16.

[7] Prussian Cultural Heritage Foundation, 'Findings of the Provenance Research Regarding the Sale of the Guelph Treasure in 1935'. The SPK claimed that it had restituted nearly 1,500 Nazi-looted art works since the 1990s: see Prussian Cultural Heritage Foundation, 'Dealing with Cultural Assets Looted by the National Socialists', accessed 7 June 2021, https://www.preussischer-kulturbesitz.de/priorities/provenance-research-and-issues-of-ownership/issues-of-ownership/dealing-with-cultural-assets-looted-by-the-national-socialists.html?L=1.

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Commission reviewed the documentation presented by the parties and conducted a hearing on the matter. The parties had pledged to abide by the decision of the Commission,[8] which issued its recommendation with explanations in March 2014.[9]

- During the third phase (from 2015 onwards), mechanisms of alternative dispute resolution were relinquished and the dispute became the object of judicial proceedings. The heirs did not accept the negative opinion of the Advisory Commission of 2014 and brought their case before US courts. Arguing that the 1935 sale of the Guelph Treasure was made under duress and asserting ten causes of action, they sought the restitution of the objects and/or 250 million USD. Defendants, on their part, sought dismissal of all the claims on the basis of sovereign immunity, international comity and the doctrine of *forum non conveniens*. So far, the proceedings have been the object of three decisions, including by the Supreme Court. However, the courts have only ruled on the motion to dismiss filed by Germany and the SPK, without addressing yet the merits of the case.
- From the viewpoint of the dispute resolution process, it is worth mentioning that the executive branches of both Germany and the US have been actively involved in the dispute. On the one hand, on 6 February 2015, nearly one year after the opinion by the Advisory Commission and just a few weeks before the beginning of the lawsuit in the US, the State of Berlin designated the Guelph Treasure as cultural property of national significance, thus preventing the export of the collection from Germany (even for exhibition purposes) without explicit permission by the federal executive.[10] On the other hand, the US Solicitor General was asked by the Supreme Court if the federal government were in favour of granting review *vis-à-vis* the ruling of the Court of Appeals for the D.C. Circuit. In its *amicus curiae* brief, the federal government highlighted the important implications for US foreign policy of questions associated with the expropriation exception and international comity.[11]

III. Legal Issues

Expropriation – Jurisdiction – Ownership – State immunity – State responsibility

- The main claim on the merits advanced by the claimants is that the 1935 sale of the Guelph Treasure to the State of Prussia was a forced one due to Nazi persecution. They argued before the Advisory Commission that "[i]n 1934 and 1935 […] Dresdner Bank and the Prussian State government behind it deliberately exploited the difficult economic situation

[8] Prussian Cultural Heritage Foundation, 'What Has Happened since the 2008 Restitution Request for the Guelph Treasure?', accessed 7 June 2021, https://www.preussischer-kulturbesitz.de/newsroom/dossiers-and-news/all-dossiers/dossier-the-guelph-treasure/what-has-happened-since-the-2008-restitution-request-for-the-guelph-treasure.html?L=1.

[9] Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property, 'Recommendation in the Matter of the Heirs of Hackenbroch and Others v. Stiftung Preußischer Kulturbesitz (Prussian Cultural Heritage Foundation)'.

[10] Medieval Histories, 'Jewish Heirs to Guelph Treasure Sue Germany in USA', *Medieval Histories* (blog), 25 February 2015, https://www.medieval.eu/jewish-heirs-to-guelph-treasure-sue-germany-in-usa/.

[11] String et al., Brief for the United States as Amicus Curiae, Nos. 19-351 and 19-520 (26 May 2020), 12-14 and 19-21.

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the Jewish art dealers found themselves in and exerted pressure on them".[12] They also maintained that the purchase price of 4.25 million Reich marks was far below the market price (estimated between 6 to 7 million Reich marks).[13] The SPK, on its part, argued that the claim for restitution lacked merit under the principles and guidelines set forth in the Joint Statement of 1999 and its implementing Guidelines. The SPK relied on the historical facts of the case, as verified through source materials, to rule out a compulsory sale.[14] The SPK also used the results of its investigation to counter the heirs' claim before the Advisory Commission.[15]

- In March 2014, the Advisory Commission concluded that the 1935 sale of the Guelph Treasure was not a compulsory one due to persecution, and therefore that it could not recommend its return to the claimants. The Advisory Commission analysed the circumstances preceding, accompanying and following the transaction; while acknowledging "the difficult fate of the art dealers and […] their persecution during the Nazi period", it interpreted all those factors as evidence that they had not been pressured during the negotiations leading to the 1935 sale.[16]
- Before the US courts, the discussion has so far revolved around several arguments used by Germany and the SPK to have the lawsuit dismissed. First, the District Court declined to dismiss the heirs' claims on the basis of the doctrine of *forum non conveniens*.[17] Second, both the District Court and the Court of Appeals concluded that those claims were not pre-empted by the ruling of the Advisory Commission.[18] Third, the lower courts considered that the doctrine of international comity did not require deference to the recommendation of the Advisory Commission nor prior exhaustion of available remedies in Germany.[19]
- The most debated issue, however, concerns whether the heirs' claims should be dismissed on the ground that the Federal Republic of Germany and the SPK are entitled to sovereign immunity as per the Foreign Sovereign Immunity Act (FSIA) – and, more specifically, whether the so-called "expropriation exception" to sovereign immunity in the FSIA gives rise to subject-matter jurisdiction over the heirs' claims. That exception to immunity from

[12] Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property, 'Recommendation in the Matter of the Heirs of Hackenbroch and Others v. Stiftung Preußischer Kulturbesitz (Prussian Cultural Heritage Foundation)', 2.
[13] Ibid.
[14] Prussian Cultural Heritage Foundation, 'Why Was the Sale of the Guelph Treasure Not a Forced Sale?', accessed 7 June 2021, https://www.preussischer-kulturbesitz.de/newsroom/dossiers-and-news/all-dossiers/dossier-the-guelph-treasure/why-was-the-sale-of-the-guelph-treasure-not-a-forced-sale.html?L=1. In a press release dated 13 January 2014, the SPK added an additional factor, namely, that the sellers and their descendants had not demanded the restitution of the Guelph Treasure before 2008, even though its whereabouts had been known since after 1945 and it had been always displayed publicly since the 1950s. See Prussian Cultural Heritage Foundation, 'Restitution Request "Welfenschatz"', 13 January 2014, https://www.preussischer-kulturbesitz.de/news-detail/article/2014/01/13/restitution-request-welfenschatz.html?L=1&cHash=0aed2406c5588554f41ff81ddc800fbf.
[15] See Prussian Cultural Heritage Foundation, 'Why Was the Sale of the Guelph Treasure Not a Forced Sale?'
[16] Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property, 'Recommendation in the Matter of the Heirs of Hackenbroch and Others v. Stiftung Preußischer Kulturbesitz (Prussian Cultural Heritage Foundation)', 3.
[17] 248 F. Supp. 3d 59 (D.D.C. 2017), 83-87.
[18] Ibid., 75-80; 894 F.3d 406 (D.C. Cir. 2018), 417-418.
[19] 248 F. Supp. 3d 59 (D.D.C. 2017), 80-83; 894 F.3d 406 (D.C. Cir. 2018), 414-416.

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suit provides that "a 'foreign State shall not be immune from the jurisdiction of' US courts in any case 'in which rights in property taken in violation of international law are in issue' and there is a specified commercial nexus to the United States".[20] The lower courts looked at the question of immunity in its different components.[21] The District Court dismissed five out of the ten claims by the heirs because they did not concern rights in property, but otherwise allowed the case to proceed against both defendants.[22] The Court of Appeals affirmed for the most, but ordered that the claims be dismissed with regard to the Federal Republic of Germany: insofar as the property in question was not present in US territory, the heightened commercial nexus with the US required by the expropriation exception *vis-à-vis* a foreign State was not satisfied.[23]

- The Supreme Court looked at a specific aspect of sovereign immunity, i.e. how to interpret the phrase "rights in property taken in violation of international law" as used in the FSIA's expropriation exception.[24] The Court ruled in favour of Germany, holding unanimously that the phrase refers to violations of the international law of expropriation (not of human rights) and that it incorporates the domestic takings rule (whereby "a foreign sovereign's taking of its own nationals' property remains a domestic affair" that does not lift immunity).[25] However, in vacating the judgment of the Court of Appeals and remanding the case for further proceedings, the Supreme Court directed lower courts to consider a counterargument raised by the heirs – i.e. that the 1935 sale of the Guelph Treasure was "not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction".[26]

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[20] String et al., Brief for the United States as Amicus Curiae, 2 (quoting 28 U.S.C. 1605(a)(3)). The exact wording of the exception is the following: 'Section 1605 - General exceptions to the jurisdictional immunity of a foreign state (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case … (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States'.

[21] Using slightly different formulations (which can be accounted for on the basis of the different jurisprudence quoted), the District Court and the Court of Appeals identify the following requirements for the expropriation exception to apply: (i) the claim must be one in which "rights in property" are "in issue"; (ii) the property in question must have been "taken in violation of international law"; and (iii) one of two commercial-activity nexuses with the United States must be satisfied – see 248 F. Supp. 3d 59 (D.D.C. 2017), 68, as well as 894 F.3d 406 (D.C. Cir. 2018), 410.

[22] 248 F. Supp. 3d 59 (D.D.C. 2017), 69-74. The dismissed claims were those of fraud in the inducement; breach of fiduciary duty; breach of the covenant of good faith and fair dealing; civil conspiracy; and tortious interference. The claims that could proceed were those of declaratory relief; replevin; conversion; unjust enrichment; and bailment.

[23] 894 F.3d 406 (D.C. Cir. 2018), 414.

[24] The Supreme Court summarized the question before it as follows: "whether a country's alleged taking of property from its own nationals falls within this [expropriation] exception" (see 592 US (2021), 1). Somewhat more clearly, the US Solicitor General had resumed the question in the writ for certiorari as follows: "Whether the expropriation exception applies to claims related to a foreign state's violations of international human rights law in connection with the taking of the property of its own nationals" (String et al., Brief for the United States as Amicus Curiae, 1).

[25] 592 US (2021), 4 and 15-16.

[26] Ibid., 16. It is worth stressing that the judgment of the Supreme Court elaborated on the question of sovereign immunity only, without implying directly the Act of State doctrine. Even though the two theories share a similar origin (i.e., the notion of sovereign equality), they differ as to the mode of operation: whereas sovereign immunity prevents the

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IV. Adopted Solution

- The dispute over the Guelph Treasure has not been resolved yet. Lower courts in the US will now determine if they have subject-matter jurisdiction over the heirs' claims on the basis of the indications given by the US Supreme Court.

V. Comment

- In the Guelph Treasure case, both alternative dispute resolution (ADR) mechanisms and litigation have been characterized by a considerable lack of predictability. The case was the only one (out of approximately fifty restitution claims decided since 1999) in which the SPK was not able to reach an agreement with the applicants.[27] The non-binding nature of the recommendations issued by Germany's Advisory Commission does not alter the fact that its ruling was not followed even if both parties had agreed in advance to submit to it. As regards the litigation phase, not only have the opinions by the three US courts highlighted fundamental discrepancies in the interpretation of the FSIA – the judgment of the Supreme Court also hints at a decisive change of attitude on the issue of Nazi-looted art. Just a few years earlier, its opinion in *Altmann* had seemed to grant US courts a wider margin to adjudicate on restitution claims against foreign States.[28] Now, the decision under scrutiny significantly curtails that capacity, and leaving room for considering the counterargument based on the nationality of the art dealers hardly hides the U-turn or reconciles it with the precedent.
- It could be argued that these corrections of trajectory are symptoms of a dynamic and healthy system that is capable of carefully assessing the facts of each dispute or incorporating criticisms (the *Altmann* opinion had been received mildly by part of the doctrine).[29] It can also be conceded that the legal system devised since the Washington Conference on Holocaust Era Assets is premised on the very idea that just and fair solutions should take precedence over legal certainty.[30] Whatever the case, these arguments hardly

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exercise of jurisdiction, the Act of State doctrine enters the picture only in the merits phase, once jurisdiction has been established. See Christine G. Cooper, 'Act of State and Sovereign Immunity: A Further Inquiry', *Loyola University Chicago Law Journal* 11, no. 2 (1980): 193-236, and Alfonso Iglesias, 'Act of State Doctrine', Oxford Bibliographies, accessed 14 June 2021, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0207.xml.

[27] Prussian Cultural Heritage Foundation, 'Restitution Request "Welfenschatz"'.

[28] *Republic of Austria et al. v. Maria V. Altmann*, No. 03-13, 541 US (2004) (Supreme Court of the United States 7 June 2004). For an overview of the case, see Renold Caroline, Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case 6 Klimt Paintings – Maria Altmann and Austria," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

[29] Beat Schönenberger, *The Restitution of Cultural Assets* (Berne: Stämpfli Publishers Ltd., 2009), 213 (quoted in Renold Caroline, Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case 6 Klimt Paintings – Maria Altmann and Austria," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva).

[30] See the Washington Conference Principles on Nazi-Confiscated Art, 3 December 1998, https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/. See also '2009 Terezin Declaration

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cancel the impression that the present landscape of norms and procedures has failed to provide either party (claimants and present possessors alike) with reasonably clear prospects as to the outcome of the dispute.

- The case also adds to the growing strand of practice indicating that ADR mechanisms and litigation are not, in effect, alternative, but are often resorted to over the course of the same dispute (see again the Altmann case or, more recently, the case of Pissarro's painting titled *La bergère rentrant des moutons*).[31] It is also worth noting the tendency of litigating before jurisdictions different from where the cultural good is located (*forum rei sitae*). If this is sometimes due to practical reasons (financial ones in Altmann, or, even here, the nationality of the claimants), tactical considerations can also play a role. In the present case, the calculation had less to do with the likelihood of a successful claim before US courts, and more with the lack of trust in the German legal edifice for addressing Nazi spoliations. The heirs of the art dealers explained their decision not to bring their claim before German courts with the country's "lack of coherent policy toward victims of Nazi-looted art, and the unfair treatment […] already suffered as a result of the Advisory Commission's recommendation".[32]
- On a final note, the case shows the bearing that policy considerations (not necessarily pertaining to the art domain) can exert on restitution disputes. In the opinion of both the US Solicitor-General and the Supreme Court, embracing the expansive reading of the expropriation exception suggested by the heirs and reading into it a reference to the international law of human rights would have serious consequences on US foreign policy.[33] The case of the Guelph Treasure thus brings to the fore a considerable risk of litigating the dispute in a jurisdiction different from the *forum rei sitae* – i.e., that the merits of a dispute with its roots in the past remain in the background, with more careful consideration being given to present and pressing concerns.

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on Holocaust Era Assets and Related Issues', 30 June 2009, https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/.

[31] See Aleksanyan G. Nare, Alessandro Chechi, Marc-André Renold, "La Bergère – Meyer Heirs and Fred Jones Jr. Museum of Art," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

[32] 248 F. Supp. 3d 59 (D.D.C. 2017), 84.

[33] String et al., Brief for the United States as Amicus Curiae, 14; see also 592 US (2021), 13: "As a Nation, we would be surprised - and might even initiate reciprocal action - if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago. There is no reason to anticipate that Germany's reaction would be any different were American courts to exercise the jurisdiction claimed in this case".

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b. Case law

- *Republic of Austria et al. v. Maria V. Altmann*, No. 03-13, 541 US (2004) (Supreme Court of the United States 7 June 2004).
- *Alan Philipp et al. v. Federal Republic of Germany et al.*, No. 248 F. Supp. 3d 59 (US District Court for the District of Columbia 31 March 2017).
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- *Federal Republic of Germany et al. v. Alan Philipp et al.*, No. 19-351, 592 US (2021) (Supreme Court of the United States 3 February 2021).

c. Legislation

- United States, Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

d. Documents

- Joint Statement by the Federal Government of Germany, the Länder and the National Associations of Local Authorities on the Tracing and Return of Nazi-Confiscated Art, Especially Jewish Property, December 1999. https://www.lostart.de/Webs/EN/Datenbank/Grundlagen/GemeinsameErklaerung.html.
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