

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**JULIUS GOLDSTEIN and PETER  
GINGOLD,**

**Plaintiffs,**

v.

**UNITED STATES OF AMERICA and  
THE AMERICAN JEWISH  
COMMITTEE,**

**Defendants.**

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**Civil Action No. 01-0005 (RMC)**

**MEMORANDUM OPINION**

Julius Goldstein and Peter Gingold, victims of the Nazi Holocaust during World War II, sue the United States for its failure, in 1944 and thereafter, to take affirmative actions to prevent the deaths of family members and other Jews and for the alleged 1945 theft of the assets of Hungarian Jews by United States troops. Pending before the Court is the government's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1). The government argues that the United States is immune from this suit and that there is no basis to find any waiver of its sovereign immunity. The United States further argues that this case presents nonjusticiable political questions, and should be dismissed for that reason as well. The Court finds that the claims that Messrs. Goldstein and Gingold assert are barred by the doctrine of sovereign immunity and, therefore, the Court does not address the political question argument posited by the government. Because transfer to another federal court will not remedy this jurisdictional defect, the government's Motion to Dismiss will be granted.

## FACTS

\_\_\_\_\_The complaint states that Mr. Goldstein is a "former forced laborer and Auschwitz survivor" and that Mr. Gingold's brother and sister were killed in Auschwitz. Compl. at 1. Acting *pro se*, these gentlemen seek damages under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, asserting that the United States failed to "undertake a humanitarian Auschwitz intervention" during World War II. Messrs. Goldstein and Gingold allege that the common law, Executive Order No. 9417, the U.S. Constitution, the Law of Nations, and the Law of Nuremberg imposed a duty on the United States to intervene at Auschwitz. They argue that intervention by the United States in April 1944 would have saved the lives of 400,000 European Jews. The complaint also alleges that "in early 1945 the US Military stole a large part of the property of the Hungarian Jews" from a "Goldtrain." Compl. at 2. Messrs. Goldstein and Gingold filed this action for themselves and on behalf of a putative class of Auschwitz survivors, robbed victims, and their heirs. As recompense for mental distress, physical harm, and financial suffering, they seek the establishment of a \$40 billion compensation fund.

## LEGAL STANDARD

When deciding a motion to dismiss for lack of subject matter jurisdiction, the Court must liberally construe all the factual allegations in the complaint in the favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *see also Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483 (D.C. Cir. 1992). However, the Court need not accept as true legal conclusions couched as factual allegations. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986). "[A] federal court should not dismiss a complaint either for lack of subject matter jurisdiction or for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would

entitle him to relief.” *Caribbean Broad Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086 (D.C. Cir. 1998) (citations omitted). The Plaintiffs have the burden of proving subject matter jurisdiction over their claims. *Id.* Because the Plaintiffs are proceeding *pro se*, the Court will liberally construe the complaint and pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972).

### ANALYSIS

Messrs. Goldstein and Gingold have raised two distinct claims and seek the establishment of a common compensation fund as a remedy for both. The Court will first analyze the claims based on the failure of the United States to intervene at Auschwitz and then turn to the “Goldtrain” claims to determine whether this Court has jurisdiction over either set of claims.

#### **I. Sovereign Immunity and the Failure to Intervene**

The United States argues that neither this Court, nor any other federal court, has jurisdiction over the claims that the United States failed to intervene at Auschwitz (“failure-to-intervene” claims) because the government has not waived its sovereign immunity. It is black-letter law that the United States is immune from suit except to the extent that Congress has specifically waived its sovereign immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). Any waiver of immunity must be unequivocally expressed and will not be implied. *Id.* Federal courts are courts of limited jurisdiction and may exercise jurisdiction only in the manner authorized by Article III of the Constitution and by the laws of Congress enacted pursuant to the Constitution. *See, e.g., Rasul v. Bush*, 215 F. Supp. 2d 55, 61 (D.D.C. 2002). Therefore, absent a congressional waiver of sovereign immunity, federal courts do not have jurisdiction to entertain a suit against the United States. Contrary to the repeated assertions of Messrs. Goldstein and Gingold, absent a congressional waiver, this immunity applies even in Holocaust cases. With this background in mind, the Court will

determine whether Congress has ever clearly waived the sovereign immunity of the United States with respect to the failure-to-intervene claims raised by Messrs. Goldstein and Gingold.

**A. Alien Tort Claims Act (“ATCA”)**

The complaint predicates jurisdiction on the ATCA. Compl. ¶ 4. This statute provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” However, the ATCA is jurisdictional only, allowing such suits in federal and not state courts, and “itself does not provide a waiver of sovereign immunity.” *Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992); *see also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *Rasul*, 215 F. Supp. 2d at 64 n.11. To proceed under the ATCA, the Plaintiffs must point to an independent basis for a waiver of sovereign immunity. Because Messrs. Goldstein and Gingold are proceeding *pro se*, the Court will examine other statutes that the Plaintiffs do not cite to discern whether Congress has waived sovereign immunity for the failure-to-intervene claims.

**B. Federal Tort Claims Act (“FTCA”)**

The FTCA, 28 U.S.C. § 2671, *et seq.*, contains a limited waiver of sovereign immunity. *See* 28 U.S.C. § 2674 (“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”). Coupled with this waiver are procedural requirements, *see* 28 U.S.C. §§ 2401, 2675, and a number of exceptions, two of which are particularly relevant to this analysis: (1) the discretionary function exception, *see* 28 U.S.C. § 2680(a), and (2) the combatant activities exception, *see* 28 U.S.C. § 2680(j). “If a claim falls within any exception to the FTCA, sovereign immunity has not been

waived and the court is without jurisdiction to hear the case.” *Industria Panificadora*, 763 F. Supp. at 1156.

### **1. Procedural Requirements Under the FTCA**

In order to maintain a civil suit against the United States under the FTCA, a putative plaintiff must first exhaust his administrative remedies by presenting the claim in writing to the appropriate federal agency within two years of accrual of that claim. *See* 28 U.S.C. § 2401(b); *see also id.* at § 2675 (requiring that the notice be sent by certified mail and contain a sum certain of damages sought). A timely filing is a prerequisite to finding a waiver of sovereign immunity. Messrs. Goldstein and Gingold do not contest the government’s assertion in its Motion to Dismiss that they have failed to exhaust their administrative remedies. *See* Motion to Dismiss at 7 n.4. They instead assert that these arguments are “irrelevant” and that the doctrine of sovereign immunity does not apply to Holocaust cases. *See generally* Answer to Defendant’s Motion to Dismiss, filed Aug. 13, 2001. However, the Court finds that the doctrine of sovereign immunity applies to any suit against the United States. An administrative filing is a jurisdictional prerequisite to a waiver of sovereign immunity under the FTCA. Because Messrs. Goldstein and Gingold did not make a timely filing, this Court has no jurisdiction to hear their claims against the United States under the FTCA. *GAF Corp. v. United States*, 818 F.2d 901, 904-05 (D.C. Cir. 1987).

### **2. Discretionary Function Exception**

Even were a timely administrative filing made by the Plaintiffs here, the discretionary function exception to the FTCA would apply. *See* § 2680(a) (excepting claims that stem from “the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved

be abused”). Section 2680(a) “shields from tort liability discretionary governmental decisions and actions grounded on considerations of social, economic or political policy.” *Industria Panificadora, S.A.*, 957 F.2d at 887 (citations omitted). A two-part test is used to determine whether the discretionary function exception applies. “First a court must determine whether there was a specific regulation mandating action in the cases.” *Maalouf v. Swiss Confederation*, 208 F. Supp. 2d 31, 36 (D.D.C. 2002). If such a regulation exists, the action is not discretionary, and the government is not immune from suit. Second, if there is no applicable regulation, the court must determine if the action is of the type grounded in social, economic, or political policy. *See Macharia*, 238 F. Supp. 2d at 22. If so, the court has no jurisdiction to consider any claim arising from the alleged action (or inaction).

Plaintiffs have not identified any United States regulation mandating that the United States intervene in a certain manner at Auschwitz. Messrs. Goldstein and Gingold point to Executive Order No. 9417, issued by President Roosevelt on January 22, 1944. This Executive Order did not mandate that the United States take specific actions, but rather established the War Refugee Board and set forth the “policy of this Government to take all measures within its power to rescue the victims of enemy oppression who are in imminent danger of death and otherwise to afford such victims all possible relief and assistance consistent with the successful prosecution of the war.” This language was inherently discretionary, especially since its directive had to be, in all instances, “consistent with the successful prosecution of the war.”<sup>1</sup>

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<sup>1</sup>Moreover, the Executive Order did not create an enforceable private right of action since it did not have a specific foundation in an act of Congress,. *See, e.g., Zhang v. Slattery*, 55 F.3d 732, 747 (2d Cir. 1995); *see also In re: Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980).

The complaint also fails under the second factor of the test. Its allegations are grounded in military and foreign policy considerations. Messrs. Goldstein and Gingold question strategic military decisions made during World War II, as is evidenced by the complaint and its attachments. In one such attachment, the Assistant Secretary of War explained to the Executive Director of the War Refugee Board that bombing rail lines used by the Nazis to transport Jews was “impracticable,” of “doubtful efficacy” and would divert military resources needed elsewhere. *See also* Compl. at 7 (“[T]here was an intensive discussion lasting several months among lawyers in the American Administration on the issue of rescue [of Auschwitz prisoners].”). Policy decisions such as these regarding the deployment and commitment of military resources are encompassed within the discretionary function exception, however awful the consequences. The FTCA does not waive sovereign immunity for claims premised on these types of decisions. *See Industria Panificadora*, 957 F.2d at 887 (affirming district court decision that claims stemming from alleged failure of United States to provide adequate police protection following the invasion of Panama fell within discretionary function exception); *Macharia v. United States*, 238 F. Supp. 2d 13, 22-26 (D.D.C. 2002) (government decisions regarding security at bombed Kenyan embassy within discretionary function exception).

### **3. The Combatant Activities Exception**

Section 2680(j) of Title 28 excepts from the FTCA’s waiver of sovereign immunity “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” There is no doubt that “April 1944 onwards,” the time frame during which Messrs. Goldstein and Gingold assert the United States should have intervened at Auschwitz, was a “time of war.” Compl. at 2. The strategic, Executive Branch decision about the commitment of

military resources during World War II and, specifically, the decision not to include Auschwitz and its supply lines in the “finalised [sic] target proposals for the US Air Force,” *see* Compl. at 9, clearly constituted “combatant activities.” *See Koohi v. United States*, 976 F.2d 1328, 1333 (9th Cir. 1992) (“the term ‘combatant activities’ includes ‘not only physical violence, but activities both necessary to and in direct connection with actual hostilities.’”) (*citing Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948)). The FTCA does not permit suits based on the selection (or non-selection) of military targets in wartime. Because Messrs. Goldstein and Gingold’s failure-to-intervene claims clearly arise out of combatant activities during World War II, the FTCA does not provide federal court jurisdiction to hear them.

### **C. Administrative Procedure Act (APA)**

The APA, 5 U.S.C. § 701, *et seq.*, contains a limited waiver of sovereign immunity for suits brought by persons harmed by agency actions and “seeking relief other than monetary damages.” *See* 5 U.S.C. § 702; *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260-63 (1999) (APA does not waive sovereign immunity for suit seeking monetary damages). This waiver does not apply here because Messrs. Goldstein and Gingold seek monetary damages in the form of the establishment of a \$40 billion compensation fund.

### **D. Other Bases**

Messrs Goldstein and Gingold assert that the failure of the United States to intervene at Auschwitz violated other legal standards, including common law, the U.S. Constitution, the Charter of the International Military Tribunal (the Law of Nuremberg), the Treaty on the International Court, and the Nazi War Crimes Disclosure Act. They also point to cases decided by German and Greek courts as support for their claims. However, nowhere among these sources is the requisite

congressional waiver of the sovereign immunity of the United States that would enable this Court to assert jurisdiction over Plaintiffs' failure-to-intervene claims.

## **II. Sovereign Immunity and the Goldtrain Claims**

Encompassed within the complaint are allegations that “the US Military stole a large part of the property of the Hungarian Jews.” Compl. at 1. These items were allegedly contained on a “Goldtrain” which was looted by the members of the “US Fifth Army under Commander Harry Collins.” *Id.* at 12. Messrs. Goldstein and Gingold seek monetary damages for this alleged theft, along with the failure of the United States to intervene at Auschwitz, in the form of the \$40 billion compensation fund.

As noted above, in order for this Court to have jurisdiction over these claims, Congress must have clearly waived sovereign immunity. Messrs. Goldstein and Gingold premise jurisdiction on the ATCA. However, as already discussed, the ATCA itself does not waive sovereign immunity, and Messrs. Goldstein and Gingold must therefore demonstrate an independent waiver of sovereign immunity. *See Industria Panificadora, S.A.*, 957 F.2d at 887. The FTCA does not provide the requisite waiver in this case because, as discussed above, Messrs. Goldstein and Gingold did not exhaust their administrative remedies by presenting their claim in writing to the appropriate federal agency within two years of accrual. *See* 28 U.S.C. §§ 2401, 2675; *see also McNeil v. United States*, 508 U.S. 106, 112 (1993) (“FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies” by submitting a timely claim for damages to the appropriate federal agency before filing suit). Finally, because Messrs. Goldstein and Gingold are seeking

monetary damages, the APA's waiver of immunity for non-monetary suits is not applicable. *See* 5 U.S.C. § 702.<sup>2</sup>

### III. Transfer to Another Court

The complaint asks that if this Court “consider[s] itself not competent” to hear the case, that it be transferred to another court. The Plaintiffs have specifically requested a transfer to California if their claims are barred by any statute of limitations. Transfer to another court, be it a California federal court or elsewhere, will not cure the jurisdictional defects in this case. The jurisdictional limitations of the Constitution and Article III bind all federal courts, not only this Court. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.”) (internal citations omitted). Because Congress has not waived the sovereign immunity of the United States for claims such as those asserted by Messrs. Goldstein and Gingold, transfer to another federal court would be futile.<sup>3</sup>

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<sup>2</sup> The fact the Messrs. Goldstein and Gingold are seeking monetary damages differentiates this case from *Rosner, et al., v. United States*, No. 01-1859-CIV-SEITZ (S.D. Fla.). The *Rosner* plaintiffs filed a class action lawsuit on behalf of Hungarian Jews and their descendants whose property was stolen from the Goldtrain. In denying in part a motion to dismiss filed by the government, the Florida court found that because the plaintiffs were seeking non-monetary relief (*i.e.* return and accounting of all property), the APA waived sovereign immunity for their claims. *See Rosner v. United States*, 231 F. Supp. 2d 1202, 1211-12 (S.D. Fla. 2002).

<sup>3</sup> The California state legislature has extended the statutes of limitations for certain types of claims brought by Holocaust survivors, namely claims filed by those survivors seeking proceeds from insurance, *see* CAL. CIV. PROC. CODE § 354.5(c), and claims for compensation filed by slave or forced labor victims or their heirs brought against entities for which the labor was performed or their successors in interest, *see id.* at § 354.6(b). These statutes do not have any impact on the decision herein that Congress, which is the only entity empowered to waive the sovereign immunity of the United States, has not done so for claims such as those asserted by Messrs. Goldstein and Gingold.

## CONCLUSION

Messrs Goldstein and Gingold have requested that this Court “set up global Holocaust standards” and “create new Holocaust-precedents.” First Answer to Defendant’s Motion to Dismiss at 1 (emphasis omitted). However, only Congress, not this Court, is empowered to waive the sovereign immunity of the United States. This Court is therefore without jurisdiction to hear the claims that Messrs. Goldstein and Gingold assert. Transfer to another court will not cure this fatal jurisdictional defect. For these reasons, the government’s Motion to Dismiss must be granted.

A separate Order will accompany this Memorandum Opinion.

Date: April 23, 2003

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ROSEMARY M. COLLYER  
United States District Judge