

# respect

A NEWSLETTER ABOUT LAW AND DIVERSITY

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## Wearing Religious Attire at Work: Freedom of Expression or Disruption?

by Cheryl Baisden

**The clothes you choose to wear can say a lot about who you are and when it comes to religious attire that choice is often influenced by what you believe. What you wear and how you choose to express your religious beliefs is a personal choice, and one that's guaranteed to all Americans as part of the U.S. Constitution.**

When it comes to deciding what you can and can't wear in the workplace, your constitutional rights aren't always as clear as they might seem, especially where religion is concerned. While employees feel they should be able to express their religious beliefs on the job, employers often argue they should be able to prohibit certain religious attire if it disrupts the workplace, conflicts with their business objectives or violates another law.

In the year 2006 alone, 2,541 employee complaints of workplace discrimination related to religious attire were filed with the Equal Employment Opportunity Commission (EEOC), a federal agency that enforces workplace anti-discrimination laws. A total of 2,387 of those cases were resolved out of court, with employees recovering \$5.7 million in damages from their employers.

### Two forms of protection

According to Grayson Barber, a Princeton lawyer who practices

constitutional law, U.S. citizens are guaranteed freedom of religious expression, which includes the right to wear religious clothing and symbols, under two different federal laws — the First Amendment to the U.S. Constitution and the Civil Rights Act of 1964. Both laws offer their own set of protections.

"The First Amendment guarantees the government cannot restrict our religious freedom and freedom of expression. Wearing certain clothing and or headwear can be considered exercising [>continued on page 4](#)

## 'Don't Ask, Don't Tell' Under Fire

by Barbara Sheehan

**Since 1993 the U.S. military has allowed gays and lesbians to serve in the armed forces under one condition — they keep their sexual orientation private. It's a policy known as Don't Ask, Don't Tell (DADT) and it has been causing controversy since its inception.**

### Origin of DADT

Campaigning for the presidency in 1992, Bill Clinton made a promise to change the Pentagon's policy on gays in the U.S. military, which stated that only heterosexuals could serve their country. President Clinton mistakenly assumed that he could lift the ban on gays and lesbians in the military through an executive order, as President Harry Truman did when he racially [desegregated](#) the military in 1948.

After President Clinton met with considerable opposition from Congress, what resulted instead was [>continued on page 2](#)

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the DADT policy, which was established through an executive order in December 1993. The policy allows gays, lesbians and bisexuals to serve in the military as long as they don't disclose, discuss or in any other way divulge their sexual orientation to fellow service members. Those who break this rule are discharged. Since the policy took effect, some 12,500 service members have reportedly been discharged from the military because of DADT.

### Former military weigh in

On the front lines in the legal battle to end DADT is Pennsylvania Congressman Patrick Murphy, who was the first Iraq war veteran elected to Congress, and has taken over as lead sponsor of the Military Readiness Enforcement Act. In an interview with the publication *DiversityInc*, Congressman Murphy shared his first-hand experience about what it is like to be in a combat situation.

"When I was a paratrooper in Baghdad, we didn't care what your race was, what your color was, what your religion was or what your sexual orientation was. They cared whether you could fire an M-4 assault rifle, whether you could kick down a door in Baghdad and whether you could do the job so we could all go home alive," Congressman Murphy said.

While legislation to end DADT has garnered support in the U.S. House of Representatives, advocates are awaiting a companion bill in the U.S. Senate, which is necessary for the legislative process to move forward. As initiatives to repeal the DADT policy continue to make headlines, there remains a less vocal contingency, including former U.S. presidential candidate and Arizona Senator John McCain, content to leave the military policy as it is.

When asked about the policy in an interview for *ABC World News*, Senator McCain, a widely recognized U.S. military hero, said that he was open to revisiting the DADT policy but that overall he thought it seemed to be working.

"...[with] all due respect, right now the military is functioning extremely well in very difficult conditions," Senator McCain said. "We have to have an assessment on recruitment, on retention and all the other aspects of the impact on our military if we change the policy. In my view, and I know that a lot of people don't agree with that, the policy has been working and I think it's been working well."

### Losing good people

Nathanial Frank, a senior research fellow at a California think tank called the Palm Center, told *ABC News* that the number of service members discharged under DADT remains relatively small compared to total discharges. What concerns him more, he said, is the quality of service members lost.

One of the more widely recognized service members to be let go, for example, is West Point graduate and Arabic linguist Lt. Dan Choi. Lt. Choi made news in March 2009 when he appeared on the *Rachel Maddow Show* and openly announced that he is gay, an act that led to a military administrative board in Syracuse recommending his discharge in June 2009. The First Army commander and the chief of the National Guard Bureau still need to review the case before he can be formally discharged, but in the meantime, Lt. Choi has emerged as a vocal advocate for gay service members.

"We think this is a really urgent issue for national security reasons," Becky Kanis, a 1991 West Point graduate and chairwomen of Knights Out, an organization that supports gay West Point graduates, told *ABC News*. "We cannot afford to lose one more Arabic linguist like we did with Choi."

Outside of sheer troop losses, other impacts of DADT have raised concerns as well. The many nuances of the DADT debate were communicated in great detail in an essay titled, "The **Efficacy** of Don't Ask, Don't Tell," which was written by Col. Om Prakash, USAF, while a student at the National War College.

In the essay, which won the 2009 Secretary of Defense National Security Essay Competition, Col. Prakash noted "homosexual service members have had to compromise their personal integrity by keeping their sexuality secret."

Lt. Choi has said that remaining in the closet "traumatizes people in a way. Number one, I'm taught the honor code at West Point—do not lie. Units are based on this honor code. But 'Don't Ask, Don't Tell' says you have to lie. It forces people to lie, to hide. Hiding and lying aren't army values."

Col. Prakash's essay quoted Vice Admiral Jack Shanahan, of the U.S. Navy, as saying of the DADT policy, "Everyone was living a big lie – the homosexuals were trying to hide their sexual orientation and the commanders were looking the other way because they didn't want to disrupt operations by trying to enforce the law."

The Prakash essay also relays feedback from other nations that already are allowing gays to serve openly, with no reported negative impact on efficacy.

"In a survey of over 100 experts from Australia, Canada, Israel and the United Kingdom, it was found that all agreed the decision to lift the ban on homosexuals had no impact on military performance, readiness, cohesion, or ability to recruit or retain, nor did it increase the HIV rate among troops."

Given this feedback, why do many members of the U.S. military want to keep DADT on the books? While a number of reasons have been cited, the prevailing reason continues to be troop cohesion. Col. Prakash points out in his essay that the final language of the policy adopted by Congress states:

"One of the most critical elements in combat capability is troop cohesion, that is the bonds of trust among individual service members...The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of good morale, good order and discipline, and unit cohesion that are the essence of military capability."



### A different culture

Troop cohesion is a principle that Bergen County lawyer John P. Ginty, who served as an officer in the U.S. submarine force from 1988 to 1993, understands firsthand. Ginty has no direct ties to the military today but offered to share his opinion as a prior member of the U.S. military who has experienced one of the most constrictive military assignments of all—serving in the limited confines of a Navy submarine.

"We had no personal privacy, no personal space, no personal real estate," Ginty recalled.

At the time Ginty served, he said he never even thought about the issue of gays in the military. It simply wasn't discussed, he said. However, when asked how he feels about the subject today, Ginty considered the practical implications of overturning DADT, for instance creating

separate barracks for gay servicemen and the impact such a move might have on troop morale. He concluded that repealing DADT would cause more trouble and discontent than good.

"The DADT policy works because it rejects the civilian pop cultural requirement that everyone announce their sexual preferences to the entire world and require that the world accept those preferences," Ginty said. "Military relationships are professional relationships, and professional relationships are not suitable for one-sided activism on subjects having nothing to do with the task at hand."

While some people have labeled the DADT policy discriminatory, the fact is that the military culture is not the same as that of general American society; and for reasons that have been deemed necessary to protect our nation's security, the military does in some instances discriminate. For instance, in order to serve in the armed forces, individuals must meet certain age requirements and certain physical requirements.

At the end of the day, the decision about DADT should be based on what's good for military performance and what's good for the troops, Ginty said. The military, he said, is still "separate and apart from civilian culture" and may not be capable or ready to accommodate the structure that civilian political activists are trying to impose on it.

### Ready or not

Whether the military is ready or not, activists are holding President Obama to his promise to take on this issue in 2010.

"The military has two choices," said Ed McCreedy, a retired captain in the U.S. Marine Corps who served as an infantry officer from 1961

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## Religious Attire *continued from page 1*

your religious freedom,” explained Barber. “So wearing anything from a shirt with a religious message to a cross, a star of David, or a turban or other religious head dress, just like wearing anything else, is a constitutional right. Until the Civil Rights Act was passed in 1964, however, those same rights were not guaranteed in what are called ‘places of public accommodation,’ like offices, restaurants and theaters, since the Constitution only focuses on what the *government* can and cannot do, not what *individuals* can and cannot do.”

The Civil Rights Act guarantees everyone equal rights in all public environments, while Title VII of the act focuses specifically on the workplace. Under Title VII, employers are prohibited from discriminating against their workers on the basis of race, gender, nationality and religion. Among other things, the law prohibits religious discrimination in hiring, firing, promoting, and providing benefits and pay to someone based on the fact that they belong to a certain religious group or hold certain religious beliefs.

“For some people, like Muslims, wearing certain attire, or even wearing a beard, is much more than just a fashion preference, it’s a part of their religious identity, it’s an integral part of their religious belief and practice,” said Barber. “That’s what makes our legal protections so important. Of course just like with any law there are exceptions and interpretations. And that’s where the courts come in to resolve disputes.”

### Courts decide

The outcome in court usually depends on the overall conduct of the employer and the type of business involved. Generally, an



**ISLAMIC**



**HINDUISM**



**JUDAISM**

employer may demand strict compliance with grooming and dress standards if it can show there is a good reason for its policy. For example, a case where a woman was hired as a receptionist at a Christian retirement home without disclosing her desire to wear a Muslim head covering at work, was decided in favor of the employer, since the woman’s attire conflicted with the facility’s Christian message.

In a case involving a member of the Sikh religion, which generally doesn’t permit shaving, the male employee lost his lawsuit challenging his employer’s (Chevron) clean-shaven policy. His work required he use a respirator, which had to form a tight seal against his face to prevent exposure to chemical fumes. Chevron argued his beard hampered the respirator’s effectiveness, and tried unsuccessfully to find him a comparable job that would allow him to continue working at their plant.

While these two cases were decided in favor of the employer, a 2001 Alamo Car Rental case was not. That case involved a Somalian female employee whose religion required her to wear a *hijab* or headscarf during the observance of Ramadan. Her employer expressed concerns over wearing the headdress after the September 11 attacks. After reaching a compromise where the

## Don’t Ask Don’t Tell *continued from page 3*

to 1965, “Either they bar gays from the military or they allow them.”

McCreedy, who is a trial lawyer in Cranford, called the DADT policy hypocritical and said he believes the military should and will allow gays to serve openly. Then, the military will simply have to “find a way to work out” all the logistics, he said.

Like Ginty, McCreedy agreed that a person’s sexual persuasion is not relevant to the military’s mission and he recognizes

that DADT raises a “complex and difficult” subject.

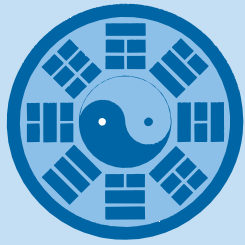
For those who don’t want to tell their personal inclination, it’s fine to say don’t tell, McCreedy said. “But if you want to tell, the consequences are that you get thrown out, and that’s not right.”

Based on some recent polling, McCreedy seems to be among the majority of Americans. According to a 2008 *Washington Post-ABC News* poll, 75 percent of Americans believe gay people

who are open about their sexual orientation should be allowed to serve in the military, up from 44 percent in 1993 when DADT was enacted.

Proponents of repealing DADT say these polls reveal a generational shift and contend that today’s soldiers are more accepting of gays than their predecessors, thereby making DADT no longer applicable today.





### CONFUCIANISM

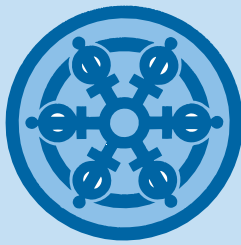
employee would wear a scarf with the Alamo Car Rental logo on it, she was fired in December 2001, eight days before Ramadan would have ended. With the help of the EEOC, the employee won her religious discrimination suit and was awarded \$287,000 in June 2007.

Chevron's efforts to find alternate work for its employee is considered an attempt at what Title VII calls a "reasonable accommodation" to allow employees to practice their religion. Under Title VII, employers must try to accommodate an employee's religious practices unless doing so would result in a workplace safety concern, would violate another law or regulation, or would place an "undue hardship" for the employer. Defining what would be considered a hardship is often something that is left to the courts, noted Barber.

### Keeping it uniform

"One relatively clear exception that does exist is that the government has the right to restrict what a person can and can't wear in the military," said Barber. "There was a legal case with the Air Force where someone wanted to wear a yarmulke, and the court ruled that the military's ban on religious attire was permitted."

After the ruling in the Air Force case, however, a federal law, the Religious Apparel Amendment, was passed. The amendment



### BUDDHISM



### CHRISTIANITY

allowed that "a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force."

Despite the passage of the Religious Apparel Amendment, a Pennsylvania court applied the same military argument when a female Muslim police officer sued the Philadelphia Police Department because she was denied the right to wear a khimar with her uniform. Wearing the scarf, which covered Kimberlie Webb's hair, forehead, neck, shoulders and chest, was required by her religion.

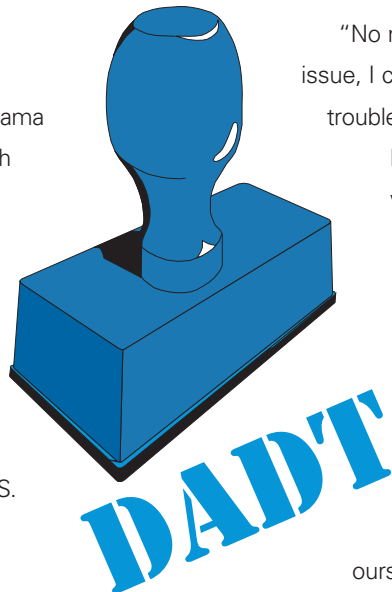
In April 2009, the Third Circuit U.S. Court of Appeals ruled that forcing the police department to accommodate her would compromise the city's interest in maintaining "religious neutrality" on the force. The unanimous three-judge panel upheld an earlier district court decision, which said the police department "is a para-military organization in which personal preferences must be subordinated to the overall policing mission which requires the utmost cooperation among all officers," and that allowing police officers to wear religious symbols and attire "would undermine these purposes and has the potential for interfering with effective law enforcement and even for causing harm to officers in a diverse community such as Philadelphia."

### Disputes rise

In the years since the Sept. 11 terrorist attacks, the EEOC has seen a definite rise in religious attire disputes. The number of religion-based charges rose from 2,127 in 2001 to 2,541 in 2006, and while a high percentage of those incidents involved Middle Eastern religious matters, Barber noted that at one time or another virtually every religion has been discriminated against. ■

### Future of DADT

In his recent State of the Union address, President Obama stated his desire to work with members of Congress to repeal DADT. In early February 2010, Admiral Mike Mullen, the chairman of the Joint Chiefs of Staff and Defense Secretary Robert Gates testified before the U.S. Senate on the issue.



"No matter how I look at the issue, I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens," Adm. Mullen testified. "For me personally, it comes down to integrity—theirs as individuals, and ours as an institution."

Defense Secretary Gates revealed that he has appointed a team to study the policy's repeal. General Carter F. Ham, commander of the U.S. Army, Europe and Jeh C. Johnson, legal counsel for the Pentagon, will have a year to study the issue and make recommendations on integrating a repeal. While Gates was careful to say that it could take until 2012 to incorporate any proposed changes, Senate leaders were open to adding a temporary halt on discharges of gay service member to an upcoming defense spending bill. ■

# Survivors Sue French Railroad for Role in Holocaust

by Phyllis Raybin Emert

**Kurt Schaechter was 21 years old when the French policemen came to take away his father Emil in 1942. The family had fled from Austria in 1938 to escape from the Nazis. They traveled through Switzerland and then settled in France, where they thought they would be safe.**

In June 1940, Germany defeated France and set up a collaborationist government in the unoccupied south. The new regime was called Vichy France or Nazi France. The Vichy government willingly cooperated with the Nazis and helped organize raids to imprison Jewish citizens.

Emil Schaechter, a journalist for a liberal newspaper, was told to bring his money, jewels, and other valuables. "I never saw him again," related Kurt Schaechter in a 1993 article that appeared in *The Independent*. "Three days later, it was the turn of my mother, Margareth. Then finally they arrested me," Schaechter said. Young Kurt had served briefly in the French Foreign Legion in 1939 and was freed by fellow Legionnaires. He was able to get new identity papers and spent the rest of the war as a refugee. Schaechter's parents weren't so lucky.

Forty-five years would pass before Schaechter found out the fate of his parents. After numerous requests, Schaechter was finally given access to the material he needed and discovered written evidence that the Vichy government collaborated with the Germans and received payment for the Jewish prisoners transported to the concentration camps, via the French National Railroad Service (SNCF). Schaechter secretly copied hundreds of documents from the archives and made them public. It was in these documents that Schaechter learned both his parents had died in separate concentration camps after spending time at deportation centers in France.

## Schaechter takes action

In 2003, Schaechter, then 82, went to court in France and sued the SNCF. Schaechter asked for one euro as "symbolic compensation" for his parents' death. According to *The New York Times*, Schaechter's hope was that the railroad would be forced to admit the role it played in the deportation of some 76,000 Jews in 77 train convoys departing from France between March 1942 to July 1944.

Schaechter told *The New York Times*, "I am doing this out of a responsibility to history. What distinguishes us from animals is our memory. Humanity cannot forget its history."

A Paris court rejected Schaechter's lawsuit in May 2003. It ruled that there was a 10-year statute of limitations and it was too late to bring suit against the National Railroad even though Schaechter filed the lawsuit within 10 years of finding the documents in the French archives. The court ruled the 10-year limitation period began from the dates of his parents' deaths.

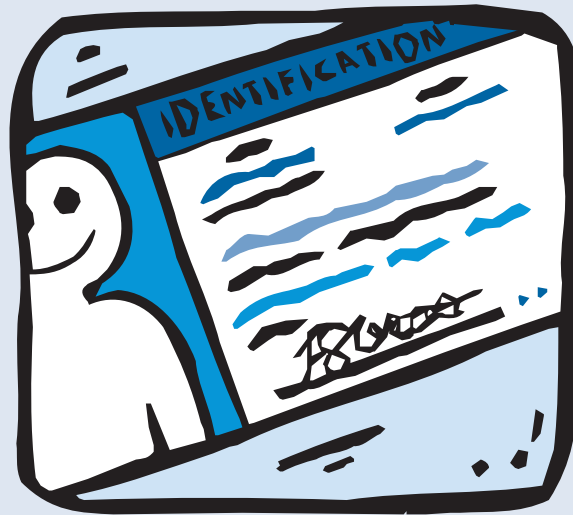
## Holocaust survivors sue in U.S. courts

Another case was brought against the SNCF in 2001 in a U.S. district court in New York City claiming crimes against humanity. *This class action lawsuit, Abrams et al v. Societe Nationale des Chemins de Fer Francais (SNCF)*, which sought monetary damages, included several hundred plaintiffs, including Holocaust survivors and victims' heirs.

According to the complaint, the plaintiffs alleged that "the railroad must have been aware of the horrendous conditions on the trains because it cleaned and disinfected the cars after taking the prisoners to the camps. Of 2,166 passengers on one train...536 died on a three-day trip to the Dachau death camp in Germany."

The railroad did not deny the charges but argued that it could not be sued in an American court because of the Foreign Sovereign Immunities Act of 1976 (FSIA). The district court ruled that the railroad

was immune from being sued under FSIA and dismissed the case. The plaintiffs appealed, and in 2003, the Second Circuit Court of Appeals reversed the district court (which had ruled that the railroad was immune from the lawsuit) and sent the case back to that court. The appeals court questioned whether the FSIA was **retroactive** and applied to events that occurred before its enactment. The railroad then appealed to the U.S. Supreme Court. The High Court returned the case back to the Second Circuit in 2004, and directed it to issue a ruling in accordance with its decision in another related Holocaust restitution case, *Altmann v. Republic of Austria*.



## The Klimt paintings

The *Altmann* case involved six priceless Gustav Klimt paintings that were taken by the Nazis and then sent to the Austrian national museum after World War II. The heir to the paintings, Maria Altmann, now elderly and a U.S. citizen, filed a claim for their return with the Austrian government, which was rejected. Ultimately, Altmann filed suit in a Los Angeles federal court in 2000 where Austria asked the judge to dismiss the lawsuit, claiming it had immunity under FSIA.

Lawyers for Altmann countered that Austria was not immune from being sued because of the **expropriation** exception under the FSIA, which involved the taking of property. In 2001, the judge in the case denied Austria's motion for dismissal and ruled that the expropriation exception applied to the paintings, so Altmann could go ahead with the lawsuit.

The Ninth Circuit Court of Appeals **affirmed** the lower court's decision, so Austria appealed to the U.S. Supreme Court. In its decision, the Court focused only on the FSIA and "held that the FSIA applie[d] to conduct prior to its enactment [in 1976] and prior to the State Department's 1952 adoption of the restrictive theory of **sovereign immunity**."

In an article that appeared in the 2005-2006 *International Civil Liberties Report*, Whittier Law School Professor Michael J. Bazylar and his assistant Kearston G. Everitt wrote of the *Altmann* case, "For the first time, a foreign entity is being forced to go to trial in an American court on a Holocaust restitution claim. The decision is also another important example of how American courts remain the only viable forum for the resolution of long-neglected Holocaust restitution claims."

Instead of going to trial, Austria elected to arbitrate the case [decide the dispute before an impartial third party without a judicial hearing]. In June 2006, the arbitrator awarded the paintings to Maria Altmann.

## Altmann's impact on Abrams

In *Altmann*, the U.S. Supreme Court declared the retroactivity of the FSIA and stated that the purpose of sovereign immunity was "to reflect current political realities and relationships." The Second Circuit Court of Appeals ruled in *Abrams* that "*Altmann* deems irrelevant the way an entity would have been treated at the time of the alleged wrongdoing...We are bound by the U.S.



Supreme Court's decision to defer to **comity** rather than to approach the situation from the perspective of the injured plaintiffs whose rights have now been altered." The expropriation exception in the FSIA applied to the facts in *Altmann* because the case involved the taking of property (the paintings). But since the *Abrams* case was a tort action, which involved a claim of personal injury, the expropriation exception in the FSIA did not apply.

The Second Circuit Court of Appeals acknowledged the "evil actions" of the railroad during World War II, but nevertheless determined it could not be sued because the railway was now part of the French government and immune under FSIA. The Second Circuit Court of Appeals upheld the district court's dismissal of the lawsuit.

## France, the railroad and the National Depository

Another case, *Freund et. al v. Republic of France et. al.*, was filed in a New York district court in March 2006 seeking "compensation for personal property in France taken during World War II in violation of international law." The lawsuit was brought against the Republic of France, the SNCF, and the national public depository of France, the Caisse Des Depots Et Consignations (CDC). Kurt Schaechter is among the plaintiffs in this case.

According to the lawsuit, the property taken while arresting, imprisoning and deporting Jews and others during the war included cash, gold, silver, jewelry, paintings, clothing, equipment and musical instruments. Deportees taken to Drancy, a deportation center in France, and other holding camps on their way to concentration camps were forced by the railroads and police to turn over all valuables. The money was deposited in the CDC, as was money received from the sale of plaintiff's property, most of which is still there today.

The complaint states that the Matteoli Commission, which was formed by the French government in 1997 "to investigate the spoliation of Jewish Property during the War," reported that the total estimated cash (not jewelry or other property) taken from detainees at the holding camps was approximately 200 million francs. At Drancy alone through 1943, over 12 million francs were forcibly collected, with the CDC being the depository for most of the money. The Matteoli Commission noted that as of 1999 nearly 10 million francs were still deposited

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**affirm** — to uphold, approve or confirm (as in an opinion of a lower court). **comity** — honoring and following a court decision from another jurisdiction (in this case another nation). **desegregate** — to eliminate racial segregation. **efficacy** — the power to produce a wanted result. **expropriation** — the taking of private property. **redress** — satisfaction, in the form of compensation or punishment, for an injury or wrong doing. **retroactive** — applicable to a period prior to the time of enactment. **sovereign immunity** — a judicial doctrine that prevents bringing a lawsuit against a government without its consent.

## Holocaust *continued from page 7*<

there. Proceeds from the sale of property as of 1954 amounted to 100 million francs.

The district court's opinion, written by Judge Richard J. Sullivan and issued in December 2008, noted that "as a result of the Matteoli Report, France established the Commission for the Compensation of the Victims of Acts of Despoilment Committed Pursuant to Anti-Semitic Laws in Force During the Occupation (CIVS) in September 1999." Judge Sullivan wrote, "permitting victims to pursue their claims in U.S. courts hinders the administration of the French alternative compensation organizations and may be harmful to U.S. foreign policy interests."

The court dismissed the case because the defendants (France, the railroad, and the bank depository) "are entitled to sovereign immunity under the FSIA." Judge Sullivan added, "even if the court had subject matter jurisdiction, the court would abstain, based on...principles of international comity, from deciding the claims of those plaintiffs who are eligible to seek compensation from the CIVS and the Fund." The plaintiffs had argued that the court had subject matter jurisdiction because of the expropriation or "takings" exception to the FSIA. The court concluded that plaintiffs "have not demonstrated that the takings exception applies to each defendant."

Judge Sullivan wrote that the plaintiffs' claims are connected to France and France has provided the means and commitment to compensating World War II victims. "For this court to sit in judgment of plaintiffs' suit," wrote Judge Sullivan, "would interfere with France's efforts to **redress** these expropriations..." The court did note that the plaintiffs "may pursue compensation based on expropriations by the SNCF," based on allegations of "material spoliations." Judge Sullivan explained that "the CIVS permits eligible plaintiffs who were victimized by French anti-Semitic legislation to file claims relating to material spoliations based on actions by SNCF"

### Analysis of case results

Princeton attorney Steven M. Richman explained that "subject matter jurisdiction — the ability of the court to hear the matter — in cases involving foreign governments or their agencies is exclusively determined as a matter of statute — the FSIA." Richman, an international law attorney, noted that American citizens do have the right to sue foreign countries and agencies "within certain specified situations, and provided they can allege facts to meet...exceptions" in the act. The decisions in these survivor lawsuits are "consistent" with the court's reading of the cases and the FSIA.

As an example of international immunity, Richman set up a hypothetical situation. "What would happen," he related, "if another country passed a statute that opened up the United States or its agencies to lawsuits based on another country's interpretation of what would be actionable as a violation of international law and sought to hold America accountable for say, incidents in Vietnam, such as My Lai [the massacre of more than 500 unarmed Vietnamese civilians by American soldiers in 1968]?" According to Richman, "the legal issue must be seen in a broader context...The fairness or not of these results to plaintiff has to be evaluated in the larger context of not only the legal issues but also the other avenues of recourse available."

The plaintiffs in *Freund* appealed to the Second Circuit Court of Appeals in January 2009, but in March 2009, they dropped the appeal against France and the CDC public depository. The appeal is still pending against the French national railroad.

Abraham Dresden, one of the petitioners in the case, told *The New York Times*, "In another 10 years, there won't be any survivors to talk to. They're trying to wait this out." Dresden is 80 and many other plaintiffs are in their 90s. ■