

OF20  
Department of State  
July-Dec 1938  
Box 7

November 18, 1938

MEMORANDUM FOR THE SECRETARY OF STATE:

I enclose herewith correspondence forwarded to the President by Mr. E.K. Burlaw, First Assistant Secretary of the Department of the Interior, with an enclosed communication addressed to the Secretary of the Interior by the Non-Sectarian Anti-Nazi League to Champion Human Rights.

As all former correspondence from this organization has been forwarded to you for handling, it will be appreciated if you will include this with the previous papers for consideration.

M.H. McIntyre  
Secretary to the President

11/15/38. Letter to the President from Mr. Burlaw enclosing letter dated 11/11/38 from Johan J. Smertenko, Executive Director of the Non-Sectarian Anti-Nazi League, 20 W. 47th Street, New York, N.Y. Re "the possibility of President Roosevelt's delivering a radio address which would ~~give~~ voice the feeling of indignation and horror at the reign of terror going on in Germany today", stating they "are making this request not only in the name of the LEAGUE which has thirty thousand active members but also in the name of over one thousand affiliated organizations a membership of thirty-two million"; listing names of most significant groups. President's penciled notation: "Mac - Will you please regret?" crossed out.

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THE WHITE HOUSE  
WASHINGTON

Warm Springs, Ga.,  
November 26, 1938.

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MEMORANDUM FOR

THE UNDERSECRETARY OF STATE

Will you send me by return

pouch any information the State Department  
has in regard to possible places for  
Jewish colonization in any part of the world?

I do not want any extensive memorandum --  
just what you happen to have on hand. I  
will return it to you at once after looking  
at it.

F. D. R.

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100019

December 22, 1938

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MEMORANDUM FOR THE HONORABLE SUMNER WELLES:

The attached radiogram addressed to me is self-explanatory and is referred for proper handling by your department.

M. H. McINTYRE  
Secretary to the President

RB/ma

12/20/38. Yaselli Berlin Friedenau Kaiserallee 85, Berlin, with prepaid reply voucher No. 20560 not to exceed \$2.44. States that Else Bremner, whose husband is in concentration camp and whose application is on file at Consul Office since April 19, can get no attention or ~~xxx~~ satisfaction. Cabled Mister Warren, Chief, Visa Division, 12/1 with prepaid answer and Acting Secretary Welles, 12/13, and has received no reply. Case is urgent and would appreciate having the matter looked into.

*file*

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*17-129*

DEPARTMENT OF JUSTICE  
WASHINGTON

December 31, 1938.

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*76-6*  
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The Honorable,  
The Secretary of State.

My dear Mr. Secretary:

Reference is made to the letter of December 2, 1938, from the Acting Secretary of State requesting my opinion upon the following question:

"Does the offense of knowingly making a false statement in an affirmation before an official, which is punishable under Article 156 of the German Criminal Code, involve moral turpitude, within the meaning of the provision of section 3 of the Immigration Act of February 5, 1917, when the record of the conviction shows that the false statement related to a material matter?"

The Acting Secretary states that this problem has arisen in the case of one A. R., a German citizen, who desires to obtain an immigration visa for use in coming to this country to reside, and who was convicted under the above-mentioned statutory provision by the Court of Assizes at the District Court, Fuerth, Bavaria, February 2, 1938, of making falsely a statement required by German law concerning his property, the United States Consul having concluded, apparently tentatively, that the offense of which he was convicted involves moral turpitude.

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Section 3 of the Immigration Act of 1917 (39 Stat. 874, 875, 877; U. S. C., title 8, sec. 136 (e) ), provides in part:

"That the following classes of aliens shall be excluded from admission into the United States: \* \* \* persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude: \* \* \* .

\* \* \* \* \*

"Provided, That nothing in this Act shall exclude, if otherwise admissible, persons convicted, or who admit the commission, or who teach or advocate the commission, of an offense purely political."

Section 2 (f) of the Immigration Act of 1924 (43 Stat. 153, 154; U. S. C., title 8, sec. 202 (f) ), reads in part:

"No immigration visa shall be issued to an immigrant if it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that the immigrant is inadmissible to the United States under the immigration laws \* \* \* nor shall such immigration visa be issued if the consular officer knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws."

Section 23 of the 1924 act (43 Stat. 165; U. S. C., title 8, sec. 221) provides that:

"Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; \* \* \* ."

The pertinent provisions of the German Law on Control of Foreign Exchange and of the German Criminal Code, as disclosed in the translation accompanying your letter, are as follows:

German Law on Control of Foreign Exchange

of February 4, 1935.

Article 34

"(1) The Minister of Finance of the Reich, the Reich Office for Foreign Exchange Control, the State Finance Offices and the Reichsbank may demand information from anyone referring to transactions or dealings which, under this law or an executive order, are prohibited or subjected to restrictions. In this connection the presentation of the books and other documents may be required.

"(2) The Minister of Finance of the Reich, the Reich Office for Foreign Exchange Control and the State Finance Office may require that the correctness of information under Paragraph I be confirmed to them under oath, and the Board of the Reichsbank may require that such confirmation be given it and the banking institutions of the Reich.

"(3) The Order regarding the Duty of giving Information of July 13, 1923 (Reichsgesetzbl. I, page 723), is unaffected."

Article 43

"(1) Any person shall be punished by a fine who purposely or negligently:

.....

"5. Does not submit the information demanded by the Reich Minister of Finance, the Reich Office for Foreign Exchange Control, a State Finance Office or the Reichsbank, does not supply it within the period of time fixed, or supplies it incompletely or incorrectly, or who does not present the books or other documents, does not present them in the period of time fixed, or does not present all of them;"

.....

German Criminal Code

"Art. 153. Any person who knowingly swears falsely an oath tendered, referred or administered to him, shall be punished by penal servitude for not more than ten years. The same penalty applies to any person who as a party knowingly confirms a false statement by an oath."

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"Art. 156. Any person who knowingly makes a false affirmation before an official competent to take a solemn affirmation or knowingly gives false testimony, invoking such an affirmation, shall be punished by imprisonment for from one month to three years."

"Art. 73. If one and the same act violates several criminal laws, only that law shall be applied which carries the severest penalty, and in case of different types of penalty, only that law which carries the severest type of penalty."

It appears from the translation of the judgment furnished by the Acting Secretary that the alien was sentenced by the court to one year and two months' imprisonment (with credit for three weeks of detention) for conviction of "continued transgression of the foreign exchange law according to paragraphs 34, 43, No. 5 of the foreign exchange law in connection with the simultaneous misdemeanor of rendering a false affidavit" under paragraph 156 of the Criminal Code. It further appears from such translation that the alien, shown by the judgment to be of Jewish extraction, was engaged with his mother in the wholesale ironware business; that on December 31, 1936, their interests in the business as shown by balance sheet were respectively 38,217,17 and 105,061,58 Reichsmarks; that since May or June, 1937, he had the intention of immigrating from Germany, and withdraw a total of 30,000 R.M. from the business, which he kept in cash, first at his place of business, later in his residence; that in October, 1937, in order to obtain the necessary certificate for immigration, he filled out two separate questionnaires given him by the foreign exchange office, one for himself and one for his

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mother, in each of which he put down as the amount of cash on hand the statement "about R.M. 1500"; that certain property standing in his mother's name, for which sale negotiations were pending, was entered on his mother's affidavit at the "last unitary value"; that he delivered his list to the authorities, together with an affidavit as to the complete and true statement of the various amounts of property possessed of by himself, his wife and minor children; that the declaration of his mother was also delivered to the foreign exchange office with an affidavit signed by her; that the alien's mother was "irrefutably lacking every vestige of survey of the financial and business situation" and that "the accused alone is responsible for the contents of her declaration of fortune."

According to the translation the court stated that the alien:

"had to stand fully convicted" of retaining 30,000 Reichsmarks, "with the intention to take this ready cash abroad either in its full equivalent or converted into other easily hidden values, without the control of the foreign exchange office and thereby avoiding the investment in restricted Reichsmark";

and that

"The accused is therefore convicted of having rendered incomplete or incorrect informations to a foreign exchange office as to means of payment which were demanded of him by the foreign exchange office, in uniform persuance of such intention, and by the same action to have rendered knowingly a false affidavit before an authority competent for receiving such assurance."

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In regard to the sentence the court observed:

"The punishment had to be proclaimed on the strength of par. 73 of the Criminal Code as per par. 156 of the Criminal Code since such prescribes imprisonment and thereby the heavy penalty in contrast to the foreign exchange law, since par. 43 of the foreign exchange law only provides for monetary punishment.

"In meting out the measure of punishment there had to be considered at the expense of the accused the considerable public interest prevailing regards truthful informations especially in the case of Jewish emigrants, since it must be avoided that non-registered capital is taken abroad and working there in Jewish hands against the German political economy and the German nation."

The question does not seem to have been presented to the Supreme Court, but the memorandum of your Legal Adviser accompanying your letter correctly observes that the opinions of the inferior Federal courts and the Attorneys General in the divers cases submitted to them for decision have held for many years that the record of a foreign court showing conviction is to be taken as conclusive evidence of conviction of the crime disclosed by it, and that neither courts nor immigration offices may go outside such record to determine facts or whether in the particular instance the alien's conduct was immoral. United States v. Uhl, 203 Fed. 152, 210 Fed. 860; United States v. Day, 16 F. (2d) 328; United States v. Karnuth, 30 F. (2d) 825; United States v. Corsi, 63 F. (2d) 757; The Washington, 19 Fed. Supp. 719; 37 Op. A. G. 293; 39 Op. A. G. 95. The question whether the crime involved moral turpitude, however, is to be determined according to its inherent nature and the standards prevailing in the United States

generally--not by those of the foreign country in which the crime was committed and the conviction occurred. United States v. Uhl; United States v. Karnuth; United States v. Corsi; The Washington, 39 Op. A. G. 95, supra; United States v. Day, 51 F. (2d) 1022; Mercer v. Lence, 96 F. (2d) 122; 38 Op. A. G. 128. It has been held that when, by its definition, the crime does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral; and, conversely, that when it does, no evidence is competent that he was in fact blameless. United States v. Day, supra, p. 1023, and cases there cited.

It should be noted, however, that each of the opinions to which reference has been made above was rendered on the particular facts and circumstances presented, and that there was involved no question of conditions other than normal obtaining in the foreign country where the crime was committed and the conviction had.

While moral turpitude is a vague term, there is general agreement that it contemplates an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general--anything done contrary to justice, honesty, modesty, or good morals. United States v. Uhl, 203 Fed. 152, 154; Coykendall v. Skrametta, 22 F. (2d) 120; United States v. Karnuth, supra; Tillinghast v. Ednead, 31 F. (2d) 81; Hutto v. Atlantic Life Ins. Co., 58 F. (2d) 69; 37 Op. A. G. 293; In re O'Connell, 184 Cal. 584, 587; Drazen v. New Haven Toxicob Co.,

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95 Conn. 500, 506; Hughey v. Bradrick, 39 Ohio App. 486. It has been observed that "its meaning depends to some extent upon the public morals," United States v. Uhl, supra, p. 154, and that "standards of morals change with the changing conditions of civilization", Hutto v. Atlantic Life Ins. Co., supra, p. 71. The Court of Appeals for the District of Columbia said in Rudolph v. United States, 6 F. (2d) 487:

"Many things which were not considered criminal in the past have, with the advancement of civilization, been declared such by statute; and the commission of the offense, if it involves the violation of a rule of public policy and morals, is such an act as may involve moral turpitude."

Conversely, it seems as plain that many things which may have been deemed criminal in the past may be so viewed no longer; and I think it as clear that in determining whether or not moral turpitude necessarily is involved it is proper to look to any conditions other than normal obtaining in a foreign jurisdiction at the time of commission therein of the crime and conviction by a foreign tribunal.

Judged by the standards prevailing in the United States, the inferior courts have considered technical perjury as involving moral turpitude. Ex Parte Chin Chan On, 32 F. (2d) 828; Masaichi Ono v. Carr, 56 F. (2d) 772; United States ex rel. Karpey v. Uhl, 70 F. (2d) 792; United States ex rel. Carella v. Karnuth, 2 F. Supp. 998. Perjury at common law is defined as "the wilful giving under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry." Bishop Criminal Law, 9th ed., sec. 1015. See also 48 C. J., 820; 21 R. C. L. 254,

Perjury has been extended by Federal statute and by statutes in many States to include false swearing not connected with judicial proceedings. Criminal Code, sec. 125; U. S. C., title 18, sec. 231; State v. Smith, 63 Vt. 201; Clark and Marshall, Law of Crimes, 2d ed., p. 653; 21 R. C. L. 255-256; 48 C. J. 820-821. In some jurisdictions it appears that perjury or false swearing even may be premised upon false swearing to a matter not material to the issue or point of inquiry. State v. Byrd, 28 S. C. 16; State v. Miller, 26 R. I. 282; Milstead v. Commonwealth, 21 Ky. Law Rep. 358.

The Federal statute, however, includes "declarations" and "certificates", but to constitute a violation the false testimony or statement must be of a material matter. Under this statute conviction was sustained for false swearing in a land contest before a local land office. Caha v. United States, 152 U. S. 211. An indictment for perjury was upheld upon a false sworn statement in a homestead application, United States v. Small, 256 U. S. 405; and for making a false statement under oath to the Civil Service Commission, United States v. Grandol, 233 Fed. 331. A conviction of perjury was affirmed for making a false statement under oath to the United States selective service draft board. Hardwick v. United States, 257 Fed. 505. See also United States v. Morhead, 243 U. S. 607, 610.

Crimes constituting fraud seem to be looked upon as involving moral turpitude within the meaning of the immigration statute.

United States v. Reimer, 79 F. (2d) 513, 514; Ponzi v. Ward, 7 F. Supp. 736, 739; and a false statement under oath to immigration officials has been held to involve moral turpitude. Kaneda v. United States, 278 Fed. 694; United States v. Smith, 62 F. (2d) 808, certiorari denied, 289 U. S. 422. Among other offenses held to involve moral turpitude under the immigration statute are: concealing assets by a bankrupt, United States v. Burmaster, 24 F. (2d) 57; issuing a check with intent to defraud, United States v. Day, 16 F. (2d) 328; Hishinote v. Nagle, 44 F. (2d) 304; executing a mortgage with intent to defraud, United States v. Tuttle, 46 F. (2d) 342; conspiring to defraud a person by deceit and falsehood, Mercer v. Lence, *supra*; and criminally receiving stolen goods, United States v. Reiner, 17 F. Supp. 414.

It has been urged on behalf of the alien here involved that since Article 156 of the German Criminal Code penalizes false statements made before officials, regardless of whether they relate to material or immaterial matters, this Government is not justified in examining into the facts in the case with a view to determining whether the statement in question was material, it being assumed that a false statement as to an immaterial matter could not reasonably be regarded as involving moral turpitude.

It is true that Article 156, under which the alien was convicted, does not require that the false affirmation be in regard to a matter material to the point of inquiry, and the documents forwarded to me by the Acting Secretary with his letter of December 19,

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1938, disclose a difference of opinion among German commentators as to whether the decisions of the German Supreme Court make any distinction between material and immaterial matters. Certain of them assert that no distinction is made between essential points and incidental points and that a false oath relating to an incidental matter would be punishable; others seem to express a contrary view. While there is some uncertainty as to the interpretation of Article 156, your Legal Advisor considers that the Government is justified in this case, under the decided cases, in resorting to the record of conviction to ascertain the precise nature of the offense of which the alien was convicted. Ex Parte Chin Chan On; United States v. Corsi, supra. If resort is had to the record it indicates, although the situation is involved, that the alien's false statement related to a matter which the German authorities deemed material and respecting which they deemed it necessary to obtain correct information.

It has also been suggested on behalf of the alien that when he submitted to the German authorities the declaration alleged to contain a false statement concerning his property he did so under the advice of an economic trustee upon which he considered that he was justified in relying. It is the view of your Legal Advisor, however, that your Department would not be justified on this score in attempting to try the case anew and to determine whether the conviction of the alien was warranted under the circumstances.

It further has been urged on behalf of the alien that the offense of which he was convicted was political. The statute excludes from its provisions an alien convicted of an "offense purely political," and extradition treaties, with few exceptions, contain a provision exempting in mandatory or permissive form political offenses from their operation. The term is not defined in the Immigration Act, nor, apparently, in any of the treaties to which the United States is a party. It is generally agreed that no satisfactory and acceptable definition of the term has yet been found. In re Ezota, 62 Fed. 964; Moore, The Case of the Salvadoran Refugees, 29 American Law Review, p. 1; Clark, Extradition, 2d ed., Appendix XXXIV; Deere, Political Offenses in the Law and Practice of Extradition, 27 American Journal of International Law, 247-270, at p. 269; Foreign Relations of the United States (1897), pp. 405-416; Harvard Research, Extradition, American Journal of International Law (1935), Pt. I, Supp., pp. 107-119; Hyde, International Law (1922), Vol. I, pp. 573-576; Moore, Extradition (1891), Vol. I, pp. 303-325; Oppenheim, International Law, 4th ed., Vol. I, pp. 573-579; Taylor, International Public Law (1901), pp. 258-259; Wheaton's International Law (Keith), 6th Ed., pp. 218-228; 3 Proceedings of American Society of International Law (1909), pp. 95-165.

Judge Moore, in the work above cited (p. 308), states that definitions are of little practical value "since the question whether a particular act comes within that category is pre-eminently circumstantial." Reference to a few cases may serve to indicate the

general nature of the concept.

In re Castioni (1891), 1 Q. B. Div. 149, 156, Lord Denman stated:

"I think that in order to bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the Act."

In the same case, however, Judge Hawkins, adopting the definition given in Stephen's History of the Criminal Law of England (1863), Vol. II, pp. 70-71, said:

"I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if these crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration."

In the draft Convention on Extradition, prepared by the Harvard Research in International Law (supra, p. 112), the following definition was proposed:

"As it is used in this Convention, the term 'political offense' includes treason, sedition and espionage, whether committed by one or more persons; it includes any offense connected with the activities of an organized group directed against the security or governmental system of the requesting State; and it does not exclude other offenses having a political objective."

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Counsel for the alien suggests that the term "political offense" should apply "to any offense incidental to the resistance of, or flight from, great persecutions or oppressions by nations or ruling majorities against large racial religious, or political minorities."

While ordinarily it may not be proper to consider the motive or purpose of the offender in determining whether a crime of which he was convicted involves moral turpitude, I agree with your Legal Advisor that when the question is presented whether the offense was political it becomes necessary to take motive into account.

It may be assumed, that, in ordinary circumstances, under the principles enunciated in the cases heretofore cited--most of which, it should be observed, presented instances of convictions not by foreign courts but by courts of this country--wilful false swearing would involve moral turpitude. However, in view of the claim made in this case that the crime was political in nature or had political aspects, the question whether in its essence it is one debarring the alien from entry is a question which, if presented to a court in the United States, would, in my opinion, require consideration in the light of the present-day situation in Germany. I do not think that the case should be divorced from the realities of the world or that opinions rendered heretofore in this country dealing with the moral qualities of crimes of which persons had been convicted by foreign tribunals in tranquil times should be followed in the letter to conclusions antagonistic to the spirit of our im-

migration law and foreign to the intent of the Congress in passing it.

There are in the United States no statutes comparable to the economic decrees of the Reich. It is well known indeed that the concepts of law presently existing in Germany are alien to those which prevail in this country. See "The German Reich and Americans of German Origin," Oxford University Press, 1938, pp. ix, 3-6. It should be noted that the German court states in its judgment convicting the alien here involved that "the accused had \* \* \* the intention of emigrating from Germany since, being a Jew, he saw his commercial progress in Germany obstructed." It is common knowledge that decrees and orders have been issued in and are enforced by the German Reich designed to eliminate Jews from all phases of German life, and indeed from that country; and that judged by our standards, as well as by those of many other nations, the members of the Jewish race in Germany are under the severest kind of persecution. The State Department had occasion to observe during December, 1938, that the recent policy pursued in Germany shocked and confounded public opinion in the United States more profoundly than anything that had taken place in many decades, and that references here in public utterances to this state of public indignation represented the feeling of the overwhelming majority of the people of the United States.

Under such conditions the terror and desperation extent among hundreds of thousands of Jews now living in Germany cannot be

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other than acute. It was apparently under such conditions and in connection with the enforcement of the decrees which brought them about that conviction was had of the crime here charged; I cannot bring myself to believe that in determining any moral or political attributes of that crime the courts of this country would close their eyes to those factors.

Indeed, it would appear that the acts here under consideration were performed under a compulsion as great as it was unjust. The alternatives open to the alien were to remain in Germany and be reduced to a state of penury and serfdom or to seek another life in another land. In selecting the latter alternative, he was confronted with the necessity of going forth with his dependent family stripped of all his possessions or seeking to retain what was rightfully his own, in avoidance of a statute and a procedure which cannot be defended on the basis of morals or justice. It was a form of duress which in good conscience we would not be justified in ignoring.

I do not believe that the term "moral turpitude," as it is generally understood, can properly be ascribed to the conduct of this alien. I advise that you would be warranted in granting him a visa.

Respectfully,

HOMER CULLINGS,

Attorney General.