

POST-WAR PROSPECTS FOR TREATMENT OF ENEMY PROPERTY

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When I came to Congress in January of 1935, the subject of alien property seemed one of ancient history, never to be heard of again. Upon the outbreak of the present war, interest in it was suddenly revived, so emphatically that I felt it my duty as a Representative in Congress to inform myself about it. From study and contacts with persons whom I regarded as informed, including publicists and lawyers who had participated in legislation and litigation related to the subject, I became convinced of several things, among them these: First, that it was a vastly important subject of national concern and hardly less complicated than it was important; second, that we had blundered in our treatment of it during and after the last war; and, third, that there were certain things to be done about it without delay and at this session of Congress.

Accordingly, on November 15, 1943, I introduced a bill, H. R. 3672, referred in due course to the Committee on Interstate and Foreign Commerce, which, together with one of my own committees, Ways and Means, had framed the legislation after the last war, known as the Settlement of War Claims Act of 1928.¹ Several other bills have subsequently been introduced.² Hearings on some of these bills have begun. In the meantime, the views and comments of interested government departments and executive agencies have been received as to my bill, among them the Alien Property Custodian, the Attorney General, the Acting Secretary of the Treasury and the Secretaries of State, War, Navy and Commerce Departments.

The chief outspoken opposition that I have heard since I introduced H. R. 3672, comes from three sources. It might be well to consider them briefly.

Two months prior to the introduction of my bill, and, no doubt, in anticipation of it, the Foreign Commerce Department of the Chamber of Commerce of the United States made a report to its Board of Directors, the gist of which was contained in these words:

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¹ 45 STAT. 254 (1928), 50 U. S. C. APP. (1940 ed.) §§9(b)(12) to 9(b)(22) inc. and 9(l) to 9(q) inc.

² S. 1940 and H. R. 4840 (same bill) May 19, 1944; S. 2038 and H. R. 5118 (same bill) June 23, 1944—all in 78 Cong. 2d Sess.

"United States property in enemy and enemy occupied countries exceed in value enemy property in the United States. The policy of non-confiscation is thus not only a sound moral principle, but in this instance, is a course of enlightened self interest."

The above statement overlooks several points, as brought out in a special article in the *New York Times* of December 5, 1943, by Mr. Godfrey N. Nelson, discussing under the title, "Alien Properties Domestic Problem" the bill H. R. 3672:

"It would be conceivable that if there were the slightest apprehension of our winning the war it would be highly inadvisable to take legislative steps to reduce to ownership of the United States the vast amount of enemy-owned property seized by the Alien Property Custodian. Since there can be no such apprehension, however, one is forced to inquire into the question as to why the subject of such ownership has not been brought up in the Congress for full and free discussion.

"The matter of policy which should be settled without undue delay is primarily to preclude the return to enemy aliens of seized property before the valid claims of American citizens shall have been satisfied; to simplify the procedure by which such claims may be established by granting American courts jurisdiction over the determination of such claims.

"This subject is of vital interest to the American taxpayer who stands to lose either by delayed action or by failure of the Congress to make proper provision for the disposition of property now held by the Government only as custodian. Mr. Gearhart observed: 'Prolonged Government administration will most certainly diminish the value of these assets, whereas their prompt sale, private management and aggressive commercial development would arrest depreciation and to that extent benefit all parties concerned, save those who plot profits upon the ruins of a war-torn world.'"

The second attack on the bill comes from Professor Edward Borchard of Yale University. Raising his voice against what he chooses to denounce as confiscation of private property, the cry which led us into the great error of returning enemy property after the first World War, he again advocates what amounts to abandonment of our own nationals of this war period, as he did for World War I, many of which nationals, because of the adoption of this mistaken policy, have never been compensated for their losses resulting from German war action, not even to this late day. This position is substantially one which was vigorously criticized and condemned by Mr. Garner, then a member of the House, later Vice President of the United States. It is interesting to recall that at the hearings before the Ways and Means Committee and the Interstate and Foreign Commerce Committee in 1926, when Mr. Newton of the committee stated that Professor Borchard (who filed voluminous memoranda and briefs in favor of the return of enemy property) "seemed to appear as a friend of the court," Mr. Garner remarked, and, not without reason, that "it develops now he is not only a friend of the court but a friend of the interested parties . . . retained by them for a consideration."

The third and other attack upon the principle upon which my bill is based is contained in a report of a special committee of the American Bar Association, the pardoned an *argumentum ad hominem*, one notes that Mr. Sommerich and another Chairman of which is Mr. Otto C. Sommerich of New York City. If one may be

member of this special committee, Mr. James J. Lenihan, Jr., appeared before the United States Supreme Court in 1937 on behalf of the Deutsche Bank³ in an unsuccessful attack upon the Constitutionality of the so-called Harrison Resolution,⁴ which alone stood between our injured American nationals and a further rape of their right to compensation for their losses occasioned by the war action of the German Government; one is thereupon inclined to discount the disinterestedness of the American Bar Association Committee and to speculate at whose instigation it was set up and its personnel chosen.

The principal conclusions I had reached when I introduced H. R. 3672 sum up as follows:

1. All enemy alien interest in seized properties and frozen assets should now and for all time be finally cut off.
2. Claimants who have suffered by action of our enemies should be afforded a present opportunity to go into the Federal Court, to there establish their claims according to the principles of Anglo-Saxon law.
3. Congress should at once provide for an expert commission to advise Congress when the necessity arises in respect to what disposition should be made of enemy property.

My suggestion as to the appointment of an expert commission to advise the Congress seems to be supported by the intricacy of the field as explored in the various articles in this symposium. The importance of the related subjects cannot be denied. One has but to read the numerous topics which have been denominated as the subjects for special treatment and to contemplate the many aspects of each phase to realize that the problems of enemy property are too intricate and involved a subject for an unaided Congressional committee to attack in the absence of full hearings, careful study, painstaking analysis and scientific condensation in the pursuit of a sound conclusion, in search of a solution which will be fool-proof against vexatious litigation, intolerable delays and that distortion and abuse which might completely pervert the intention and objectives of the Congress. Hasty, ill-considered action must be avoided this time. The mistakes we made following the conclusion of World War I must not be repeated. I hope this symposium will help point up the problems and the difficulties.

My position is very different, however, with respect to the other two principal conclusions I have stated above. They demand immediate action by Congress for reasons I stated on the floor of the House on November 15, 1943, reasons which will bear repetition here.

MR. GEARHART: "Mr. Speaker, according to unofficial reports which have reached my desk, we have lawfully in our possession and under our control enemy-owned properties, assets of various kinds, of a value of hundreds of millions of dollars.

"The Japanese and German owners of much of that colossal estate are now fighting in

³ *Cummings v. Deutsche Bank*, 300 U. S. 115 (1937).

⁴ Public Resolution No. 53 of June 27, 1934, 48 STAT. 1267.

the armed forces of their respective countries to destroy us, or, in some other related capacity, are bending every effort to insure the success of our relentless enemies.

"To the extent that this magnificent enemy-owned estate belongs to our most contemptible enemies—Japan and Germany—they who are now striving to destroy us, should it not be immediately sold to the highest bona fide American bidders and the proceeds devoted to the protection rather than the destruction of these United States? . . .

"No thought of confiscation exists in the bill I introduce. No question of confiscation is involved. As but a hasty glance at the measure will reveal, the bill requires that defeated enemy governments shall compensate their own nationals for any losses suffered by them as a consequence of the seizure of their property as enemy property by virtue of American legal action.

"At the time the nonconfiscation argument was advanced in the Seventy-first Congress, the then Under Secretary of the Treasury, Mr. Garrard B. Winston, was asked by Mr. Garner: 'Is it confiscation of property for us to carry out the provisions of a treaty where the German government itself obligates itself to pay its citizens on account of our taking this property?' The Under Secretary of the Treasury replied: 'If you take the property of an individual citizen to pay the debts of his government and his government reimburses him for the property taken, there is no inequity.'

"Again, how can it be said that not to use this enemy property to pay losses of American citizens suffered through enemy action is a sound moral principle? Are we to give back this property and let American citizens go totally uncompensated; or are we to compensate them out of the inexhaustible United States Treasury and make American taxpayers pay the losses caused by enemy governments, while the nationals of those countries get their properties back less only a custodian's charge of one-half of 1 percent, as they did to the extent of 80 percent when Germany made its former bid for world mastery?

"To delay action now is to open the way to an enemy-inspired propaganda campaign to arouse our sympathies for our soon-to-be-vanquished foe, at a time when the war spirit has waned, arouse a false sympathy for them which will lead us into a repetition of the same tragic mistake we made following World War No. 1.

"Failure to act decisively will hearten the German and Japanese bankers and industrialists, encourage them in the belief that, however the war goes, they will get back their American investments.

"Anyone who says there is an element of confiscation of private property in the bill I have introduced is either not familiar with its provisions or is deliberately misrepresenting the facts. It was introduced to protect American citizens against those crafty creatures, some of them, I am afraid, paid German agents, who would be so generous with other peoples' property, our American claims, and so cosmic in their love of our enemies that they would give back to their original owners the assets of our enemies and let our own people, who have suffered private losses at the hands of our enemies, go unpaid, or, failing in that, to unload the claims on Uncle Sam, that is, upon our American taxpayers who, through taxation, would have to raise the money to pay the claimants.

"My bill requires Germany and Japan, as a condition of peace, to pay their own nationals the full value of any property which they had in this country at the outbreak of the war. If we are going to use words like, 'confiscation,' let us use them honestly. If the word

'confiscation' is honestly defined, I challenge anyone to show where there is any confiscation under my bill. There can be no misunderstanding unless the word is purposely used to mislead and befuddle.

"If it is read in the light of established legal principles, my bill will be revealed as one based on the centuries-old principle of 'subrogation,' a principle of law quite the opposite in meaning from that which 'confiscation' implies.

"If anyone is disposed to argue that, possibly, Germany and Japan would not live up to their promise to compensate their own nationals, the answer is that, as between the two sets of claimants, the German and Japanese nationals, certainly not our American claimants, should assume that risk. To assert that Germany and Japan would not live up to their obligation is to declare them in advance quite unworthy of the confidence of even their own people. But that, Mr. Speaker, is not a matter of concern to those in whose interest we legislate.

"Be that as it may, my bill protects both the American claimants and the alien enemy nationals against confiscation of private property insofar as any law of the United States can do it. Therefore, we can well dismiss this cry of confiscation as unworthy of further consideration. It is but a weapon of obstruction, nothing more."

These conclusions and remarks made by me on the floor of the House were not made for oratorical effect or without careful study of the matter. Specialists, including practicing lawyers of undoubted integrity, had brought to my attention what had been said or written on both sides of the subject and the legislative and court action before and since the passage of the Trading With the Enemy Act in 1917 on our entry into the World War.

It is my firm resolve that we shall not be deceived, as was the 69th Congress, by the false argument that it is confiscation to apply Japanese and German assets in our possession to the losses of our own people who have been injured by our Axis enemies. This is not the result of hatred from experience on battlefields of France in the last war but the considered judgment of a public servant trying to view the matter from the point of our own best national interest. In reaching my judgments, I find myself not without support in the opinions of jurists of our present courts, outstanding citizens and eminent lawyers who have expressed themselves in favor of the principles embodied in my bill.

In my consideration of the subject, I have given careful thought and made inquiry as to whether there is any truth, not to speak of force, in the argument that the enactment of my bill will result in confiscation of private property, violate the settled principles of modern civilization, destroy the traditional policy or offend the Constitution of the United States and be a return to barbarism. I find there is no truth in any of these statements.

I have approached the matter from five angles: Principles, precedents, policy, experience and national self-interest.

In principle, it is just that when a nation chooses to start a war of aggression, private losses resulting therefrom shall fall on its nationals and not on the nationals

of the aggrieved nation, if there is no other way of compensation.

There is no Constitutional principle, as our Supreme Court has repeatedly decided, which imposes any limitation on the use to which Congress may put the property and assets of enemy aliens.⁵

There is no principle of law or equity which requires a victorious nation to do more in the protection of private property than we did in the Treaty of Berlin⁶ or in the Treaty of Versailles in Article 297-(i) which provided as follows: "Germany undertakes to compensate her Nationals in respect to the sale or retention of their property rights or interests in allied or associated states."⁷ In this connection there is a very enlightening memorandum of the German Embassy in reply to Honorable William R. Castle, the Chief of Western European Affairs of the State Department, dated April 20, 1926, showing how Germany compensated her own citizens for their private property retained under the Treaty of Versailles by England, France, Belgium and Italy.^{7a}

As to precedents, we have the action taken after the last war by England, France, Belgium and Italy in applying enemy property to enemy debts and we do not consider these barbarous nations. Nor can we deny the fairness of the British position as then taken that it had not confiscated private property: first, because it was credited on valid claims against Germany and its nationals; second, because the Allies had charged Germany with the duty, to which Germany had by treaty solemnly agreed, of repaying to the individuals the value of any property so taken from private citizens, and third, because it seemed eminently just, since if damages were to be collected but delay in payment was unavoidable, that nationals of the wrongdoing country should suffer the hardship of delay rather than those of the country that had been wronged. The soundness of this British viewpoint seems established by the fact that American nationals after twenty-seven years are still waiting full compensation for war losses inflicted by Germany.

As to policy, I think my attention has been called to nearly all the statements that have been made on the law of enemy property and its uses since the days of Grotius. Time and again assertions of doubtful validity have been hung on these quotations before Congress and its committees; paragraphs are torn from their contexts, sentences are garbled and fallacious contentions are drawn from a single phrase or cliché. George Washington, Thomas Jefferson, Benjamin Franklin, Alexander Hamilton, Chief Justice Marshall, Woodrow Wilson, John Bassett Moore,

⁵ *United States v. Chemical Foundation Inc.*, 272 U. S. 1, 9-11 (1926); *Woodson v. Deutsche Gold und Silber Scheideanstalt Vormals Roessler*, 292 U. S. 449 (1934); *Cummings v. Deutsche Bank*, 300 U. S. 115 (1937); see *Z. & F. Assets Realization Corp. v. Hull*, 311 U. S. 470, 490 ff. (1941). See also McNulty, *Constitutionality of Alien Property Controls*, *supra*, this symposium, p. 135 *et seq.*

⁶ See Sec. 5 of that Treaty, providing that this government is to retain property of German nationals until suitable provision is made for claims of our nationals against the German government. Vol. III of *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS* (SEN. DOC. NO. 348, 67th Cong. 4th Sess. 1923) 2597.

⁷ *Id.* at 3464.

^{7a} *Hearings before the Committee on Finance, United States Senate, on H. R. 15,009*, 69th Cong., 2d Sess. (1927) 367.

Philander C. Knox, Charles E. Hughes when Secretary of State, his distinguished successor Cordell Hull, and a goodly sprinkling of university professors, are all called as witnesses by those who cry confiscation and barbarism and "quote scripture for their purpose." Limitations of space prevent detailed exploration and refutation here. Suffice it to point out that Mr. Hull's recent words have been quite consistent with the position he took, as a member of the House of Representatives, in 1926 in denouncing arguments advanced on behalf of German interests for the return of enemy property, when he joined with Mr. Garner in opposing the scheme that America should return all enemy property and pay its own nationals for losses inflicted by Germany as a "stupendous steal—the greatest in the history of this country."⁸

There is an old legal maxim that when the reason faileth, the law no longer applies. To the extent that what recognized authorities have said has been correctly quoted and applied as to the use to be made of enemy property, my bill is in full accord. Nations that abide by their treaties earn for their nationals a different treatment than treaty-breaking countries which present-day Germany and Japan have proved themselves to be. The generous treatment accorded Germany and her nationals as to enemy property after the last war was largely accounted for by the moral implications of statements made by Woodrow Wilson and members of the Congress, such as the following words of the then President on April 2, 1917: "We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make. . . ." "We have no quarrel with the German people, we have no feeling toward them but one of sympathy and friendship." That, in my opinion, is not the present-day attitude of the American people toward either Japan or Germany and I am opposed to any disposition of the property of their nationals which proceeds on any such sentiment.

I come next to what our experience and the most recent action of our courts and Congress has shown, to my satisfaction, to be not only the right policy as to seized enemy property and assets, *but our established policy*. Unanimous decisions of our Supreme Court have brushed aside the specious contentions that any right, susceptible of Constitutional protection, subsists in seized enemy property; and has reaffirmed the principle of international law that we have the unlimited right to use it as we will.⁹ Since the end of the last war, the Congress of the United States has twice acted positively and definitively, to establish the American policy in this matter—in 1934 when it passed the Harrison Resolution¹⁰ and in 1940 when it en-

⁸ See RETURN OF ALIEN PROPERTY, *Hearings before a Subcommittee of the Committee on Ways and Means sitting in conjunction with a Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 10820*, 69th Cong. 1st Sess. (April, 1926), *passim*; also RETURN OF ALIEN PROPERTY—No. 3; *id.* No. 4 (Nov., 1926) pp. 25 ff., 67, 199, 235, 395—*cf.* p. 635 (letter from Mr. Sommerich to the Committee).

⁹ *Brown v. United States*, 8 Cranch 110 (U. S. 1814); *Miller v. United States*, 11 Wall. 268 (U. S. 1870); *Stoehr v. Wallace*, 255 U. S. 239 (1921); cases cited *supra* note 5; McNulty, *Constitutionality of Alien Property Controls*, *supra*, this symposium, p. 135.

¹⁰ *Supra* note 4.

acted Private Law 509.¹¹ The last word of the Congress of the United States on the subject of enemy property is summed up in the unanimous report of the Committee on Foreign Relations of the Senate in connection with the bill leading up to the above private law.¹²

This report is so clear, conclusive, scholarly and expressive of my own views that I quote from it *in extenso*.

“. . . The foundation of law for the bill is as follows:

“The Trading with the Enemy Act, October 6, 1917 (40 STAT. 411), section 12, at page 424:

“After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct. . . .’

“Joint resolution terminating the state of war between the Imperial German Government and the United States of America, and between the Imperial and Royal Austro-Hungarian Government and the United States of America, July 2, 1921, part 1 (42 STAT. 105).

“The Treaty of Berlin between the United States and Germany August 25, 1921, to restore the friendly relations between the two nations, part 2 (42 STAT. 1939), incorporates the above act of July 2, 1921, which reserves to the United States and its nationals . . .

“all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice, signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any act or acts of Congress; or otherwise.’

“And section 5 thereof, providing in part:

“All property of the Imperial German Government, . . . and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, . . . the United States of America . . . shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government . . . shall have . . . made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, . . . since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly. . . .’

“Article I provides:

“Germany undertakes to accord to the United States . . . all the rights, privileges, indemnities, reparations, or advantages specified in the aforesaid joint resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such treaty has not been ratified by the United States.’

¹¹ 54 STAT. (part 2) 1341 (July 19, 1940).

¹² SEN. REP. NO. 1300, 76th Cong. 3d Sess. (1940).

"The agreement between the United States and Germany for a Mixed Commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded between the two Governments on August 25, 1921, signed at Berlin August 10, 1922, part II (42 STAT. 2200).

"The fourth annual message of President Calvin Coolidge, made to the Sixty-ninth Congress, second session, Messages and Papers of the Presidents, Coolidge 1925-29, at page 9629:

"We still have in the possession of the Government the alien property. It has always been the policy of America to hold that private enemy property should not be confiscated in time of war. This principle we have scrupulously observed. As this property is security for the claims of our citizens and our Government, we cannot relinquish it without adequate provision for their reimbursement. Legislation for the return of this property, accompanied by suitable provisions for the liquidation of the claims of our citizens and our Treasury, should be adopted. If our Government releases to foreigners the security which it holds for Americans, it must at the same time provide satisfactory safeguards for meeting American claims."

"The Settlement of War Claims Act of 1928, an act to provide for the settlement of certain claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary against the United States, and for the ultimate return of all property held by the Alien Property Custodian (45 STAT. 254).

"Public Resolution No. 53, Seventy-third Congress (48 STAT. 1267), June 27, 1934, amending the Settlement of War Claims Act of 1928.

"The Settlement of the War Claims Act of 1928, in part, provided for the return of 80 percent of the seized former enemy alien property and the retention of 20 percent thereof by the Treasury of the United States as security for the agreement of Germany to pay in full all proved damages of American nationals.

"Thus was created the German special deposit account.

"That legislation, and the Trading With the Enemy Act of 1917 expressly retained in the Congress of the United States control and disposition of this German special deposit account and any money or other property received and held by the Alien Property Custodian, or deposited in the United States Treasury, and the Supreme Court of the United States has twice unanimously expressed the following views:

"In *Woodson, Alien Property Custodian et al. v. Deutsche Gold und Silber Scheidanstalt Vormals Roessler* (292 U. S. 449 (1934), at p. 453), Mr. Justice Sutherland, delivering the opinion, said:

"... The Trading with the Enemy Act was passed by Congress in the exertion of the war power; its purpose was to weaken enemies by diminishing the sources from which they could obtain aid, and to strengthen this country by adding to resources for the successful prosecution of the war. Section 12 declares that after the end of the war any claim of any enemy to recover money or property received and held by the Custodian or deposited in the United States Treasury "shall be settled as Congress shall direct" (40 STAT. 424). While this suggests that confiscation was not effected or intended, it plainly shows that Congress reserved to itself full freedom at any time to dispose of the property as might be deemed expedient and to deal with claimants as it should deem to be in accordance with right and justice, having regard to the conditions and circumstances that might arise during and after the war. It is clear the enemy owners were divested of every right in respect of property taken and held under the act (*United States v. Chemical Foundation*, 272 U. S. 1, 9-11)."

"In *Cummings, Attorney General et al. v. Deutsche Bank and Discontogessellschaft*

(300 U. S. (1937), p. 115, at p. 120), Mr. Justice Butler, delivering the opinion of the Court, said:

"Public Resolution No. 53 is not repugnant to the fifth amendment. By exertion of the war power, and untrammelled by the due process or just compensation clause, Congress enacted laws directing seizure, use, and disposition of property in this country belonging to subjects of the enemy. Alien enemy owners were divested of every right in respect to the money and property seized and held by the Custodian under the Trading With the Enemy Act (United States v. Chemical Foundation, 272 U. S. 1, 9-11; Woodson v. Deutsche, etc., Vormals, 292 U. S. 449, 454). The title acquired by the United States was absolute and unaffected by definition of duties or limitations upon the power of the Custodian or the Treasurer of the United States. Congress reserved to itself freedom at any time to dispose of the property as deemed expedient and right under circumstances that might arise during and after the war. Legislative history and terms of measures passed in relation to alien enemy property clearly disclose that from the beginning Congress intended after the war justly to deal with former owners and, by restitution or compensation in whole or part, to ameliorate hardships falling upon them as a result of the seizure of their property. But that intention detracted nothing from title acquired by the United States or its power to retain or dispose of the property upon such terms and conditions as from time to time Congress might direct. As the taking left in enemy owners no beneficial right to, or interest in, the property, the United States did not take or hold as trustee for their benefit.'

"And at p. 122:

"To grant to former alien enemy owners of the privilege of becoming entitled upon conditions specified to have returned to them the property of which they had been deprived by exertion of the war power of the United States was made by the Congress in mitigation of the taking and in recognition of "the humane and wise policy of modern times" (Brown v. United States, 8 Cranch 110, 123). In United States v. White Dental Co. (274 U. S. 398) it appears that during the war the German Government sequestered the property of a German corporation which, through ownership of all its capital stock, was controlled by an American corporation. Speaking of the taking we said (pp. 402-403): "What would ultimately come back to it (the American owner), as the event proved, might be secured not as a matter of right, but as a matter either of grace to the vanquished or exaction by the victor. . . . It would require a high degree of optimism to discern in the seizure of enemy property by the German Government in 1918 more than a remote hope of ultimate salvage from the wreck of the war." We think it clear that the grant by the Settlement of War Claims Act was made as a matter of grace and so was subject to withdrawal by Congress (United States v. Teller, 107 U. S. 64, 68; Frisbie v. United States, 157 U. S. 160, 166; Lynch v. United States, *supra*, 577). The resolution does not infringe the fifth amendment.'

"It being clear, therefore, that Congress is invested with full power, and that the claimant has no other resort or recourse for just compensation, it is the clear duty of the Congress to enact this measure following the principle laid down by Mr. Adams in the Spanish Treaty case of 1819, as to which the following is quoted in Moore's International Law Digest (vol. 5, p. 188):

"The treaty of February 22, 1819, which provided for the cession of the Floridas by Spain to the United States, and for the mutual adjustment of various claims, stipulated for the exchange of ratifications within 6 months. Before the treaty was signed, Mr. Onis, the Spanish minister, delivered to Mr. Adams, who was then Secretary of State, his full powers, which contained the following clause:

"Obliging ourselves, as we do hereby oblige ourselves and promise, on the faith and

word of a King, to approve, ratify, and fulfill, and to cause to be inviolably observed and fulfilled, whatsoever may be stipulated and signed by you; to which intent and purpose, I grant you all authority and full power, in the most ample form, thereby as of right required.'

"With reference to this passage, Mr. Adams, after citing Vattel, book 2, chapter 12, section 156, and Martens' Summary, book 2, chapter 1, section 3, said: 'The obligation of the King of Spain, therefore, in honor and in justice, to ratify the treaty signed by his Minister, is as perfect and unqualified as his royal promise in the full power; and it gives the United States the right, equally perfect, to compel the performance of that promise. . . .

"The President considers the treaty of 22nd February last as obligatory upon the honor and good faith of Spain, not as a perfect treaty (ratification being an essential formality to that), but as a compact which Spain was bound to ratify; as an adjustment of the differences between the two nations, which the King of Spain, by his full power to his minister, had solemnly promised to approve, ratify, and fulfill. . . .

"The King of Spain was bound to ratify the treaty; bound by the principles of the law of nations applicable to the case; and further bound by the solemn promise in the full power. He refusing to perform this promise and obligation, the United States have a perfect right to do what a court of chancery would do in a transaction of a similar character between individuals, namely, to compel the performance of the engagement as far as compulsion can accomplish it, and to indemnify themselves for all the damages and charges incident to the necessity of using compulsion. . . ."

This report of the Foreign Relations Committee of the Senate, followed as it was by favorable action in both Houses, approved by the President, seems to me to make very clear the American attitude as to enemy property upon which my bill is based.

While no reference has as yet been made to this report in any court decision, nor was the principle on which it is based referred to in any of the mass of litigation that grew out of the Trading With the Enemy Act, passed on our entry into the war in 1917, I am persuaded that the American policy as to the enforcement of the rights and protection of the property of this country and its citizens against invasion or denial thereof by foreign nations was in fact fixed in 1819, along with the Monroe Doctrine, by strong men of a weak republic, one of whom sat in the Presidential chair and the other beside him as Secretary of State.

As I read this report and discussed it with counsel who presented the matter to Congress, it became clear to me that it was on this principle that the Trading With the Enemy Act of 1917 was really based, consciously or otherwise, and that ancient and modern ponderous citations as to the confiscation in war of enemy property had become obsolete and irrelevant as far as this country is concerned. We had not adopted a policy of confiscation but of equity. The truth being that the United States has never precipitated or participated in any foreign war of aggression and that we fought only in self-defense, where rights of the nation or its nationals under treaties, agreements or international law have been invaded; in short only having engaged in war with those who broke treaties, violated their agreements and set at naught the law of nations, the Adams pronouncement is a complete

declaration of our policy and specifically applies to seized enemy property. Under the Adams pronouncement, when the rights of the nation or its nationals have been violated or invaded, we assert our sovereignty by enforcing our rights and the derivative rights of our citizens as would a court of equity. By way of protecting those rights we seize and take into custody the property within our dominion of the offending nation and its nationals. From a legal aspect, this action is in the nature of that little-known but well-established implementation of the Court of Chancery, known as an equitable attachment. The purpose of such seizure is to enforce the right denied or recover compensation for losses resulting from its violation. As in any case in municipal law and procedure, when either objective is accomplished, the attachment is released and the property seized passes back into the possession of its original owner. And the same happens when, as it were, the attachment is bonded or proper security is given. Failing recognition of the right denied and recovery of compensation for the losses resulting from its violation, the proceeds of the seized property are equitably applied, to the extent necessary, to compensate for losses suffered from the injury or on account thereof, but if inadequate for full compensation, leaving the offender still liable for the remainder of the loss which has been suffered. In all this there is no taint of confiscation and confiscation is simply not involved any more than in any strictly judicial process. When a nation starts or enters a war of offense or aggression, and, as a war measure, seizes the property within its domain of the nationals of the nation attacked, then perhaps we come upon an act of deliberate confiscation in conflict with the law of private property and the modern law of nations. But such has demonstrably never been true of the United States of America. Hence, in dealing with the subject of enemy property and its treatment by our government during or after this war, it sounds strange to hear any voice lifted in a cry of confiscation, except, possibly, professional legal voices so lifted for a fee.

While it does not seem to have been realized, it is the fact that the Settlement of War Claims Act of 1928¹³ was drawn to the principle of an equitable attachment as I am assured by learned counsel who was consulted in regard to that measure. Had the Settlement of War Claims Act of 1928 been enforced in accordance with its terms, there might today have been a different story as to unpaid American claimants. The term equitable attachment was not used in the informal discussions which led to the rationale of that measure; it was, perhaps, a bit too technical for popular comprehension, but the expression was then used that the new bill would work on the principle of a compression tank, a homely equivalent of equitable attachment, and the seized property of German nationals would be released only as Germany paid or secured the payment of proved private war losses of American citizens. German duplicity and fraud and our own misguided trustfulness defeated the purpose of that Act, but it set a high ideal of international justice and established an equitable basis for the treatment of enemy property. Germany's complete

¹³ *Supra* note 1.

violation of the solemn agreements on which this Congressional action relied, renders it, of course, absurd to think of so dealing with enemy property now in our control while Japanese treachery hardly entitles that country to claim debatable niceties of international law. Obviously, we must and shall apply every dollar of seized enemy property to proved war losses of our nation and its citizens and we should do it *instanter*.

In the doing of it, we shall have neither acted in hatred or disregard of international law or inconsistently with our Constitution and traditions or in violation of the principles of equity and good morals, for the conclusive reason that it is now apparent beyond cavil or doubt that the nations with which we are at war do not observe treaties and solemn covenants and that they have not the remotest possible chance of showing the ability, if they had the bona fide intent, to compensate this nation or its nationals for war losses which they have inflicted.

This concept of equity as the unacknowledged and, perhaps, unrecognized rationale of American policy as to seized enemy property is not, of course, the motivating force in the original seizure of enemy property. It is seized and taken into custody, in the first instance, as a war measure to disable the enemy and to make use of the enemy-owned facilities, notably shipping, means of communication and raw materials, patents and formulas, needed for the production of arms and ammunition and their mobilization and transport. Once in custody, however, it is held not for unjust enrichment but to offset losses caused by enemy action during the war and once it becomes certain that such losses cannot or will not be indemnified except by resort to such seized enemy assets, its instant application to such purpose is indicated, without the slightest tinge or taint of confiscation. Citizens of any country, having ventured for profit to invest or create assets in foreign lands, must in full fairness answer with those assets for wrong doing of a marauding government which exists by their choice or acquiescence, and if their government willfully fail or is unable to compensate for the injuries to another nation or its nationals, it is again but to resort to long established principles of equity to hold that the private citizen, who stands surety for his government's action, must make good his secondary liability by his assets located in foreign domains and be content to be subrogated for his private loss to claims against his own government for the property so made to respond. Were I to attempt to summarize what I conceive to be the American policy toward enemy owned property, I would put it in four words: *protective seizure, equitable disposition*, having due regard to the maxim that one must be just before one is generous, that where the equities are equal the law must prevail. The high courts of this country have in dealing with enemy property repeatedly given full force and effect to equitable principles, regardless of the character of the controversy or the nature of the property involved.

This diversion into background material has been intentional, for refinements in doctrinaire systems of law (international, constitutional or otherwise) are not in

the spirit of the American public. It avails little for practical purposes to probe the technical aspects of enemy property, when the ultimate disposition of it rests with Congress which does not decide such issues on *a priori* juridical grounds but as it interprets the will of the people, within the framework of the Constitution. The general sense of fair play so prevails among our people that the strongest demonstration of legal and constitutional technical right to do as we see fit with enemy property will not suffice, unless it be shown that our use of it is just and fair. That is the reason after the last World War we did not go the full distance of England, France, Belgium, and Italy of forthwith executing the same power they had availed of and did not instantly apply all seized enemy property to debts owing by the enemy and its nationals. Experience has shown we were wrong and, as a matter of fact, the beginning of Nazi insanity, Germany's self-destruction and the attendant Axis alliance may be found in the summer of 1931 when the German Reich, in simple English "welched" on the agreement by which, in good faith, we had been induced to return to her nationals 80% of the private property and assets we had seized and had the right by law and treaty to retain and use as we saw fit. As events have shown, she broke her agreement in order to help provide the means to start the present war.

Seizure and use of German and Japanese assets, whether owned publicly or privately, rests, then, on equitable principles, not confiscation and upon constitutional principles, not barbarism, as some would have us believe.

I come to the final point from which I have viewed the subject, that of national self-interest.

As yet, my own mind is open in such questions as these:

To what extent, if any, shall we provide relief or payment, out of the proceeds of enemy property or otherwise, to others than American citizens; for instance, those who are aliens, but not enemy aliens, who suffered private losses in foreign countries through Axis invasion of the so-called conquered nations?

If any such recognition is to be given to injured aliens, is it to be at the expense of American citizens who have suffered private losses, through depletion thereby of any fund eventually established for the purpose?

Is a distinction to be made between such aliens who were resident abroad at the time the injuries were suffered and those who were domiciled here when the loss occurred?

On this point, however, a difference is to be recognized between permitting all friendly aliens or resident aliens, if so limited, to prove their claims in American courts and permitting them to share in any funds available for compensation. The bill offered by me throws the doors of our Federal Court wide open for proof of claims but carries no commitment, express or implied, which in any way limits the

Congress from excluding or including any particular group or class of claimants in the final distribution, much as in a federal equity receivership. I think that is as far as we should now go; and I would not oppose any amendments which gave the courts power to limit proof of claims to American citizens and non-enemy aliens resident in this country when the loss occurred, including German nationals not resident in Germany when war was declared or since escaped, upon proof of their loyalty to this country.

Another question on which I have reached no final conclusion is as to the eventual disposition of the very valuable seized enemy-owned patents, although my mind is very clear that unrestricted free licensing of such patents by the Alien Property Custodian is unwise and unjust. My bill interdicts this in the following language:

“(d) The Alien Property Custodian is directed to offer for sale, and to sell, with all convenient speed, all enemy patents, trade-marks, and copyrights vested in him, except such patents, trade-marks, and copyrights belonging to persons whose funds are exempt from seizure as defined in subdivision (b) hereof, in accordance with, and upon the terms and conditions set forth in section 12, subdivision 4, of this Act: Provided, however, That the Alien Property Custodian shall not offer for sale, or dispose of such patents, trade-marks or copyrights as the President, by Executive order, shall exempt from sale on account of the fact that such exemption is necessary to the prosecution of the war: Provided further, That as to other than such patents, trade-marks, and copyrights, the Alien Property Custodian is directed not to grant any further license or licenses for the use thereof except upon payment of fees commensurate with the reasonable value of such licenses, such fees to be transmitted by him forthwith to the Secretary of the Treasury as provided in subdivision (a) hereof: And provided further, That no such fee to be agreed upon shall be deemed commensurate with the reasonable value thereof, unless the Secretary of Commerce, upon due investigation, certifies that he considers the fee to be paid as a reasonable compensation for such license agreement.”

I do not believe in socializing or nationalizing what we have always regarded as private property, including patents, and it will take a lot of sound argument to convince me that these patents should not forthwith be put in American ownership of competent management and established financial responsibility. They should not be given away like bread at a circus to make a Roman holiday for promoters or irresponsible financiers.

This leads to a further point of major importance as to which I am not certain what is the best implementation. Neither these patents (and much the same may be said, *mutatis mutandis*, about enemy owned trade-marks, copyright and secret formulas) nor any other of these enemy assets should be permitted to drift back or be siphoned back into the original enemy ownership through tricks and devices of nominally American corporations, as occurred after the last war. Unless someone presents a better idea, it is my intention at the proper time to offer an amendment to my bill, following a precedent in the National Housing Act, whereby some gov-

ernment official or agency will for a safe and reasonable period, retain a nominal stock interest in any corporation acquiring certain types of enemy assets, so there will be what in ecclesiastical and charitable corporations is called a power of visitation. As events proved after the last war, promises, pledges and solemn covenants provide no safeguard against the recapture of these assets by the original enemy owners. It is amazing to learn to what extent our mistakes in handling enemy property after the World War supplied the means to our present enemies not only of preparing for this one but of building the machinery and devices of modern warfare. For a full and explicit discussion of the re-entrenchment of enemy cartels, to which I referred on the floor when introducing the bill, attention is called to the recent report of the Kilgore Committee.¹⁴

However, I do recognize the fact that some reservations are to be made with regard to the use of these patents, as I indicated on the floor of the House:

MR. PHILLIPS: I wish to ask the gentleman if it is not a fact that there also would be involved the use, for the public good, of certain patents, chemical formulas, and medical processes in the procedure such as you suggest?

MR. GEARHART: Yes, I failed to mention that the bill I have drawn provides that whenever the President is of the opinion that a patent should not be sold, it should be retained and licensed to American manufacturers, or, should it be deemed advisable, it might be released to the public domain.

There remains one other factor of national self-interest, which is easily lost sight of in these days of feverish war spending with the national debt reaching toward three hundred billion dollars. That factor is the United States Treasury. Twenty years ago it was seriously proposed, with the backing of the then Secretary of the Treasury and the then Chairman of the Foreign Relations Committee of the United States Senate, and it came very near happening, that the United States release all seized enemy property and pay out of its own Treasury the private losses which its own citizens had suffered at the hands of Germany during the World War. This indicates the extent to which some persons were confused by sentiment and misled by the fallacious argument of confiscation; other influences also entered in, of which we hear the present-day echo in the report of the Commerce Department of the United States Chamber of Commerce, contending that as a matter of expediency and good business, we should "turn the other cheek" and return to German Nazis and Japanese treachery private property and assets which they had in this country when Pearl Harbor was attacked. Then, too, I regret to say as a member of that profession, there were always lawyers ready to espouse the enemy side of any question of public or private concern. The post-war load of accumulated debt facing this country is staggering enough. Obligations which must be met in full to the returning men of the services will add tremendous new financial burdens on our

¹⁴ CARTELS AND NATIONAL SECURITY, 78th Cong., 2d Sess. (1944) 2 parts (Report from Subcommittee on War Mobilization pursuant to S. Res. 107).

taxpayers. As a member of the Congress in dealing with decent compensation of American soldiers who have lost all but life itself, with American citizens who have had immeasurable material losses, I do not intend to have to square my conscience with a moment's hesitancy or delay in applying instantly and to the last dollar every German and Japanese asset in our possession to the compensation of the injuries and losses they have brought upon our people leaving, as my bill contemplates, Germany and Japan to compensate their nationals for private property so applied by us to the losses of our nationals. That to me is a sound and moral principle; that is the course of enlightened national self-interest; that is the way of insuring against future aggression by treaty-breaking nations.