CONGRESS IN THE WINGS: THE CZECH CLAIMS NEGOTIATIONS, 1974-1981

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Scholars and political commentators have long debated the proper mix of executive and legislative authority in the conduct of foreign relations. During the past half-century, the prevailing view has been one of skepticism toward congressional efforts in the field. From the neutrality legislation of the 1930s to the attempts in the 1950s by Senator Joseph McCarthy and others to limit President Eisenhower's discretion in dealing with Communist countries, congressional intervention has been criticized for its shortsightedness, its parochialism, its potentential for embarrassing the United States, and for depriving it of the flexibility needed for the effective assertion of American interests abroad.[1]

The Constitution gives Congress several specific roles that affect foreign relations: to declare war, to regulate commerce with foreign nations, to share in the treaty-making process.[2] Each of these roles has the potential for shaping, even rigidly shaping, America's relationship with the world. The ordinary conduct of foreign affairs, however—the daily business of dealing between governments—is commonly thought to be an executive branch responsibility into which Congress intrudes at some peril to the nation. The Supreme Court, in the 1936 *Curtiss-Wright* case, stated the accepted proposition that the President acts as the primary representative of the United States in foreign affairs:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation, the Senate cannot

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[1] Following the 1982 congressional elections, *The Economist* editorialized that "[i]t will cause nothing but confusion abroad if the rest of the world feels that Mr. Reagan does not speak for his government. Foreigners tend to prefer the single voice of even an imperial presidency to the cacophony of the coequal branch of government." *Ouch, he explained*, THE ECONOMIST, Nov. 6, 1982, at 13. *See also*, Tower, *Congress Versus the President: The Formulation and Implementation of American Foreign Policy*, 60 FOREIGN AFF. 229 (Winter 1981/82).

[2] U.S. CONST. art. I, § 8, cl. 3 (regulation of commerce); *id.* § 8, cl. 11 (declare war); *id.* § 2, cl. 1 (treaty-making).

> intrude; the Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, . . . "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[3]

Dispositive as such a statement seems, it could not realistically be read to deny Congress any legitimate say in defining the purposes for which the President negotiates with other powers. The Court's statement is an assertion of Presidential primacy, not of complete autonomy. Indeed the *Curtiss-Wright* Court acknowledged that the Constitution does not divide authority in foreign matters unequivocally. Subsequent Courts have confirmed that, when the President acts in the absence of a congressional authorization he may enter "a zone of twilight in which he and the Congress may have concurrent authority, or in which its distribution is uncertain."[4] American political history, from the Federalist Papers forward, assumes a congressional—at least a senatorial—voice in foreign affairs:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.[5]

In practical terms, what *Curtiss-Wright* was about, after its thumping defense of the President's authority, was assuring him adequate running room:

> It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[6]

Congress should not, in sum, so tie the Executive's hand that he cannot respond to new international conditions, or so require him to serve private interests that he must as a consequence ignore larger public ones. Even in those areas in which congressional authority is explicit, as in the regulation of foreign trade, some latitude must be afforded the na-

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[3] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[4] Dames & Moore v. Regan, 453 U.S. 654, 668 (1981).

[5] THE FEDERALIST No. 75, at 223 (A. Hamilton) (R. Fairfield ed. 1981).

[6] 299 U.S. at 320.

tion's principal dealmaker. He must remain free to seek the paramount goal of national security even if doing so requires the sacrifice of domestic economic interests.

The wide latitude granted the President in conducting international policy is broadly accepted in theory. Yet it is often challenged by events, and by strong tides of public opinion. America's involvement in the Vietnam War, legislatively based on commitments and authority in the SEATO Treaty and the Tonkin Gulf Resolution, generated, in its tragic aftermath, a congressional insistence on controlling the commitment of American forces abroad, even absent a formal declaration of war.[7] Approval of the Panama Canal Treaty—an event of almost traumatic effect on many Americans—occurred only after the Senate insisted upon several amendments which for a time threatened its acceptance by Panama. For three decades congressional support for Israel has decisively affected American policy in the Middle East. A classic confrontation between executive and congressional imperatives in foreign policy occurred during the Kissinger era, when the Secretary of State's devotion to *Realpolitik*[8] collided with Congress' determination to punish or ignore nations whose human rights records were unacceptable. Kissinger's notion of "discretion" for the executive, using Justice Sutherland's term in *Curtiss-Wright*, was obviously very broad. For its part, Congress, in the wake of Vietnam and disclosures of CIA involvement in several questionable activities, wanted to be in on more take-offs, on the assumption that this would reduce the frequency of the crash landings.

Private persons—litigants, claimants, and others with commercial or family interests abroad—sometimes find themselves in the middle of such an executive-congressional tug-of-war. Indeed, they often cause it. For example, they may produce pipeline equipment, and find themselves stymied by Presidential sanctions against its shipment to the Soviet Union. They therefore prevail on members of Congress (most recently, on the leader of the President's own party in the House of Representatives) to repeal the President's authority to impose the sanctions. There they meet arguments much like those in *Curtiss-Wright*: it would embarrass the United States by embarrassing the President if his authority in such a crucial area were challenged. The fact that virtually all of Europe united in opposition to President Reagan's pipeline sanctions was irrelevant. The act of disabling the President in his capacity as foreign policy executor must be avoided for the nation's sake.[9]

In 1981, the Supreme Court upheld President Carter's agreement to terminate ongoing legal proceedings against Iran, to nullify attachments, and to refer all claims to a special tribunal, in order to obtain

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[7] Maintenance of International Peace and Security in Southeast Asia, 50 U.S.C. App. 1937 (1976).

[8] H. KISSINGER, WHITE HOUSE YEARS 57, 114 (1977).

[9] 128 CONG. REC. H7920-31 (daily ed. Sept. 29, 1982).

the release of fifty-two American hostages. Congressional approval, express and implied, was one of the factors cited:

> [W]here, as here, the settlement of claims has been a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.[10]

The Court contrasted Congress' quiescence in the Iranian agreement with its reaction to a 1973 executive agreement initialled with Czechoslovakia which proposed to settle $105,000,000 in American citizens' claims against Czechoslovakia for $20,500,000. Congress had moved swiftly then to block the Czechoslovak agreement and to require legislative approval of any future settlement of the claims.[11] It is this Czechoslovak affair—so protracted, so faceted with international, financial, and human considerations, so frustrating, and ultimately so rewarding—that this article describes. The result, eight years after Congress blocked the 1973 Agreement and after further congressional intervention, was the most favorable of the post-war claim settlements.[12]

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[10] 453 U.S. at 688. The Court acknowledged that this was

> [o]nly one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.

Id. at 662. The Court analyzed President Carter's use of executive authority according to Mr. Justice Jackson's guidelines in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

> When the President acts pursuant to an express authorization from Congress, he exercises not only his powers but those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." ... When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." . . . In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation of power principles are concerned, hinges on a consideration of all the circumstances that may shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or quiescence." . . . . Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."

453 U.S. at 668-69.

[11] 453 U.S. at 688 n.13.

[12] Pechota, *The 1981 U.S.-Czechoslovak Claims Settlement Agreement: An Epilogue to Postwar Nationalization and Expropriation Disputes*, 76 AM. J. INT'L L. 639, 640 (1982) [hereinafter cited as *The 1981 U.S.-Czechoslovak Claims Settlement Agreement: An Epilogue*]. *See also* Johnson, *Legislators as Diplomats: The Czechoslovak Gold Dispute*, 9 J. LEGIS. 36 (Winter 1982).

The authors of this article were counsel for a coalition of claimants against Czechoslovakia and observed most of the *denouement* first-hand. Our purpose in recounting the long struggle here, however, is to suggest that the Czechoslovak negotiations hold certain useful lessons for the future. The wary, but in the end symbiotic, cooperation between Congress and the State Department that developed in the Czech claims case may be appropriate for other controversies involving American interests and intractable foreign governments.

There are two strands to the Czech affair. One involves the claims of American citizens to compensation for the taking of their property by Czechoslovakia. The second involves gold, tons of it, in the Federal Reserve Bank of New York. It was, or was not, depending on one's point of view, owned by Czechoslovakia and hence subject to seizure by the United States as an asset of a nation which refused to pay for the confiscation of American property.

I. THE CLAIMS

Post-war nationalization in Czechoslovakia occurred in two stages: first, in 1945, when the socialist President Benes signed decrees to bring about the nationalization of certain businesses; second, in and after 1948, when the new Communist government completed the sweeping expropriation of private property. Legislation enacted in the first phase acknowledged the obligation to pay compensation for nationalized property.[13] The Communist government that took over in 1948, however, regarded nationalization of private property as a sovereign right, and insisted that state sovereignty encompassed the power to determine the terms and conditions of compensation, if any, that the state would provide for foreign-owned property.[14]

Pursuant to the Agreement On Commercial Policy And Compensation Claims, which Secretary Acheson obtained from the Benes government in 1946,[15] the State Department began negotiations to obtain pay-

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[13] *See* 15 DEP'T ST. BULL. Dec. 1, 1946, at 1003.

[14] *See Settlement of Claims Against Czechoslovakia: Hearing and Markup on H.R. 7338 Before the Subcomms. on Europe and the Middle East and on International Economic Policy and Trade of the House Committee on Foreign Affairs*, 96th Cong., 2d Sess. 116, 123 (1980) [hereinafter cited as *1980 House Claims Hearing*] (Statement of Edward L. Merrigan); *id.* at 181, 187 (Legal Memorandum accompanying statement of Harry McPherson); *Unpaid Claims of U.S. Citizens Against Czechoslovakia: Hearing on S. 2721 Before the Subcomm. on International Trade of the Senate Committee on Finance*, 96th Cong., 2d Sess. 23 (1980) [hereinafter cited as *1980 Senate Claims Hearing*] (Statement of Edward L. Merrigan); *id.* at 43 (Legal Appendix to the Statement by Harry McPherson); *The 1981 U.S.-Czechoslovak Claims Settlement Agreement: An Epilogue*, *supra* note 12, at 641-42.

[15] Commercial Relations—Exchange of Notes, November 4, 1946, United States-Czechosolvakia, 61 Stat. 2431, T.I.A.S. No. 1569, 7 U.N.T.S. 119. The Agreement provided for "adequate and effective compensation" to nationals of either country with respect to their rights or interest in properties nationalized by the other country.

ment for the Americans whose properties Czechoslovakia had seized. In 1949 and again in 1955, no final settlement resulted from negotiations. In 1958 the Eisenhower Administration recommended—and Congress enacted—an amendment to the International Claims Settlement Act of 1949.[16] In addition to authorizing the determination of American claims against Czechoslovakia, the law provided that if, within one year after enactment, the United States and Czechoslovakia failed to enter a settlement agreement, the United States would use the proceeds from the sale of certain steel mill equipment purchased by Czechoslovakia in the United States in 1947, which was never delivered, to make pro rata payments to United States citizens holding awards from the Foreign Claims Settlement Commission (FCSC) against Czechoslovakia. Still no settlement was obtained.

American citizens submitted claims to the FCSC for $364,000,000. The FCSC completed its award determinations by 1962, reducing the size of many of the awards—in large part because of the difficulty of proving the value of properties seized ten years earlier in an uncooperative foreign country. Each award included principal plus interest at a rate of six percent through 1958: in all, the awards totalled about $113,000,000. Because the United States and Czechoslovakia failed to reach a settlement, the United States Treasury distributed $8,540,768 from the sale of the Czech steel mill equipment, leaving an unpaid balance of $105,104,437 to approximately 2,600 awardholders.[17]

In 1963, around the time when the United States concluded post-war settlement agreements with Bulgaria, Poland, Rumania, and Yugoslavia,[18] the Department of State again attempted to reach an agreement with Czechoslovakia settling the balance of the United States claims. No agreement was implemented, in large part because Congress considered the proposed compensation of $2,000,000 inadequate.[19] For the next ten years, no serious effort at a settlement occurred. Then, in 1973, at the height of the detente period and as Congress considered legislation offering substantial trade credits to Eastern European nations, the Czechoslovak Government and the Nixon Administration resumed settlement negotiations. Those negotiations resulted in the initialling of an agreement on July 5, 1974 which provided:

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[16] Title IV of the International Claims Settlement Act of 1949, 22 U.S.C. § 1642 (1976 & Supp. V 1981).

[17] FCSC DEC. & ANN. 379 (1968).

[18] The United States concluded claims settlement agreements with Rumania and Poland in 1960, 11 U.S.T. 317, 1953; with Bulgaria in 1963, 14 U.S.T. 969; and with Yugoslavia in 1965, 16 U.S.T. 1. *See* Dames & Moore v. Regan, 453 U.S. 654, 680 n.9 (1981).

[19] *See Final Negotiations and Settlement of Claims Against Czechoslovakia: Hearings and Markup on H.R. 2631 and H.R. 5125 Before the Subcomms. on Europe and the Middle East and on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 17, 19 [hereinafter cited as *1981 House Claims Hearings*] (statement of Rozanne L. Ridgway, Special Assistant to the Secretary of the Department of State); *see also 1980 Senate Claims Hearing, supra* note 14, at 17.

1. That the Czechoslovak Government's $105,000,000 debt to United States citizens, and the full amount of any unadjudicated claims, would be settled fully and finally for the payment of $20,500,000, payable, without interest, over a twelve-year period.[20]

2. That the United States immediately would release its blocking controls over all Czechoslovak properties, rights or interests in the United States.[21]

3. That the United States would inform the Tripartite Commission for the Restitution of Monetary Gold of its agreement to release to the Czechoslovak Government 18,400 kilograms of gold.[22]

Apparently the parties also contemplated that, upon passage of the Trade Act of 1974,[23] Czechoslovakia would be eligible for most favored nation treatment in the United States tariff laws.

Because the initialled agreement between the United States and Czechoslovakia required formal ratification by both governments, Congress had an opportunity to examine it. After hearings,[24] Congress vetoed the agreement as being totally inadequate to compensate awardholders after a quarter of a century of delay. Instead, Congress demanded in the Trade Act of 1974 that (a) the July 5, 1974 agreement between the United States and Czechoslovakia be renegotiated and the new agreement submitted to Congress; and (b) the United States not release any gold belonging to Czechoslovakia located in the United States until Congress approved the claims settlement agreement.[25] The Senate Finance Committee explained that the initial agreement was unacceptable because the United States, by entering such a one-sided agreement with Czechoslovakia, effectively would endorse expropriations of United States properties by other countries without the payment of adequate compensation.[26]

A six-year impasse followed. The Czechoslovak Government resented Congress's rejection of the agreement it had initialled with the State Department, and the State Department understood that it would be futile to ask Congress to approve an unremunerative agreement.

Meanwhile, the reference in the initialled agreement to the United States Government's consent to the return of 1,840 kilograms of gold to

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[20] Agreement Between the United States and Czechoslovakia on the Settlement of Certain Outstanding Claims and Financial Issues, July 5, 1974, art. 1, 3 (unpublished).

[21] *Id.* art. 10.

[22] *Id.* art. 7.

[23] 19 U.S.C. §§ 2101-2487 (1976 & Supp. V 1981).

[24] *Czechosolvakia Claims Settlement: Executive Hearings Before the Senate Comm. on Finance*, 93rd Cong., 2d Sess. (1974) [hereinafter cited as *1974 Senate Hearings*].

[25] 19 U.S.C. § 2438 (1976).

[26] S. REP. No. 1298, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7168, 7348.

Czechoslovakia alerted Congress, and the United States claimants, to the existence of a collateral fund within the United States of which they previously had been unaware. The State Department seemed similarly uninformed. During congressional hearings in 1974, State Department officials could not answer Senators' inquiries about where the gold was located.[27]

The withholding of most favored nation status from Czechoslovakia did not prove to be an effective sanction, particularly as relations between the United States and Czechoslovakia soured during the later 1970s. However, as gold prices soared, the hoard located in the Federal Reserve Bank of New York provided new leverage which Congress ultimately used to provoke a settlement.

II. THE GOLD

The United States custody of the gold proved to be the key element in the final round of negotiation. Czechoslovakia had obtained title to the gold as the result of a post-World War II arrangement to reimbuse nations which had been plundered by Germany. During the second World War, the Nazis stole huge amounts of gold from various countries, much of which was recovered by American or other allied armies in 1945. The United States adopted a policy of refusing to recognize the legality of Germany's acquisition of this gold. The United States advocated that the gold should not be claimed as war booty, but that it should be distributed pro rata among claimant countries as restitution for their established losses of monetary gold.[28]

On January 14, 1946, eighteen interested countries, including the United States, Great Britain, France, and Czechoslovakia, signed the Paris Reparations Agreement of 1946,[29] which provided that all monetary gold stolen by Germany should be pooled for restitution among the countries from which it had been stolen.[30] The Agreement directed countries participating in the pool to submit claims to the United States, Great Britain, and France, as the occupying powers.[31] After the adjudication of competing claims, the agreement directed the United States, Great Britain, and France to "take appropriate steps within the zones of Germany occupied by them respectively to implement distribution" to the countries entitled to restitution of stolen gold.[32] To carry out that function, the United States, Great Britain, and

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[27] *1974 Senate Hearings*, *supra* note 24, at 8, 23.

[28] *See 1980 House Claims Hearing*, *supra* note 14, at 29 (Legal Opinion of Department of State and Department of Treasury).

[29] Agreement Between the United States of America and Other Governments, Jan. 14, 1946, 61 Stat. 3157, T.I.A.S. No. 1655.

[30] *Id.* Part II, art. A.

[31] *Id.* Part III, art. E.

[32] *Id.* Part III, art. F.

France signed the Tripartite Commission Arrangement on September 27, 1946, establishing the Tripartite Commission for the Restitution of Monetary Gold.[33]

The Commission awarded Czechoslovakia title to approximately 24 metric tons of gold. France delivered six tons of gold to Czechoslovakia, but in 1948 President Truman responded to the uncompensated Czechoslovak expropriations of American properties by blocking all Czech assets in the United States, including approximately 8.2 metric tons of gold located in the Federal Reserve Bank of New York. Britain, which itself had unresolved disputes with Czechoslovakia, similarly froze another 10.5 metric tons of Czech gold in the Bank of London.

Section 408 of the Trade Act of 1974 specifically prohibited the release of any gold belonging to Czechoslovakia and controlled by the United States until such time as Congress might approve a claims settlement agreement.[34] During the 1974 hearings, members of the Senate Finance Committee, including Chairman Russell Long, asserted that the United States should confiscate, sell, and distribute the gold, as had been done with the Czech steel mill equipment, to satisfy the outstanding United States claims.[35] Without support of a legal memorandum, the State Department advised the Finance Committee that confiscation of the Czech gold was distinguishable from confiscation of the Czech steel mill equipment, in that the United States had a custodial obligation under the Paris Reparations Agreement which rendered the confiscation of the Czech gold unlawful.[36]

In 1980, confronted with a continuing stalemate, Senator Daniel Patrick Moynihan and Representative Lester Wolff introduced legislation that seemed consistent at once with Congress' predisposition toward a negotiated settlement, the custodial duties of the United States, and the objective of making prompt compensation to the aging United States awardholders.[37] The legislation would have provided a final deadline for the Department of State to negotiate an acceptable settlement with the Czech Government. Absent such a timely settlement, the legislation directed the Secretary of the Treasury (1) to liquidate Czechoslovak assets blocked within the United States, including the Czech gold held in the Federal Reserve Bank in New York; (2) to invest the proceeds from the assets' liquidation, and to use the earnings from the investment to satisfy the American awards; and (3) to return the principal proceeds in full to Czechoslovakia, once all American awards had been satisfied.

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[33] 15 DEP'T ST. BULL., Sept. 29, 1946, at 563.

[34] 19 U.S.C. § 2438 (1976).

[35] *1974 Senate Hearings*, *supra* note 24, at 7-10, 22-23.

[36] *Id.* at 1, 2, 4, 5, 10, 22.

[37] S. 2721 (as amended), 96th Cong., 2d Sess., 126 CONG. REC. S5470 (daily ed. May 15, 1980); *see also* 126 CONG. REC. S6926 (daily ed. June 13, 1980); H.R. 7338, 96th Cong., 2d Sess., 126 CONG. REC. H3602 (daily ed. May 13, 1980).

Congressional hearings on the proposal occurred in August and September 1980.[38] The State Department conceded that Czechoslovakia had violated international law by expropriating property without providing adequate compensation. However, the Department opposed the legislative proposal on several grounds, including that (1) the gold could not be considered Czech property, and hence subject to seizure by the United States under accepted principles of law, until its final allocation and delivery to Czecholovakia; (2) unilateral action by the United States regarding the gold in its custody would violate the Tripartite Commission Arrangement's requirement that decisions of the Commission be unanimous; and (3) the international legal doctrine of reprisal forbade United States action in this case, because the United States could not yet demonstrate that reasonable efforts at negotiation had failed.[39]

The State Department's arguments that title to the gold had not passed to Czechoslovakia when the Tripartite Commission had finally adjudicated Czechoslovakia's rights—indeed when France had transferred six tons of gold to Czechoslovakia pursuant to that decision—was unconvincing. In 1974, State Department representatives had asserted that "[t]his is gold to which the Czechs have a legal title, which has never been questioned."[40] The second contention, that the British and French governments would object to the United States' failure to secure their consent before acting, was more serious, but the State Department conceded in testimony that unilateral action would not be seriously detrimental to United States relations with either country;[41] and, of course, the United States retained the option to negotiate with the British and French for their approval, if the Czechoslovak stalemate persisted, as Senate Committee members had suggested in 1974.[42] The State Department's third argument, that one could not consider these negotiations a failure after thirty-three years, seemed curious indeed.

When the Ninety-seventh Congress convened in 1981, Senator Moynihan and Representative Bingham introduced similar versions of the legislation considered in 1980.[43] Meanwhile, a particularly able State Department delegation, led by former Counselor to the Department

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[38] *See 1980 House Claims Hearing* and *1980 Senate Claims Hearing, supra* note 14.

[39] *See 1980 House Claims Hearing, supra* note 14, at 28 (Legal Opinion of Department of State and Department of Treasury).

[40] *1974 Senate Hearings, supra* note 24, at 1; *see also id.* at 22.

[41] *1980 House Claims Hearing, supra* note 14, at 55-56. The State Department representative testified that "[o]ur main argument is not based upon the adverse consequences of this legislation. Our main argument is based on the idea that we ought to be given a fair chance to pursue the negotiating route." *Id.* at 56. He testified further that the legislative proposal had accelerated the negotiating process and that it would become clear within a few months whether a concrete result was attainable. *Id.* at 26.

[42] *1974 Senate Hearings, supra* note 24, at 7.

[43] S.754 (as amended), 97th Cong., 1st Sess., 127 CONG. REC. S2413 (daily ed. March 19, 1981); H.R. 2631, 97th Cong., 1st Sess., 127 CONG. REC. H1035 (daily ed. March 19, 1981); *see also* 127 CONG. REC. E1162 (daily ed. March 18, 1981).

Rozanne Ridgway, began a series of negotiations in Prague. At this point congressional intervention in the negotiating process began to have a dispositive effect. Here were the elements of the situation which led, in November 1981, to the conclusion of the highest claims recovery in recent American history.

Ambassador Ridgway, instead of conveying the Department's sympathy to the Czechoslovaks over Congress' proposed "unlawful" legislation, simply advised that the measure would pass and the United States would seize the Czech gold unless Czechoslovakia made a reasonable proposal to settle the American claims. To give credence to her assertion, the Senate Finance Committee unanimously reported the Moynihan legislation.[44] For jurisdictional reasons, the bill was then referred to the Foreign Relations Committee. That Committee, which might have been thought to be especially sympathetic to concerns of legal legitimacy—if no longer particularly committed to detente with Eastern European Communist states—simply reported the bill to the Senate without comment. There it sat, ready for easy passage if the Prague negotiations stalled.

Czechoslovakia repeated its original offer of $20,000,000. Ambassador Ridgway quickly refused it. Then followed a series of steadily larger offers, each of them declined on the ground that congressional approval, required by the 1974 Trade Act, would not be forthcoming for anything less than a fair settlement of these thirty-three-year-old claims.

The injustice suffered by the mostly elderly claimants whose property Czechoslovakia had taken in 1948, who held awards with interest only through 1958, and who had received no benefit from the appreciation of property values in the intervening decades, was a powerful spur towards a full recovery. Even members of Congress without constitutent claimants could appreciate this injustice, and thus there was no counter-pressure within Congress to accept a low settlement. Furthermore, two elements which had led the United States to accept from other countries less than a full settlement of its citizens' claims—the lack of assets that the United States might seize, if necessary, to generate a substantial claims fund; and geopolitical considerations that suggested getting the claims issues out of the way in order to pursue larger goals—were both missing in the case of Czechoslovakia. A spectacular rise in the price of gold provided substantial leverage, and the U.S. had little to gain from placating the Czechs through a generous compromise.

There was still another congressional motive in seeking a high

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[44] S. REP. No. 189, 97th Cong., 1st Sess. (1981). Two House subcommittees had favorably reported a similar bill (H.R. 2631) to the House Committee on Foreign Affairs on June 24, 1981. *See 1981 House Claims Hearings, supra* note 19, at 14. Thus, the House of Representatives, which customarily has a more limited role than the Senate in foreign policy matters, was poised to share in a congressional solution to this intractable foreign dispute.

percentage recovery. American property-owners abroad had suffered a series of expropriations over the years, with little or no compensation. This annoying phenomenon brought about the blocking of the $20,000,000 settlement in 1974; now, with the gold's value providing more than adequate collateral for fair compensation, Congress was determined that this opportunity to establish a useful precedent not be lost.

Finally, the alternative to a negotiated settlement that the United States threatened to employ, while unusual, was neither unjust to the other nation nor unlawful.[45] The legislative proposal provided for a final attempt at negotiation and, absent a settlement, would have returned to Czechoslovakia the full value of its gold as of the date of taking, after the proceeds had generated enough earnings to compensate the awardholders. Seizure of the gold would have annoyed the Czechs and required consultation with Britain and France, but in the light of Czech intransigence over the years, it would have been widely regarded as merited.

Yet even the sponsors of the legislation wished for a negotiated settlement, and willingly gave Ambassador Ridgway and the Czechs time to reach one before passing it. The United States and Czechoslovak Governments obviated the need for enactment of the legislation by reaching an acceptable agreement on November 6, 1981.[46] The agreement provided for the payment of $81,500,000 in full settlement of all claims, and for the release of the gold to Czechoslovakia. The $81,500,000 represented full payment of the principal still owing—about $65,000,000—plus twenty-two percent of the interest through 1958. On December 16, 1981, Congress approved the Agreement, as the Trade Act of 1974 required, in the Czechoslovakian Claims Settlement Act of 1981.[47]

We do not suggest that the Czech claims affair offers a paradigm for all, or even for many disputes in which the United States may become engaged. We do suggest that an attitude of cooperation between the executive and congressional branches of government can be fruitful to both, and to American interests abroad. Congressional pressure, based on considerations of justice, served to give the executive negotiators a lever by which the weight of thirty years' intransigence on the part of the Czechs could be moved. The negotiators, in turn, kept Congress and the claimants fully advised of the progress of their discussions. The trust and common purpose that resulted brought about a recovery four times greater than the awardholders would have received, had not Congress stepped in to block the proposed settlement of 1974. In our view, the writers of the Federalist Papers, and even the *Curtiss-Wright* Court, would have approved the process.

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[45] *See 1980 Senate Claims Hearing, supra* note 14, at 52 (Legal Appendix to the Statement by Harry McPherson).

[46] Agreement on the Settlement of Certain Outstanding Claims and Financial Issues, Nov. 6, 1981, United States-Czechoslovakia, 21 I.L.M. 371.

[47] 22 U.S.C. § 1642 (Supp. V 1981).