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The International Rights of Property—Some Observations†

. . . During recent years we have been greatly concerned with delineating, obtaining and enforcing, on all levels of society including international, the rights of the individual, of the man. We may call these civil rights at one level, human rights on another. In our great concern with these rights we have far too often ignored one of the most basic of the bundle of rights—the right to hold property.

The right to hold property is at least coequal to the other human or civil rights of the individual. Without the right to acquire property and enjoy that property without threat of confiscation or undue interference, possession of other rights may mean little to the individual—in fact, denial of his right to hold and enjoy property may well lead to denial of his other rights. The framers of the Constitution and the Bill of Rights recognized this; by providing that an individual could not be deprived of his property without due process of the law, they fully equated the right to property ownership with civil and other personal rights. Many constitutions throughout Latin America, and indeed Europe, Asia, and Africa, contain similar language. Between a nation and nationals of other states, it is a recognized principle of international law that a state cannot expropriate an individual's property unless it provides compensation.

The desire to acquire and hold property which will be that individual's alone has been a driving force throughout history. It had

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much to do with the great waves of settlers from land-starved and opportunity-starved Europe to North America, Canada, Australia, New Zealand, and South Africa. The Communists early recognized this human trait, this great thirst for land and property in individuals, and they have played upon it to their advantage in country after country where the land and other property was held by the very few. There are still many who are fooled into thinking that in their own case, once the lands have been confiscated and redistributed, and the Communists have ascended into complete power, that perhaps the Communist rule will not do as it has done throughout history and eventually take back all properties into collectives or into ownership by the State, with complete denial of individual ownership and initiative.

In the wake of Castro's takeover, Castro's agents throughout Latin America spread his message calling for confiscation without compensation of all property held by foreigners, especially that held by U.S. citizens, and its redistribution. Castroism was a threatening force throughout Latin America, as I witnessed at Bogota in 1960. After Castro's success, or rather our failure at the Bay of Pigs, Castroism threatened to spread not only to all of Latin America, but also to the newly emerging nations of Africa and Asia as well. By 1962 many of the legislative bodies of Central and South America were considering, and in some cases had already enacted, legislation preparatory to seizure of foreign, and particularly American, property without compensation. Although many of the ruling classes in these countries were supporting these moves, apparently in the hopes that they would thereby maintain their political power and continue to stave off any real reforms affecting their own properties, nevertheless a substantial percentage of Latin American income and even capital was being diverted into Swiss banks or into holdings in the United States or Canada, with little reinvestment in Latin America. Concerned American investors also were trying to save what they could. Despite the great plans made at Bogota and Punta del Este, the funds poured by the United States into the Alliance for Progress were in most cases able to do little more than replace only a portion of the private capital which had fled.

It was quite apparent by 1962, at least to those of us who served on the Senate Foreign Relations Committee, that there could be no real progress in Latin America so long as a favorable climate for private investment did not exist. Our governmental assistance could not hope

to accomplish anything substantial so long as capital continued to flee faster than we sent it in. Capital investment would not grow in Latin America, or in the developing nations of Asia and Africa, while there existed the threat of confiscation without compensation, whether it be direct or by creeping expropriation in its many forms. The Congress enacted and fully supported the investment guaranty program,[1] but it was growing very slowly. The Administration appeared helpless, or at least not desirous of taking any real action.

I felt if we did not act then, all could be lost, and the tide of Castroism would sweep over all the Southern Hemisphere. In the summer of 1962, I introduced what has been generally called the Hickenlooper amendment. Despite strong opposition from the Administration, the amendment hit a responsive chord among members in Congress concerned with the trend, and with extensive support in both Houses the amendment was enacted as Section 620(e)(1) of the Foreign Assistance Act of 1961, as amended.[2]

Perhaps I should assume that all in this assemblage are thoroughly acquainted with this amendment. However, I do not believe I can validly make this assumption, for even now, nearly five years after the original amendment was enacted, almost weekly my office still receives calls from some attorney or another who wishes to express his delight with his just having discovered the existence of the amendment. A brief review of the amendment might be rewarding.

The Hickenlooper amendment, or Section 620(e)(1) of the Foreign Assistance Act of 1961 as amended, provides:

> The President shall suspend assistance to the government of any country to which assistance is provided under this or any other Act when the government of such country or any government agency or subdivision within such country on or after January 1, 1962—
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> (A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or
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> (B) has taken steps to repudiate or nullify existing contracts or agreements with any United States citizen or

[1] 22 USC Sec. 2181-2184. Sections 221 through 224 of Title III of Foreign Assistance Act of 1961, Public Law 87-195, as amended.

[2] 22 USC Sec. 2370(e)(1); added to Foreign Assistance Act of 1961 by Sec. 301(d)(3) of the Foreign Assistance Act of 1962, P.L. 87-565, and by Sec. 301(d)(1) and (2) of the Foreign Assistance Act of 1964, P.L. 88-633.

> any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or
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> (C) has imposed or enforced discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or has taken other actions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned,
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> and such country, government agency, or government subdivision fails within a reasonable time (not more than six months after such action, or, in the event of a referral to the Foreign Claims Settlement Commission of the United States within such period as provided herein, not more than twenty days after the report of the Commission is received) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be; and such suspension shall continue until the President is satisfied that appropriate steps are being taken, and no other provision of this Act shall be construed to authorize the President to waive the provisions of this subsection.

The amendment goes on to provide that the President may request the Foreign Claims Settlement Commission to evaluate the property and determine its full value, rendering an advisory report to the President within ninety days after such request. I believe this is a very important part of the amendment, for it provides access by the President to an unbiased and experienced body of authorities on value —however, the President has seen fit to ignore the Foreign Claims Settlement Commission and rely instead on advisors within the State Department, although this provision remains in the law.

Sections 638 [3] and 639 of the Foreign Assistance Act of 1961 as amended [4] exempt from Section 620 (e)(1) and other restrictions of the Act assistance to any country pursuant to the Peace Corps Act,[5] the Mutual Educational and Cultural Exchange Act,[6] and the Export-Import Bank Act,[7] and assistance for famine or disaster relief.

[3] 22 USC Sec. 2398. Added to Act by Sec. 302(h) of Foreign Assistance Act of 1963, P.L. 88-205.

[4] 22 USC Sec. 2399. Added to Act by Sec. 302(k) of Foreign Assistance Act of 1965, P.L. 89-171.

[5] 22 USC Sec. 2501 and following; P.L. 87-293 as amended.

[6] 22 USC Sec. 2451 and following; P.L. 87-256, as amended.

[7] 12 USC Sec. 635 and following.

In short, Section 620(e)(1) requires the President to suspend all other assistance by the United States to any country whose government or subdivision expropriates, whether directly or by "creeping expropriation," American property without taking "appropriate steps" within six months for providing speedy and full compensation. Knowing that in almost every case where a statutory provision restricting foreign assistance has contained a waiver the Administration has persisted in exercising that waiver, I insisted that the prohibition under Section 620(e)(1) be absolute and not subject to any waiver; and Congress agreed.

The Administration was at first very hostile to the amendment, even after it was enacted. Little originally was done to inform offices in the field of its provisions, and some American ambassadors and desk officers off-handedly advised Latin American leaders and leaders in other countries that it could be ignored or that there were ways to get around it. Various legislative assemblies and government leaders throughout Central and South America continued to pursue their plans to confiscate American properties. It is to its everlasting credit that Congress rose to the occasion, and in a spontaneous bipartisan demonstration of unity Senator after Senator arose on an October afternoon in 1962 to publicly decry the failure of the Administration to carry out the law and to make clear that the prohibition would stand. The message was heard "down town," and gradually the word got out to the embassies and consulates that Congress "damn well" meant what it had said.

Time ran out on Ceylon, which seized American-owned property with no provision whatsoever for just compensation, and all assistance to that nation was suspended in accordance with the amendment. At about the same time a large and leading Latin American nation which shall remain nameless speedily found means to settle pending expropriation claims. Most of the Latin American legislative assemblies changed their minds about enacting confiscatory laws.

The Clay Committee praised the amendment, and within the year Secretary Rusk had reversed his opposition and admitted the amendment was a useful tool to the diplomat in protecting American property but was especially useful as a deterrent. In 1965 Undersecretary of State Tom Mann agreed that the amendment was not a bad law.

I do not claim that the amendment is a panacea, but it has provided the American investor abroad with some protection. Perhaps more important, it provided an umbrella under which the investment

guaranty program has dramatically expanded and there is increasing hope for such multilateral agreements as the Convention for the Settlement of International Disputes between States and Nationals of other States. The full impact of the amendment, suspension of assistance, has been felt only by Ceylon, which since has made arrangements for compensation of American claimants and is again receiving American foreign assistance—but many a country has been faced with the decision of compensating Americans whose property it has expropriated or losing all American governmental assistance, and has made the right decision just before the ax would have fallen. Perhaps as many as twenty such cases currently confront various desk officers of the State Department, including some in Latin America, Africa, and Asia—but I am confident that in almost every case, the country in question will "think twice" and determine that it cannot afford to lose both future American private investment and American foreign assistance.

Denied the easy demagogic "out" of seizure and division of property of the "imperialist Americans," politicians in various parts of the world are beginning to take a second look and consider the benefits of cooperation as against the penalities of seizure.

Castroism has lost much of its political appeal, although Cuba remains a center for subversion and breeding of discontent. As the investment climate in most countries has improved, private investment has increased—both from domestic and foreign sources—and, coupled with American governmental assistance and other public investment, capital is becoming more available within the developing countries to permit them to attack some of their basic problems, build necessary infrastructure, and make real and constructive progress. I believe the amendment has worked well and that it should be retained.

It is argued that the amendment curbs the power of the President to make foreign policy decisions. But the amendment places in the President, which practically speaking means in the State Department, the responsibility for deciding five facts: whether there has been an expropriation, without full compensation, of property, owned by Americans, without appropriate steps being taken within six months to discharge the expropriating state's obligations under international law toward the American owners. The President may but is not required to use, and in fact he has not used, the expertise of the Foreign Claims Settlement Commission to determine valuation. Only when these five factual elements have been found by the President or

his deputies does the amendment come into play, for then Congress has determined that it is in the national interest that all American assistance to the expropriating country be suspended, unless it is a type of assistance exempted under Sections 638 and 639 of the Act.

If the President felt strongly that it was in the national interest to continue foreign assistance to a country despite the amendment, he could request specific legislation from Congress exempting that country—but he knows that Congress would resist such an exemption, and he has made no such futile legislative request. Were the decision whether to suspend asistance because of expropriatory acts left to the President alone, which usually would mean to the recommendation of the desk officer for or Ambassador to the respective country, I very much doubt in view of the history of foreign assistance—and I have served on the Senate Foreign Relations Committee for twenty years —that the decision would ever be taken. Foreign states and their officials are very much aware of this, and it is only because the amendment is mandatory in its application that it is different from other restrictions of a discretionary nature contained in the Foreign Assistance Act, and it has real deterrent effect.

I contend the Executive Branch is not the only branch of our government endowed by the Constitution with foreign policy making powers. The Constitution places in Congress powers to declare war, to raise armies, to levy taxes, to confirm appointment of ambassadors and other diplomatic officials, to give advice and consent regarding the ratification of treaties, to regulate imports, to regulate commerce and navigation, to appropriate funds, to investigate practically any activity. These are only a few of its powers than can and do affect the conduct of foreign policy. It is true that the administration of foreign policy is generally in the hands of the Executive Branch, but the formulation of foreign policy is *not* solely the province of the President to the exclusion of the Congress.

The initiative in foreign policy formulation has often been taken by Congress—for example, then Congressman Fulbright and Senator Connally put Congress on record during World War II as supporting the creation of a United Nations; [8] Senator Vandenberg took the lead in passing a resolution calling for development of regional arrangements for self-defense, a precursor of NATO; [9] the Senate Foreign Relations

[8] Fulbright Resolution, H.Con.Res. 25, 78th Cong. September 21, 1943. Connally Resolution, S.Rev. 192, 78th Cong., November 5, 1943.

[9] Vandenberg Resolution, S.Res. 239, 80th Cong., 2nd Sess., June 11, 1948.

Committee wrote the formula under which aid programs would be administered by a separate agency and not by the State Department; [10] Senator Fulbright introduced legislation which made foreign currencies left over after World War II available for use for educational and cultural exchange purposes; [11] Senator Alexander Smith and then Congressman Mundt developed the Smith-Mundt program for exchange of persons; [12] Senator Ellender originated the Food for Peace program; [13] and the Development Loan Fund,[14] the International Development Association,[15] the Investment Guaranty Program,[16] the Civil Action Program of our armed forces, and the Rural Reconstruction Program which we broadened this last year to cover all of Southeast Asia, all these owe their origin to Congressional initiatives.[17] It is no departure from precedent therefore for Congress to assert again its initiative in foreign policy formulation as it has indeed in enactment of this amendment.

Some claim that the "sanction," if we may call it that, of complete suspension of foreign assistance is too drastic. I do not agree. The fact is that in nearly five years, the sanction has had to be applied in its full force in only one case—but its deterrent effect has been great. While it may seem that the threat of suspension of assistance stirs resentment and worsens relations between a country and the

[10] Economic Cooperation Act of 1948, P.L. 472, 80th Cong., 2nd Sess. S. 2202, approved April 3, 1948. For various documents leading up to this Act, see The European Recovery Program: Staffs of the Senate Foreign Relations Committee and House Foreign Affairs Committee, November 10, 1947. See also the Senate Committee's Report on S. 2202, February 26, 1948. No. 935.

[11] Mutual Educational and Cultural Exchange Act of 1961, as amended (Fulbright-Hays Act), P.L. 87-256, 75 Stat. 527, 22 USC 2451 and following, as amended.

[12] United States Information and Educational Exchange Act, 1948, P.L. 402, 80th Cong., 2nd Sess., H.R. 3342. Popularly known as the Smith-Mundt bill. See also Sen. Report No. 811, January 7, 1948.

[13] Food for Peace Act, P.L. 408, 89th Cong., 2nd Sess., November 11, 1966. S. 2932 and S. 2933 introduced by Senator Allen J. Ellender (D.-La.) to revise P.L. 380, 83rd Cong., July 10, 1954 "Agricultural Trade Development and Assistance Act of 1954."

[14] Chapter 2 Title I of Foreign Assistance Act of 1961 as amended, P.L. 87-195, 22 USC 2161 as amended.

[15] International Development Association Act, P.L. 86-565, 86th Congress, 76 Stat. 293, as amended.

[16] Sec. 221 through 224, Title III, Foreign Assistance Act of 1961, P.L. 87-195, 22 USC Sections 2181 through 2184, as amended.

[17] Mutual Security Act of 1957, P.L. 141, 85th Cong., 1st Sess., August 14, 1957. See Foreign Relations Committee Report 417, June 7, 1957, on S. 2130.

United States, the fact is that the expropriation without compensation has already poisoned relations between the country and the United States and will continue to be a burr under the saddle and worsen relations between the nations until it is settled. The amendment places responsibility and initiative upon the expropriating country, which can remove the ban on assistance at any time, as did Ceylon. I believe a result of the amendment has been the improvement of our relationships with the developing countries, for it has made clear and perfectly predictable what our reaction will be to their expropriating American property. And is not predictability of action or of a sanction the very core of "the rule of law" in international affairs toward which this assemblage is working?

There are those who have argued that the amendment is an affront to the sovereignty of other nations. This is not so. My colleagues and I have long urged the developing nations to adopt reforms, including land reforms to satisfy the desire of all individuals to hold and enjoy property. If a state determines that it desires to place all property under state-ownership, that is a sovereign right of that state, and I will not encourage such action but neither would I interfere. However, when a state expropriates American property without meeting its obligation under international law to provide compensation, then the United States has a sovereign right to determine what it will do with taxpayers' money in either giving or withholding aid to that state. No state has a *right* to our foreign assistance; if it accepts our assistance, then it must also accept the conditions of that assistance, and cannot plead that by so doing its sovereignty is violated.

The "sanction," if it can be called that, of the Hickenlooper amendment is not perfect—but then we do not live in a perfect world. We in Congress would welcome whatever suggestions you may have whereby we may develop better mechanisms or institutions for the protection of the property of Americans abroad.