

# LEGISLATORS AS DIPLOMATS: THE CZECHOSLOVAK GOLD DISPUTE

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## INTRODUCTION

Since the Vietnam War era, Congress has entered the field of diplomacy with a vengeance. Members of Congress and their staffs have examined the details of continuing negotiations over Spanish base rights (1976), the Panama Canal treaties (1976), and the Strategic Arms Limitation Talks (SALT II, 1979), among examples.<sup>1</sup> As Crabb and Holt note, "The novel feature of Congress' involvement in diplomatic negotiations today is the tendency of legislators to engage in them *independently* without White House approval, and sometimes in the face of presidential opposition."<sup>2</sup>

This independence is evident in the recent dispute over the proper dispensation of several tons of gold held by the United States, but claimed by Czechoslovakia. The history of this diplomatic dispute, stretching over three decades, is punctuated by two major legislative interventions, one in 1974 and a second in 1980, which reveal a fundamental divergence between the executive and legislative branches in the conduct of diplomacy.

Throughout the negotiations with Czechoslovakia on the gold issue, the Department of State emphasized the improvement of United States-Czechoslovakia relations. In sharp contrast, legislators encouraged hard bargaining, spurred by vocal constituents whose financial claims against Czechoslovakia depended on the outcome of the negotiations. These competing approaches can be characterized as a clash between the national interest and private interests. The State Department perspective is global, with questions of reapproachment and detente paramount, while the legislative view is local, with questions of constituency representation and re-election foremost.

Many legislative forays into the field of diplomacy have been challenged as unwarranted and misguided, and have raised serious inquir-

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1. See C. CRABB & P. HOLT, *INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY* (1980); T. FRANK & E. WEISBAND, *FOREIGN POLICY BY CONGRESS* (1979).
2. C. CRABB & P. HOLT, *INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY* 200 (1980). For example, in November, 1979, American television viewers had the opportunity to watch Representative George Hansen (R.-Idaho) conducting personal negotiations with Iran for the release of the fifty-five United States citizens held as hostages.  
*Id.*

ies regarding who is at the helm of the ship of state.<sup>3</sup> This article attempts to show, however, that the role of Congress in this dispute, though often frustrating to the executive branch, has served two useful purposes. First, Congress has acted as a fiduciary seeking to protect the financial interests of a significant number of American citizens and firms with outstanding claims against Czechoslovakia; and, second, Congress has acted as a catalyst accelerating the State Department moves toward a resolution of the dispute.

## I. THE HISTORY OF THE UNITED STATES—CZECHOSLOVAKIA CLAIMS DISPUTE

### A. The Tripartite Commission Agreement of 1946

In March 1939, Hitler's armies invaded Czechoslovakia and seized 43.4 metric tons of gold in bars and ingots stored in the vaults of the National Bank in Prague. When the Allied forces swept into the Third Reich in 1945, 24.5 metric tons of this gold were discovered in the Rhine city of Aachen bearing the seal of the Czechoslovakia National Bank.<sup>4</sup>

On January 14, 1946, eighteen countries affected by Nazi depredation, including Czechoslovakia, France, Great Britain, and the United States, signed the Paris Reparations Agreement of 1946.<sup>5</sup> This Agreement provided for the pooling of all the monetary gold found in Germany, then for its return to the rightful owners. To carry out this function, the United States, Great Britain, and France, the occupying powers, signed the Tripartite Commission Agreement on September 27, 1946, establishing the Tripartite Commission.<sup>6</sup>

Six tons of gold were handed over immediately to the Edward Benes government of Czechoslovakia. In 1949, the Benes government fell and was replaced by a Communist government which nationalized firms and property belonging to United States citizens. President Truman curbed the further transfer of gold to Czechoslovakia and blocked all other Czech assets in the United States including steel mill equipment purchased but not delivered, until the property claims of United States citizens were settled. This action froze the 8.4 metric tons of gold stored in the United States, while 10.5 metric tons were similarly frozen by the British Government.<sup>7</sup>

3. See Rogers, *Who's in Charge of Foreign Policy?*, N.Y. Times, Sept. 9, 1979, (Magazine), at 44.

4. Agence France-Presse, Prague, Czechoslovakia, Sept. 7, 1979 (press release), published in Hartford Current, Sept. 7, 1980, at 22.

5. 61 Stat. 3157, T.I.A.S. No. 1655.

6. *Id.*

7. See *Settlement of Claims Against Czechoslovakia: Hearings and Markup on H.R. 7338 Before the Subcomm. on Europe and the Middle East and the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 170 (1980) [hereinafter cited as *1980 House Claims Hearings*].

## B. The Czechoslovak Claims Act of 1958

The expropriation of American properties by Czechoslovakia in 1949 was followed by a series of unsuccessful efforts by the State Department to secure a settlement of this matter. That year Czechoslovakia agreed, in principle, to a lump-sum payment to settle these United States claims. Two attempts, however, to negotiate specific terms, one in 1949 and another in 1955, proved fruitless.<sup>8</sup>

The deepening cold war provided little incentive for compromise; United States parties, moreover, may have had unrealistic expectations of a high settlement figure in mind, based on the fact that Yugoslavia had just negotiated similar claims with the United States for ninety-one cents on the dollar for the principal amount.<sup>9</sup> Neither Czechoslovakia nor any other Eastern European nation against which we had claims was prepared to follow the Yugoslavian lead.<sup>10</sup>

According to a State Department representative, the high settlement with Yugoslavia resulted because the United States held sizable assets, including the total value of frozen Yugoslavian gold, which was worth forty-two million dollars at the time, while the claims amounted to only seventeen million dollars. Also, Yugoslavia had just withdrawn from the Cominform and "was very eager to improve its relationship with the United States."<sup>11</sup>

In agreements reached in 1950 and 1956, the French settled with the Czechs for approximately sixty percent of their original claim; the British appeared willing to barter as well.<sup>12</sup> In neither case, however, were our allies willing to relinquish actual gold holdings to Czechoslovakia, pointing to the Tripartite Commission Agreement provision that "decisions of the Commission shall be by unanimous agreement of its members."<sup>13</sup> In other words, the stalled United States-Czechoslovakia negotiations prevented the release of the Czechoslovakian gold stored in the United States and England.

This stalemate led the Eisenhower Administration to recommend in 1958 that Congress authorize the Foreign Claims Settlement Commission, which was established by the International Claims Settlement Act of 1949,<sup>14</sup> to adjudicate claims of United States citizens against Czecho-

8. *Czechoslovakia Claims Settlement: Executive Hearings Before the Senate Committee on Finance*, 93rd Cong., 2d Sess. 28 (1974) [hereinafter cited as *1974 Senate Claims Hearings*].

9. *1980 House Claims Hearings*, *supra* note 7, at 170 (State Department memorandum).

10. *Id.*

11. *Id.* at 22 (statement of Robert L. Barrie, Deputy Assistant Secretary for European Affairs, Department of State). The Communist parties of Poland, Czechoslovakia, Yugoslavia, Hungary, Rumania, Bulgaria, France, Italy, and the Soviet Union established the Cominform, or "Communist Information Bureau" in Poland in 1947 to disseminate propaganda against the United States.

12. *Id.* at 62 (statement of Robert L. Barrie).

13. *See Paris Reparations Agreement*, Jan. 14, 1946, at part II, para. 6, 61 Stat. 3157, T.I.A.S. No. 1655.

14. International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-1642p (1976).

slovakia.<sup>15</sup> Congress moved quickly on this recommendation and on August 8, 1958, Pub. L. 85-604 was signed into law.<sup>16</sup> Prompted by Czech intransigence and claimant pressure, Congress gave this statute sharp teeth. The law authorized the use of the \$8.5 million proceeds from the seizure and sale of the United States-held Czech steel mill equipment for *pro rata* payments to claimants holding awards, if within one year following enactment of the statute no settlement had been reached.<sup>17</sup>

No settlement was reached and the proceeds were distributed to the 2,630 claimants validated by the Foreign Claims Settlement Commission. The arithmetic of the dispute then looked like this: with a principal total of seventy-two million dollars for all the awards, plus six percent per annum interest from 1949 to 1958, the total debt owed by Czechoslovakia was approximately \$113.6 million.<sup>18</sup> Payment of \$8.5 million from the steel mill proceeds reduced the sum to \$105 million outstanding, with no settlement, or even negotiations, in sight.

### C. The Trade Act of 1974

In the two decades from 1960 to 1980, the Department of State twice initiated *ad referendum* agreements with Czechoslovakia, once in 1963 and again in 1974. The agreements were not implemented, observes an executive branch official, "primarily because they were viewed by Congress as providing insufficient compensation by the claimants."<sup>19</sup> The primary congressional opponent of these agreements was Senator Russell B. Long (D.-La.), the most ardent spokesman for the afflicted claimants and Chairman of the Senate Finance Committee, which has jurisdiction over claims involving the United States. Other members of this Committee were also dissatisfied with the inability of the State Department to obtain full payment for the claimants.<sup>20</sup>

The Finance Committee moved quickly to change this situation. In an unprecedented legislative intervention into trade negotiations, the Finance Committee added Section 408 to the Trade Act of 1974 which directed the Administration to renegotiate a claims settlement with Czechoslovakia satisfactory to the Congress. This section also expressly prohibited United States consent to the release of any Czecho-

15. 1980 *House Claims Hearings*, *supra* note 7, at 19.

16. Act of Aug. 8, 1958, Pub. L. 85-604, 72 Stat. 527-530 (1958) (codified at 22 U.S.C. §§ 1642-1642p (1976)) (amending the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-1624, 1626, 1627).

17. Since the steel mill equipment was deteriorating, the Treasury Department liquidated it in 1954. See H. REP. NO. 2227, 85th Cong., 2d Sess. (1958).

18. 1974 *Senate Claims Hearings*, *supra* note 8, at 11 (statements of Fabian Kwiatek, Assistant Legal Advisor to John Armitage, Deputy Assistant Secretary of State for European Affairs).

19. 1980 *House Claims Hearings*, *supra* note 7, at 15-16 (statement of Russell L. Munk, Assistant General Counsel, International Affairs, Department of the Treasury).

20. See, e.g., 1974 *Senate Claims Hearings*, *supra* note 8, at 41-44 (remarks of Sen. Robert Byrd (D.-Va.) & Sen. Michael Gravel (D.-Ala.)).

slovakian gold in the custody of the Tripartite Commission.<sup>21</sup>

Congress had elected to become a full partner in the settlement of claims against Czechoslovakia. The 1974 *ad referendum* agreement was, in effect, vetoed by the Senate Finance Committee, and the Department of State was put on notice that the gold belonging to Czechoslovakia would not be released until the American claimants received more than forty-two percent on the principal of their awards.<sup>22</sup>

The State Department's pursuit of detente with the Soviet bloc, perhaps at its zenith in 1974, was dealt a blow by Congress in the name of constituent rights. "We are going to protect our citizens," Senator Long declared to State Department officials. "It is my guess . . . that if we act like tough Yankee traders of old, we get these claims paid off one hundred cents on the dollar."<sup>23</sup>

This blow, though, was milder than a remedy which earlier crossed the mind of the Finance Chairman and others. Remembering the Czech steel mill sale, Senator Long advised the State Department during 1974 hearings:

If I had your job, I would not negotiate with that Communist Government in Czechoslovakia, I would negotiate with the British and French. I would say, let us just split their gold up and we will take part of it and you take the rest, and what we have got we will divide among our people, and you divide what you have got among your people, and we will distribute it.<sup>24</sup>

The committee backed away from this position, in deference to the State Department's legal opinion that sale of the gold would violate international law, principally, the Tripartite Commission's custodial relationship to this gold.

This retreat from outright sale to the more moderate veto provision of Section 408 provided only limited succor to the State Department. Rejection of the forty-two cents agreement would lead to the collapse of negotiations with Czechoslovakia, predicted a Deputy Assistant Secretary of State for European Affairs, adding that "we would not have any opportunity to get a better solution from the Czechs in the immediate future . . . ."<sup>25</sup>

#### D. Fortuna

It was a prescient prediction, for negotiations did collapse and United States-Czechoslovakia relations, never cordial, cooled further. But Machiavelli's *fortuna* prepared the way for an intriguing legislative initiative to resolve this impasse. The good fortune, at least from the claimants' point of view, came in the form of spiraling gold prices.

21. Trade Act of 1974, § 408, 19 U.S.C. § 2438 (1976).

22. 1974 *Senate Claims Hearings*, *supra* note 8, at 4, 5, 19, 39.

23. *Id.*, at 51 (remarks of Sen. Long).

24. 1974 *Senate Claims Hearings*, *supra* note 8, at 7.

25. *Id.* (statements of John Armitage).

The value of the Czech gold held by the members of the Tripartite Commission rose from approximately twenty million dollars in 1946 to \$364.5 million by 1980. The portion held by the United States climbed in value from \$11.5 million to some \$163 million, fifty-eight million dollars over the \$105 million sought by the claimants in 1974 as full payment.<sup>26</sup>

Lawrence Chamberlain persuasively documents how most legislative proposals are born in the offices of interest groups.<sup>27</sup> The leap in the value of gold gave one of the claimant attorneys an inspiration. Why not sell all the Czech gold, or at least that portion held by the United States, invest the proceeds, pay off the claimants with the interest accrued, then return the principal to the Czechoslovakians, a cash amount significantly greater than the original value of the gold in 1946? The State Department was as unenamored of this plan as it had been of Senator Long's earlier suggestion that the Tripartite Commission simply sell the gold and divide the proceeds. The stage was set for another round in the tug of war between Congress and the State Department.

## II. THE NEW INITIATIVE

### A. The 1980 House Hearings

#### 1. H.R. 7338

Lester A. Wolff (D.-N.Y.) introduced this legislative brainstorm as H.R. 7338. Although a member of the House Committee on Foreign Affairs, Representative Wolff was not on one of the subcommittees which could hold hearings on the United States-Czechoslovakia claims issue—either the Subcommittee on International Economic Policy and Trade or the Subcommittee on Western Europe and the Middle East. As it happened, the chairmen of both these subcommittees, Jonathan B. Bingham (D.-N.Y.) and Lee H. Hamilton (D.-Ind.), were interested in reviewing the issue. In the Senate, the Finance Committee continued to be a key arena for discussion on the dispute. A new committee member, Daniel P. Moynihan (D.-N.Y.), became an active voice on this issue.<sup>28</sup>

On August 19, 1980, the Bingham and Hamilton Subcommittees joined forces to take public testimony from Congressman Wolff, State and Treasury Department spokesmen, claimants, and claimant attorneys. The specific focus of the hearing was H.R. 7338, the Wolff bill designed to convert into law the ingenious formula advanced by the

26. See *Id.* at 32 (statement of Edward L. Merrigan, counsel for claimant). See also *1980 House Claims Hearings*, *supra* note 7, at 3, 17.

27. Chamberlain, *The President, Congress, and Legislation*, 61 *POL. SCI. Q.* 42 (1946). See also Moe and Teel, *Congress as Policy-Maker: A Necessary Reappraisal*, 85 *POL. SCI. Q.* 443 (1970).

28. Interviews with staff members of Representatives Bingham and Hamilton, and Senator Moynihan, July 1980, Washington, D.C. At their request, their anonymity will be maintained throughout this article.

claimant attorneys. Wolff spoke avidly on behalf of the bill saying, "What I want to accomplish by this legislation is to secure a fair payment for those claimants who have waited so long for their compensation."<sup>29</sup>

State and Treasury officials took their seats at the witness table following Wolff. They wasted no time in arriving at their objections to H.R. 7338, with its plan to sell the Czech gold. The State Department spokesman said that the Department was approaching new negotiations with Czechoslovakia, which were apt to lead to "a very substantial cash payment" by the Czechs, allowing quicker compensation to the claimants than through the slow accretion of interest under the Wolff proposal.<sup>30</sup>

The Treasury spokesman agreed that the payment to claimants under the Wolff formula might take one or two decades, depending on interest rates, and it was "unlikely" that Tripartite gold outside the United States could be used.<sup>31</sup> The State Department pleaded for "another few months" to see if an acceptable compromise could be reached with Czechoslovakia.<sup>32</sup> Privately, Carter administration officials conceded that the Wolff bill had stirred the State Department and Prague toward re-opening negotiations before this draft formula became law.<sup>33</sup>

The subcommittees drew one conclusion from the Carter Administration's testimony: its case was terribly weak. Its spokesmen had failed in 1974 and now again in 1980 to present any arguments other than suggestions that unilateral action by the United States would violate the Tripartite Commission Agreement.<sup>34</sup>

Despite their sympathies for detente, Representatives Bingham and Hamilton and their colleagues left the hearing room with serious reservations about the State Department's position. The Administration's presentation rested on the hope that, thirty years after the original confiscation program, the Czechs would finally agree to a settlement acceptable to Congress. In contrast to the Carter Administration's testimony, Bingham and Hamilton had been obviously impressed by the claimants and by the thorough research of their attorneys.<sup>35</sup>

## 2. *The State Department Legal Memorandum*

Part of the State Department's reluctance to emphasize its position during the hearings stemmed from a concern that a formal statement

29. *1980 House Claims Hearings*, *supra* note 8, at 5.

30. *Id.* at 9 (statement of Robert L. Barrie).

31. *Id.* at 17 (statement of Russell L. Munk).

32. *Id.* at 26 (statement of Robert L. Barrie).

33. Interview with State Department desk officer for Czechoslovakia and a Department legal counsel, Aug. 1980, Washington, D.C. Both requested anonymity.

34. *1974 Senate Claims Hearings*, *supra* note 8, at 10 (statement of Fabian Kunetek); *1980 House Claims Hearings*, *supra* note 7, at 9 (statements of Robert L. Barrie and Russell L. Munk).

35. Interviews with staff of Representatives Bingham and Hamilton, Aug. 19-20, 1980, Washington, D.C. For an indication of the subcommittees' views of the Administration's arguments, see *1980 House Claims Hearings*, *supra* note 7, at 56.

would only serve to provide the Czechs with more propaganda against the Congress, perhaps one day in a court of law. The State Department, under pressure from the House Subcommittees, subsequently presented more concrete arguments against the Wolff proposal. Its central argument was based on the rule of unanimity in the 1946 Tripartite Agreement: the United States simply could not act unilaterally.<sup>36</sup> According to the State Department, the British and the French had no intention of allowing the sale of Czechoslovakia's gold because this would "violate the governing international agreements." Statements from the British and the French were provided to the subcommittees by the State Department to emphasize this point. The French were particularly emphatic:

The mere fact that the United States Congress could claim its own competence to legislate on that issue would constitute a serious breach of the universally recognized norms of international law. It is out of the question for France to admit that domestic law overrules international commitments.<sup>37</sup>

Further, the French and the British were apparently unwilling to bend on the specific reference in the Paris Reparation Agreement to the restitution of the gold, not the cash value of that gold as stipulated in H.R. 7338.<sup>38</sup> As the French statement put it, the 1946 Agreement "clearly puts forward the principle of 'immunity' concerning the gold . . . ."<sup>39</sup>

The State Department also addressed the "doctrine of retorsion." The claimant attorneys made this doctrine a pivotal issue in their case, citing an eighteenth century legal authority:

When a sovereign is not satisfied with the way in which his subjects are treated by the laws and customs of another Nation, he is at liberty to announce that he will follow the same policy, with respect to the subjects of that Nation, which that Nation is following with respect to his subjects. This is what is called retorsion, and it is in every way in keeping with justice and sound statesmanship.<sup>40</sup>

The claimants argued that since Czechoslovakia violated international law by nationalizing the properties of United States citizens without payment of prompt, adequate, and effective compensation, this international transgression by Czechoslovakia provided legal jurisdiction for retaliation. Seizure of the gold and its sale on the open market was, therefore, entirely appropriate.<sup>41</sup>

36. "Decisions of the Commission shall be by unanimous agreement of its members." Paris Reparations Agreement, Jan. 14, 1946, 61 Stat. 3157, T.I.A.S. No. 1655. The State Department legal opinion may be found in *1980 House Claims Hearings*, *supra* note 7, at 28-51.

37. *1980 House Claims Hearings*, *supra* note 7, at 24 (written statement of the French Embassy, introduced by State Department spokesmen).

38. *Supra* note 5.

39. *1980 House Claims Hearings*, *supra* note 7, at 24 (written statement of the French Embassy, introduced by State Department spokesmen).

40. E. DE VATTEL, *THE LAW OF NATIONS* 228 (1964 trans. of 1758 ed.); See *1980 House Claims Hearings*, *supra* note 7, at 198 (class brief of claimants presented by attorney Harry McPherson); E. LAUTERPACHT, *OPPENHEIMS INTERNATIONAL LAW* 354 (7th ed. 1952).

41. *1980 House Claims Hearings*, *supra* note 7, at 192-201.



This, however, was “not legally correct,” said the State Department.<sup>42</sup> In the first place, the appropriate doctrine was “reprisal,” not retorsion, since the latter was a “process of political retaliation, not a legal defense.”<sup>43</sup> Moreover, reprisal itself is applicable only when certain conditions are met: the reprisal action is taken in response to a breach of international law by another State; antecedent efforts to solve the dispute through negotiation and other peaceful means have failed; and, the reprisal actions must be reasonably proportional to the injury suffered.<sup>44</sup>

The State Department argued that these requirements had not been satisfied in the Czechoslovakian gold case, despite that nation’s breach of international law in 1949. The means of settlement had not yet been satisfied, and the past conduct of the Czechoslovakians failed to indicate an unwillingness to arrive at a settlement. The State Department memorandum reminded Congress that it was the United States legislature, not the government of Czechoslovakia, which had shot down the last negotiated agreement in 1974. Further, the State Department was sufficiently confident of a successful new round that it had tabled a proposal for fresh negotiations with Czechoslovakia. So, concluded the Department of State, “the United States could not effectively maintain at this juncture that settlement of its claims through negotiations or other peaceful means is impossible, or that all reasonable efforts to this end have been attempted and failed.”<sup>45</sup>

### 3. *The Claimant Attorneys*

The claimant representatives disputed the State Department’s interpretation of the word “decisions” in the unanimity principle of the 1946 Agreement. The State Department argued that, while the word was never defined by the Agreement, it “was intended to have an expansive meaning.”<sup>46</sup> The claimant attorneys, however, had quite a different interpretation: the controversial word referred to “adjudicatory” decisions, e.g., scrutinizing claims or determining shares, not decisions related to the actual distribution of the gold.<sup>47</sup> “The status of this matter is clear,” they reasoned in a joint legal brief, “all the necessary unanimous decisions were rendered thirty years ago; and Czechoslova-

42. *Id.* at 40 (State Department brief).

43. *Id.* at 41 (State Department brief). Reprisals are defined as “such injurious or otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency. . . . [R]eprisals are acts, otherwise illegal, performed by a State for the purpose of obtaining justice for an international delinquency by taking the law into its own hands. . . . Reprisals are admissible . . . in all . . . cases of an international delinquency for which the injured State cannot get reparation through negotiations, or other amicable means. . . .” LAUTERPACHT, *supra* note 40, at 136.

44. See Waldlock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 458-60 (1952).

45. 1980 *House Claims Hearings*, *supra* note 7, at 43 (State Department brief).

46. *Id.* at 36.

47. *Id.* at 204.

kia's title to twenty-four tons of gold was restored in a unanimous allocation . . . The Commission accomplished its central mission, and no further substantive decisions are required."<sup>48</sup>

The claimant attorneys proposed an alternative to the cash-value plan of H.R. 7338. In an amendment to the Wolff bill, Czechoslovakia could be granted the right of first refusal to purchase the gold.<sup>49</sup> As for the doctrine of reprisal, the attorneys concluded that: "All tests have been met. Thirty-year-old stalemate is not the prompt, adequate compensation required by international law."<sup>50</sup>

Though a few additional legal issues were advanced by both sides, they were secondary. The battle lines were now drawn more clearly than ever before in the long history of this dispute.

#### 4. *Staff Recommendations*

The legislative staff attempted to draw some conclusions from these arguments to guide Representatives Bingham and Hamilton. One key House staffer admitted candidly that he was unable to choose between the State Department and the claimants on legal grounds, since both sides had advanced "post-hoc legal justifications for pre-existing policy positions."<sup>51</sup> In his view, the Subcommittees were confronted "basically with a policy issue, and that, faced with conflicting legal arguments, we should determine our course of action on policy grounds . . . that is, whether legislation—or the threat of it—in this case is good policy."<sup>52</sup>

Another staffer assigned to the case saw merit in aspects of both the State Department's and the claimant attorneys' legal briefs, but concluded that in a court of law the former's interpretation of the Tripartite unanimity principle was apt to prevail. He noted, however, that the legal arguments presented a "close call," and was secondary at any rate for purposes of evaluating H.R. 7338 to questions of "common sense, humanity, and politics."<sup>53</sup>

Common sense spoke for the bill, according to this staff aide, "because the procedure in H.R. 7338 eventually pays off everyone." Moreover, it was "common sense to realize that these negotiations have gone on long enough." As for a sense of humanity, the award holders were elderly and, in some cases, needy.<sup>54</sup>

Politics entered the scene through two doors, one marked "local" and the other "international." It was obviously good local politics to help constituents, and from the State Department's point of view it was

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48. *Id.* at 205.

49. *1980 House Claims Hearings*, *supra* note 7 (Memorandum from claimant attorneys dated September 9, 1980).

50. *Id.*

51. *Legal Analysis of Czech Claims Issue*, (Sept. 18, 1980) (staff memorandum to Rep. Bingham).

52. *Id.*

53. *Whither the Czech Claims Dispute*, (Aug. 25, 1980) (staff memorandum to Rep. Bingham).

54. *Id.*; *See, e.g.*, *1980 House Claims Hearings*, *supra* note 7, at 66-67, 88-90.

good international politics to improve relations with an important nation in the Soviet bloc. The staffer concluded that State's political argument was overrated. "The Czechs will overcome their unhappiness with the Wolff bill and accept the payment at the end of the rainbow, even if it isn't a pot of gold," he advised, "either that, or they will take more seriously a negotiated settlement."<sup>55</sup>

#### B. Markup of H.R. 7338

On September 30, 1980, a month after the hearings on H.R. 7338, the two House Foreign Affairs Subcommittees convened again to draft an amended version of the original Wolff bill. The amended H.R. 7338 would extend the negotiating deadline from 60 to 180 days; approximately one-fifth metric tons of coins and other items of historic value to the Czechoslovakians would be returned to Czechoslovakia; the Czechoslovakians would have the first opportunity to purchase the rest of the gold; and, some new claimants would be recognized (beyond the 2,630 claimants originally permitted to present their claims), with claims against Czechoslovakian confiscation policies between 1946-48 and after 1958.<sup>56</sup>

Finally, to enhance the incentives for Czechoslovakia to reach a negotiated settlement with the United States before the Wolff formula went into effect, an amendment was offered to ease the requirement in Section 408 of the 1974 Trade Act requiring the approval of Congress on any United States-Czechoslovakia settlement. The amendment provided that failure to adopt a concurrent resolution of disapproval should be deemed approval by Congress of a settlement agreement, reducing the chances that Congress could strike down a "reasonable" settlement.<sup>57</sup>

The claimants' attorneys privately vowed to defeat this staff proposal. They believed this approach significantly increased the likelihood that the State Department would reach a low settlement, in a belief this new provision would make a congressional veto difficult. The members of the subcommittees were not strongly wedded to either point of view, and the amendment passed with the understanding that this provision could be easily changed in full committee markup if anyone felt strongly about it.<sup>58</sup>

In fact, none of the amendments provoked controversy during the sparsely attended subcommittees' markup. Within twenty minutes the amended Wolff bill had been approved by the Subcommittee on Europe and the Middle East, and the Subcommittee on International Economic Policy and Trade, with only one dissenting vote.<sup>59</sup>

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55. *Whither the Czech Claims Dispute*, *supra* note 53.

56. *1980 House Claims Hearings*, *supra* note 7, at 150-51.

57. *Id.*

58. *See, e.g., Id.*, at 151, 153 (statements of Representative Bingham).

59. *Id.*, at 158.

The dissenter, Representative Millicent Fenwick (R.-N.J.), objected not to the amendments but to the Wolff formula itself. To her, it was a "messy arrangement." She thought rather that "it would be far simpler if we could persuade our allies to allow us to sell the gold to satisfy whatever is considered a just proportion of the claim; and return the balance."<sup>60</sup> Chairman Bingham told Representative Fenwick that State Department officials still had several months to attempt her approach, even after the bill became law, if they wished, but "there is no way that we can compel them to do that."<sup>61</sup>

The next step for H.R. 7338 was to be a markup by full committee in November 1980. The crush of legislative business in an election year, coupled with Bingham's and Hamilton's belief that their subcommittees' markup had gotten the point across to the State Department and to the government of Czechoslovakia, kept the Wolff bill off the full Committee agenda.<sup>62</sup>

### C. Repercussions

During the 1980 hearings, Bingham, Hamilton, and Fenwick sent a clear signal that the State Department should come back soon with a deal considerably better than the 1974 agreement or see the Wolff bill become law. Still convinced that H.R. 7338 could turn United States-Czechoslovakia relations to rubble, State Department officials vowed privately they would do their best to achieve an agreement Congress would accept.<sup>63</sup>

Just exactly what was acceptable remained unclear, since no member of Congress had stated a specific dollar figure that absolutely had to be achieved. Among the figures provided to the Congress on earlier settlements, however, only the Yugoslavian and Bulgarian examples, ninety-one percent and seventy-three percent of principal respectively, had drawn praise on Capitol Hill. (See Table 1). The historical lesson in these figures was probably not lost on the legislators: sizable assets held by the United States provided excellent leverage toward a satisfactory settlement.<sup>64</sup>

The concept of "full payment" was actually built into the Wolff bill. To some, this meant one hundred percent of the principal; to others, the phrase meant that plus interest through 1980. Generally, though, most legislators close to the issue seemed to think the State Department would impress Senator Long only if it obtained ninety percent of principal, or close to it, along with a reasonably short payment period, i.e., immediate cash or a short installment plan. Skepticism abounded that

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60. *Id.*, at 152.

61. *Id.*, at 153.

62. Interviews with staffs of Representatives Bingham and Hamilton, November 1980, Washington, D.C. [hereinafter November Staff Interview].

63. Interview with State Department desk officer for Czechoslovakia, Nov. 1980, Washington, D.C.

64. Nov. Staff Interview, *supra* note 62.

Czechoslovakia would agree to such a settlement.<sup>65</sup>

Czechoslovakia received the same message of impatience sent by Congress to the State Department via the 1980 hearings and markups. Three Czech diplomats attended and taped these hearings. In late October, 1980, an official letter was delivered to the Congressional leadership from the President of the Czechoslovakia Federal Assembly.<sup>66</sup> The Assembly, noted the letter, had followed the Wolff initiative with "utmost uneasiness." Czechoslovakia was not at fault for earlier aborted negotiations. The 1974 agreement, for example, fell through "due to actions you no doubt know about."<sup>67</sup> There were "people endeavoring to distort the facts" and to encourage the United States to violate solemn international agreements, even though "such actions would condemn Czechoslovakia-United States relations to long term and futile stagnation at an unprecedented level."<sup>68</sup> The Wolff proposal, if successful, concluded the Czech official, would be "condemned by world opinion and even the future generation of your country would have to blush when recalling such an act."<sup>69</sup>

In short, Czechoslovakia did not want its gold sold. Less clear was just how willing Czechoslovakian officials were to halt this course of events by striking a satisfactory bargain. According to the letter, they were ready for the "resumption of constructive talks, free of menace and pressure."<sup>70</sup> Regardless of how these talks went, one thing was certain: the clock was running on Capitol Hill.

### CONCLUSION

Elections in the United States bring a certain slippage in the legislative process. Members go home, face the voters, and are either returned or retired. For Lester A. Wolff, caught up apparently in a rising tide of conservatism that swept his and many other districts, the verdict spelled retirement. Whether he had won or lost, H.R. 7338 would have rested on the shelf anyway for a few months as Congress passed through the legislative lapse associated with elections, post-election holidays, and the start up of a new session. The clock continued to run on the American claims against Czechoslovakia, however, as House and Senate staffers monitored the negotiations through periodic telephone calls to the Department of State. Despite Wolff's departure, the purposes of his bill remained alive.

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65. Interviews with staffs of Representatives Wolff, Bingham, Hamilton, and Fenwick, Nov. 1980, Washington, D.C.

66. Official Letter from Alois Indra, President of the Federal Assembly of the Czechoslovak Socialist Republic, to Thomas O'Neill, Jr., Speaker of the House (Oct. 27, 1980) (files of the Subcommittees on Europe and the Middle East and on International Economic Policy and Trade).

67. *Id.* (apparent reference to the fatal opposition of Senator Long and the Finance Committee to the agreement).

68. *Id.*

69. *Id.*

70. *Id.*

During this congressional interregnum, State Department officials approached Czechoslovakia with a request for full payment on the principal owed, plus interest through 1958, \$105 million. Czechoslovakia countered with an offer of \$43.5 million, or sixty percent of the principal alone (seventy-two million dollars). While this was over double the \$20.5 million offered in 1974, the counteroffer was unlikely to impress a Congress that now had \$163 million worth of gold sitting in the bank. The State Department suggested another round of negotiations in spring 1981 and Czechoslovakia agreed.

After months of negotiation, both governments initialed an agreement in Prague on November 6, 1981, which provided for an \$81.5 million settlement for United States citizens.<sup>71</sup> This settlement figure represented full payment of the principal owed, plus twenty-two percent of the interest through 1958.<sup>72</sup> Had the Yugoslavian benchmark formula been used to compute the figure, the result would have been less favorable to the Americans.<sup>73</sup> Still, the process was not completed. The agreement awaited approval of both houses of Congress. Also, similar negotiations between Great Britain and Czechoslovakia were still under way.

Czechoslovakia had now increased the amount of its proposed payment, perhaps because of a new "Wolff-like" claims bill, which had begun its course through the Senate Finance Committee and the House Foreign Affairs Committee. Mr. Bingham introduced H.R. 5125 into the Ninety-seventh Congress on March 18, 1981, noting that both the State Department and the claimants' attorneys had "equally compelling legal arguments." In light of such parity, he stated, "I believe we can and must take the course that delivers the greater equity to our claimants."<sup>74</sup> One way or the other, key members of Congress seemed determined to settle this matter once and for all, and in a manner that would assist the award holders before the price of gold plummeted. It was a classic illustration of Congress' desire and right to protect the interest of constituents, arguably the fundamental tenet of representative democracy.

During these events, Representatives Bingham and Hamilton and Senator Moynihan provided the State Department and the Czechoslovakian government another chance to negotiate a proper settlement by providing the two parties with suggestions for an acceptable compromise and allowing them time to reach an agreement. It was a delicate, admirable balance the legislators had struck between forcing the issue on behalf of constituents, on the one hand, and standing back to allow the professional diplomats to practice their arts, on the other hand. Privately, State Department officials admitted reluctantly that this con-

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71. *Washington Post*, Nov. 7, 1981, § A, at 22.

72. *Id.*

73. *See* note 63 *supra* and accompanying text.

74. 127 CONG. REC. E1.163 (daily ed. March 18, 1981).

gressional push might have been just what was needed to reach a settlement at last.<sup>75</sup>

Congress entered the diplomatic field once again, only this time in an exemplary fashion as catalyst and questioner rather than negotiator. On December 16, 1981, the last day of the First session of the Ninety-seventh Congress, both Houses approved, with minor changes, the negotiated claims settlement between the United States and Czechoslovakia through passage of the Czechoslovakian Claims Settlement Act of 1981.<sup>76</sup> This resolution will, one hopes, aid both the claimants and United States-Czechoslovakia relations. Congress deserves much of the praise for the successful outcome.

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75. Interviews with a State Department desk officer for Czechoslovakia, December, 1980, Washington, D.C.
  76. Czechoslovakian Claims Settlement Act of 1981, Pub. L. No. 97-127, — Stat. — (1981); See 127 CONG. REC. H9833-34 (daily ed. Dec. 16, 1981). For the final round of hearings on this subject in the House of Representatives, see *Settlement of Claims Against Czechoslovakia: Hearings and Markup on H.R. 5125 Before the Subcomm. on Europe and the Middle East and the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. (1981).

**TABLE I**  
 U.S. Claims Settlements with Eastern European Countries and China  
 (Source: Annual report of U.S. Foreign Claims Settlement Commission for 1979)

Country	Date	Principal Amt of Claims (million \$)	Agreed Payment (million \$)	Assets* held by US (million \$)	Payment Period (years)	Pct of Principal
Yugoslavia	1948	\$ 18.8	\$17	\$47	Cash	91%
Yugoslavia	1964	9.7	3.5	.0	6	36%
Poland	1960	100.7	40	.0	20	40%
Romania	1960	61.1	24.5	22.	4	40%
Bulgaria	1963	4.8	3.5	3.1	2	73%
Hungary	1973	62	22.2	3.3	20	36%
CSR**	1974	72.6	29	8.5***	12	40%
China	1979	196.9	80.5	80.5	5	41%

\* Asset valuations approximate and changed over time. Hence, some agreements involving assignment of assets produced actual compensation different from the amount specified in the relevant agreement.

\*\* Czechoslovak settlement disapproved by Section 408 of the Trade Act of 1974.

\*\*\* Amount of proceeds from the sale of a Czechoslovak steel mill in 1956.

Department of State  
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