return to RB

German Leg. Inv.

L. B. Friedman

Letter # 33

25

March 20, 1945

Dear Bill:

I am enclosing herewith some memoranda, prepared in the Legal Division, which may be helpful in connection with the problem of the legal right to expropriate private property in connection with carrying out Allied objectives.

I am also enclosing a letter to you from Minskoff concerning this matter.

Sincerely,

(Signed) Harold Glasser

Harold Glasser
Assistant Director of Monetary Research

Mr. William H. Taylor,
U. S. Treasury Representative,
American Embassy,
London, England.

Enclosures

March 20, 1945.

MEMORANDUM

Re: Authority of the Allied Military Government of Germany to expropriate specific property in Germany owned by American citizens or corporations.

In the Declaration which was issued as a result of the recent conference at Yalta the three signatories agreed to "eliminate or control" all heavy industry which could be used for war. In spite of the devastation caused by saturation bombing and artillery fire, it is probable that at the end of this war there will still be in existence in Germany factories and industrial equipment which fall within the classification of property which should be eliminated or controlled.

In view of the fact that there may well be foreign interests including American which own, directly or through equity control, factories and equipment which are subject to "elimination or control," it is useful to examine the legal bases upon which the Allied Military Government could predicate its action with respect to any such property.

It is hardly necessary to dwell at length on the nature of the authority that will be exercised by the Allied Military Government in Germany. Previous memoranda have demonstrated adequately and at length that under the principles of international law the Allied Military Government will have full authority to carry out its war objectives in Germany with or without a surrender agreement or peace treaty. 1/ and that it will possess all the powers of a de facto government. 2/

1/ Memorandum from Mr. O'Connell, General Counsel of the Treasury Department, to the Secretary of the Treasury, January 30, 1945, p. 9, et seq.

2/ 2 Oppenheim, International Law (6th Lauterpacht ed. 1940) 336-50; 2 Hyde, International Law (1922), 336-68; 1 Moore, International Law Digest (1906), 45-51; 7 Id. 257-315; Hall, International Law (8th Higgins ed. 1924) 553-76; Lawrence, International Law (7th Winfield ed. 1923) 408-30; Birkhimer, Military Government and Martial Law (3rd ed. 1914) 21-369; Spaight, War Rights on Land (1911), 320-418; Colby, Occupation under the Laws of War (1926) 26 Col. L. Rev. 146.

This memorandum is addressed to the narrower question of the legal authority for dismantling, destroying or otherwise disposing of properties which can be used for war. It is submitted that irrespective of the nature or form of the Allied Military Government its character as a de facto government in Germany would be sufficient to clothe it with one of the essential powers of government -- that of eminent domain.

The power to dispose of private property, physically located within the territorial jurisdiction of a government, for a public purpose or to fill a public need is well established. 3/ This power exists in a de facto government, as well as in a de jure government. 4/

Equally well settled is the principle that the right of eminent domain applies not only to the property of the citizens of the particular State but to all property located within the territorial boundaries of the State, including property owned by resident or nonresident foreigners. Thus, Hall states:

> * * * * the will of the state shall be exclusive over its territory, it also asserts authority as a general rule over all persons and things, and decides what acts shall or shall not be done, within its dominion. It consequently exercises jurisdiction there, not only with respect to the members of its own community and their property, but with respect to foreign persons and property. * * * 5/

3/ Vattel, The Law of Nations or the Principles of National Law, ch. XX, sec. 244; Westlake, International Law, p. 130. See also Grotius, De Jure Belli ac Pacis Libri Tres, Vol. II Book II, p. 385 and Book III, pp. 796-797.

4/ Oetjen v. Central Leather Company (1918), 246 U. S. 299; Ricaud v. American Metal Co., (1918) 246 U. S. 304; U. S. v. Belmont (1937) 301 U. S. 324, 328. The British courts are in agreement. See, for example, Luther v. Sagor, L. R. (1921) 3 K. B. 532.

5/ Hall, A Treatise on International Law (8th ed., 1924), p. 56; also see Lawrence, The Principles of International Law (1923), p. 199; Lauterpacht, Oppenheim's International Law, 5th ed., Vol. I, p. 233; Taylor, International Public Law, p. 206; Keith, Wheaton's International Law, 6th ed., Vol. I, pp. 335-336.

The State Department has recognized the validity of this proposition. Secretary Hull, in reply to a German note of May 7, 1941, protesting the seizure of two German merchant vessels in American ports as being a breach of neutrality, stated in reply:

> "I do not understand upon what theory your Government maintains that the requisitioning of idle ships in American waters would constitute a breach of neutrality or represent the seizure of foreign-owned private property 'contrary to law.' The right of a government to requisition for public use private property within its jurisdiction, whether owned by nationals or by aliens, subject to the payment of just compensation, is not open to question. 6/

The State Department gave an identical reply to the Italian Ambassador who had made a similar protest. 7/

Moreover, the State Department has recognized this right of a foreign government even in cases of property owned by American citizens. In a note to the Minister in China on March 27, 1922, the Secretary of State said:

> * * * * Concerning the question of whether the Chinese authorities may exercise the right of eminent domain over property owned by American citizens in China, the Department may state that since the right is so essential to the existence of any sovereign state, the Department would not be inclined to question the exercise of the right by China in an appropriate case, that is, for a public purpose, but would of course be under the necessity of insisting that just compensation be made for any property taken or damaged, and that there shall be no discrimination in this respect against American citizens." 8/

6/ Quoted in Hackworth, Digest of International Law, Vol. VII, pp. 540-541.

7/ Id., p. 541.

8/ Hackworth, op. cit. supra. Vol. III, p. 654.

Again, in the case of the expropriation by the Mexican Government of American oil lands and refineries in Mexico, it is interesting to note that although we protested, we never seriously contended that the Mexican Government was without authority to expropriate such property. Rather, the State Department directed its primary efforts toward obtaining full compensation for the American owners. 9/

Even when sovereignty changes hands, by conquest, treaty or otherwise, there is no right in nonresident aliens to retain title to specific property within the foreign territory. The new government falls heir to the right to exercise eminent domain over all property within its territory and may impose any reasonable conditions upon the retention of ownership of the property. Under such circumstances, Hyde points out that:

> "The law of nations imposes no duty upon a State to permit nonresident aliens to retain title to immovable property within the national domain. * * ** 10/ (Underscoring supplied).

Measures taken by the Allies at the end of the last war afford direct precedent for the proposition that the property of aliens in a defeated country may be taken for the payment of reparations, or for any other public purpose. The Treaty of Versailles required the German Government to cede to the Allied Reparations Commission certain types of property. 11/ In some cases this property was owned by aliens, including Americans.

9/ See statement of Department of State, May 27, 1921, quoted in the Bucareli Agreements and International Law by Robledo at pp. 1-3, and the text of the Bucareli Agreements cited in the same work, pp. 81-111.

10/ Hyde, International Law Chiefly as Interpreted by the United States (1922), Vol. I, p. 240.

11/ The Treaty of Versailles, part VIII, annex III. See especially paragraphs 1 and 3.

Probably the most sensational application of these provisions was the ceding of certain oil tankers to the Allies. The Standard Oil Company was able to prove that these tankers were owned by a German corporation which it had organized, and in which it owned all of the stock. Nevertheless, the Arbitration Tribunal rejected its claim for restitution, stating:

> * * * * in application of a generally accepted principle, any person taking up residence or investing capital in a foreign country must assume the concomitant risks and must submit, under reservation of any measures of discrimination against him as a foreigner to all the laws of that country; * * *. An Allied or Associated national having invested capital in Germany has no ground for complaint if for this reason he incurs the same treatment as German nationals." 12/ (Underscoring supplied).

It is submitted that the above decision is squarely in point. It covers precisely the type of situation with which the military government of Germany will be confronted when it deals with property in Germany which is owned directly or indirectly by Americans or other foreigners.

From the foregoing it is evident that the right to exercise the power of eminent domain is a fundamental one, inherent in any de facto as well as de jure government. It should be noted that the power of eminent domain has even been sustained in cases where the government exercising the power was not only a de facto government, but was merely temporary in the sense that the war which gave rise to that government was still in progress. 13/

12/ The British Yearbook of International Law, 1927, p. 158, at pp. 168-169.

13/ During the last war the German Governor General who was in command of certain occupied Russian territory, acting under the existing local eminent domain law, took title to certain privately owned land for the purpose of extending a district hospital. The Supreme Court of Poland upheld the taking, and rejected the claim of the former owner for restitution. Mariamoff and others vs. Wloclawek (1924) Annual Digest, 1923-1924, p. 144.

The Czechoslovak Supreme Court held that the plaintiff, the original owner, had no interest in certain machinery which the Austro-Hungarian occupation forces had requisitioned in 1917 and later sold to the defendants. The Court said that such a forced sale was clearly authorized under existing principles of international law. (1922 Annual Digest, 1919-1922, p. 477. (Case not designated by name).

Adverting to the position of the occupying power as the de facto government of the territory occupied, it seems manifest that the powers of the de facto government include all the powers that are necessary to fulfill the needs or obligations of that government. Certainly, in the case of Germany the obligations to pay such reparations as may be agreed upon may be lawfully fulfilled by any government which is in control of Germany.

If necessary such a government could pass new legislation to carry out legitimate governmental functions. Obviously, it is a fortiori true that the de facto government could utilize existing local law. 14/

It is pertinent to note, at this point, that under the Weimar Constitution the German government had full power to take private property for a public use. 15/ As far as is known the Weimar Constitution has not been repealed although certain sections may have been stayed by Nazi laws. In any event, it is safe to assume that the Nazi government has retained the power to take property under eminent domain. This authority will be available to the Allied Military Government.

The only further question which remains is whether the taking of German property for the purpose of making reparations or restitution,

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14/ As authority for the proposition that the military government may exercise existing law see New Orleans vs. Steamship Company (1874) 87 U. S. 387; Dooley vs. U. S. (1901) 182 U. S. 222; Lauterpacht, Oppenheim's International Law (6th ed.) Vol. II, p. 342 at note 1; Colby, Occupation Under the Laws of War (1926) 26 Col. L. Rev., 146, 151 at note 1.

An interesting statement to this effect is made in a recent article by Philip C. Jessup. He states:

> "In addition to these ordinary methods of acquiring private property the occupant has a most important general power which he enjoys by virtue of the fact that he stands for purposes of local government in the shoes of the legitimate sovereign." July 1944, 33 American Journal of International Law, p. 457.

15/ The Weimar Constitution, Article 153. Article 156 authorizes the government to take over private enterprises "suitable for socialization." The owners of property which is expropriated do not have an unqualified right to compensation, since Article 153 authorizes the payment of adequate compensation, "unless a Reich law orders otherwise."

or for the purpose of effecting the "elimination or control" of such property, constitutes a public purpose within the meaning of the law applicable to eminent domain. It is submitted that on this question little discussion is necessary since it is hard to conceive of any governmental function more public in purpose than that which is necessary to carry out an international obligation.

The mere fact that the destruction of a particular factory or the dismantling or removal of particular equipment may confer no direct benefit upon the German people has no bearing on the question of whether such an exercise of the power of eminent domain fulfills a "public purpose."

For example, even under the conventional and accepted practice of exacting money reparations, the defeated nation may have to levy taxes on its people in order to make payment. Although the turning over of the fruits of such taxation to the victorious foreign power would not directly benefit the people of the defeated nation, it could hardly be argued that such a tax was not for a public purpose. 16/

It really makes little difference whether the terms imposed upon the vanquished nation call for the dismantling and delivery of a particular factory or the dismantling and destruction of that factory. 17/

16/ "The power of eminent domain and the power of taxation are identical in their source, * * *. So far as it concerns the question of what constitutes public use or service that will justify the exercise of those sovereign powers over private rights of property, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to their control in each." 51 Am. Jur. 377.

17/ "The principal legal consequences of an international delinquency are reparation of the moral and material wrong done * * *. The only rule which is unanimously recognized by theory and practice is that out of an international delinquency arises a right for the wronged State to request from the delinquent State the performance of such expiatory acts as are necessary for a reparation of the wrong done. What kinds of acts these are depends upon the special case and the discretion of the wronged State." Lauterpacht, Oppenheim's International Law (5th ed.), Vol. I, p. 285. To the same effect, see Grotius, De Jure Belli ac Pacis, Vol. II, pp. 430 and 719.

So long as the use of the property is in furtherance of a legitimate governmental function, such use constitutes a public purpose. 18/

18/ Under the United States law of eminent domain the term "public purpose" or "public use" connotes a governmental purpose as distinguished from a private purpose:

> "Where the federal Government under the constitution has power to undertake the purposes for which the land is sought to be acquired, then the use is a public one." City of Oakland v. United States (1943), 124 F. 2d 959, 964, cert. den. 316 U. S. 679.

To the same effect see Burnidge v. U. S. (1939), 101 F. 2d 295, 298, and In re U. S. (1939), 23 F. Supp. 758.

It has also been defined as follows:

> "A public use may be broadly defined as a use affecting the public generally, or any part thereof, as distinguished from particular individuals." 29 C.J.S. 823.

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