THE GERMAN DECARTELIZATION PROGRAM—THE LAW IN REPOSE

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I. WHAT THE PROGRAM WAS

IF THERE is any field in which the official United States occupation policy has been steadfast and unwavering it has been with respect to the decartelization of Germany. The subject received attention almost from the beginning of that stage of World War II in which it appeared that the war might end some day—and in our favor. As early as September, 1944, President Roosevelt wrote Secretary Hull that the “defeat of the Nazi armies will have to be followed by the eradication of these [cartel] weapons of economic warfare.”¹ The same policy was expressed by the Joint Chiefs of Staff in April, 1945,² and again in the Potsdam Agreement three months later.³

On February 12, 1947, the United States military authorities in charge of the occupation of Germany promulgated a law, known as Law 56, the purpose of which was to eliminate from the German economy *at the earliest practicable date* “concentrations of economic power as exemplified, in particular, by cartels, syndicates, trusts, combines, and other types of monopolistic or restrictive arrangements which could be used by Germany as instruments of political or economic aggression.”⁴

On April 15, 1949, a committee, appointed by the Secretary of the Army, to review the decartelization program in Germany submitted a documented report in which it reached the conclusion that very little had been done to carry out the program set forth in Law 56.⁵

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¹ Ferguson Report 13.

² JCS 1067/6, issued April 26, 1945. See Ferguson Report 13-14.

³ Ferguson Report 14-17.

⁴ Ibid., at 16-17.

⁵ Ibid., at 89, 119. The Ferguson Committee consisted of Commissioner Garland S. Ferguson of the Federal Trade Commission, Chairman, Samuel S. Isseks of New York City, and

The purpose of the present study is not to evaluate the occupation policy of the United States government in this brave new world—or that part that is the American Zone in Germany—or even to evaluate the policies back of the decartelization program in Germany. Nor does it attempt to suggest what should or should not have been done in any specific case coming within the scope of the decartelization program. Rather, its purpose is to examine the program in action and to suggest possible reasons why it has failed.

That it has failed, thus far, is painfully apparent. One need only look at the chronology to see that. Like an animal on a treadmill, the efforts that have been put forth have resulted in little more than keeping the program from losing ground. Taking its initial formulation as the bench mark, the decartelization program appears to have alternated mainly between holding its own and falling behind. It has almost never advanced.

Thus, the break-up of the I. G. Farben combine that occurred in 1945, granting that it was largely theoretical, represented nevertheless the high water mark of that particular deconcentration. The individual units today are in closer collaboration than they were then.⁶ The original break-up of the Ruhr iron and coal industries into 25 or 30 units has retrogressed into a separation of approximately 10 or 15 units; the iron and coal facilities which were originally separated have now been reintegrated.⁷

In October, 1949, High Commissioner McCloy announced that the United States decartelization staff had been reorganized and that the program would proceed. As of January, 1950, a fresh staff is being organized and will shortly tackle the problem anew.

These recent moves, and the apparent determination of Mr. McCloy and his staff to do something at long last to implement the official United States policy, are most encouraging. They cannot obscure the fact, however, that as of the time this is being written, four years and five months after the first clear-cut declaration of policy in the Potsdam Agreement, those in charge of the decartelization program are attempting to formulate rules for the effective handling of deconcentration cases, and are “re-

A. T. Kearney of Chicago. Assistants to the members of the Committee were William H. England, former Chief Economist of the Federal Trade Commission, Norman Mitchell of Chicago, and the author.

⁶ Contrast the statement of General Clay to the Ferguson Committee in December, 1948, to the effect that I. G. Farben, as such, no longer exists (Ferguson Report 24), with the statements of the I. G. Farben stockholders in December, 1949, recommending that the properties be turned back to them to “decartelize.” For comment on this proposal, see Stokes, *Same Industrial Empire—Real Truth behind German Cartels* seen in Report of I. G. Farben Committee, Washington Evening Star, Dec. 21, 1949.

⁷ Ferguson Report 24-27.

examining" the cases which have already been processed in order to decide what should be done about them. The personnel of the decartelization staff has decreased from a peak of ninety-four lawyers and investigators to a mere handful as of the present time—this, notwithstanding the fact that practically the entire program still lies ahead, rather than behind.⁸

II. HOW THE PROGRAM FAILED

This gloomy picture of frustration and failure is not the product of an over-fertile imagination. It is based upon cold, hard facts. The picture of what has, and has not, happened is best obtained from the Report of the Ferguson Committee. The findings of that Report may be summarized as follows:⁹

The clear and consistent policy, on paper, of the United States government, beginning with the Directive of the Joint Chiefs of Staff and the Potsdam Agreement in 1945 and continuing to the present time, has been to eliminate from the German economy excessive concentrations, monopolistic restraints, cartel agreements, and other restrictions upon the operation of a free competitive market. The settled purpose of the program was to establish in Germany a sound and democratic economy, and to channel the reconstruction of Germany along peaceful democratic lines. Pre-war and Nazi Germany presented an extreme case of monopoly control, domination of the economy by a few powerful industrialists and financiers, and the use of cartel agreements and other restrictive business practices to hold the German economy in thrall and to extend German control into foreign areas. The extent to which these evil practices participated in bringing about World War II is well known. It was thought, and rightly, that these practices had to be eliminated if there was to be any hope of permanent and satisfactory world peace. It was to the elimination of these evils that the decartelization program was directed.

Following the 1945 declarations of policy, extensive negotiations were conducted with the British and others in an effort to formulate a satisfactory law to carry out an effective decartelization program. During the same period, thorough studies of German industries were made with particular attention to the external assets of these industries, the extent of their domination and cartel practices, and the existence of excessive concentrations of economic power achieved through the use of combines and financial controls.

⁸ *Ibid.*, at 107.

⁹ No attempt will be made to cite the specific pages of the Report wherein the ensuing factual accounts are discussed in detail. The Report, proper, is 129 pages long. For a summary of the findings, see Ferguson Report 112-119.

Law 56 was put into force in February, 1947. No one would claim that it was the best drafted of all possible laws. Nevertheless, it provided an adequate basis for effective action to the extent that those charged with its administration were prepared and disposed to act effectively. A mere law, and a staff to administer it, are not, of course, enough in themselves to bring about results—at least, in accordance with American ways of doing things. One also needs regulations and rules to tell the staff what to do and how to do it.

Having steered safely, though perilously, through the shoals of multipartite negotiations, the decartelization program finally foundered because of procedural complexity and the lack of support of those responsible for its administration.

As for procedures, the regulations for carrying out the program were most deficient with respect to the deconcentration cases, i.e., those directed to the elimination of excessive concentrations of economic power, as distinguished from restraints on trade through restrictive practices and agreements between competitors. These procedures were extremely complicated, involved many reviews, and required much collaboration and cooperation, not only between the various agencies within the United States military government itself, but also between the United States and British governments—which were not always in fundamental agreement as to objectives. Careful attention was given to the erection of procedural safeguards that would ensure against arbitrary action on the part of the regulating authorities and guarantee that all agencies in military government have full opportunity to review the proposals.

Precaution was also taken to assure that no action would be taken by the United States authorities without the full collaboration and approval of the British authorities. Granting the soundness of appropriate attention to these matters, the net result was a procedure so complicated that it is doubtful whether any staff, however great its energy and however good its will, could have carried out a successful program within a reasonable period of time.

Aside from the difficulties resulting from the procedural entanglements, it is clear from the Ferguson Report that at no time did those in positions of high authority show any real enthusiasm for the program or any real desire to carry it out vigorously. In the course of time, even many of those in subordinate capacities came more and more to reflect the lukewarm attitude of their superiors. The results have been about what one would expect.

Outside of the Decartelization Branch itself, some measure of decon-

centration was achieved. Apparently, the German banks were effectively and expeditiously decentralized. I. G. Farben was broken up into independent units with the view toward ultimate decentralization of the plants although, as pointed out above,¹⁰ there are indications that this program, which got off to a start that was satisfactory enough, has since faltered. The Ruhr coal, iron and steel properties present an ambiguous picture. The properties are in the British Zone and the policies with respect to them have largely been British policies. It appears that substantial deconcentration was achieved by breaking these properties up into 25 or 30 separate units. There is no indication, however, that this break-up was based primarily upon economic considerations or that effective steps were taken to prevent future reconsolidation. More recently, the United States has participated more actively in the Ruhr program. The chief result of this participation appears to have been to reduce the number of separate units to 10 or 15, rather than to effect further deconcentration.

Within the Decartelization Branch the deconcentration phase of the program must be distinguished from the activities involving cartels, trade associations, etc. The most crucial as well as the most difficult part of the program lies in the deconcentration phase. It is here that the program has been the most ineffectual.

According to the Ferguson Report, investigation showed that within Germany there were approximately 70 separate industrial organizations which were appropriate subjects for possible deconcentration action. In the American Zone alone there were about 25 such organizations. Following the enactment of Law 56, a handful of these organizations were selected as primary targets. The preliminary investigations had already been made. What remained was to prepare a case. The cases were prepared. To date, out of the four cases selected as the best with which to start, three have been suspended without dealing with them on their merits. The fourth has proceeded, but only after the original recommendations had been substantially watered down; and no final action has yet been taken. In the remaining deconcentration cases, the activity of the Decartelization Branch is still in the realm of investigation, discussion, and consideration.

The record of accomplishment in the fields outside deconcentration is hardly more impressive.

Law 56 unequivocally declared illegal, cartel and other activities having the purpose or effect of restraining trade, fostering monopoly, or restricting access to markets. For over a year after Law 56 was enacted,

¹⁰ Note 6 supra.

nothing was done to carry it out. It was not understood by the Germans—indeed, was not generally known even to exist—and parties outside the American Zone were unaware that their cartel arrangements had purportedly been terminated. Starting in February, 1948, the Decartelization Branch required parties to cartel agreements to notify the other parties of their termination. At the time of the Ferguson Report, approximately 1,100 termination notices had been given, with about 400 additional cases remaining. Little has apparently been done to follow up the program to see whether termination has been effectuated, what arrangements have been substituted for the terminated agreements, or what criteria are being applied in deciding whether or not an agreement should be terminated. Nor have effective steps been taken to bring recalcitrants into line.¹¹ The procedure is somewhat as if the Department of Justice were to issue a general order requiring all persons to terminate all agreements that violate the Sherman Act, and then were to sit back and relax with the satisfied feeling of a job well done.

Trade associations have, in the past, been common devices for maintaining private, nongovernmental controls over the conduct of business in Germany. The Decartelization Branch has investigated the operations of seven trade associations suspected of violating Law 56. In two of these cases the associations were dissolved, but new associations were formed and there is no evidence as to the present nature of their operations. In two other cases a temporary modification of certain restrictive practices was obtained, but there is nothing to indicate that the reform has been either complete or permanent. The three remaining cases have been the subject of some investigation and some tentative recommendations, but that is all. As for several other trade association cases in which violation of Law 56 is suspected, apparently nothing has been done.

A characteristic restrictive practice in Germany has been the enactment of licensing laws under which restrictions, usually administered by those already in the industry, are imposed for the purpose of limiting the number of persons who may enter into various businesses and industries and controlling their conduct after their entrance. After considerable delay, the military government finally ordered the repeal of these licensing laws in December, 1948. The Ferguson Committee was told that new laws of a more "reasonable" nature will be substituted for the old ones.

¹¹ The Ferguson Committee was informed that there were approximately 100 cases pending in which it was considered that enterprises had improperly failed to notify their cartel partners of termination. In three of these cases orders to show cause had been served. In one of them the effect was an immediate termination. The other two remain undecided. In a fourth case, an order to show cause was referred to the British for service in July, 1948, but as of the time of the Report it had not been served. Ferguson Report 74-76.

In addition to carrying out the immediate program, it was obviously necessary to try to achieve some permanency, looking to the day when Germany would no longer be an occupied country. This called for both a legislative program which could continue to operate in the post-occupation era, the Germans themselves being willing, and an educational program which would give the Germans a better understanding of the reasons for a decartelization program and why their own interests would be served by continuing it.

On the legislative side, laws to prevent interlocking directorates, the elimination of bearer stock certificates, and various banking reforms designed to prevent the revival of the extensive financial controls that put the great mass of German industry in the complete power of a handful of financiers have been proposed since the early days of occupation. Nothing has come of them. Recommendations emanating from an interdepartmental government committee in Washington have also been made for reform of the German patent system. Again, no action.

In education, a crucial field if any permanent reform of German economic practices is to be achieved, the record of accomplishment is almost completely barren. There have been occasional speeches and radio addresses, mostly sporadic and the result of individual effort rather than organizational planning. Those charged with the conduct of this part of the program have been less than adequately supplied with working tools and have not, themselves, always possessed a sufficient understanding of the real purpose of the program. As for the education of the German people themselves, the surface has not even been scratched.

The Ferguson Committee, on these facts, came to the self-restrained conclusion that "the Decartelization program, despite uncontroverted policies and clear directives, has not been effectively carried out. After almost four years of occupation and more than two years of operation under an adequate law, the program has not proceeded very far."¹²

III. WHY THE PROGRAM FAILED

Why, one may ask, should a program as clear-cut and unequivocal as this, designed for application to an economy over which we had full power and control, have failed so completely?

Various reasons have been suggested: the fact that circumstances have changed and it has become necessary to "build up" Germany against the increasing antagonism and threat of the Russians; that the American authorities never received adequate cooperation from their allies; that the job had already been done, in effect, through the division of Germany

¹² Ferguson Report 119.

into separate zones, through the economic disintegration that resulted from the conquest of Germany, and through the imposition of extensive controls in other respects over German industry and the Germany economy. No doubt these and other considerations influenced the thinking of those in charge of the program. Some of them may even suggest reasons why the program might have been modified.¹³ They do not explain why the program, which was not modified, was not carried out.

Several factors, as I see it, contributed to the failure of the program. To what extent any given factor was responsible is anyone's guess. I would enumerate them, not necessarily in the order of their importance, as follows: (1) confusion over purposes and objectives back of the decartelization program; (2) nonsupport of the program by the Germans; (3) nonsupport of the program by our allies in the occupation; (4) nonsupport of the program by our own officials, combined with inadequate personnel and cumbersome procedures for carrying out the program.

CONFUSION OVER PURPOSES AND OBJECTIVES BACK OF THE DECARTELIZATION PROGRAM

No one who has paid attention to the philosophy back of the occupation program can be unaware of the schizophrenia that has sometimes characterized American thinking with respect to occupation policies. One can name at least five different approaches that have been suggested as proper attitudes toward Germany. Even this unduly simplifies the picture. First, is the attitude of vengeance: the view that Germany outraged the world with its unprecedented brutality, its destructive aggression, its totalitarian concepts and its threat of world domination. According to this theory, Germany was a mad dog which had to be destroyed. A second approach is to apply the Marquis of Queensbury rules: view the recent unpleasantness as a hard fought battle to be terminated on a high plane of good sportsmanship, forgiveness and no-hard-feelings, with the contestants free to go their own ways and maintain friendly relationships until the day that they may meet again in the squared ring. A third approach is to strip Germany of its war-making potential so that it can never again threaten the rest of the world: remove the fangs of the rattlesnake, so to speak. A fourth, and rather belated approach, is to preserve the war-making strength of Germany as a bulwark against the great threat from the

¹³ In my opinion, they do not justify modification, a conclusion also reached by the Ferguson Committee (Ferguson Report 120, 125-128) and, apparently, by the present High Commissioner, John J. McCloy. See text at notes 7-8 *supra*. I deem it irrelevant to argue this point, however, since, as I pointed out at the beginning, the purpose of this discussion is to ascertain why the program failed, not whether it was a good program or whether it should have been changed.

East: chain and control the beast, in other words, so that it can do us no harm, but preserve it and nurture it as a watch dog against those that would threaten our welfare. A fifth approach is to view Germany as not consisting entirely of lost souls, but rather as a people who can eventually be educated to embrace a democratic, peace-loving attitude that will enable that nation to take its place again in world affairs and contribute to the betterment of international relations and stability.

To me, the last named objective makes the most sense and has the most appeal. It does not follow that the other approaches are necessarily wrong. It does appear, however, that the program to decartelize Germany makes sense only in terms of a purpose to democratize Germany. Certainly the United States, which long ago dedicated itself to the principles of free competitive enterprise and which consistently extols the advantages that a competitive system holds for society, could hardly urge such a system upon the Germans for the purpose of either destroying Germany industrially or re-enforcing its warlike spirit. Rather, in urging our system upon Germany, it must necessarily be in terms of bringing to the German people a freedom and an economic democracy that will enable it to achieve a vigorous, sound, and well-balanced economy; an economy in which individuals are free to move from one pursuit to another and in which their success or failure will depend upon neither concerted protection nor concerted attack, but rather upon the efficiency of their operations and the merits of their products and services.

The decartelization program has little or nothing in common with the reparations program, the dismantlement activities, or even denazification, except as the latter would remove from positions of control individuals whose thinking and actions are completely foreign to the concept of a free and balanced competitive economy.

Unfortunately, the issue and the objectives were not always clearly expressed, or even clearly seen, by those in charge of the program. There have been numerous tendencies to view the decartelization program as an instrument of vengeance and reprisal, a program to be carried out vigorously only if one sought revenge and reprisals. For example, Lawrence Wilkinson, the Economic Adviser to General Clay, tended to lump decartelization, denazification and dismantlement into the same category.¹⁴ His approach and attitude toward decartelization is best indicated by his criticism of that program as "a situation where we pulled on the hand of a man lying on the floor and wondered why he didn't get to his feet in spite of the fact that we had one foot on his neck."¹⁵

¹⁴ Ferguson Report 95, 98.

¹⁵ *Ibid.*, at 95.

The fact that individuals may seek to achieve a certain objective for different reasons is not necessarily fatal to a program: the different purposes may still lead to the same results or call for the same course of action. Unfortunately this was not the situation in Germany. One could not reconcile a decartelization program with both the vengeance theory and the "building up" theory. To the extent that the program was identified with wreaking vengeance upon the Germans, its effectiveness was bound to be threatened once the vengeance motive, which may have been dominant in the minds of many at the beginning of the occupation, gave way to a more moderate and enlightened approach.

Had it been clearly understood from the beginning that the purpose of the decartelization program was not to destroy the German economy, but rather to revive it on a basis which would enable the Germans to enjoy economic freedom and develop democratic practices, the history of the decartelization program might have been quite different. Unfortunately, the misunderstanding and misinterpretations of the motives back of the program led to schism, confusion, and uncertainty within our own administration and gave to the opponents of the program, wherever they were to be found, the ammunition to disrupt and thwart its effective working. It is possible that this confusion of purposes, more than anything else, led to the other defects that I have enumerated, and paved the way for the ultimate breakdown.

NONSUPPORT OF THE PROGRAM BY THE GERMANS THEMSELVES

Offhand, one may question the suggestion that an effective decartelization program requires the support of the Germans themselves. After all, Germany was a conquered nation. Theoretically, we were in a position to do as we saw fit. Actually, it is rarely possible to control and dominate any substantial group of people, even a badly defeated one, for any length of time without a large measure of support, or at least acquiescence, from those who are governed. In our role as conquerors, we could, and did, promulgate new laws and impose our will upon the Germans. For such a program to work effectively, however, those who are subject to it must be convinced that it is good for them.

There is nothing to indicate that the Germans have ever been convinced, in any measurable degree, of the efficacy of the decartelization program. Nor is this surprising. The program, based upon the concept of a free competitive economy, was foreign to most of their tradition and practice. It was a new idea. It had to be sold to them. Beyond this, it was a program that had been imposed on them by their conquerors and therefore

one to be viewed with suspicion and antagonism. The conqueror does not usually come bearing gifts.

There were two ways to convince the Germans that the program was a good one for them. One was by education and, if you will, propaganda; the other was by actual achievement. In the realm of education, little has been done. No thorough, carefully thought-out program of education has been developed or implemented. As I have previously suggested, even many of those directly responsible for carrying out the program were largely in the dark as to the basic philosophy behind it. With a few notable exceptions, there were not many individuals in occupation circles who possessed a broad understanding of the anti-trust laws and their underlying purpose and significance. Reading materials on the subject, reported United States anti-trust cases, and various other working tools essential to an understanding of the program by those administering it, have been scant and inadequate. Practically nothing has been done in the German language to acquaint the Germans with the objectives behind the program. It is disconcerting, to say the least, to have German lawyers, in 1949, plaintively writing to persons in the United States asking where and how they can find out something about the anti-trust laws, what they mean, what they stand for, and how they operate.¹⁶

The lack of effort to educate and propagandize might not have been an insuperable obstacle had there been any substantial achievement to which American authorities could point and say to the Germans, "Here is what the decartelization program can do and is doing for you." There has been little achievement, not because the effective operation of the program would not have produced results to which one could point with pride, but because the program has not been carried out. And even such moderate success as has been achieved, apparently has not been brought home to the Germans.

For example, it appears that within the I. G. Farben facilities, which were the subject of some preliminary deconcentration, production has been restored in a striking degree. General Clay testified, for instance, that certain Farben units were producing more than ever before in their history.¹⁷ Representatives of the British staff responsible for decartelization in the British Zone indicated to the Ferguson Committee that the degree of increased production in the Ruhr area that was actually achieved would have been impossible had the intricate and confusing snarl of the coal, iron and steel combines not been untangled.¹⁸ There is also evidence that the deconcentration of the banking system aided, rather than im-

¹⁶ *Ibid.*, at 88.

¹⁷ *Ibid.*, at 24, 92-93.

¹⁸ *Ibid.*, at 92.

peded, German recovery.¹⁹ Granted that these isolated instances fall far short of furnishing sufficient evidence to persuade the German people that a competitive democratic economy is indeed the best economy for them, they are at least better than nothing. But there is no indication that these facts were ever brought to the Germans' attention or that it was ever pointed out that this same experience would probably have been repeated had decartelization and deconcentration occurred in other industries.

NONSUPPORT OF THE PROGRAM BY OUR ALLIES IN THE OCCUPATION

One of the excuses given for the delay in the decartelization program has been the alleged inability of the American authorities to obtain full cooperation from our allies. There is evidence in the Ferguson Report to indicate that cooperation was not forthcoming, although it is by no means as conclusive as has sometimes been suggested. It has been necessary, of course, to write off the Russians as a cooperating group, although the Russian attitude, during the period when there was collaboration, appears to have been generally in favor of a vigorous decartelization program. Thus, the most extensive and expeditious job of deconcentration that has yet been accomplished, the preliminary break-up of the I. G. Farben combine, occurred during the period of quadri-partite operation. During that period and during the subsequent tri-partite period, substantial support for a strong decartelization program was also received from the French. Thus, in the early days, the United States, France, and Russia stood for a strong program, with the British urging a more moderate one. Ultimately the United States shifted in the direction of the British position. The final result, after the withdrawal of the Russians, was a rather strong decartelization law for the French Zone, with a somewhat more modified law in the British and American Zones. In the end France by and large went its own way, while Britain and the United States developed a coordinated bi-partite program. This ultimate development was a natural one since (1) there was more economic connection between the industries in the British and American Zones, and (2) their laws were practically identical in terms.

It does not follow that the motives and ultimate objectives of the British, French and Americans were identical, even on paper. There is some suggestion that the French, with their long-standing fear of German power and their bitter experience with German aggression, were determined to take whatever steps they could to render Germany a harmless neighbor, and at the same time recoup their own serious industrial losses. The British, on the other hand, have been charged with approaching the

¹⁹ Ibid., at 93.

decartelization program with one eye toward preserving and maintaining the advantages of Britain's own trade and with the ultimate objective of socializing Germany. To the extent that this is true, one would not expect the British to embrace enthusiastically a deconcentration program which might reinvigorate German industry and render it less susceptible to governmental control. The official American policy, on the other hand, was to re-establish a sound, albeit peaceful, German industry on a democratic and competitive basis.

Accepting, for the sake of argument, the proposition that the British were uninterested in going forward with an effective decartelization program, three choices lay open to the American authorities: (1) try to persuade the British to accept a vigorous program whether they liked it or not, (2) recognize that British cooperation was not to be obtained and modify the American program to conform more closely to British concepts, or (3) go our own way and do the best we could in the American Zone, leaving the British to follow along or not as they chose. The American authorities apparently did none of these. They continued to urge officially a vigorous decartelization program, and at the same time developed procedures that increasingly required the approval and cooperation of the British. The result was about what one would expect—nothing was done.

From a political standpoint, the importance and desirability of collaboration with the British is, of course, not to be discounted or minimized. If a unified Germany were eventually to develop, and if the occupying authorities were to do an effective job, it was essential that every effort be made to achieve full cooperation and coordination. From an economic standpoint, whether such coordination was essential rather than merely desirable is less certain. One may properly question the contention that it was useless to decartelize in the American Zone unless the British Zone were similarly decartelized. In the first place, it is settled American theory that a competitive economy can hold its own in competition with a cartelized economy. Experience has demonstrated this. In the second place, it is possible that vigorous unilateral action by the United States might well have been followed by comparable action on the part of the other occupying authorities. This apparently is what happened in the decartelization of the banks. Mr. Jack Bennett, Financial Adviser to General Clay, informed the Ferguson Committee that there was opposition to the deconcentration of the banks, just as there has been to the decartelization of industry. The American authorities went ahead and decon-

centrated the banks anyway. Within a short time the others followed suit.²⁰

All in all, once it became clear that cooperation from the other occupying authorities was not to be obtained, American authorities should either have modified their own program or gone ahead as best they could on their own. The fact that they did neither resulted in a paper program which failed to achieve its purpose.

NONSUPPORT OF THE PROGRAM BY OUR OWN OFFICIALS

Notwithstanding the serious obstacles already described, the United States program might have operated satisfactorily had the individuals in final authority been sufficiently desirous of carrying it out. Despite the obstacles, the philosophy back of the program could have been clarified. The support of the Germans, despite their unfamiliarity with the concepts, might have been obtained through a vigorous and intelligent educational program. In any event, whether supported by the Germans or not, a record of achievement might have been made that would have eventually demonstrated to their satisfaction that decartelization would not impair the German economy, but would, on the contrary, carry with it affirmative advantages. Greater cooperation from our allies might have been obtained. In any event, a large measure of accomplishment might have been achieved on a unilateral basis.

The plain fact is, however, that, with the exception of a few clear-sighted individuals who recognized the true significance and the long-range importance of the program, those responsible for its application apparently either had little interest in the program or were in varying degrees opposed to it. Nor were these lukewarm views confined solely to the occupying authorities. There is little indication that the American public in general took any real interest in the program. Whether this was because they did not know about it, because they did not fully appreciate its significance, or because they were too busy with other affairs, is beside the point. There is even less indication that the American businessmen and industrialists gave it any support. American businessmen, despite the fact that the anti-trust laws and the competitive system are designed as much for their protection as for the protection of the consumer, do not always show the ardor and zeal one might expect when it comes to urging greater and more vigorous enforcement of the anti-trust laws. On the only occasion when a group of American businessmen took an active interest in

²⁰ *Ibid.*, at 29-30.

the German situation, they came back and reported that the decartelization program should be toned down.²¹

Within the government itself, various agencies, although dedicated to the basic objectives of free trade and competition, showed little inclination to take an active interest in or lend vigorous support to the decartelization program in Germany. Their general approach was perhaps a little too much that of the hen who mothered the ducklings and then fluttered anxiously on the shore but dared not go into the water.²² Military government itself could hardly be expected to take the initiative and push with zeal a decartelization program designed to democratize the economy of Germany. That, after all, is not an army's job, and army training is not the sort that equips its personnel to carry out such a program.

With this lack of support and intelligent direction, it is not surprising that the program, after a fairly brave and vigorous start, eventually ran down. Efforts to understand and carry out the purposes of deconcentration and to instill in the German economy the principles of a competitive system appear gradually to have given way to a program in which the main activity consisted of a search for reasons why the program should not be carried out.

The reasons given were various, but they indicate in general a complete misunderstanding of the way in which a competitive system works and a lack of faith in that system. It was contended that deconcentration would lessen production, as if the whole history of our American economy had not demonstrated that deconcentration is a spur to production. It was contended that the job had already been done, in effect, by the partition itself, as if there were no thought that Germany would ever again become a unified nation. It was urged that industry should not be deconcentrated when production was at low ebb, ignoring the fact that eventually the hope was to bring production back to a high level, and failing to realize that deconcentration could be achieved with the least possible interference with production when the latter was at low ebb. It was also contended that cartels are an inevitable part of the German economy. One could as persuasively argue that Nazism is inevitable in Germany and oppose a

²¹ *Ibid.*, at 99-100.

²² There were, on the other hand, those in government who consistently and vigorously espoused an effective decartelization program—and the ultimate rendition of a Ferguson Report is a testimony to their efforts. Both President Roosevelt and President Truman wholeheartedly supported the program. So did the Department of Justice and certain groups in the State Department. Within the decartelization staff itself, the most vigorous opposition to a "do nothing" program came from former Department of Justice employees who recognized the basic significance and importance of effective decartelization.

denazification program on that ground. It was urged that German customs and practices should not be interfered with, ignoring the fact that the whole purpose of the occupation was to interfere with them so as to convert the German people to ways more consistent with world peace and cooperation. It was urged that German industry should be built up as a bulwark against the Russians, ignoring the fact that, in the event of war, Russia would presumably overrun Germany within a few days. Finally, it was urged that nothing could be done without the cooperation of the other Allied powers. Whether or not this was true, it would hardly explain the lack of effort either to obtain such cooperation or to demonstrate that the job could be done without it. More fundamentally, these contentions indicate a lack of faith in a competitive, free enterprise system. There are those, of course, who contend that competition destroys an economy, whereas cartels and monopolies strengthen it. It is a strange contention, however, to hear advanced by representatives of a country which, from its beginning, has dedicated itself to exactly the opposite economic philosophy.

In the light of these attitudes, failure of the program was almost inevitable. Perhaps as a concomitant to this general approach, the operating staff was steadily cut down in size during the very periods when they were needed the most. Staff members became increasingly demoralized as a result of indecision and inactivity on the part of their superiors. Indeed, in a couple of instances, individuals who had the temerity to suggest that perhaps the decartelization program was not operating successfully, were subjected to outright attack by their superiors for their frankness.

IV. THE LESSONS TO BE LEARNED

The lessons which this experience teaches practically write themselves. Any student of the law knows that it is not enough to write a statute. That is only the start. The real job comes in administering the statute. It is a truism to point out that no law can be adequately and effectively administered without (1) convincing those who are subject to it, by education and demonstration, that the law is desirable and sound, (2) putting its administration in charge of persons who understand the law and its purposes and are willing to make an effort to carry it out intelligently and vigorously and (3) providing a working staff that is sufficient in size and in competency to undertake the hard work involved in any extensive program.

Lest the picture appear blacker than it is, let this discussion end upon a note of hope. Something may yet be done, although the hour is late.

Following the investigation and report by the Ferguson Committee, substantial changes, all of them for the good, have taken place. The conduct of the German program is now under the auspices of the State Department. The individuals found by the Ferguson Committee to be primarily responsible for the failure of the program are no longer with it. Strenuous efforts are being made to reorganize and restaff the decimated decartelization staff. The questionable policy decisions of the past are being re-examined. Efforts are being made to streamline the procedure so that it can serve its proper function of facilitating and channeling, rather than obstructing, the program. In short, the program at last appears to be the subject of intelligent and determined action.

The reforms which have lately taken place could have taken place two years ago if the program had been under active surveillance by those in the government who believed in it and were in a position to see that it was carried out. It is too much to hope that the zenith of understanding and competency can be consistently achieved in this or any program. This being so, it is essential that it be subjected to constant, intelligent, objective and thorough scrutiny by the public or by those to whom the public entrusts the ultimate responsibility for carrying out public policy. General Clay frequently emphasized that he was conducting the operations of military government in a goldfish bowl. I have no doubt that this is true. But it is not enough that operations be conducted in a goldfish bowl. It is essential that there be those around who can see and report what is going on in the bowl.²³

²³ For evidence that the goldfish themselves are not likely to render an adequate and objective report, see Clay, *Decision in Germany* 325-34 (1950).