

CONFISCATION OF THE PROPERTY OF TECHNICAL ENEMIES

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ON March 11, 1942, the President established the office of Alien Property Custodian and authorized the Custodian to take over all kinds of property of certain non-resident foreign nationals.¹ Since that day this officer has seized, through more than 2200 vesting orders, a great number of alien property rights of a very considerable aggregate value. The most important part of the Custodian's holdings consists of more than 40,000 alien-owned patents and patent applications² which are said to comprise "some of the finest research achievements in modern science" and to represent "the largest block of patents in the United States."³

The Custodian's policies with regard to these patents and patent applications deserve our closest attention, primarily because of their connection with recent proposals to reform patent laws and to eliminate patent cartels,⁴ but just as much because of the destructive effect which they will have upon the rights of the former patent owners. These policies have been formulated in a detailed report published by the Custodian early in 1943 under the title *Patents at Work*. In his report the Custodian states that "national policy clearly dictates that this Government should seize" all enemy patents and patent applications in order to turn them "to the advantage of all its citizens."⁵ To that end he offers to make enemy patents available to any legitimate American manufacturer on a non-exclusive basis, royalty free, and for the life of the patent.⁶ Moreover, the Custodian's report indicates that all enemy vested patents are to remain "a permanent possession of the American people,"⁷ that is, they will be permanently confiscated. The same policy is pursued with respect to enemy patent applications. The Custodian declares his intention to publish them "thus making these inventions part of the

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1. EXEC. ORDER No. 9095, 7 FED. REG. 1971 (1942), as amended by EXEC. ORDER No. 9193, 7 FED. REG. 5205 (1942), dated July 6, 1942.

2. OWI Release No. 2171, July 9, 1943.

3. PATENTS AT WORK (U. S. Alien Property Custodian 1943) 1.

4. BORKIN AND WALSH, GERMANY'S MASTER PLAN (1943); REPORT TO THE NATION (U. S. Office of Facts and Figures); Callmann, *Patent License Agreements* (1940) 28 GEO. L. J. 871.

5. PATENTS AT WORK (U. S. Alien Property Custodian 1943) 5.

6. *Id.* at 14.

7. *Id.* at 11.

common body of knowledge of the community,"⁸ and thereby destroying their patentability for all time, not only in the United States, but wherever published inventions are not patentable.

The Custodian's powers over alien property reach a remarkably wide group of owners which is far from homogeneous in character. Not all of its members, although presumably the majority, are enemies in the common sense of this word—persons who are residents of an enemy country and who owe allegiance to the enemy. Many are assumed to be enemies because they are subject to the enemy's control and influence, although they have been placed in that position against their own will, as the result of an adverse fate or of acts of aggression perpetrated upon them by the enemy himself.

The most important group among these technical enemies is composed of the residents of enemy occupied countries, such as Czechoslovakia, Poland, Norway, Holland, Belgium, France, Luxembourg, Yugoslavia and Greece. The American property holdings of these people are substantial; rights owned by them amount to more than one-third of the vested patents and patent applications.⁹ The Custodian visualizes the peculiar position which this minority occupies. He has acknowledged that he is aware of "a great measure of responsibility which he owes to these unfortunate people,"¹⁰ and he has stated that it is his duty to safeguard their rights. Nevertheless he has not found it possible to follow this duty and to preserve the value of their property. For in his opinion "these sufferers from axis aggression would not have us do less than turn their patent rights into an active weapon of warfare for the defeat of their oppressors."¹¹ Acting on these assumptions, the Custodian decided that except in one respect, he should treat their patents no differently from those of enemy nationals proper. He has offered these patents to American licensees, royalty free and on a non-exclusive basis, but he has limited the royalty free period to the duration of the war and six months thereafter. Simultaneously, he has offered to agree with licensees on royalty rates for the rest of the term of the patents and to establish such rates on the basis of commercial practice.¹² He has finally added that the ultimate disposal of the patents would be "the subject of discussions with the governments in exile."¹³

Three governments in exile—Norway, Belgium and Holland—, failing to see eye to eye with the Custodian in this matter, have filed notes of protest with the State Department which inquire "why the patents

8. *Id.* at 5.

9. *Id.* at 8.

10. *Id.* at 6.

11. *Id.* at 6-7.

12. *Id.* at 15.

13. *Id.* at 11.

of nationals of countries unfortunate enough to have them occupied by the enemy should be exploited during wartime without compensation, whereas American citizens whose patents have been taken over for war purposes are receiving full compensation."¹⁴ And they further complain that many patents owned by their nationals have been taken over although they have no connection at all with the war effort. Both these arguments are persuasive indeed.

Apart from the nationals of enemy occupied countries, we find a number of other groups of technical enemies who have been classified as enemies by definition of the statute only. These groups also consist of various kinds of property owners who stand a good chance of regaining their property at some time after the war when the need for its public administration has ended. Their exact definition will have to await Congressional action after the end of the war. But it can already be foreseen that Congress will want to restore, for example, the rights of all those whom the statute considers as enemies solely because they happened to be caught in Germany at the outbreak of the war, be they American citizens or allies of this country, or neutrals. Moreover, Congress will undoubtedly want to free property of enemy enterprises which are actually owned by our own nationals, our allies, or neutrals. And Congress may want to follow the example set after 1918 and free the property of all those who live in territories which Germany may have to cede after the war. Congress may want to go further. It may, for example, decide that Austrians, or at least some of them, should be placed on an equal footing with Czechoslovaks or other later victims of German aggression.¹⁵ Neither would it be amiss to consider that Congress may want to make a distinction in favor of those German nationals who are the enemy's most cruelly persecuted victims and to whom it must seem a bitter irony to find themselves treated as our enemies. When the time arrives for Congress to take action of this kind, it will find that to a very large extent its decisions have been anticipated by the Custodian in a manner unfavorable to prospective claimants. For we need hardly say that their chances of recovery will be greatly reduced once the Custodian has carried out his publicly announced policies.

The three governments which filed protests with the State Department based their objections primarily on the violation of certain treaty provisions. The Norwegian Government, for example, could refer to a treaty of friendship and commerce between this country and Norway, which provides that each country will grant to the nationals of the other "that degree of protection that is required by international law" and that "their property shall not be taken without due process of law and without pay-

14. N. Y. Times, May 13, 1943, p. 4, col. 8.

15. Brief for Austrian Action, Inc., as *amicus curiae*, United States *ex rel.* Schwartzkopf v. Uhl (decided Aug. 18, 1943, Second Circuit Court of Appeals).

ment of just compensations." ¹⁶ All three governments could refer to the General Multilateral Convention for the Protection of Industrial Property ¹⁷ which is even more in point. That Convention provides that patents of the nationals of the contracting parties shall "enjoy the advantages that their respective laws now grant, or may hereafter grant, to their own nationals." ¹⁸

International treaties tell only part of the story. Of much greater importance is the fact that international law in general, aside from any treaty provision, is also commonly held to prohibit the confiscation of private property. ¹⁹ This last proposition has been emphasized by a number of American opponents of the Custodian's policies who have joined the protests voiced by the refugee governments. ²⁰ The same position was finally taken by the American Bar Association in a set of resolutions adopted by its House of Delegates. ²¹

The simple and unequivocal denunciation of confiscatory policies found in international law is not present in the treatment of enemy property under domestic law and the Constitution. On the contrary, there is an unbroken line of oft-quoted decisions, the language of which seems to indicate that administrative agencies, if they are granted sufficient powers by Congress, may do with enemy property what they please. ²²

There is, therefore, an apparent conflict of authority. A group of writers, fixing their view on international law, denounces the confiscation of alien property as an illegal act, and their opinion, proper as it may be from their given viewpoint, seems to be in complete discord with the corresponding rules existing in the domestic sphere of the law. It requires little analysis to conclude that a situation of this kind may easily create very serious difficulties. A government agency which makes use of the apparent freedom given to it by the municipal law, may well expose this country to very considerable claims for redress and indemnity which de-

16. 47 STAT. 2136, 2137 (1928). For an analysis of this treaty, see testimony of Francis Deak, *Hearings before House Committee on Patents on H. R. 32, 77th Cong., 1st Sess.* (1941) 59.

17. Ratified and proclaimed by the United States on June 2, 1934, 53 STAT. 1748 (1934).

18. *Id.* at 1752.

19. See p. 748 *infra*.

20. See Borchard, *Nationalization of Enemy Patents* (1943) 37 AM. J. INT. L. 92; Sommerich, *Recent Innovations in Legal and Regulatory Concepts as to the Alien and His Property* (1943) 37 AM. J. INT. L. 58; Turlington, *Vesting Orders under the First War Powers Act, 1941* (1942) 36 AM. J. INT. L. 460.

21. AMERICAN BAR ASSOCIATION, REPORT OF SPECIAL COMMITTEE ON CUSTODY AND MANAGEMENT OF ALIEN PROPERTY (1943) 42.

22. *Cummings v. Deutsche Bank und Disconto Gesellschaft*, 300 U. S. 115 (1937); *Henkels v. Sutherland*, 271 U. S. 298 (1926); *Miller v. United States*, 11 Wall. 268 (U. S. 1870); *Brown v. United States*, 8 Cranch. 110 (U. S. 1814); *United States v. Chemical Foundation, Inc.*, 5 F. (2d) 191 (C. C. A. 3d, 1925), *modified*, 272 U. S. 1 (1926).

rive from international law. Moreover, the discrepancy between the two prevailing sets of rules may create the uncomfortable feeling that the norms of our municipal law do not live up to the demands of justice and equity which have been recognized elsewhere.²³

But the differences between international law and municipal law in this field, although they may exist to some extent, are not as wide as they seem; and confiscation of property, at least of those who are not enemies in the common sense of that term, is just as much disapproved by the municipal law as it is by the law of nations. It is the purpose of this article to demonstrate the validity of this proposition.

HISTORICAL BACKGROUND

In earlier days the enemy and his property were subject to harsh and simple rules. The Roman law permitted any private person to appropriate to himself such enemy property as he might find.²⁴ This rule continued during the Middle Ages. The only change to which it was subjected was that the right of appropriation shifted from the individual to his sovereign. Later on when commercial intercourse began to develop from country to country, some kind of reciprocal protection was worked out for the benefit of foreign traders and their wares.²⁵ This reciprocal protection still survives in commercial treaties which customarily provide that in case of war enemy nationals may have a certain period of time within which to leave the country and take their property with them.²⁶

In the seventeenth century a number of legal philosophers set themselves the task of developing principles which should govern the intercourse of nations. The foremost representative of their school was Hugo Grotius.²⁷ His work on the law of nations contains an extended discussion of the treatment to which enemy property should be subjected. He admits that both tradition and practice allow complete confiscation. However, he condemns this tradition and urges that no confiscation should take place if it will violate "the rules of piety and morality."²⁸ A century later the same thought was expressed in a more forceful manner by the philosophers of rationalism and particularly by their foremost representative, Rousseau. His demand to discontinue the old practice was based on an appeal to reason. He claimed that reason compelled dis-

23. This article will not deal with those objections to the legality of the Custodian's policies which derive from specific problems of the patent law. See Wille, *Government Ownership of Patents* (1943) 12 *FORDHAM L. REV.* 105.

24. D. 41. 1. 5. 7.

25. *MAGNA CHARTA* (1215); and other statutes cited in GATHINGS, *INTERNATIONAL LAW AND AMERICAN TREATMENT OF ENEMY PROPERTY* (abr. ed. 1937) 1.

26. *Id.* at 2.

27. GROTIVS, *DE JURE BELLICIS AC PACIS* (1625).

28. 3 *id.* at 4, 9.

tinguishing, in the course of warfare, between enemy combatants and those who did not engage in hostilities. "War is no relation of man to man, but one of government to government. The individual is an enemy only by accident, not as a human being, nor as a subject, but as a soldier; not as a part of his country, but as its defender."²⁹ This distinction conformed to a certain extent with the changes in Europe's social structure which had taken place since the end of the Middle Ages. The sovereign had become the absolute monarch who owned and personified his country; war could be and was said to be his personal affair which he settled with the sovereign who had become his enemy, while his subjects, and the subjects of his enemy, were peaceful citizens continuing to be engaged in the pursuit of their trade and living and leaving the fight to him and his standing armies. The duty of the citizen was to keep quiet; his reward was that he could hope to be treated as an innocent bystander.

During the Revolution the American States concerned themselves little with these European teachings. Most of them adopted confiscation acts and seized the considerable properties of Tories and Englishmen which they found in their territories.³⁰ After the end of the war, however, a new and different policy was initiated which was destined to form the basis of a consistent treaty practice pursued by this country up to the present time. This policy was inaugurated by Alexander Hamilton. The Jay Treaty, which he negotiated with Great Britain in 1794,³¹ provided that neither country would confiscate, during a war, private property of the other's citizens. This provision was supplemented by the treaty with Britain of 1803³² in which the United States agreed to pay \$30,000,000 to British subjects by way of adjustment of their claims arising from acts of confiscation committed during the Revolutionary War. Hamilton's Camillus letters³³ contain an elaborate justification of the new policy. He thought that whenever a government grants permission to foreigners to acquire property within its territory, it distinctly promises protection and security; "for to make individuals and their property a prey of warfare is to infringe every rule of generosity and of equity and to add cowardice to treachery."³⁴ Moreover, he felt that the property of foreigners within a nation's territory pays valuable consideration for its protection and exemption from forfeiture because "that which is brought

29. ROUSSEAU, *SOCIAL CONTRACT* (1762) c. 4. Cf. *Griswold v. Waddington*, 15 Johns. (N. Y. 1818) 57, *aff'd*, 16 Johns. (N. Y. 1819) 438.

30. Thompson, *Anti-Loyalist Legislation during the American Revolution* (1908) 3 ILL. L. REV. 81; Turlington, *Treatment of Enemy Private Property in the U. S. before the World War*, 22 AM. J. INT. L. 270 (1928).

31. 8 STAT. 116, 124 (1867).

32. GATHINGS, *op. cit. supra* note 25, at 24, citing 5 ANNALS OF CONG. 969, 1269 (1798).

33. 5 HAMILTON, *WORKS* (Lodge ed. 1898) 160, 412-18.

34. *Id.* at 417.

in has as a rule enriched the revenue and is liable to the Treasury." ³⁵ Finally, he maintained that property brought into a territory is a deposit and that society is a trustee which must not breach the faith lodged in it.

These three new points translate Rousseau's distinctions into the language of classical capitalism. Economic stability, necessary for the development and security of capital investment, must be fully guaranteed in peace and in war; governmental power must be reduced to contractual terms which cannot be lawfully abrogated. Hence the alien who has brought his property into the country before the war is held to have made an agreement with the government which survives a declaration of war.

Brown v. United States

During the war of 1812 the new policy found some measure of recognition. In *Brown v. United States* ³⁶ a federal court had condemned, as a prize of war, certain English property found on American soil. The United States Supreme Court held that no authority existed by which this act could be justified. The Court admitted, as a matter of general principle, that warring nations still have the ancient power to confiscate enemy property wherever found, but it held that "the mitigation of this rigid rule, which the humane and wise policy of modern times had introduced into practice, will more or less affect the exercise of the right." ³⁷ Hence the Court held that Congress must be given an opportunity to decide whether and to what extent confiscation is required in a given instance and that no confiscation can be permitted unless and until Congress has spoken. This ruling was subsequently supported by Chancellor Kent who held that the confiscation of enemy property, in general, is "condemned by the enlightened conscience and judgment of modern times." ³⁸

Confiscation Act of 1862

Congress made no use of the mandate which *Brown v. United States* had given it until the time of the Civil War when it adopted the Confiscation Act of 1862. ³⁹ This statute was entitled, "An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes." The first four sections of the Act established a number of new crimes and made provisions

35. *Ibid.*

36. 12 Cranch 110 (U. S. 1814).

37. HAMILTON, *op. cit. supra* note 33, at 509.

38. 1 Commentaries *3, *65. See also *United States v. Percheman*, 7 Pet. 51, 86 (U. S. 1833): "The modern usage of nations, which has become law, would be violated; that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if property should be generally confiscated and private rights annulled."

39. 12 STAT. 589 (1862).

for the liberation of slaves. The fifth and sixth sections, applying to rebel property, could have been drafted by Rousseau himself. Their language made it clear that Congress intended to confiscate only the property of persons who by overt acts of treason had made themselves active and direct participants in the rebellion. Section 5 stated that "to insure the speedy termination of the present rebellion, it [should] be the duty of the President of The United States to cause the seizure of all estate and property . . . of the persons . . . named in [the] section, and to apply and use the same and the proceeds thereof for the support of the army of the United States."⁴⁰ The list of persons which followed consisted of the highest executives of the Confederate States, their judges and legislators, other office holders of the Confederate States who took office or gave an oath of allegiance after the date of secession, officers of the Confederate Army, and owners of property situated in the loyal territory who were engaged in aiding and abetting the rebellion. Section 6 added one more group which consisted of all property owners wherever their property was situated, who continued to aid and abet the rebellion after having been ordered to return to their allegiance to the United States. The Supreme Court in *Miller v. United States*⁴¹ upheld the statute in a decision which discussed both its constitutionality and its relation to international law. This decision found that the confiscation of enemy property was a proper exercise of the so-called war powers of Congress. The war powers were said to derive from the express constitutional grant of power to declare war,⁴² which "involve[d] the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted."⁴³ One of these means was held to be the seizure and confiscation of all property of an enemy and the right to dispose of it at the will of the captor. The Court added that any uncertainty with respect to the existence of this right would be set at rest by the additional express grant of power to "make rules respecting capture on land or water."⁴⁴

International law entered the opinion in a roundabout way. Since the war to which the statute applied was a civil war, enemies were also citizens, even though in a state of rebellion. Hence it became necessary to decide whether their property was protected by the due process and just compensation clauses of the Fifth Amendment. The Court held that the Fifth Amendment did not apply. It based its opinion on the fact that rebellious citizens, because they were actively engaged in warfare against their country, had placed themselves beyond the application of the municipal law and thereby had lost the protection of the Fifth Amendment

40. *Id.* at 590.

41. 11 Wall. 268 (U. S. 1870).

42. U. S. CONST. Art. VIII, § 11.

43. *Miller v. United States*, 11 Wall. 268, 305 (U. S. 1870).

44. *Ibid.*

which is but a part of the municipal law. "War existing, the United States were vested with belligerent rights in addition to the sovereign powers previously held. Congress had then full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining war against the Government." ⁴⁵

The Court left no doubt that these extra-municipal "belligerent rights" are part of the law of nations. The defendant had made this assertion, and he had added that the law of nations concerning the confiscation of enemy property did not apply to rebels. The Court admitted that if the Confiscation Act "direct[ed] the seizure and confiscation of property not confiscable under the laws of war, [they could not] yield it to our assent," ⁴⁶ and one of the Justices, who dissented on another point, added that "war powers [had] no express limitation in the Constitution and the only limitation to which their exercise was subjected was the law of nations." ⁴⁷ On the basis of that law the Court found that rebel property could be confiscated.

International Law Before 1914

The policies pursued by Congress in 1862, even though they were limited in scope to those enemies who had committed hostile acts, can well be said to represent an exception to the general attitude prevailing during the nineteenth and in the early twentieth century. In America, no action was taken against alien property in the War of 1812, in the Mexican War of 1848, and in the Spanish-American War of 1898. In Europe, Napoleon and the English took each other's property in the course of a full-fledged economic war which lasted until 1813. Subsequently, however, no example of confiscatory action can be found on that Continent. In 1870, during the Franco-Prussian War, William of Prussia expressed the attitude of the era succinctly by stating, "I am at war with the French soldier and not with the citizens of France. The latter will, therefore, continue to enjoy the absolute security of their persons and property." ⁴⁸

In this country international relations were constantly based on a desire to protect property in the case of war. The United States entered into numerous treaties which provided for a period of time within which an enemy national could leave the country with his property. ⁴⁹ Moreover, there was some reason to assume that the Hague Convention which was

45. *Id.* at 306.

46. *Id.* at 310.

47. *Id.* at 315.

48. SCHULZ, *PRIVATEIGENTUM IM BESETZTEN UND UNBESETZTEN FEINDES LAND* (1919) 16.

49. GIBSON, *ALIENS AND THE LAW* (1940) 29, 168; Turlington, *supra* note 30, at 273 *et seq.*

ratified by the United States together with twenty-two other countries outlawed the confiscation of enemy property altogether. Section 46 of the regulations respecting warfare on land, adopted at the Hague in 1907, provided that "the honor, the right of the family, the life of the individual, and private property, as well as religious convictions and the exercise of religious services [were to be] respected. Private property cannot be confiscated."⁵⁰ It was merely doubtful whether this provision referred to enemy property in general, or only to property seized by a conquering army.

Towards the beginning of the twentieth century, therefore, American writers on international law could rely on a century of forbearance and on an equally long period of continued treaty practice and could conclude that private property of enemies was inviolable.⁵¹

The First World War

In the very first days of the first World War the doctrine of the inviolability of enemy property broke down completely. It became immediately apparent that the old distinction between peaceful citizens and combatants was no longer as persuasive as it had been fifty years before. Non-combatants were now beginning to assume a military importance of their own. Many millions of them, men and women, were drafted to supply and support the people's armies that marched onto the battlefields. Alien property, too, had acquired new significance. During the preceding decades the economic relations of the great commercial and industrial nations had expanded in a manner which former generations could hardly have envisioned. Previously, alien property holdings had consisted primarily of the warehouses and stocks of a few international traders and only occasionally of industrial and financial investments. Now the expansion of markets for manufactured products, the world-wide expansion of patent protection, the corporate device, international banking and finance, and numerous related factors, had led in many countries to the development of powerful economic positions in the hands of foreign nationals.

In 1914, German business had acquired a strong position in the City of London, in various English industries, and in many parts of the British Empire. England could not but fear that these interests, if left under the control of the enemy, or in the hands of those whom the enemy had appointed as managers, would not be available for the British war effort,

50. *Regulations Respecting The Laws and Customs of War on Land*, HAGUE CONVENTION OF 1907, *Annex*, § 46.

51. BENTWICH, *THE LAW OF PRIVATE PROPERTY IN WAR* (1906); BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1915) 113; 2 OPPENHEIM, *INTERNATIONAL LAW* (3d ed. 1921) 157; Turlington, *loc. cit. supra* note 30.

but, on the contrary, would be used to the advantage of the enemy. It became, therefore, inevitable that the English should immediately provide for the sequestration and public administration of enemy property. The English courts supported this action.⁵² The Hague Convention was found to be inapplicable.⁵³ As the war went on, England did not remain satisfied with a mere sequestration of enemy property and proceeded to sell and liquidate it. Other countries followed England's example.

When the United States entered the war, it did not hesitate to take similar action. On October 6, 1917, Congress adopted the Trading with the Enemy Act.⁵⁴ This statute, in the form which it assumed by the amendment of March 28, 1918,⁵⁵ followed the English example by authorizing the sequestration of enemy property as well as other far-reaching measures against such property.

Public Management. The statute, as originally enacted in 1917, provided solely for the seizure and holding of enemy property by an Alien Property Custodian. The powers of the Custodian were restricted to those of a common-law trustee.⁵⁶ He could manage the property in the interest of the United States and of those who would ultimately become entitled to it. The reasons for measures of this kind had become apparent even before modern economic conditions made them a necessity. In *Miller v. United States*,⁵⁷ the Court had emphasized that depriving an enemy of property within reach of his power impairs his ability to resist and furnishes his opponent means for carrying on the war. In 1917, proof of these assertions could be seen everywhere. The German firm of Orenstein and Koppel which had been engaged in the business of installing railroads inside American plants had turned over to the Berlin authorities various maps of these plants. German fire insurance companies had done the same with industrial maps obtained by their American subsidiaries. The Bosch Company, a manufacturer of electrical apparatus, was said to have taken war orders in order to injure the allies by passive resistance. The Hamburg-American Line and the North-German Lloyd had kept records of cargo movements for the benefit of the German Navy. Other firms had cornered the market in coal tar products and thereby hampered the manufacture of ammunition. In short, it was found that "large portions of the property formerly in the hands of German investors had had definitely hostile effects upon the interests of the United States."⁵⁸ No-

52. *Porter v. Freudenberg*, [1915] 1 K. B. 857.

53. *Id.* at 874.

54. 40 STAT. 411 (1919), 50 U. S. C., App., § 616-18 (1940).

55. 40 STAT. 459 (1919), 50 U. S. C., App., § 12 (1940).

56. 40 STAT. 411 (1919), 50 U. S. C., App., § 12 (1940).

57. 11 Wall. 268 (U. S. 1870).

58. See *United States v. Chemical Foundation, Inc.*, 5 F. (2d) 191 (C. C. A. 3d, 1925), *modified*, 272 U. S. 1 (1926).

thing was easier to defend than the decision of Congress to oust the managers of German property from their positions and to see to it that the use of this property in the interest of the war effort was safeguarded, that espionage and passive resistance were prevented. Nothing could be said to be "more appropriate to the effective carrying on of war than to seize and thus render impotent the money and property . . . owned by alien enemies."⁵⁹

The Custodian's position as a common-law trustee required him to preserve the substance of all seized enemy property. He had no right to sell it, except to prevent waste or otherwise to protect the property and the interests of the United States and the yet unknown ultimate owner. In effect, this provision granted the Custodian considerable power. He could sell goods which might not endure until after the war; he could sell property which by reason of the war, and even as a consequence of his seizure, had become unproductive, as for example, business organizations which had become unable to obtain raw materials or had lost their supplies or their customers, or required new managements, manpower, or credit facilities, without being able to obtain them.

Whatever the Custodian may have been authorized to do under these provisions, he could do nothing confiscatory in character. On the contrary, the Act expressly preserved possible claims of the enemy owner for the return of his property. Such claims were to be settled later, as Congress should direct.

Liquidation of Enemy Property. The power to liquidate was added in March, 1918, by an amendment to section 12 of the Act⁶⁰ which authorized the Custodian to sell all property held by him as though he were its absolute owner. To a great extent the power to liquidate enemy property is also a logical consequence of attempts to make enemy property useful for the war effort. A particular enterprise held by the Custodian may be of no use to the war effort, while some of its equipment, or part of its assets, may be greatly needed in other places. Thus the war effort requires the breaking up of the enterprise. Other enemy investments such as real property holdings or securities may be of no direct importance for the war effort, but their sale and the reinvestment of the proceeds in government securities would help to finance the war.

Liquidation of enemy property may, however, be motivated by purposes of aggressive economic warfare. In 1917, the Custodian was particularly impressed by the fact that many German-owned enterprises were engaged in the manufacture of necessities of war, earning large profits

59. *Salamandra Ins. Co. v. N. Y. Life Ins. & Trust Co.*, 254 Fed. 852, 859 (S. D. N. Y. 1918).

60. 40 STAT. 460 (1919), 50 U. S. C., App., § 12 (1940).

"which would have to be turned over to the enemy after the war."⁶¹ His feeling was that enterprises of this character should be sold, so that the enemy claimant could, after the war, become entitled only to the proceeds of the sale and possibly to interest earned by the investment of these moneys in Government securities. By such action there would be permanent destruction of the enemy's economic position, as it existed before the war, in trade, shipping and banking, and in various industrial fields.

Whether Congress, in giving to the Custodian the power to sell seized property "as though he were its absolute owner," meant to permit him to liquidate the enemy's economic position in its entirety is a futile question. The language of the amendment was sufficiently far-reaching to permit such an interpretation, and it was construed accordingly. Subsequently, it was said that the amendments had transformed the Act "from a purely conservation measure to one of action, final and drastic." Thus it had become the purpose of the statute "to eliminate enemy ownership of property in this country," "to place those properties in American hands," and thereby to "strike a blow at the enemy in the darkest hour of war."⁶²

The terms of the amendment restricted the Custodian in only one respect. All sales were to be made at public auction after advertisement and to the highest bidder. Sales to the United States were excepted.⁶³ But even such sales were held to be permissible only if made "for a fair and just compensation."⁶⁴ This restriction was, therefore, important. It gave assurance that liquidation would place in the hands of the Custodian a substantial consideration for the property sold, amounting to the highest price obtainable in the public market. Consequently, there still remained for Congress the question of returning to the former owner, if it so desired after the war, a fair compensation for his property.

Whether liquidation of enemy property is a regulatory measure, or whether it amounts to confiscation, has never been determined. To some extent, it may indeed be considered in the nature of a regulation only, at least insofar as sales are required during a war for the public protection against direct dangers.⁶⁵ However, this line is immediately overstepped when liquidation takes place for purposes which reach far beyond any immediate danger. A sale of enemy property merely because of a desire to invest the proceeds in Government securities, like any act of aggressive economic warfare, must, therefore, be considered to be an act of confiscation.

61. *United States v. Chemical Foundation, Inc.*, 5 F. (2d) 191, 197 (C. C. A. 3d, 1925), *modified*, 272 U. S. 1 (1926).

62. *Id.* at 205.

63. 40 STAT. 411 (1919), 50 U. S. C., App., § 12 (1940).

64. 31 OPS. ATT'Y GEN. 463 (1919); see also 32 OPS. ATT'Y GEN. 577 (1921).

65. BORCHARD, *op. cit. supra* note 51, at 256; Herz, *Expropriation of Foreign Property* (1941) 35 AM. J. INT. LAW 243, 252.

Requisitions in the National Interest. The amendment of March, 1918, contained one additional clause which was destined to play an important role. The Statute authorized sales without public auction in exceptional cases when the President determined that the national interest required such a special procedure. This provision was utilized by the Custodian in a case involving the Chemical Foundation, a corporation formed by him for the purposes of his administration. Acting with the President's permission, the Custodian sold to Chemical Foundation about 6,000 German and Austrian chemical patents for the nominal price of \$50 each, in order to enable Chemical Foundation to license the use of these patents to American chemical manufacturers.⁶⁶

This was a pure measure of confiscation. It was recognized as such by the courts, and it was justified by them because its avowed purpose was to forestall any possibility that these rights might ultimately revert to the enemy, to prevent the concentration of monopolistic powers in one hand in case of a public sale, and to create an American chemical industry "which [would stand] equipped, manned and maintained in full operation, ready to be converted at once into a line of national defense in the event of war."⁶⁷

Collective Liability for Enemy Debts. After World War I Congress divided the property holdings of the Custodian into two separate groups. One group comprised property which Congress did not intend to hold any longer. It included the property of the following: American citizens and friendly aliens who had resided in enemy country; enemy business organizations which were owned by Americans or friendly aliens; all those who lived in territories which at the end of the war were then ceded by the enemy, such as Alsace-Lorraine, and the territory of the new successor states, like Poland, Czechoslovakia and Yugoslavia; residents of enemy occupied territories, such as Belgium and Serbia; American born and neutral women who had become enemy nationals as a result of marriage to German or Austrian citizens; persons who, after having been released from war internment, decided to remain in this country; former residents of the United States who returned to this country after the war; and nationals of Bulgaria and Turkey, who had been allies of the enemy, but never enemies themselves.⁶⁸

The remaining property, that is, the property of Germans, Austrians and Hungarians, was retained in a manner which requires a somewhat

66. *United States v. Chemical Foundation, Inc.*, 5 F. (2d) 191 (C. C. A. 3d, 1925), modified, 272 U. S. 1 (1926).

67. *Id.* at 213.

68. 40 STAT. 411 (1919), 50 U. S. C., App., § 9 (1940), as amended by 41 STAT. 35, 977 (1921), 42 STAT. 1511 (1923), 44 STAT. 406 (1926). See *Hearings before the Committee on Finance on H. R. 15009*, 69th Cong., 2d Sess. (1927) (return of alien property).

detailed comment. In 1921 Congress declared that it intended to continue to hold German and Austro-Hungarian property as a pledge for the satisfaction of American war claims.⁶⁹ This intention was affirmed in the German-American Peace Treaty⁷⁰ and in a subsequent treaty of August 10, 1922,⁷¹ by which a mixed claims commission was set up for the determination of American war claims. Subsequently, however, Congress, by the so-called Winslow amendment,⁷² decided to return to enemy claimants part of their property up to an amount of \$10,000 per claimant, to pay to them income accruing thereafter on retained property, not in excess of \$10,000 per year in the case of any claimant, and to return the property of enemy concerns in which non-enemies owned interests of more than 50 per cent.

Finally, in 1928, the original intention of Congress was effectuated in the Settlement of War Claims Act.⁷³ This statute was the result of negotiations with German claimants, the German Government, and American claimants, and it met with their approval. The statute ordered the payment of 80 per cent of the German, Austrian and Hungarian claims. It also provided for the payment by the United States of compensation for the property of German citizens requisitioned during the war, and it provided for the payment of American war claims against the three countries in question. The Treasury was ordered to retain the income on enemy property accrued before the Winslow amendment was adopted, the remaining 20 per cent of the enemy claims, one-half of the compensation payable to German claimants, and certain payments due under the Dawes plan. Enemy claimants were given interest-bearing certificates which were to be redeemed with funds paid into the Treasury by Germany. The statute was supplemented by the Debt Funding Agreement with Germany, dated June 23, 1930, by which Germany agreed to pay 40,800,000 reichmarks in each year until 1931.⁷⁴ This entire complicated procedure functioned until 1934 when Germany defaulted and Congress adopted a joint resolution by which it ordered the Custodian to release no further property for the time being.⁷⁵

The purpose of these Congressional measures in spite of their apparent complexity does not require much clarification. Congress did have a legitimate interest in trying to enforce the claims of its nationals against the former enemy, and it decided to protect their interests as an incident to the re-establishment of peace. From the viewpoint of the individual

69. 42 STAT. 105 (1921).

70. 42 STAT. 1939 (1923).

71. 42 STAT. 2200 (1923).

72. 42 STAT. 1511 (1923), 50 U. S. C., App., § 9 (1940).

73. 45 STAT. 254 (1928).

74. 48 STAT. 1267, 1268 (1934).

75. *Ibid.*

enemy claimant, however, Congress committed an act of confiscation; for his property was pledged for the satisfaction of claims of third persons for whose debt he had never agreed to become liable. True, his property was only mortgaged and held as security for these claims; his title was otherwise fully restored. But subsequent events demonstrated that to the extent of this mortgage he had actually lost his property.

Administrative Charges. Section 24, added by the amendment of March 4, 1923,⁷⁶ authorized the Custodian to pay the necessary expenses incurred by him in securing the possession, collection, or control of seized property, or in protecting or administering it. Under this provision the Custodian retained from all amounts paid over to claimants a sum equal to 2 per cent to cover general or administrative expenses of his office.⁷⁷ He also deducted special expenses such as the costs of the sale of property, which could have amounted to sizeable sums.⁷⁸

The nature of this measure depends on the purpose for which the charges are made. Expenses incurred in administering and preserving property may well be said to be an incident to the Government's regulatory powers. Costs of sales may fall in the same category. They may, however, be incurred in the course of a confiscatory sale, and in that case their deduction from the proceeds of the sale is in itself an additional act of confiscation.

LEGAL CONCEPTS

Capture on Land and General War Powers

A comparison between the 1862 Act and its 1917 successor reveals that they have little, if anything, in common. Their differences are so great that the question arises whether the two statutes serve the same purpose or emanate from the same legislative power.

Two separate war powers relating to property rights are granted to Congress by the Constitution: the express power to make rules respecting capture on land or water and the implied power over alien property which is derived from the words "Congress may declare war" and embraces the authority to prosecute such war "by all means and in any manner in which war may be legitimately prosecuted, including any invasion of property rights which is required for that purpose."⁷⁹ The Act of 1862 was an exercise of the express power to regulate captures on land, while

76. 42 STAT. 1511 (1923), 50 U. S. C., App., § 9 (1940). See *Cummings v. Deutsche Bank und Disconto Gesellschaft*, 300 U. S. 115 (1937).

77. *Woodson v. Deutsche Gold und Silber Scheideanstalt*, 292 U. S. 449 (1934); *Escher v. Woods*, 281 U. S. 379 (1930).

78. *Becker Steel Co. v. Cummings*, 296 U. S. 74 (1935). In that case stock had been sold for \$20,000; "expenses of the sale" amounted to more than \$16,000.

79. *Miller v. United States*, 11 Wall. 268 (U. S. 1870).

the Act of 1917 was an exercise of those powers which are implied from the general authority to declare war.

Capture on land or water is an institution which the drafters of the Constitution assumed to be pre-existent. The Constitution specifically restricts itself to authorizing Congress to make rules for effective application of this right and does not expressly establish the right itself. It is a belligerent right possessed by the United States, as by any sovereign who becomes involved in a war, and it exists independently of any constitutional delegation. The same situation obtains in the case of the supplementary right of capture on water. For capture on water is equivalent to the right to take prizes, which has long been recognized as a sovereign right of any belligerent. With respect to the latter right no one doubts that the Constitution merely adds to it a subsidiary power to establish proceedings for its enforcement.

The right of capture on land or water is nothing more than the ancient right of the sovereign to appropriate enemy property. It is this right which has been attacked consistently for centuries as a naked and impolitic right, condemned by the judgment of modern times, and which has been restricted successfully by the rules of international law to apply only to those who are active participants in the enemies' warfare. The Supreme Court in *Miller v. United States*⁷⁹ held that the Confiscation Act of 1862 was an exercise of those belligerent rights which after war has been declared the United States enjoys over its enemies within the limits established by the rules of international law. And the Act applied only to those property owners who by overt acts of treason had placed themselves in a position of belligerence against the nation.

Nevertheless, an exercise by Congress of the power to make rules concerning capture does not require any specific justification. It is an express legislative power and therefore absolute and unconditional. Whenever Congress desires to put the right into effect, it can do so even if its sole motive is to enrich the national treasury. Moreover, there is nothing in the Constitution which requires Congress to delegate its authority to an administrative agency to insure that confiscation will take place only in appropriate cases. On the contrary, the Congressional power is absolute, and Congress can order the indiscriminate capture of all enemy property subject to this power.

The Confiscation Act clearly exemplified these incidents of the right of capture. The Act provided for complete confiscation and forfeiture of enemy property to the United States; it did not profess to pursue any ulterior purpose beyond such forfeiture, and it made it the duty—not the privilege—of the President to seize any and all property to which the terms of the Act applied.

The right of capture bears no relation to the general war powers over alien property. The war powers are implied powers, and for that reason

available only insofar as their exercise is necessary to effectuate the purpose for which they are implied. Since they derive from the power of Congress to declare war, they are limited to such measures as are necessary to conduct a war. Wherever a confiscation of property is required for that purpose, it is thus authorized; where less stringent measures, such as licensing or sequestration, or partial confiscation only are sufficient, these measures must be taken and confiscation is not permissible.

The 1917 statute fully met these requirements. It established a list of authorized measures, such as sequestration, sale, liquidation, and confiscatory sale of enemy property which could or could not be exercised. Since the necessity for these measures varied from case to case, their imposition was entrusted to the Office of Alien Property Custodian, a fact-finding administrative agency which could exercise its discretion within the limitations referred to.

In contrast to the right of capture, the general war powers bear no relation at all to international law. Restrictions which may be established by international law to protect non-combatants or others do not apply to the war powers. In *Littlejohn v. United States*⁸⁰ there was involved a special statute passed in 1917 under the general war powers which authorized the President to take over possession and title of enemy ships in United States harbors. The plaintiff urged the Court to read into the statute "the recognized rules of international law designated to mitigate the horrors of war."⁸¹ The Court, however, refused to do so, and in indisputable contrast to the holding in *Miller v. United States* decided that "every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs."⁸² Consequently, a statute deriving from the general war powers, as against one which is an exercise of the right of capture, may apply to any property which is under the jurisdiction of the United States whenever measures against such property are necessary for the war purpose; and it makes no difference whether the property is owned by an enemy combatant, or an enemy who is not engaged in hostilities, or by an alien friend, or even a citizen.

Within the scope of these powers, the 1917 statute applied to any enemy, whether he was engaged in hostilities and subject to the laws of war or was a peaceful citizen and exempted by international law from the right of capture. It even applied to alien friends whose country had been occupied by the enemy's armed forces, although their property, beyond any doubt, was not subject to the right of capture.

The distinction between the right of capture and the general war powers is of considerable practical importance, for it opens the way for the courts to review the validity of statutes and administrative acts which are de-

80. 270 U. S. 215 (1925).

81. *Id.* in 70 L. Ed. 553 (1925).

82. *Littlejohn v. United States*, 270 U. S. 215, 226 (1925).

rived from these powers. On the basis of this distinction the courts are able to apply two alternative standards to all invasions of alien property rights and to demand that any such invasion comply with either one of the two. The first standard is established by international law, which has restricted the right to capture enemy property to the property of those enemies who are engaged in hostilities. The second standard derives from constitutional law and permits the taking of measures against any property which is under the jurisdiction of the United States, but only to the extent necessary for the war effort.

With respect to the latter standard, it is hardly necessary to add that in accordance with the elementary canons of constitutional law, the courts may not usurp the functions of the legislature and of administrative agencies by determining the degree to which a particular measure appears necessary for the war purpose. Only such legislative or administrative acts which are in no way related to the legitimate end can be said to be unconstitutional.⁸³ And the purposes which are served by the war power should be broadly defined in order to give Congress the greatest possible leeway. The conduct of the war to a victorious finish does not exhaust the legitimate war purposes. These purposes also include the re-establishment of peace, and they may well be said to include the settlement of war claims and reparations in the course of the re-establishment of peace and possibly all kinds of military and economic post-war planning for the prevention of future wars.

Even within these confines, however, the courts will have considerable and far reaching opportunities to frustrate what Congress might wish to do. For example, a court might declare the seizure and free use of patented inventions owned by residents of enemy occupied countries which cannot possibly be of direct service to the war effort beyond Congressional power although the United States is willing to compensate the owner. And the power of licensing patents of alien friends for a period beyond the war emergency might also be said to be unauthorized by the Constitution.

Those cases which appear to be irreconcilable with the proposition that the general war powers do not confer any absolute right of confiscation are, on close analysis, compatible with this view. *Brown v United States*,⁸⁴ the first in this line of cases, referred to the right of capture and not to the general war powers in holding "that war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found."⁸⁵ *Miller v. United States*, holding that "the right to seize and confiscate all property of an enemy . . . is and always has been an un-

88. See *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819); *Legal Tender Cases*, 12 Wall. 457 (U. S. 1870).

84. 8 Cranch. 110 (U. S. 1814).

85. *Id.* at 122.

doubted belligerent right,"⁸⁶ interpreted the Confiscation Act of 1862 which is based on the right of capture and not on the general war powers. Only a few of the cases decided under the 1917 Act contain any general language concerning Congressional powers. Some of them expressly assert that a seizure under the Act did not, or did not necessarily, amount to confiscation. In *Stoehr v. Wallace*,⁸⁷ the Court restricted itself to asserting "that Congress, in time of war, may provide for the seizure and sequestration" of enemy property without mentioning the powers of confiscation. In *Woodson v. Deutsche Gold*,⁸⁸ it was decided that pending further action by Congress under section 12 "confiscation was not affected or intended." Other cases related only to questions of jurisdiction and held principally that full title to the seized property was in the hands of the United States⁸⁹ and that no interest remained in the hands of the former owner.⁹⁰ They, therefore, merely permit the inference that the enemy owner, while the United States holds his property, has no interest which entitles him to a hearing in court, and they do not make it necessary to assume that the Act brought about a confiscation of enemy property. The United States alone may be empowered to protect the seized property in all court proceedings, and still be said to hold the property merely as a public administrator, and not as absolute owner.

A final group of cases did hold expressly that the United States has absolute power to confiscate enemy property. These cases, however, must be restricted to their facts. Thus the court in *Kahn v. Garvan*, finding that enemies "are subject to the exercise of that power [of confiscation] without any legal limitations,"⁹¹ actually confirmed only the powers of Congress to permit the seizure of enemy property. And the court even admitted that the case did not require any ruling on the powers of confiscation by adding that "such seizure is in no sense a condemnation, but merely a sequestration," and that "up to the present time in any case it [the power of confiscation] has not been exercised to the full extent of confiscation."⁹² Similarly, in *United States v. Chemical Foundation, Inc.*,⁹³ the finding of the court that enemy property may be confiscated, merely confirmed the acquisition by a Government subsidiary in an exceptional statutory proceeding of a group of patents for the purpose of establishing a vital defense industry. Finally, in *Cummings v. Deutsche Bank*,⁹⁴ the holding that under the statute alien enemies were divested of every right, and that the United States acquired absolute title, carried out so far as

86. *Miller v. United States*, 11 Wall. 268, 305 (U. S. 1870).

87. 255 U. S. 239 (1920).

88. 292 U. S. 449 (1934).

89. *Littlejohn v. United States*, 270 U. S. 215 (1925).

90. *White v. Mechanics Securities Corp.*, 269 U. S. 283 (1925).

91. *Kahn v. Garvan*, 263 Fed. 909, 916 (S. D. N. Y. 1920).

92. *Ibid.*

93. 5 F. (2d) 191 (C. C. A. 3d, 1925).

94. 300 U. S. 115 (1937).

was necessary the purpose of retaining part of the enemy property as security for American claims.

The Fifth Amendment

Generally speaking, the entire war powers of the Government are restricted by the due process and just compensation clauses of the Fifth Amendment, just as much as any other legislative power of Congress. In the case of the war powers, however, the courts have applied the Fifth Amendment in a manner which is considerably less rigid than is customary, apparently in order to meet the peculiar requirements of the war situation.

The most outspoken example of this attitude is the willingness of the Supreme Court, in time of war, to permit military agencies to act first and to establish compensation proceedings afterwards.⁹⁵ Another such example is the willingness of the courts to uphold those provisions of the 1917 Act which permitted the summary seizure of property which the Custodian found to be enemy owned, even though such property was actually the property of a citizen and even though the Custodian's conclusions were "founded upon evidence which would [have appeared] to [the] court to be unsatisfactory."⁹⁶ The courts consistently held that as long as the seizure was a mere possessory procedure, permitting a citizen subsequently to appeal to a court for redress, the Fifth Amendment was not violated, and they found that sections 7c and 9a, permitting an action against the Custodian by any claimant not an enemy satisfied this requirement.⁹⁷ The decisions went even further, confirming the summary powers of the Custodian, even though in exercising them he obtained "a good deal more than possession," namely, the power to sell the property as long as no claimant appeared.⁹⁸ And beyond this, the courts decided that the statute was valid, although it gave to a citizen-claimant whose property was seized and sold before he filed his claim no more than the proceeds from the sale.⁹⁹ Further than that, however, the courts refused to go. Thus, it was held¹⁰⁰ that the remedy given by sections 7c and 9a would have

95. *United States v. Russell*, 13 Wall. 623 (U. S. 1871); see also *In re Inland Waterways*, 49 F. Supp. 675 (D. Minn. 1943).

96. *Salamandra Ins. Co. v. N. Y. Life Ins. & Trust Co.*, 254 Fed. 852, 857 (S. D. N. Y. 1918).

97. *Commercial Trust Co. v. Miller*, 262 U. S. 51 (1923); *Stoehr v. Wallace*, 255 U. S. 239 (1921); *Central Trust Co. v. Garvan*, 254 U. S. 554 (1921); *Baltimore & Ohio R. R. v. Sutherland*, 18 F. (2d) 560 (C. C. A. 4th, 1927); *Kahn v. Garvan*, 203 Fed. 909 (S. D. N. Y. 1920); *Salamandra Ins. Co. v. New York Life Ins. & Trust Co.*, 254 Fed. 852 (S. D. N. Y. 1918). See also *Stern v. Newton*, N. Y. L. J., Feb. 6, 1943, p. 519, col. 7 (Sup. Ct.).

98. *Central Trust Co. v. Garvan*, 254 U. S. 554 (1921).

99. *Sielcken-Schwartz v. American Factors*, 60 F. (2d) 43 (C. C. A. 2d, 1932).

100. *Becker Steel Co. v. Cummings*, 296 U. S. 74 (1935).

been inadequate if the Custodian had had the power to deduct his expenses from the amount due a citizen-claimant.

Specific alien property legislation, passed under the general war powers, can affect the property of a citizen only incidentally in the manner just referred to. With respect to this kind of legislation, it is therefore much more important to ascertain to what extent the Fifth Amendment protects persons other than citizens.

As far as alien friends are concerned, this question has been clearly settled in their favor in *Russian Volunteer Fleet v. United States*.¹⁰¹ That case involved a United States Government corporation which, acting under the statute of June 14, 1917, concerning alien ships,¹⁰² requisitioned certain Russian ships which were then in the course of construction in the United States. The statute, which was based on the war powers, had expressly permitted such confiscation, but had provided that just compensation was to be paid to the owner. Subsequently, the compensation was ascertained by the Government, but was refused by the assignee of the ship owner as unsatisfactory. The assignee, a Russian corporation, thereupon sued the United States in the Court of Claims for the payment of just compensation. The court decided that it lacked jurisdiction because of the provisions of section 155 of the Judicial Code¹⁰³ which excludes actions against the United States by aliens whose country does not grant reciprocity. The Supreme Court decided that these provisions should not have been read into the Act. It held that "the petitioner was an alien friend and as such was entitled to the protection of the Fifth Amendment" and that the Amendment is "a standard for our government which the Constitution does not make dependent upon the standards of other governments."¹⁰⁴ This holding was subsequently affirmed in *Becker Steel Company v. Cummings*.¹⁰⁵ In that case the Court, for the avowed purpose of preserving the constitutionality of the 1917 statute, permitted a construction of sections 9a and 7c which was favorable to non-enemy claimants. The Court held that in order to be constitutional, the statute must offer to non-enemy claimants a remedy adequate to assure them the return of their property if improperly seized.

With respect to enemies, the question seems to be settled against them by those various cases, previously discussed, which permitted certain acts of confiscation against enemy property under the 1917 Act.¹⁰⁶ One of these cases expressly held that the confiscation of enemy property was

101. 282 U. S. 481 (1931).

102. 40 STAT. 182 (1917).

103. 36 STAT. 1135 (1911), 28 U. S. C. § 261 (1940).

104. *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 492 (1931).

105. 296 U. S. 74 (1935).

106. *Cummings v. Deutsche Bank und Disconto Gesellschaft*, 300 U. S. 115 (1937); *Woodson v. Deutsche Gold und Silber Scheideanstalt*, 292 U. S. 449 (1934); *United States v. Chemical Foundation, Inc.*, 5 F. (2d) 691 (C. C. A. 3d, 1925).

possible "by the exertion of the war power and [was] untrammelled by the due process and just compensation clauses."¹⁰⁷

Alien Friends and Enemies.

The standard of necessity derived from the general purpose of the war powers is, therefore, now supplemented, in the case of the property of alien friends, by the requirements of due process and just compensation; while in the case of enemies, these requirements do not apply. Thus the Fifth Amendment constitutes the only dividing line between the property of enemies and alien friends in this field of legislative action. Where alien property legislation affects enemies, regulatory measures, as well as acts of confiscation, are permissible to the extent required by the war effort. In the case of alien friends, regulatory measures are available to the same extent as in the case of enemies, while confiscation requires just compensation and due process.

This distinction, clear as it may seem, is not easily applied to practical situations because of the ambiguity of the terms "alien friend" and "enemy." As used in the 1917 Act, these terms did not in any way conform to the meaning given them by the Court in the *Russian Volunteer Fleet* case. A national of an enemy occupied country, for example, whom the 1917 statute considered to be an enemy,¹⁰⁸ must be held to be protected by the Fifth Amendment by anyone who reads the apodictic language of the *Russian Volunteer Fleet* case. After 1918, Congress solved this dilemma by exempting from confiscation the property of so many groups of alien owners that the remaining property was undoubtedly only property of enemies in the narrower sense of the word.¹⁰⁹ Since then the term "enemy" has become even more complex in its implications. Today, when partisans and saboteurs work behind the enemy's ranks and when the enemy himself regards large groups of his nationals as his own enemies, the wisdom of a determination of enemy character simply on the basis of nationality is questionable.¹¹⁰

The release of enemy property which Congress decreed after World War I was accompanied by a resumption of the general discussion of the entire alien property question. However, this discussion again proceeded solely from the viewpoint of the law of nations, without consideration of the limitations on domestic legislative powers. Most writers took the position that the pre-war rule of international law, which established the

107. *Cummings v. Deutsche Bank und Disconto Gesellschaft*, 300 U. S. 115, 120 (1937).

108. 40 STAT. 411 (1919), 50 U. S. C., App., § 4a (1940).

109. See p. 762 *infra*.

110. DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* (1943) 24-120; Biddle, *The Problem of Alien Enemies* (1942) 3 FREE WORLD 201; Sommerich, *loc. cit. supra* note 20; Wilson, *Treatment of Civilian Enemy Aliens* (1943) 37 AM. J. INT. L. 30.

inviolability of private property, was still in existence and that the policies pursued by most participants in the war had not weakened the power of this rule. John B. Moore, calling the practice pursued during the war a "reversion to evil practices under righteous pretenses,"¹¹¹ claimed that the war had not developed any new facts which could justify the violations of enemy property that had taken place. He felt that previous wars had been just as violent and just as sanguine as World War I. Edwin M. Borchard pointed out that confiscatory policies tend to support the disintegration of the entire institution of private property.¹¹²

The post-war administration fully supported these views. It was by the direction of President Harding that the Government brought action to nullify the confiscatory sale of patents to the Chemical Foundation.¹¹³ Solicitor General Stone, arguing the case for the Government, requested the Court in vain to condemn the sale as "subversive of the future of the country."¹¹⁴ Other Government representatives, discussing the post-war policy of holding enemy property as security for American claims, carefully, though not quite logically, emphasized that nobody in Congress regarded this measure as "confiscatory in the ordinary sense of the word" and that the administration by supporting it did not mean to advocate any policy of confiscation.¹¹⁵ As late as 1937, Secretary of State Cordell Hull took the position that confiscation of enemy property is not in keeping with the national practice, that it is harmful to American investors, and that "the taking over of such property, except for a public purpose and coupled with the assumption of liability to make just compensation, would be fraught with disastrous results."¹¹⁶

Similar attitudes were expressed in various international conferences. The International Law Association in 1924 resolved that "it [was] formally of the opinion that the revived practice of warring states, by which they confiscate the valuable property of alien citizens, [was] a relic of barbarism, worthy of the most severe condemnation."¹¹⁷ The International Chamber of Commerce took similar action.¹¹⁸

111. Moore, *Fifty Years of International Law* (1937) 50 HARV. L. REV. 395, 421; see also MOORE, *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS* (1924) 13-25.

112. Borchard, *Enemy Private Property* (1924) 18 AM. J. INT. L. 523, 532.

113. *United States v. Chemical Foundation, Inc.*, 5 F. (2d) 191 (C. C. A. 3d, 1925).

114. Brief for Appellant, p. 499, *United States v. Chemical Foundation, Inc.*, 5 F. (2d) 191 (C. C. A. 3d, 1925).

115. *Hearings before Committee on Interstate and Foreign Commerce on H. R. 13496*, 67th Cong., 4th Sess. (1922) 301, 313, cited, together with numerous similar statements, in HAYS, *ENEMY PROPERTY IN AMERICA* (1923) 57.

116. Letter to Senator Capper, May 27, 1935, quoted in Borchard, *Confiscations: Extraterritorial and Domestic* (1937) 31 AM. J. INT. L. 675, 680.

117. Stockholm Conference of International Law Association, 1924, quoted in BITTER AND ZELLE, *NO MORE WAR ON FOREIGN INVESTMENTS* (1933) 75.

118. Resolution to Guarantee Property in Peace and War, World Conference of 1923, quoted, *id.* at 77.

Proposals for rules forestalling future recurrences of the practice were legion. They ranged from a demand to codify the international law on enemy property,¹¹⁹ and for a "Kellogg Pact for private property,"¹²⁰ to demands for a series of bilateral treaties.¹²¹ The last mentioned proposal was actually followed by the United States in a number of instances.¹²²

Other writers, however, felt that modern warfare and changed economic conditions had shown clearly that enemy property could not be left in the hands of its owners without interference. Their suggestion was that the sequestration of enemy property should be permissible.¹²³

FIRST WAR POWERS ACT OF 1941

When the United States entered the second World War, the Trading with the Enemy Act of 1917 was still on the books. However, it was not apparent whether all of its terms could be applied to the new situation. Some special provisions of the statute had already been invoked by the President even before this country entered the war. These were the provisions of section 5b,¹²⁴ which permitted the President, during any period of national emergency, as well as in time of war, to regulate transactions involving foreign exchange and foreign property rights. This had been used by the President between April, 1940, and July, 1941,¹²⁵ to establish the so-called "freezing control" of the Treasury over foreign assets. Other provisions of the statute came into effect immediately as a result of the declaration of war. Among them were section 3a, which prohibits commercial intercourse with the enemy, and section 7b insofar as it stays actions brought in our courts by enemy nationals.¹²⁶ No certainty existed, however, with respect to the most important provisions of the Act under which the Custodian had operated during the last war. To some extent they were undoubtedly only applicable to the specific situation which prevailed in and after 1918. This was true, particularly in the case of sections 9 and 12 insofar as they arranged for the release of enemy property

119. GARNER, *PROC. AM. SOC. INT. L.*, 27th Ann. Meeting (1933) 118 *et seq.*

120. BITTER AND ZELLE, *loc. cit. supra* note 117.

121. Borchard, *Reprisals on Private Property* (1936) 30 *AM. J. INT. L.* 108.

122. GIBSON, *loc. cit. supra* note 49.

123. GATHINGS, *loc. cit. supra* note 25.

124. 40 STAT. 411 (1919), as amended by 48 STAT. 1 (1933), 54 STAT. 179 (1940), 50 U. S. C., App., § 5b (1940).

125. EXEC. ORDER No. 8389, 5 FED. REG. 1400 (1940), as amended; DOCUMENTS PERTAINING TO FOREIGN FUNDS CONTROL (U. S. Treasury Dep't 1943). See THIESING, *CONTROL OF FOREIGN OWNED PROPERTY IN THE UNITED STATES* (1941).

126. 40 STAT. 411 (1919), 50 U. S. C., App., §§ 3a, 7b (1940). See Davis, *Trading with the Enemy*, *N. Y. L. J.*, Dec. 19, 1941, p. 2048, col. 1; *Ex parte Kumezō Kawato*, 317 U. S. 69 (1942); *Ex parte Colonna*, 314 U. S. 510 (1942).

seized by the first Custodian. Section 7c,¹²⁷ which contained the core of the Custodian's powers, was not expressly restricted to the first World War situation, but it could well be said that this section was too closely connected with other obsolete provisions to stand alone.

Congress aggravated rather than solved these problems when it adopted the First War Powers Act in 1941,¹²⁸ since certain ambiguities in the new statute raised problems of construction in addition to the old question of determining the extent of legislative powers over alien property.

The First War Powers Act established entirely new powers for the seizure of alien property, which it incorporated in section 5b of the Trading with the Enemy Act. Under section 5b these powers are given not necessarily to an Alien Property Custodian, but to such person or agency as the President may designate; they are available not only during the time of war, but also during any other period of national emergency; they can be made to apply without distinction to the property not only of enemies, but of any foreign government or national; their exercise results not only in the transfer of possession, but in the "vesting" of the property in question in the designated person or agency; and any property thus vested may be "held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States."¹²⁹

These terms are very far reaching. Stretched to their limits they would even cover the vesting and subsequent liquidation of the property of our closest allies during any time of national emergency, a possibility which was hardly contemplated by Congress. Whether such an extreme interpretation of the statute is at all feasible need not be decided for our purposes. We are concerned with the vesting powers only to the extent to which they have actually been put into effect. So far this has been done only once—by the President's Executive Order 9095.¹³⁰

Executive Order 9095 designates a newly established Office of Alien Property Custodian as the recipient of the vesting powers, and it authorizes the new Custodian to vest six certain classes of property rights and no more. Three of these classes refer exclusively to enemy property. Taken together, they comprise all enemy property within the jurisdiction of the United States, with the exception of cash and securities which are left under the freezing control of the Treasury. The remaining three classes comprise a number of property rights of non-enemy aliens, namely, patents, copyrights and trade-marks, ships, and business enterprises. Alien patents, copyrights and trade-marks, as well as ships, are subjected, un-

127. 40 STAT. 411, 460 (1919), 50 U. S. C., App., §§ 7c, 9, 12 (1940).

128. 55 STAT. 838 (1941), 50 U. S. C., App., §§ 611-22 (Supp. 1942).

129. 40 STAT. 411 (1919), 50 U. S. C., App., § 2a (1940).

130. EXEC. ORDER No. 9095, 7 FED. REG. 1971 (1942), as amended by EXEC. ORDER No. 9193, 7 FED. REG. 5205 (1942).

conditionally, to the vesting powers. Alien business enterprises may be vested only if "the national interest" so requires.

Section 5b, taken together with Executive Order 9095, furnishes certain new definitions of persons who are to be considered enemies. Under the Act of 1917, enemy status was based on residence within either the enemy territory itself or any territory occupied by the military or naval forces of the enemy.¹³¹ Under the amended section 5b, residence is no longer the decisive factor. The statute makes use of the more elastic term "national" which was defined, in a previous Executive Order establishing the freezing regulations,¹³² as comprising not only residents of the enemy country, but also persons acting or purporting to act for the benefit of the enemy and "any other person who there is reasonable cause to believe" is a national as defined in that Executive Order.

Persons within enemy occupied territory are no longer necessarily to be considered enemies. They are non-enemy nationals unless they are citizens of an enemy country, or controlled by or acting on behalf of an enemy, or "the national interest" requires that they be treated as enemies. Aliens who live neither in enemy territory, nor enemy occupied territory, may be considered as enemy nationals only if they are controlled by or acting on behalf of the enemy, or if the national interest of the United States requires that they be treated as enemy nationals. In other words, mere enemy citizenship is not a sufficient ground for the vesting of property under the Executive Order.

This new arrangement should be welcomed because it endeavors to protect the property of those victims of enemy aggression which it has been found unnecessary to seize.¹³³ Unfortunately, however, it has not been followed in practice. For the Custodian has vested all patents of nationals of enemy occupied countries, along with those of the enemy, without examining whether each particular patent is required to be vested in the national interest.

Nature of Vesting Powers

A very stimulating attempt to establish the nature of these vesting powers and their relation to the old act has been made by J. F. Dulles.¹³⁴ The analysis set forth by him is apparently motivated by the radical use which the Custodian has made of the vesting powers in the case of alien

131. 40 STAT. 411 (1919), 50 U. S. C., App., § 2a (1940).

132. EXEC. ORDER NO. 8389, 5 FED. REG. 1400 (1940), as amended by Section 5c, EXEC. ORDER NO. 8785, 6 FED. REG. 2898 (1941).

133. Except with respect to section 5b, the definitions of section 2 are still in force; *Drewry v. Onassis*, N. Y. L. J., Nov. 17, 1942, p. 1496, col. 3.

134. Dulles, *The Vesting Power of the Alien Property Custodian* (1943) 28 CONN. L. Q. 245.

owned patents. Dulles suggests that in view of the applicability of the new provisions to any alien, friendly or enemy, and in view of their availability not only in wartime, but also in times of national emergency, they cannot possibly derive from any right to confiscate enemy property. He also excludes the possibility that they are an exercise of the general governmental powers of eminent domain because no specific use by the United States of vested property is indicated in the statute and because the Act does not comply with certain other typical requirements of eminent domain statutes. Dulles continues by emphasizing the close connection which exists between vesting powers and freezing control, both of which are contained in the same sentence of section 5b. He concludes that vesting powers are given solely to assure the effectiveness of freezing control by placing some of the property which is subject to that control into the hands of a public administrator.

The result of this contention would be that vesting powers do not permit any confiscatory acts but only regulatory measures in aid of the freezing control. If this were true, the Custodian would have to be satisfied with the position of a mere sequestrator. The language of the statute is not incompatible with these conclusions, for the powers to liquidate, sell and otherwise deal with vested property which, according to the statute, are given to the Custodian, can be assumed to have been given to him only for the purpose of preserving the values which are in his hands. Of course, a considerable number of steps which the Custodian has already taken (and foremost among them are the patent policies adopted by him which result in a destruction of values rather than in their preservation) would appear under this interpretation to exceed his legitimate powers.

This construction of the statute does not, however, do justice to the requirements of the war situation and is contrary to the apparent intention of Congress. If the statute permitted nothing but the sequestration of vested property, confiscatory acts would not even be allowed where the war effort necessitates the use of alien property, and it would make no difference if this country were perfectly willing to pay just compensation to the alien owner. This result can hardly be said to be desirable in the case of property owned by alien friends although such property, if actually needed, could at least be taken under those war statutes which permit the taking of property of citizens,¹³⁵ and on the same terms as those which apply to citizen owners. But the result would be entirely inadequate insofar as vesting powers apply to enemy property. None will doubt that Congress intended to make enemy property available for the war effort to the extent permitted under the Constitution. For all of these reasons it would,

135. Property Requisition Act, 55 STAT. 742, 50 U. S. C., App., §§ 611-22 (Supp. 1942), as amended by the Second War Powers Act, 56 STAT. 156, 50 U. S. C., App., §§ 632, 636 (Supp. 1942).

therefore, be preferable to assume that Congress in section 5b did establish powers which are elastic enough both to provide for the necessary use of enemy property and to furnish to alien friends that degree of protection to which they are entitled.

This assumption is supported by the fact that vesting powers were established by the First War Powers Act, the title of which indicates that it was meant to be an exercise of the war powers of Congress. The only open question is whether the vesting powers are an exercise of the absolute right of capture or of the more limited general war powers over alien property. In view of the comparison between the Confiscation Act of 1862 and the Trading with the Enemy Act, it is apparent that the vesting powers cannot convey any unlimited right of confiscation. For this right of confiscation cannot possibly apply to the property of non-enemies, while both section 5b and Executive Order 9095 permit the vesting of non-enemy property. Vesting powers do, however, meet the tests which have been established for alien property legislation based on the general war powers of Congress. They are delegated to a fact finding administrative agency which may exercise its discretion in applying them. They permit a series of different measures against vested property, none of which result in the final forfeiture of the property to the United States. The vesting powers are, therefore, restricted by the limited purposes of the general war power in the same manner in which the powers given to the Custodian by the 1917 Act were restricted. Consequently, they must be held to authorize the Custodian to take only such measures as are necessary for the successful pursuit of the war effort and for the re-establishment of peace.

This relative character of the vesting powers has found a certain measure of recognition in the language employed in Executive Order 9095 and in the Custodian's own regulations and vesting orders. In some of the cases in which the President delegates discretionary powers to the Custodian, and in most cases in which the Custodian exercises such discretion under his authority, express reference is made to the national or the public interest. Under Executive Order 9095¹³⁶ business enterprises owned by alien friends may be vested if the Custodian determines that this action is "necessary in the national interest," and the property of nationals of enemy occupied countries may be vested if the national interest of the United States requires such action. The Custodian's General Order 26¹³⁷ claims that "the public interest requires" that vested property be liquidated and sold in certain ways. His Vesting Order 1¹³⁸ states "that the action

136. EXEC. ORDER No. 9095, 7 FED. REG. 1971 (1942), as amended by EXEC. ORDER No. 9193, 7 FED. REG. 5205 (1942).

137. 8 FED. REG. 7628 (1943).

138. 7 FED. REG. 1046 (1942).

herein taken is in the public interest." The same findings are contained in subsequent vesting orders. At present the term used in these orders is "deeming it necessary in the national interest."¹³⁹ Such findings are made in the case of the vesting of any kind of property which is subject to vesting powers, whether or not Executive Order 9095 requires the existence of a national interest. The only exception is made in orders vesting property in the course of liquidation.¹⁴⁰ This consistent invocation of the national interest would appear to be entirely unnecessary if the vesting powers were based on any absolute right of confiscation.

The vesting powers, like any other legislation concerning alien property, are subject to the due process and just compensation clauses of the Fifth Amendment insofar as they apply to property of alien friends. Unfortunately, the First War Powers Act does not take pains to provide for a full compliance with the requirements of these two constitutional provisions.

The new statute itself does not open the courts to a party aggrieved by a vesting order. If any recourse to the courts exists at all, it can only be derived from the terms of the 1917 Act. Section 9a of that Act authorized any person not an enemy, or an ally of an enemy, to claim "any interest, right, or title" in property seized by the Custodian, and it provided that an action to establish such interest, right, or title might be brought in the district courts.¹⁴¹ Section 5b, in its amended form, does not contain any similar provision. The question is, therefore, whether section 9a can be said to apply to the vesting of property under section 5b. The Custodian answers this question in the negative.¹⁴² He maintains that the courts have no jurisdiction to hear claims to vested property. If that were so, the statute would be unconstitutional, not only because it would deny due process to alien friends, but also because it would have the same effect upon citizens whose property the Custodian may have mistakenly found to be subject to his powers. The argument which is advanced in favor of the Custodian's assertion is that if section 9a permits any person not an enemy "to get back his property, if vested under 5b," "the clearly intended scope of 5b is drastically curtailed"; and it is added that the language of 9a, adopted in 1917, should not be used to defeat the specific

139. See VESTING ORDER No. 1508, 8 FED. REG. 10526 (1943).

140. See VESTING ORDER No. 1805, 8 FED. REG. 10313 (1943).

141. 40 STAT. 411 (1919), 50 U. S. C., App., § 9a (1940).

142. *Draeger Shipping Co. v. Crowley*, 49 F. Supp. 215, 216 (S. D. N. Y. 1943). The Custodian argues that the powers to seize enemy property under the old Trading with the Enemy Act have been repealed by implication because section 5b of the First War Powers Act carries its own punitive provisions disregarding the fact that section 16 of the old Act did provide for criminal sanctions.

intention of Congress expressed in section 5b, in 1941, to go beyond the limitations of the 1917 Act.¹⁴³

This argument is not convincing. Opening the courts to a non-enemy claimant does not necessarily mean that the vested property must be returned to him if he can prove his non-enemy character. That may have been true under the 1917 statute which permitted the seizure of enemy property only. In the case of a vesting under section 5b, however, it can well be said that section 9a merely establishes jurisdiction to hear non-enemy claimants and does not compel the court, in granting relief, to surrender the property to the claimant. If the Constitution does not warrant the vesting of the property at all, then it should of course be returned; if, however, the non-enemy claimant can only object to the taking of certain measures against his property by the Custodian, then the court should grant such relief as is appropriate to the situation. True, section 9a expressly said that the court should order the retransfer of property and did not expressly authorize any other form of relief. However, a broad interpretation of the statute is indicated. For "acts of Congress are to be construed and applied in harmony with, and not to thwart, the purpose of the Constitution."¹⁴⁴

The same conclusion has already been reached in a case decided in a district court in New York.¹⁴⁵ In that case the Custodian had found that the capital stock of a New York corporation, which was registered in the name of a citizen, was actually held by the latter for the benefit of a German corporation. On the basis of these findings the Custodian had vested the stock, dismissed the stockholder of record from his position as president, and was proceeding to liquidate the corporation. The motion of the Custodian to dismiss the complaint for lack of jurisdiction was denied. The court held that section 9a did apply. It stated that 5b and 9a are not incompatible because an alien claimant, even though he can prove that he is not an enemy, need not necessarily succeed in obtaining possession of the property. Apparently these words were meant to say that non-enemy claimants, although given their day in court, will not recover their property if the action taken by the Custodian against the property is warranted by section 5b.

Section 5b also fails to make provision for the payment of just compensation to alien friends whose property is confiscated. Again the statute must be interpreted in a manner which will save its constitutionality. A

143. Dulles, *loc. cit. supra* note 134.

144. *Becker Steel Co. v. Cummings*, 296 U. S. 74 (1935); *Russian Volunteer Fleet v. United States*, 282 U. S. 481 (1931); *Phelps v. United States*, 274 U. S. 341 (1927).

145. Judge Bondy, in *Draeger Shipping Co. v. Crowley*, 49 F. Supp. 215 (S. D. N. Y. 1943); see also *Stern v. Newton*, N. Y. L. J., Feb. 6, 1943, p. 519, col. 7 (Sup. Ct.), which presupposes the availability of a recourse to the courts.

recent article by Turlington¹⁴⁶ suggests such an interpretation. He proposes that section 5b should be considered to contemplate subsequent provisions for the payment of compensation to non-enemies and for the payment of either compensation or credit against claims to enemies or enemy governments.¹⁴⁷ Turlington feels that such provisions should now be prescribed either by the President, or, preferably, by Congress. The only objection which could be made to this suggestion is that the courts have held, in the case of eminent domain statutes, that the law as it exists at the time when property is taken must make provisions for the ascertainment and payment of compensation within a reasonable period of time.¹⁴⁸ However, section 5b is not an eminent domain statute. It stems from the war powers, and, as we have already seen, in the case of war power statutes the Supreme Court has applied the standards of the Fifth Amendment in an elastic manner which permits some consideration of the peculiar circumstances of the war situation.¹⁴⁹ In the light of these rulings, it may well be said that the failure of Congress to insert at the outset provisions for compensation into section 5b does not make the statute unconstitutional. During the hectic first days of the war, when section 5b was amended, immediate and effective action was the primary problem for the legislature. Moreover, most of the persons affected by the statute would not have been in a position, and will not be in a position while the war lasts, to take part in any compensation proceedings. There existed, therefore, ample reason to postpone until later the establishment of compensation proceedings.

During the time which has elapsed since December, 1941, the Custodian's office has accomplished, with admirable energy and efficiency, the great task of vesting and collecting a considerable amount of enemy holdings. The time may now have come for Congress to examine the results of this work and to reconsider the policies under which the Custodian is to manage his holdings. A number of pressing problems await Congressional determination. Foremost among them are the problems of providing due process and just compensation for alien friends and of establishing policy standards by which the administration will have to abide.

146. Turlington, *loc. cit. supra* note 20.

147. An interpretation of section 5b, as authorizing the final disposal of vested property by the President or the Custodian might conceivably be held to constitute an improper delegation of authority by Congress. See *Schechter v. United States*, 295 U. S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *United States v. Von Clemm*, 1 CCH 1943 War Serv. 9131 (C. C. A. 2d, 1943) (discussing the Treasury Regulations).

148. *Sweet v. Rechel*, 159 U. S. 380 (1895).

149. *Kahn v. Garvan*, 263 Fed. 909, 914, 916 (S. D. N. Y. 1920).