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NOTES

The Policy and Practice of the United States in the Treatment of Enemy Private Property

PRIOR TO 1914

In 1814 John Marshall regarded as rigid the rule of international law that enemy property, wherever found, is subject to seizure and confiscation by a belligerent, and considered it an expression of a sovereign right that would remain undiminished though the rule itself be mitigated in practice.¹ Yet he recognized as humane and wise the policy of curtailing in practice the exercise of this right² characterized by Chancellor Kent as "naked and impolitic * * *", condemned by the enlightened conscience and judgment of modern times."³ Furthermore, considering enemy property to present a problem rather of policy than of law, with power to confiscate residing in the legislature alone, he held that a declaration of war, in itself, did not confer upon the courts power to condemn to confiscation enemy private property within our territory in the absence of some expression of will to that effect on the part of Congress.⁴ Later, however, Marshall flatly denied the privilege of the conqueror to confiscate private property on the ground that such seizure would violate "the modern usage of nations, which has become law."⁵ The soundness of his supposition that usage may render unlawful the exercise of a right without impairing the right itself has been severely and authoritatively impugned.⁶

The extent to which by 1914 usage had established as United States policy the practice of exempting from confiscation the property of enemy aliens is somewhat controversial.⁷ Quite early in its history, however, this nation became committed to a policy designed to prevent a recurrence of the difficulties that arose out of the practice of sequestering debts due to British subjects during the Revolution. Article X of the treaty with Great Britain negotiated by John Jay in 1794 stipulated that debts due from individuals of one nation to individuals of the other, and other forms of private property of their respective nationals on each other's territory at the outbreak of war, should be exempt from sequestration and confisca-

1. See *Brown v. United States*, 8 Cranch. 110, 122 (U. S. 1814).

2. *Ibid.*

3. 1 KENT COMM. *65.

4. *Brown v. United States*, 8 Cranch. 110 (U. S. 1814).

5. See *United States v. Percheman*, 7 Peters 51, 86 (U. S. 1833).

6. See 7 MOORE, DIG. INT. LAW 313 (1906).

7. Compare Turlington, *Treatment of Enemy Private Property in the United States before the World War*, 22 AM. J. INT'L L. 270 (1928), with Borchard, *Treatment of Enemy Private Property in the United States before the World War*, 22 AM. J. INT'L L. 636 (1928).

tion.⁸ Treaties embodying this basic policy against confiscation were offered during the first century of our national existence to practically all foreign nations.⁹ In a cogent and eloquent exposition of the underlying principles of this policy, Alexander Hamilton wrote:

"The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security * * *. An extraordinary discretion to resume or take away the thing, without any personal fault of the proprietor, is inconsistent with the notion of property * * *. It is neither natural nor equitable to consider him as subject to be deprived of it for a cause foreign to himself; still less for one which may depend on the volition or pleasure, even of the very government to whose protection it has been confided; for the proposition which affirms the right to confiscate or sequester does not distinguish between offensive or defensive war; between a war of ambition on the part of the power which exercises the right, or a war of self-preservation against the assaults of another."¹⁰

This non-confiscatory principle not only pervaded the treaties of this period but also consistently characterized the executive policy propounded at international conferences.¹¹ Congress was equally consistent in uniformly abstaining from authorizing confiscation in any of the foreign wars in which this nation engaged prior to World War I.¹² Furthermore, this uniform practice was paralleled abroad; no case of confiscation of enemy private property occurred in any of the international wars between 1793 and 1914. A century of desuetude seemed to justify concluding that the nations of the world had abnegated the formerly asserted right, and that the practice of abstention had crystallized into a customary rule of international law prohibiting such confiscation. Judicial declarations supported this conclusion.¹³

8. 1 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS 597 (1910).

9. See MARTIN AND CLARK, AMERICAN POLICY RELATIVE TO ALIEN PROPERTY, SEN. DOC. NO. 181, 69th CONG., 2d Sess. 5, 19 (1926).

10. See 4 WORKS OF ALEXANDER HAMILTON 412 (Lodge's ed. 1885).

11. Borchard, *supra* note 7, at 639.

12. The Acts of 1861 and 1862 were not general confiscatory measures affecting enemy private property as such, but only penal provisions for the punishment of rebellious citizens. See Comment, 28 YALE L. J. 478, 481 (1919). But see 35 HARV. L. REV. 961 (1922).

13. See *The Paquete Habana*, 175 U. S. 677, 686, 20 Sup. Ct. 290, 294, 44 L. Ed. 320, 323 (1900), in which Justice Gray reviews the origin and reasons for the rule exempting fishing vessels from capture as a prize; *United States v. Klein*, 13 Wall. 128, 137 (U. S. 1871) in which Chief Justice Chase declared: "The Government recognized to the fullest extent the humane maxims of the modern law of nations which exempt private property of non-

DURING WORLD WAR I

The expressed policy and early practice of the United States during the first World War was consistent with the principle that forbade confiscation of enemy private property. Thus, the Trading with the Enemy Act,¹⁴ adopted six months after we entered the war, authorized appointment of an alien property custodian to receive, control, and hold in trust enemy private property for the avowed purpose of preventing its use in the enemy interest. The Act clearly contemplated sequestration rather than confiscation.¹⁵ By section 12 of the act the custodian was "vested with all the powers of a common-law trustee," and empowered to dispose of the property, by sale or otherwise, "if and when necessary to prevent waste and protect such property and to the end that the interests of the United States in such property and rights of such persons as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded."¹⁶

Acting under the authority of this Act, the Alien Property Custodian seized enemy-owned property and funds in an amount aggregating about six hundred million dollars.¹⁷ Convinced that many of the sequestrated investments represented sinister attempts to secure control of American industry, and wishing to prevent German participation in the profits from investments in war industries, the Custodian recommended that the act be amended to give him an absolute power of sale of all enemy property and interests in this country, the cash received to be invested in Liberty bonds to be held in trust for the German interests. By an amendment in accordance with these recommendations adopted in March, 1918, the qualifying words "if and when necessary to prevent waste" were replaced by the words "in like manner as though he were the absolute owner thereof."¹⁸

Armed with this increased authority, the Custodian proceeded perhaps overzealously "to make the trading-with-the-enemy act a fighting force in the war."¹⁹ Many of the trusts were sold at inadequate prices for the admitted purpose of injuring the owners;²⁰ a number of these sales were made after the armistice had called a halt to hostilities. Thus, in April, 1919, 4,700 patents and a large number of trade-marks were sold for a quarter of a million dollars to the Chemical Foundation, a corporation formed to acquire them

combatant enemies from capture as booty of war." *But see* *Herrera v. United States*, 222 U. S. 558, 572, 32 Sup. Ct. 179, 183, 56 L. Ed. 316, 320 (1912); *Miller v. United States*, 11 Wall. 268, 305, 20 L. Ed. 135, 144 (1871).

14. 40 STAT. 411 (1917).

15. *Banco Mexicano v. Deutsche Bank*, 289 Fed. 924 (App. D. C. 1923); *see Stöhr v. Wallace*, 269 Fed. 827, 834 (S. D. N. Y. 1920). See also H. R. REP. NO. 1623, 69th Cong., 2d Sess. 4 (1926).

16. See "Historical Note" to 50 U. S. C. A. App. § 12 (1928).

17. REP. ALIEN PROP. CUST. 142 (1944).

18. 40 STAT. 460 (1918).

19. REP. ALIEN PROP. CUST. 15 (1919).

20. See Borchard, *Enemy Private Property*, 18 AM. J. INT'L L. 523, 530 (1924).

as trustee for the chemical industry of this country.²¹ This "Americanization" campaign of the Custodian drew a caustic comment from John Bassett Moore:

"In the original statute the function of the alien property custodian was defined as that of a trustee. Subsequently, however, there came a special revelation, marvelously brilliant but perhaps not divinely inspired, of the staggering discovery that the foreign traders and manufacturers whose property had been taken over had made their investments in the United States not from ordinary motives of profit but in pursuance of a hostile design, so stealthily pursued that it had never before been detected or even suspected, but so deadly in its effects that the American traders and manufacturers were eventually to be engulfed in their own homes and the alien plotters left in grinning possession of the ground. Under the spell engendered by this agitating apparition, and its patriotic call to a retributive but profitable war on the malefactors' property, substantial departures were made from the principle of trusteeship."²²

The Trading with the Enemy Act had provided that "After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."²³ After the armistice, in successive enactments amending section 9 of that Act, Congress authorized immediate restitution to several classes of persons.²⁴ In reporting favorably on one of these bills, the House Committee on Foreign and Interstate Commerce affirmed as the constant intention of Congress that the property held in custody during the war or its proceeds should be returned to the owners at the war's termination, and further asserted that, "It has never been the purpose or the practice of the United States to seize the private property of a belligerent to pay our Government's claims against such belligerent. Such practice is contrary to the spirit of international law throughout the world."²⁵

The spirit of international law in 1919, as understood by its students throughout the world, most certainly demanded, upon restoration of peace, restitution to the ex-enemy subject of his property with its accumulated profits. To the astonishment and dismay of those students, however, the Treaty of Versailles included a pro-

21. Sommerich, *A Brief against Confiscation*, 11 LAW & CONTEMPT. PROB. 152, 161 (1945). This sale was characterized as subversive and condemned as a "dangerous precedent in American public life" by Attorney General Harlan F. Stone, *ibid.*; nevertheless, it was sustained by the Supreme Court. *United States v. Chemical Foundation*, 272 U. S. 1, 47 Sup. Ct. 1, 71 L. Ed. 131 (1926).

22. MOORE, *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS* 22 (1924).

23. 40 STAT. 424 (1917).

24. 41 STAT. 35 (1919); 41 STAT. 977 (1920); 41 STAT. 1147 (1921).

25. H. R. REP. NO. 1089, 66th Cong., 2d Sess. 3 (1920).

vision permitting the victors to retain and dispose of sequestered alien property, the proceeds to be used to pay private debts and public reparations, and charging Germany with the obligation of reimbursing her expropriated nationals.²⁶ Referring to this provision, Professor E. M. Borchard remarked:

"Thus, at one stroke of the pen an institution which was deemed impregnable and fundamental to the existing economic order, and the history and economic basis of which could hardly have been adequately realized by the treaty-makers, was temporarily, at least, undermined. This cannot be deemed a service to mankind, nor in the long run, to the participating countries. If, as is commonly assumed, one of the principal functions of law is to insure the security of acquisitions, one cannot fail to remark how seriously that function has been impaired. * * * For a temporary gain of a few millions within easy reach, the clock has been turned back several hundred years and there has been revived an ancient barbaric practice which is likely to do incalculable harm before a wiser generation will undo it."²⁷

The Versailles Treaty was never ratified by the United States; however, the Treaty of Berlin included a provision²⁸ that all property of the Central Powers, public or private, in the possession of the United States, should be retained until those governments or their successors "shall have respectively made suitable provision for the satisfaction of all claims" of American citizens. The Winslow Act of 1923,²⁹ providing for the return of property or its net proceeds up to a maximum of \$10,000 to each owner, disposed of about ninety per cent of the trusts.³⁰ Five years later the Settlement of War Claims Act³¹ was passed. Under its provisions the return of the property belonging to Austrians and Hungarians was conditioned upon payment by their governments of an amount sufficient to cover the Tripartite Claims Commission's awards to American citizens. This act also provided for the immediate return to German nationals of eighty per cent of their property or its proceeds still held by the United States, conditioned upon their consenting to postponement of return of the remainder. Claims of American nationals were to be paid in full.

Final settlement under this act was frustrated by failure of Germany to meet her annual payments in satisfaction of awards made by the Mixed Claims Commission, which failure induced passage of the Harrison Resolution³² in 1934, postponing further American

26. Art. 297, 3 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS 3464 (1923).

27. See Borchard, *supra* note 20, at 525.

28. 3 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS 2597 (1923).

29. 42 STAT. 1511 (1923).

30. Borchard, *supra* note 20, at 531.

31. 45 STAT. 254 (1928).

32. 48 STAT. 1267 (1934).

payments for so long as Germany should remain in arrears. The resolution was held by the Supreme Court to bar recovery on claims filed before its adoption; since the United States held an absolute title in the seized property, the grant was merely a matter of grace and could be withdrawn without violating the Fifth Amendment.³³

Nonetheless, the Court recognized a clearly disclosed congressional intent that former owners of seized property should receive just treatment by restitution or compensation.³⁴ That the executive policy on the eve of the Second World War was in agreement with this judicially recognized congressional policy is evidenced by a statement made by Secretary of State Hull:

"It is important * * * that the United States should not depart in any degree from its traditional attitude with respect to the sanctity of private property within our territory whether such property belongs to nationals of former enemy powers or to those of friendly powers. A * * * 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."³⁵

DURING WORLD WAR II

The complexity of international economy considerably increased in the years intervening between World Wars I and II, thereby facilitating employment of new methods for conducting economic warfare. Anticipating a renewal of conflict, the Axis powers were astute in devising schemes for concealing their beneficial ownership and control of property and interests in the United States.³⁶ The machinery for controlling enemy property used in the previous war was rapidly rendered obsolete.

The imperative need for speedy and flexible methods to meet totalitarian tactics impelled a series of administrative measures supplemented later by legislative action. Following the German invasion of Norway and Denmark, the President issued the first of a group of executive orders³⁷ freezing, except upon Treasury Department authorization, the movement or transfer of any property in the United States owned by designated countries or their nationals, thereby preventing acquisition of an interest therein by the occupying enemy. Immediately after our formal entry into the second World War, the First War Powers Act was passed, Title III of which amended Section 5 (b) of the Trading With the

33. *Cummings v. Deutsche Bank*, 300 U. S. 115, 57 Sup. Ct. 359, 81 L. Ed. 545 (1937).

34. *Id.* at 120, 57 Sup. Ct. at 362, 81 L. Ed. at 550.

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

36. Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 LAW AND CONTEMP. PROB. 17, 52 (1945).

37. Exec. Order No. 8389, 5 FED. REG. 1400 (1940), as amended by Exec. Order No. 8785, 6 FED. REG. 2897 (1941); Exec. Order No. 8832, 6 FED. REG. 3715 (1941).

Enemy Act of 1917; it strengthened the President's existing regulatory power and added the power to vest in such agency as he might designate "any property in which any foreign country or a national thereof has any interest" to be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States."³⁸ The old Office of Alien Property Custodian having been abolished by Executive Order No. 6694 in 1934, and its functions transferred to the Office of the Attorney General, the President established a new Office of Alien Property Custodian in March, 1942,³⁹ delegating to the Custodian far broader powers than those possessed by the World War I official. His discretionary jurisdiction over designated alien property was made to include, but was not limited to, the power to direct, manage, supervise, control or vest enemy business property, patents, property under judicial administration, and any other property of enemy nationals except fluid assets and intangibles. The latter were left under Treasury jurisdiction unless and until the Custodian determined that they were necessary to maintain or safeguard other property of the same enemy national. It is to be noted that the machinery thus established for the control of foreign property and interests differs considerably in power and somewhat in purpose from its World War I counterpart. The President's power to sequester enemy property under the Trading with the Enemy Act of 1917 did not include power to use it to our own advantage; as previously indicated, the amendment added that power. While the former law provided the power to seize enemy alien property, the present provision goes much further and gives the Government's agents power to seize and utilize property owned by foreign friend or foe. Furthermore, in determining who are enemy nationals, the Custodian was granted great leeway for the exercise of administrative discretion since the customary criteria of citizenship, residence, place of organization and place of doing business were no longer solely controlling; a person could be so classified though not within an enemy country if the Custodian determined that such person was an agent for or controlled by a person within an enemy country, or that such person was a citizen or subject of an enemy country within an enemy-occupied country, or that "the national interest" required such person to be treated as an enemy national.⁴⁰

This increase in power was made necessary by a broadening of purpose, which in turn reflected the complexity and magnitude of the problems presented by economic warfare against totalitarian states. The Axis powers had waged economic warfare in the Western Hemisphere long before the severance of diplomatic relations between those powers and the American Republics, infiltrating into our economy with subtle devices designed to secure control of im-

38. 50 U. S. C. APP. §§ 5(b), 616 (1946).

39. Exec. Order No. 9095, 7 FED. REG. 1971 (1942), as amended by Exec. Order No. 9193, 7 FED. REG. 5205 (1942).

40. *Ibid.*

portant industries⁴¹ and provide funds to foster subversive activities within this and other American nations.⁴² These Axis activities had a further long range purpose of providing a cache for salvaging assets in case of defeat, thus to perpetuate their power to again plan a war directed toward world domination.⁴³ Therefore, the aim in establishing administration of enemy property was not merely to immobilize Axis assets in America in order to prevent their use against us during the war, nor was it limited to turning those assets to use against the enemy; it extended to the complete extirpation of Axis influence in the national economy in order to preclude the possibility of the defeated aggressors thus perpetuating their power.⁴⁴

In contrast with the unitary method of administration of alien property followed in the previous war, this time a distinction was drawn between two broad classes of property and a dual control was established. Passive assets, such as cash and investment securities not involving control over production, were placed within the jurisdiction of the Treasury Department and subjected to its blocking and freezing controls to prevent a use of the property by the owner in a manner detrimental to the American interest.⁴⁵ Other types of property, particularly productive assets, patently demanding more positive control in order to assure maximum production in promotion of our own war effort, were placed under the jurisdiction of the Office of Alien Property Custodian.⁴⁶

In exercising his jurisdiction, the Custodian employed three basic forms of control. The least stringent form of supervision was exercised by the issuance of general orders and related regulations requiring persons claiming an interest in certain classes of property to perform or refrain from certain acts.⁴⁷ A second kind of control, in use chiefly during the early months of the war as an interim protective device in cases where the loyalty of the management of an enterprise was under investigation, involved the issuance of a supervisory order giving the Custodian control of the property without transferring title.⁴⁸ But the most important type of administration

41. Reeves, *supra* note 36, at 52.

42. Domke, *Western Hemisphere Control Over Enemy Property: A Comparative Survey*, 11 LAW & CONTEMP. PROB. 3 (1945).

43. 11 DEP'T STATE BULL. 383 (1944).

44. Domke, *supra* note 42, at 16.

45. See note 38 *supra*.

46. See note 41 *supra*. On Oct. 14, 1946, by Exec. Order No. 9788, the President terminated the independent Office of Alien Property Custodian, transferring his powers and functions to the Attorney General. The following day the Attorney General created in the Department of Justice the Office of Alien Property, delegating to its Director the powers and functions formerly granted to the Alien Property Custodian. In September, 1948, it being considered desirable to place jurisdiction over the assets remaining blocked on September 30, 1948, in the same agency administering the program of alien property control, the Attorney General was authorized and directed to assume that jurisdiction. 19 DEP'T STATE BULL. 303 (1948).

47. REP. ALIEN PROP. CUST. 20 (1943).

48. *Id.* at 19.

of enemy-controlled property resulted in an outright transfer of title to the Custodian, as a representative of the United States Government, accomplished by his issuance of a vesting order.⁴⁹

In pursuing the wartime objectives of obtaining complete control over enemy property in this country and fully exploiting it in the interests of the United States, the Custodian recognized that he had to reckon with possibly conflicting post-war objectives, decision on which was within the competence of Congress and not of the Custodian.⁵⁰ The alternative possibilities of returning or retaining seized property suggested different vesting policies. The first possibility, which was supported by precedent, suggested minimum vesting; yet maximum vesting would better accord with the second possible post-war policy.

Faced with this dilemma, the Custodian followed generally a policy of vesting all significant enemy property, public or private, where such action would contribute to the prosecution of the war.⁵¹ Vesting of such property as mortgages, life insurance and accounts owed to nationals of enemy countries was considered postponable.⁵² All interests of enemy nationals in patents and patent applications,⁵³ patent contracts,⁵⁴ and property under judicial supervision⁵⁵ were usually vested. Where the interests of enemy nationals were large enough to constitute actual or potential control of a business enterprise, the Custodian would normally issue a vesting order.⁵⁶ Two types of vesting orders were used, one vesting only the enemy interest in the enterprise and the other vesting all its assets, the type issued depending upon the nature of the enterprise in question.⁵⁷ As speedily as enemy influences could be removed and satisfactory sales arranged, the Custodian would transfer to private hands all vested properties except patents and copyrights.⁵⁸

The exception of vested patents from the general policy of prompt sale constituted a basic departure from the policies permitting seizure and sale adopted toward the close of the previous war. In World War II, in contrast with the belated action taken in World

49. *Ibid.*

50. REP. ALIEN PROP. CUST. 4 (1944).

51. *Ibid.* Until he was granted authority to vest all German and Japanese assets in the United States, the Custodian generally refrained from vesting real estate in which the vestible interest was less than \$2,500. In his 1945 report, however, the Custodian announced his intention to vest all German and Japanese real estate unless practically worthless. REP. ALIEN PROP. CUST. 138 (1945).

52. REP. ALIEN PROP. CUST. 4 (1944).

53. *Id.* at 90.

54. *Id.* at 105.

55. *Id.* at 133.

56. *Id.* at 25.

57. *Id.* at 26.

58. REP. ALIEN PROP. CUST. 66 (1943). *But cf.* Eisner, *Administrative Machinery and Steps for the Lawyer*, 11 LAW & CONTEMP. PROB. 61, 68 (1945). Vested business enterprises were either liquidated piecemeal or maintained as going concerns depending upon their necessity and importance to the war effort. Myron, *The Work of the Alien Property Custodian*, 11 LAW & CONTEMP. PROB. 76, 82 (1945).

War I, it was early determined that the most effective utilization of these patents during the war period and in the postwar economy could be achieved by retaining title and making them generally available to American industry without charge.⁵⁹ To assure the widest possible use of the inventions and processes covered by enemy owned patents vested by the Custodian, non-exclusive, royalty-free licenses were granted where no Americans held previously acquired exclusive licenses.⁶⁰ Any American holding an exclusive license under a vested enemy patent was privileged to retain his sole right of exploitation, the royalties then being payable to the Custodian, unless the issuance of additional licenses was deemed necessary to the war effort; however, he was equally privileged to relinquish his exclusive rights and accept a non-exclusive, royalty free license.⁶¹

The policy with respect to foreign copyrights was similar to that controlling patents. Generally, they were vested either to enable the Custodian to foster American publication of important works of a foreign national no longer available, or to collect royalties due from American licensees to enemy nationals.⁶² But an essential difference is to be noted in that patent vesting was universal with respect to those of nationals of enemy and enemy-occupied countries, while copyright vesting was selective, aimed at achieving the above stated purposes.⁶³

Selective vesting was likewise the policy adopted by the Custodian relative to trademarks. By vesting selected enemy-owned trademarks, the Custodian sought to protect the public generally from deception, to protect the interests of American firms legitimately using trademarks registered in the name of enemy nationals, to protect the prospective American purchaser of a vested business enterprise against any post-war claim by the enemy national for the use of the trademark, and to collect royalties accruing to nationals of enemy countries for the use of trademarks by American firms.⁶⁴ Unlike the practice in respect to patents and copyrights, certain vested trademarks were sold from the inception of the vesting program. Thus, those attaching to vested enterprises sold as going concerns were included in the sale; where related to non-vested enterprises, they were sold to the users; and where associated with vested patented products, use of them by the patent licensees was permitted.⁶⁵

The procedure generally followed in the disposition of vested

59. Sargeant and Creamer, *Enemy Patents*, 11 LAW AND CONTEMP. PROB. 92, 93 (1945).

60. REP. ALIEN PROP. CUST. 74 (1943).

61. *Id.* at 75.

62. REP. ALIEN PROP. CUST. 109 (1944).

63. *Ibid.* The major exception to this policy was the vesting on March 22, 1946, of the American copyright interests of German nationals in all published works reported in the *Halbjahrsverzeichnis* for 1941, 1942 and 1943, and in the *Deutsche Nationalbibliographie* for 1944.

64. REP. ALIEN PROP. CUST. 134 (1945).

65. *Id.* at 135 (1945).

property involved an adequately advertised public sale to the highest bidder, with the right reserved to weigh, in addition to monetary considerations, the likelihood of the bidders maintaining the property as a valuable producing unit in a freely competing economy in accordance with our national policy.⁶⁶ The "Americanizing" of the property to prevent its reverting to enemy control being a primary objective, these sales were made only to American citizens.⁶⁷ The devices adopted to prevent the return of vested enterprises to German nationals after the last war had proven largely ineffective; therefore this time reliance was placed upon careful selection of purchasers, rather than upon continuous supervision after sales, to achieve Americanization of the property.⁶⁸

The Custodian did not consider his program of selling vested properties to be incompatible with a possible post-war decision to provide full compensation to the former owners. Premising in general that these original owners would be interested not in specific pieces of property but in the economic value of their property as a source of income, he concluded that the converting of the vested property into cash by sales at the best price obtainable under current market conditions did not in any way prejudice the character of any ultimate settlement.⁶⁹ Nor did the Custodian consider the vesting and licensing of patents as precluding eventual payment of compensation to the enemy owners; but all income received by him for patents was treated as distinctly divorced from claims for compensation.⁷⁰ While awaiting Congressional determination of the policy to be pursued in the ultimate disposition of vested property, the cash proceeds and income therefrom were placed in special accounts in the United States Treasury.⁷¹

Provision for some measure of return of vested property to the nationals of Italy, Roumania, Bulgaria, and Hungary was made in the treaties of peace with those nations which came into force on September 15, 1947.⁷² The United States was granted the right to seize, retain, liquidate or take any other action with respect to property rights and interests of these nationals within the United States, and apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against those governments and their nationals, other than claims fully satisfied under other treaty provisions. But all property, or the proceeds therefrom, in excess of the amount of such claims was to be returned. And the enemy nationals whose property was not returned were to be compensated by their respective governments.⁷³

66. REP. ALIEN PROP. CUST. 68, 72 (1943).

67. *Id.* at 70.

68. *Ibid.*

69. *Ibid.*

70. Sargant and Creamer, *supra* note 59, at 108.

71. REP. ALIEN PROP. CUST. 15 (1945).

72. TREATIES AND OTHER INTERNATIONAL ACTS SER., Nos. 1648 (Italy), 1649 (Roumania), 1650 (Bulgaria), 1651 (Hungary) (Dep't State 1947).

73. Art. 79 (Italy); Art. 27 (Roumania); Art. 25 (Bulgaria); Art. 29 (Hungary).

As a part of our policy of assisting Italy in the re-establishment of her economy on a self-sustaining basis, a general settlement agreement was negotiated with her, and in accordance with that settlement the President, on August 5, 1947, was authorized by Congress to return, pursuant to section 32 of the Trading With the Enemy Act, as amended, any property or interest of Italy or her nationals.⁷⁴ However, provision was made for the retention of vested property of war criminals and others who aided the Germans after Italy became a co-belligerent.⁷⁵ The claims of American nationals against Italy were in no way prejudiced, arrangements being made for the full implementation of the treaty terms in respect thereto. On April 23, 1948, a lump sum of \$5,000,000 was paid by Italy to the United States for the purpose of providing for special war damage claims of American nationals.⁷⁶

With respect to the property of German and Japanese nationals, a more rigorous policy was adopted. Near the close of the war, the Alien Property Custodian joined with the Secretary of State and the Secretary of the Treasury in a memorandum to the President recommending that the Government vest and retain all German and Japanese interests in property within the United States.⁷⁷ To implement this recommendation, the President issued an executive order⁷⁸ extending the jurisdiction of the Custodian to cover all property in the United States owned by these two countries or their nationals. Following this increase in the area of his authority, the Custodian took steps to vest the German and Japanese passive assets previously controlled by the Treasury's freezing regulations, all property recently inherited by nationals of those countries not hitherto vested because of its small worth to the war effort, and cloaked property of German nationals still undiscovered.⁷⁹

This change in policy increased in importance when the text of the Potsdam Agreement was promulgated in August of 1945.⁸⁰ Article IV, paragraph 3, of that agreement provides: "The reparation claims of the United States * * * shall be met from the western zones and from appropriate German external assets."⁸¹ Commenting upon this provision, Professor Borchard said: "The Treaty of Versailles, Article 297, left confiscation optional; the Potsdam declaration seems to make it somewhat obligatory. The change, it is feared, marks the deterioration in legal and moral conceptions between the two wars."⁸²

Confiscation was made even more obligatory by an agreement⁸³

74. Pub. L. No. 370, 80th Cong., 1st Sess., §§ 1, 2 (Aug. 5, 1947).

75. 17 DEP'T STATE BULL. 377 (1947).

76. 18 DEP'T STATE BULL. 584 (1948).

77. REP. ALIEN PROP. CUST. 2 (1945).

78. Exec. Order No. 9567, 10 FED. REG. 6917 (1945).

79. REP. ALIEN PROP. CUST. 7, 8 (1945).

80. 13 DEP'T STATE BULL. 153 (1945).

81. *Id.* at 157.

82. Borchard, *The Treatment of Enemy Property*, 34 GEO. L. J. 389, 390 (1946).

83. TREATIES AND OTHER INTERNATIONAL ACTS SER., No. 1655 (Dep't State 1946).

reached at the Paris Conference on Reparations, which met the following November. Article 6 A, Part I, of this agreement provides that each signatory government shall "hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets" less certain permitted deductions. An Inter-Allied Reparation Agency was established to supervise the distribution of the allotted shares of the total German reparations.⁸⁴ Under the agreement, the United States is to receive 11.8 percent of the industrial and other capital equipment removed from Germany and of German merchant ships and inland water transport, and 28 percent of all other forms of German reparations, which includes German external assets.⁸⁵ Since the coming into force of the Paris reparation agreement on January 24, 1946, each IARA country has accounted to IARA with respect to the value of German assets within its jurisdiction as of January 24 of each year; rules for this accounting were adopted by the Assembly of IARA in Brussels on November 21, 1947.⁸⁶

In accordance with the Paris agreement to "hold or dispose of German enemy assets within" the jurisdiction of the United States "in manners designed to preclude their return to German ownership or control," Congress passed the War Claims Act of 1948,⁸⁷ approved July 3. Section 12 thereof further amends the Trading With the Enemy Act of 1917 by the addition of the following section:

"Sec. 39. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date."

The Act provides for the creation of a trust fund in the Treasury to be known as the War Claims Fund⁸⁸ and to consist of all sums covered into the Treasury pursuant to section 39. The monies in the fund are to be available except as may be provided hereafter

⁸⁴ *Id.* at 20.

⁸⁵ *Id.* at 3.

⁸⁶ Simsarian, *Rules for Accounting for German Assets in Countries Members of the Inter-Allied Reparation Agency*, 18 DEF'T STATE BULL. 227 (1948). The United States, Canada, and the Netherlands signed at Brussels on December 5, 1947, the first comprehensive, multilateral agreement on the problem of conflicting claims by governments to German external assets. Maurer and Simsarian, *Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets*, 18 DEF'T STATE BULL. 3 (1948).

⁸⁷ Pub. L. No. 896, 80th Cong., 2d Sess. (July 3, 1948).

⁸⁸ *Id.* § 13(a).

by Congress, only to pay certain claims filed by employees of contractors with the United States injured, disabled, killed, or detained by the Japanese, claims of other civilian American citizens captured and interned by the Japanese, claims of American prisoners of war, and those of religious organizations functioning in the Philippine Islands and affiliated with a religious organization in the United States.⁸⁹

Although the change in the Custodian's vesting policy after the extension of his jurisdiction clearly contemplated this retention of the property of German and Japanese nationals without compensation by the United States Government, congressional sanction of such policy was not considered to preclude peace settlement provisions compelling the German and Japanese governments to reimburse their own nationals.⁹⁰ The Treaty of Versailles is a precedent for such compulsion.⁹¹ One proposed amendment to the Trading With the Enemy Act would provide additional assurance of full reimbursement to the former owners by vesting the courts of the United States with jurisdiction to adjudicate their claims, the judgments to be paid by their own governments in compliance with treaty stipulations.⁹²

Such provisions, it is contended,⁹³ by contemplating compensation, continue the traditional policy against confiscation, and invalidate the argument that the retention of enemy private property imposes on the unfortunate few caught with foreign investments at the outbreak of hostilities more than their fair share of the reparation burden. In rejoinder it is asserted that the relegation of the expropriated enemy national to his own insolvent government for compensation is "transparent hypocrisy," a mere subterfuge to escape the onus of the inevitable charge of confiscation by the substitution of a bad debtor for a good debtor.⁹⁴ In reply it is said that the defeated country could compensate her nationals and distribute the burden merely by redistributing her wealth.⁹⁵

To counter the contention that their view disregards the distinction between private and public property and sustains the Soviet theory which regards all private property as the assets of the nation,⁹⁶ the advocates of the present policy point to the foreign exchange and similar controls, clearing balances and related arrangements, as indicative of the extent to which the indicia of purely

⁸⁹ *Id.* §§ 4, 5, 6, 13(a).

⁹⁰ REP. ALIEN PROP. CUST. 14 (1945).

⁹¹ See note 26 *supra*.

⁹² H. R. 3672, 78th Cong., 1st Sess. (1943); see Gearhart, *Post-War Prospects for Treatment of Enemy Property*, 11 LAW & CONTEMP. PROB. 183 (1945).

⁹³ See Rubin, "Inviolability" of Enemy Private Property, 11 LAW & CONTEMP. PROB. 166, 177 (1945); Bouve, *The Confiscation of Alien Property*, PROC. AM. SOC'Y INT'L L. 14, 24 (1926).

⁹⁴ Borchard, *supra* note 77, at 396; Cohen, *The Obligation of the United States to Return Enemy Alien Property*, 21 COL. L. REV. 666, 678 (1921).

⁹⁵ Rubin, *supra* note 87, at 177.

⁹⁶ Borchard, *supra* note 77, at 401.

private ownership have been stripped from foreign investments.⁹⁷ And since the imperative need for foreign exchange has forced the Allied governments to compel their nationals to liquidate foreign investments,⁹⁸ to permit enemy nationals to retain their foreign holdings would be manifestly unfair. Furthermore, say the proponents of this view, the reparation claims of the Allied governments will require the enemy countries to marshal the maximum available foreign assets, and therefore eventual expropriation by their own governments would be so inevitable as to render a return of enemy private property purely illusory.⁹⁹

CONCLUSION

In the century following Marshall's decision in *Brown v. United States*, the principle of non-confiscation of enemy-owned private property within our country seemed to be growing deep roots in precedent. The principle was badly shaken and those roots somewhat disturbed by the policy and practice pursued by the belligerents in World War I. The Potsdam and Paris agreements, implemented in this country by the War Claims Act of 1948, complete the uprooting.

Behind this change in policy is apparently the thought that, in view of economic realities, it would have been merely quixotic to forbear from confiscating and attempt to return enemy private property. There are forcible arguments supporting the view that the economic consequences of total war have rendered "anachronistic and inappropriate, as well as misleading"¹⁰⁰ the terms "confiscation" and "enemy private property." Certainly a policy should not be pursued that would make the foreign asset position of the defeated enemy countries and their nationals more favorable than that of the Allies and their nationals. Furthermore, if the release of his foreign assets would merely result in their liquidation under the compulsion of the enemy national's own government in order to provide foreign exchange to meet reparation and related claims, then admittedly administration would be simplified by retaining those assets to meet claims against the enemy and referring the former owner to his own government for compensation.

However, simplification of administration is not sufficient justification for compromising the principle of non-confiscation. Moreover, it would seem that a German or Japanese with foreign assets subject to compulsory liquidation would be assured of some measure of compensation, whereas, though by treaty stipulation expro-

97. Rubin, *supra* note 87, at 178.

98. In this connection, see letter of Feb. 2, 1948, to Senator Vandenberg, Chairman of the Senate Foreign Affairs Committee, from Secretary Snyder, as Chairman of the National Advisory Council, outlining the program adopted to assist countries likely to receive financial aid from the United States to obtain control of the blocked assets in the United States of their resident citizens.

99. Rubin, *supra* note 87, at 181.

100. *Ibid.*

priated German nationals were referred to their own government after World War I, in fact they did not receive compensation.¹⁰¹ And if to meet reparation and related claims, the German and Japanese governments would have to compel liquidation of foreign assets held by their nationals, then the enemy national will not be placed in a more favorable position than that of an Allied national by a policy of non-confiscation.

The propriety of confiscating enemy public property, cloaked property ostensibly private but actually government owned, and property of war criminals, who forfeit by their conduct the privilege of immunity, is not questioned. Nor would principle or past practice impugn the necessity and lawfulness of measures designed simply to prevent utilization of their private property within our country by our enemies during war. Such practice is entirely compatible with the principle forbidding confiscation.¹⁰²

But the considerations of justice and long-range expediency which prompted Hamilton to early espouse and eloquently expound the doctrine of immunity for enemy private property have increased in validity and cogency with the increase in our power and the importance of our position as the champion of capitalism in the current worldwide clash of ideologies. When the nation was young and weak, its government had the moral strength and breadth of vision to compensate British creditors whose debts had been confiscated during the Revolutionary War.¹⁰³ It would seem that the practice of international probity then initiated should with the increase in our strength be scrupulously followed, for in our present predominance we set the pattern for international conduct.

Four hundred million dollars is an outside estimate of the maximum amount this government will net by its confiscatory practice.¹⁰⁴ In contrast, the foreign investments of our nationals total into the billions.¹⁰⁵ The proponents of our new policy concede that the rule of immunity evolved with the evolution of the world's economy,¹⁰⁶ and thereby impliedly admit that it is a natural and necessary concomitant of international trade. If capitalism is to continue to be the basis of our economy, and if an increase in international economic interdependence is as inevitable as the Breton Woods arrangements, the International Trade Organization, and the Marshall Plan seem to assume, then it would seem that this recent resuscitation of the rule permitting confiscation of enemy private property is highly inimical to the interests of the United States. There is something anomalous in a public policy which at one and the same time attempts to champion capitalism and confiscation.

V. L. B.

101. Borchard, *supra* note 77, at 399.

102. See Dickinson, *Enemy-Owned Property: Restitution or Confiscation?*, 22 FOREIGN AFFAIRS 126, 137 (1943).

103. 2 STAT. 192 (1802).

104. REP. OFFICE ALIEN PROP. 2 (1947).

105. Borchard, *supra* note 77, at 391.

106. Rubin, *supra* note 87, at 168.

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PRACTICAL ASPECTS OF FOREIGN PROPERTY CONTROL

SIM C. BINDER

A PRACTICAL analysis of the legal and economic problems of foreign property control resulting out of Executive Order No. 8389, as amended, should be implemented by a brief survey of its background in order to determine its scope, effect, and trend. Three methods form the basis of the foreign property control as established under the Executive Order:

1. The so-called freezing or blocking of certain foreign assets.

2. The control of securities which are imported into the United States or which have been at some time or other outside the United States.

3. The census of certain foreign assets on particular dates.

The first method has immediate practical economic and political effects. The second determines the origin of a certain category of foreign assets enabling the government to avoid the infiltration of looted property. The third method will reveal to the government the source of beneficial ownership as well as any shifts in certain foreign assets.¹

I. BACKGROUND

THE control, used as a technical device by the Executive Order must not be confused with the exchange control measures introduced in Europe during the depression of 1931 and whose origin

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¹Taylor, *Property Census, an Element in Foreign Funds Control*, FOR. COM. WEEK., Aug. 30, 1941, p. 6.

and purpose were quite different. The collapse of the Austrian Credit Anstalt in May, 1931, the failure on July 13, 1931, of the German Darmstadter and Nationalbank, the state of advanced economic contraction and progressing social disintegration in Germany, the desire to check the flight of capital, and Hungary's struggle with depression led to the introduction of foreign exchange control in Germany on July 15, 1931, in Hungary on July 17, 1931, and in Austria on October 9, 1931.²

Then, in order, all the nations affected by the depression followed, both in Europe and in South America, some adopting foreign exchange control as a temporary relief, and others weaving foreign exchange control into their economic system as a permanent factor of economic policy.³ The United States itself knew a mild form of foreign exchange control during the banking holiday of 1933.^{3a}

The exchange control introduced by the German Republic after the advent of Nazism and together with bilateralism in trade, gradually developed into a totalitarian institution.⁴ The distortion by Germany of exchange control into a totalitarian offensive economic and political weapon has finally brought about the corresponding reaction of American democracy, to wit, the use of foreign exchange control, as part of foreign property control, first as a defensive and later as an offensive weapon.

In the economics of war, foreign exchange control indeed plays an important part.⁵ The belligerents use this control. The leader

²Ellis, *Exchange Control in Central Europe* (1941) 60 HARV. ECON. STUD. 33, 77, 80, 158, 166, 167.

³For a list of countries and date of introduction of regulations, see DELCOURT, *LES PROCÉDES MODERNES DE CONTRÔLE DU CHANGE ET LEUR APPLICATION DANS LES PAYS ANGLAIS-SAXONS* (Paris, 1936) 21.

^{3a}Proclamation of President dated March 6, 1933, and Executive Order of the President dated March 10, 1933.

⁴Ellis, *supra* note 2 at 211. The best analysis of the purposes of exchange control as it has worked from 1931-1939 is given by Professor H. S. Ellis, *id.* at 290: (1) Prevention of unregulated export of capital and depreciation of the currency. (2) Temporary insulation to permit adjustment to international equilibrium. (3) Increasing the total economic gain from foreign trade. (4) Securing cheap foreign exchange for government purposes. (5) Retaliation against foreign controls, quotas, tariffs, and the like. (6) Protection of domestic production. (7) Totalitarian economic and political control. For the impact of foreign exchange control on private law, see NUSSBAUM, *MONEY IN THE LAW* (1939) 475.

⁵MENDERSHAUSEN, *THE ECONOMICS OF WAR* (1941) 66, 207, 210, 213; EINZIG, *ECONOMIC WARFARE* (London, 1940) 95-96.

of the belligerent democracies, Great Britain, at first hesitated, and has only gradually completed its war policy in matter of foreign exchange control which started on September 3, 1939. The too generous character of this policy has been criticized and today "the exchange control screws have been tightened",⁶ and the Dominions have also adapted themselves to the new conditions of economic warfare.⁷

The United States as leader of the non-belligerent democracies has unhesitatingly adapted itself to the lightning necessities of economic political strategy. Though hampered by delicate problems of foreign policy which had to be handled by the State Department (*e.g.*, those concerned with Spain and with Japan), the Treasury has blow by blow replied to every conquest by every aggressor since April, 1940.⁸

The signing of the Lease-Lend Act on March 11, 1941,

⁶For a general view on the English problem see Harris, *External Aspects of War and Defense Economy: the British and American cases* (1941) 23 REV. ECON. STAT. 18; *Tightening Exchange Control Screws* (London, 1941) 140 THE ECONOMIST 662; Holden, *Rationing and Exchange Control in British War Finance* (1940) 54 QUAR. JOUR. ECON. 171; Balogh, *The Drift Towards a Rational Foreign Exchange Policy* (1940) 7 ECONOMICA (N.S.) 248. For a summary view of the legal aspect, see Wilson, *British Exchange Control After One Year of Operation*, COMMERCE REPORTS, Sept. 7, 1940, p. 762.

⁷PARKINSON, *CANADIAN INVESTMENT AND FOREIGN EXCHANGE PROBLEMS* (Toronto, 1940) 3-121; Mackenzie, *Recent Changes in the Operation of Foreign Exchange Control in Canada*, CANADIAN CHARTERED ACCOUNTANT, Dec. 1940; *Australian Exchange Regulations* (1939) 149 COM. AND FIN. CHRON. 3186, 3637.

⁸April 9, 1940—the Germans occupy Denmark and invade Norway: Executive Order No. 8389—April 10, 1940.

May 10, 1940—the Germans invade the Netherlands, Belgium, and Luxembourg: Executive Order No. 8405—May 10, 1940.

June 17, 1940—Marshal Petain asks Germany for an Armistice: Executive Order No. 8446—June 17, 1940.

July 10, 1940—Lithuania, Latvia, and Estonia under duress join the Soviet Union: Executive Order No. 8484—July 15, 1940.

October 8, 1940—Nazi troops enter Roumania: Executive Order No. 8565—October 10, 1940.

March 1, 1941—Bulgaria joins the Axis and German troops occupy Sofia: Amendment to Executive Order—March 4, 1941.

March 11, 1941—President Roosevelt signs the Lease-Lend Bill.

March 11 (c.), 1941—Hungary is considered as being under Axis control: Executive Order No. 8711—March 13, 1941.

May 27, 1941—President Roosevelt proclaims an unlimited State of Emergency: Executive Order No. 8785—June 14, 1941, freezing funds of the balance of continental Europe.

June 22, 1941—Germany invades Russia: U.S.S.R. licensed as a generally licensed national—June 24, 1941.

July 23, 1941—Vichy France agrees to Japanese control of Indo-China: Executive Order No. 8832—July 26, 1941.

marks a turning point in the policy of foreign property control which becomes an offensive weapon with far reaching international effects. The current and most stringent aspects of this new phase are:

1. The authorization of a proclaimed list blocking certain nationals and controlling certain exports.⁹
2. The regulations concerning restricted exports and imports.¹⁰
3. An accentuated trend to "prevent the use of the financial facilities of the United States in ways harmful to national defense and other American interests, to prevent the liquidation in the United States of assets looted by duress or conquest, and to curb subversive activities in the United States."¹¹

Foreign property control is presently coördinated with the diplomatic necessities of the American foreign policy to aid the fighting democracies. Japanese assets have been frozen, and in order to strengthen the position of the Chinese currency in the occupied areas and Shanghai, to halt the inflation of prices in China, and to furnish an economic weapon against Japan, the Chinese assets are also blocked.¹² Generalissimo Chiang Kai-shek himself has stressed the weakening effect of this measure on the Japanese war effort.¹³

The financial effect of this policy in the United States is important. The foreign property affected by the present census or by blocking amounts to billions of dollars.¹⁴ The effects on private economy are obvious insofar as blocked nationals are concerned. Indeed, prior to the present war many wealthy or simply foreseeing European aliens, both corporations and individuals,

⁹The Presidential Proclamation of July 17, 1941. The Proclamation takes due account of the difference between export control and freezing control. The one deals with the commodity, and the other with the transaction. Taylor, *supra* note 1 at 7.

¹⁰Treasury Regulation, July 22, 1941.

¹¹White House Release, June 14, 1941.

¹²It is significant that Mr. Ta Chung Lin, representing the Chinese point of view, had asked for the freezing of Chinese assets as a fundamental contribution to the Chinese war effort in an article published a few days before the issuing of Executive Order No. 8832. Ta Chung Lin, *China's Foreign Exchange Problems* (1941) 31 AM. ECON. REV. 266.

¹³New York Times, Sept. 11, 1941, p. 10, col. 5.

¹⁴Dickens, Abelson, *Foreign Investments in the United States After One Year of War*, FOR. COM. WEEK., Jan. 4, 1941, p. 5.

placed their surplus capital and quite often practically total capital in American securities and American banks "in the hope of keeping a nest egg intact."¹⁵

Foreign governments and foreign national banks have also placed their assets in the United States. This "refugee capital" being affected,¹⁶ the flight of capital out of Europe is no longer directed exclusively to the United States. Refugee capital from Europe is beginning to show up in Latin America, mainly in Brazil, Argentina, and Mexico.¹⁷

II. THE EXECUTIVE ORDER IN GENERAL

A. Legislative Authority

THE immediate source of authority for the present system of foreign funds control in the United States is Executive Order No. 8785 of June 14, 1941, as amended by Executive Order No. 8832 of July 26, 1941 (extending the control to China and Japan).

The Executive Order depends for its legislative authority on Section 5b of the Act of October 16, 1917,¹⁸ as amended by the Act of March 9, 1933,¹⁹ and by the Joint Resolution of April

(In millions of dollars)

COUNTRY	LONG TERM INVESTMENTS				SHORT TERM INVESTMENTS	TOTAL
	STOCKS AND BONDS	DIRECT	MISCELLANEOUS	TOTAL		
Canada	432	479	78	989	404	1393
Belgium	64	72	11	147	152	299
France	190	67	64	321	525	846
Germany	15	55	29	99	14	113
Italy	22	12	22	56	26	82
Netherlands	632	217	12	861	189	1050
Switzerland	595	86	34	715	489	1204
United Kingdom	995	856	335	2186	375	2561
Other Europe	75	58	27	160	501	661
Total Europe	2588	1423	534	4545	2271	6816
Latin America	69	19	22	110	438	548
Rest of World	100	67	16	183	523	706

United States holdings in Axis dominated territory aggregate more than \$1,200,000,000. Travis, *Frozen Assets of U. S. Companies*, THE MAGAZINE OF WALL STREET, July 12, 1941, p. 360.

¹⁵De Give, *Controls Over Foreign Funds, TRUSTS AND ESTATES*, July, 1941, p. 89.

¹⁶For the legal aspects of discrimination between residents and the psychological effects of the freezing orders, see Lourie, *Freezing of Foreign Assets in the United States* (Unpublished Thesis in Burgess Library, Columbia University, 1941).

¹⁷*Refugee Capital*, BUSINESS WEEK, Feb. 1, 1941, p. 50.

¹⁸40 STAT. 415 (1917), 12 U. S. C. A. § 95a (1936).

¹⁹48 STAT. 2 (1933), 12 U. S. C. A. § 95 (1936).

23, 1940.²⁰ The Act of 1917 was enacted during the World War I and is solely a war time measure. The Act of 1933 was a peace time measure enacted at the time of the banking holiday. The Resolution of 1940 amended the Act of 1933 so as to include the prohibition upon the transfer or dealing in any evidence of indebtedness or evidences of ownership of property in which any foreign state or national had any interest by any person within the United States or any place subject to the jurisdiction thereof. It also ratified and confirmed all the executive orders and the rulings, regulations, and licenses issued thereunder up to that date.

B. Provisions

The provisions of Executive Order No. 8785 are as follows:

Section 1. "All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

"A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

"B. All payments by or to any banking institution within the United States;

"C. All transactions in foreign exchange by any person within the United States;

"D. The export or withdrawal from the United States,

²⁰54 STAT. 179 (1940), 12 U. S. C. A. § 95 (Supp. 1940).

or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

"E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

"F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions."

Section 2A prohibits all "of the following transactions . . . except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise:

"(1) The acquisition, disposition or transfer of, or other dealing in, or with respect to, any security or evidence thereof on which there is stamped or imprinted, or to which there is affixed or otherwise attached, a tax stamp or other stamp of a foreign country designated in this Order or a notarial or similar seal by which its contents indicates that it was stamped, imprinted, affixed or attached within such foreign country, or where the attendant circumstances disclose or indicate that such stamp or seal may, at any time, have been stamped, imprinted, affixed or attached thereto; and

"(2) The acquisition by, or transfer to, any person within the United States of any interest in any security or evidence thereof if the attendant circumstances disclose or indicate that the security or evidence thereof is not physically situated within the United States."

"Section 2B permits the Secretary of the Treasury to "investigate, regulate, or prohibit under such regulations, rulings, or instructions as he may prescribe, by means of licenses or otherwise, the sending, mailing, importing or otherwise bringing, directly or indirectly, into the United States, from any foreign country, of any securities or evidences thereof or the receiving or holding in the United States of any securities or evidences thereof so brought into the United States."

Section 3 designates the blocked countries and the effective date of the Order.

Section 4 authorizes the Secretary of the Treasury and/or the

Attorney General to issue regulations, rulings, and instructions, etc., and to require reports under the Order.

Section 5 contains a definition of some of the terms used in the Order.

Section 6 contains formal provisions relating to the effect of earlier Orders, and rulings, regulations, and licenses issued thereunder.

Section 7 empowers the Secretary of the Treasury or the Attorney General to prescribe regulations and instructions to effectuate the purpose of the Order and it specifically provides that licenses under the Order may be granted by or through such agencies as the Secretary of the Treasury may designate, and that the decision of the Secretary as to the granting, denial, or other disposition of applications for licenses shall be final.

Section 8 provides a penalty of a fine not to exceed \$10,000 or imprisonment, not to exceed ten years or both for anyone willfully violating the terms of the Order.

Section 9 expressly reserves the power of amendment and revocation.

C. Regulations and Rulings

Pursuant to the authority granted by the Executive Order, the Secretary of the Treasury has issued regulations. No systematic code of procedure has been set up however, and the regulations issued are few in number. One important regulation designates the Federal Reserve Bank as the agency to whom applications for licenses should in general be made. Others supply certain definitions, call for the making of certain reports, and call attention to the applicable penalties for violation. In addition a small number of rulings have been issued, some interpretative in character and others in the nature of procedural regulations. An example of the former is General Ruling No. 1 which construes "Denmark" as not applying to Iceland: an example of the latter is General Ruling No. 5 which sets up a control of imported securities.

D. Realistic View of Treasury

One somewhat unusual characteristic of this system of regulation is at once apparent, namely, that it is almost impossible for any affected individual to violate its provisions even deliberately. This is because not merely is the individual required to possess a license, but the individual with whom he deals and the bank through whose hands the transaction will pass are separately responsible for seeing to it that he possesses the appropriate license. Furthermore, the licensing provision is one which vests great discretion in the Secretary of the Treasury, and is accompanied by no adjudicative system or similar recourse to make any initial test of the correctness of an interpretation. The only possible test will arise if criminal proceedings should become necessary. In consequence of these facts the Treasury is in a position to enforce its powers in a broad pragmatic spirit unhampered by legalistic questions of interpretation or application. A realistic approach of this character is indispensable in a field where the factual situation is changing so suddenly and dramatically, and where broad questions of foreign and military policy greatly overshadow questions of private right. In order to maintain the fluidity of the system, the Treasury has not felt itself bound by its own administrative precedents, has refrained from issuing advisory opinions, and has been sparing in the issuance of interpretative rulings.²¹ While many and highly interesting abstract questions might arise concerning the scope and construction of the Executive Order, in view of the practical operation of the system, such questions are of little importance.²²

The conditions abroad and the changing conditions at home make necessary a plan that will in a realistic manner be able to cope with the changing problems. This can only be accomplished if the scheme is flexible and fluid enough to meet rapidly shifting conditions.²³

²¹The Executive Order has been in operation nineteen months and during this time only nine general rulings and five public circulars have been issued.

²²For an interesting discussion of many problems of constitutionality and construction see Note (1941) *Col. L. Rev.* 1039; Harris and Joseph, *Present Problems Concerning Foreign Funds Control*, *N. Y. L. J.* Jan. 22, 1941, p. 336, col. 1.

²³Originally there was no announced purpose when the Executive Order was

This can be readily perceived in the amendments to various general licenses hereafter discussed where the effect in some instances have been to loosen the control and in other instances to tighten the control, and in the Proclaimed List of Certain Blocked Nationals.²⁴

issued. Debates in the Senate at the time of passage of the Joint Resolution show that the purpose was to protect the property of unknown foreigners in this country from being looted by aggressors, to protect property within the jurisdiction of the United States which is owned by the respective governments or their nationals, to protect American citizens as to their claims growing out of such transactions so as to preserve the property not only for the owner, but for American claimants, to prevent changes of title to property by a conquest, or other forceful or violent means, and to prevent the sequestration by Germany of the avails of her unlawful aggression. 86 CONG. REC. 5006-6009 (1940). While originally the purpose of the plan was as stated above, it has now definitely become an economic weapon of offense and defense in connection with our declared policy as shown in the Lease-Lend Act of preventing a German victory. See note 11 *supra*.

²⁴GEN. LIC. No. 5 originally permitted payments to the United States and its agencies; the amendments have enlarged the scope of this license to include payments to state, county, and city governments.

GEN. LIC. Nos. 13, 14, 19, and 22 originally permitted only transactions in the name of certain Netherlands East and West Indies banks and certain Belgian banks. Now transactions by such banks are permitted by or for the account of any Netherlands and Belgian nationals respectively, provided no payment or withdrawal is made from any blocked account.

GEN. LIC. No. 15 originally permitted banking institutions in the United States to issue letters of credit for export to and import from the Netherlands East Indies. The amendment enlarges the scope of these transactions to the extent that they may be financed by a Netherlands blocked account but it restricts imports to the extent that they shall not involve property in which any national other than a Netherlands national had any interest since the effective date of the Order.

GEN. LIC. No. 21 originally named two Netherlands banking companies (one in London, the other in the United States) as "generally licensed nationals". The amendment permits these institutions to have transactions by or for any person in the Netherlands East or West Indies as though it were for its own account, except that no payment or withdrawal is to be made from a blocked account. A question may arise here whether this permits transactions for individuals or for the property interest of individuals who are on the Proclaimed List of Certain Blocked Nationals.

GEN. LIC. No. 32 originally made it possible to send only \$50 a month and \$10 extra for each member of the household with a maximum of \$100 a month to non-citizens abroad. Only individuals who had resided continuously in the United States for one year prior to the date of the license could make these remittances, and then only if they had been making similar remittances to the same payee for at least six months prior to April 8, 1940. By amendment, the amount has been increased to \$100 a month and \$25 a month extra for each member of the household, and the maximum raised to \$200. The amendment also removes the restriction that the person sending the money must have been living in the United States continuously and must have been making such remittances previously. The original license contained other restrictions—the money sent was only for living expenses of the payee and his family, and the payee had to be a relative or dependent of the remitter—some of which have been relaxed. There is no longer the requirement that the payee be a relative or a dependent of the sender.

GEN. LIC. No. 33 pertains to remittances by persons in the United States to United States citizens resident abroad. By amendment, the sender no longer must

III. THE LICENSING SYSTEM

SECTION 1 of the Executive Order prohibits certain transactions involving certain countries and their nationals, except as authorized.

Section 2 prohibits all transactions concerning certain securities, except as authorized.

The Order and the Regulations contemplate applications being made for a license authorizing each transaction which should be either in the form of a specific license for a particular transaction, or an operating license to govern the conduct of the business. In addition the Treasury has adopted a system of issuing general licenses permitting all transactions of the type set forth in these general licenses without the necessity of making specific applications therefor.

A. General Licenses

1. Miscellaneous Provisions.

The first general license issued permits payments or transfers of credit to a blocked account in a domestic bank provided that it shall not be made (a) from a blocked account in a domestic bank, and (b) from any other blocked account if it transfers an interest of a blocked country or a blocked national to any other country or person. This general license does not permit the payment or transfer to a blocked account in the name of one other than the ultimate beneficiary of such payment or transfer, or any foreign exchange transaction including the transfer of credit or payment of an obligation expressed in any foreign currency.²⁵

Domestic banks may debit blocked accounts with certain necessary charges such as cables, telegraph, postage, and service fees.²⁶ In the same way payments from a blocked account to the United States, state, county, and city governments or political subdivisions thereof, for customs duties, taxes, fees, and other obligations owed by the owner of such account are permitted.²⁷

be in the United States, the amount that could be sent was raised from \$250 a month to \$500 a month, and the transportation allowance raised from \$250 to \$1,000.

²⁵GEN. LIC. No. 1.

²⁶GEN. LIC. No. 2.

²⁷GEN. LIC. No. 5.

Another general license permits bona fide purchases and sales of commodities futures contracts by domestic banks for the account of the blocked nationals on any exchange or board of trade in the United States and payments and transfers by the domestic banks in connection therewith, provided that in the case of purchases, the contracts are held in the blocked account of the national in the same bank, and in the case of sales the proceeds are held in the blocked account of the national in the same bank.²⁸

Living expenses of blocked nationals are provided for by a general license permitting payments and transfers of credit in the United States from accounts of blocked nationals in domestic banks for such expenses up to an amount not exceeding \$500 per month.²⁹ Payments may also be made from any blocked account to a publisher or his agent for individual subscriptions to a periodical published in the United States, provided that the publisher and agent are located in the United States and the total amount paid from any blocked account does not exceed \$25 in any one month and \$100 in any one year.³⁰

Remittances may be made abroad for living expenses in amounts not exceeding \$100 per month plus an additional \$25 per month for each member of the payee's household, the total not to exceed the sum of \$200 per month for each household. Such remittances may not be made from a blocked account of any national other than the payee or a member of his household.³¹ Additional provision has been made for United States citizens within any foreign country. The monthly allowance has been increased to \$500 per household, and an additional sum of \$1,000 is permitted to enable the citizen or his household to return to the United States.³² Domestic banking institutions may also make payments,³³ transfers, and withdrawals from the accounts of citizens of the United States while such citizens are in any foreign country

²⁸GEN. LIC. No. 9.
²⁹GEN. LIC. No. 11.
³⁰GEN. LIC. No. 71.
³¹GEN. LIC. No. 32.
³²GEN. LIC. No. 33.
³³GEN. LIC. No. 37.

in the course of their employment by the government of the United States.

Another general license permits access to safe deposit boxes leased to blocked nationals or containing property of blocked nationals, provided that an authorized representative of the safe deposit company is present; however, money or evidence of indebtedness or ownership of property removed therefrom must be held in the custody of the safe deposit company subject to the Executive Order.³⁴

Domestic banks are permitted to make payments, transfers, and withdrawals from accounts of citizens of the United States domiciled or residing in the Netherlands East or West Indies provided that no blocked country or blocked national other than a citizen of the United States ever had any interest in such account.³⁵

Domestic banks acting as trustee or administrator of an estate in the United States in which blocked nationals are beneficiaries, co-trustees, or co-representatives, may pay distributive shares to non-blocked nationals and conduct such other transactions arising in connection with the trust or estate as if no beneficiary, co-trustee, or co-representative were blocked nationals, provided that such transactions shall not be at the request or direction of such beneficiaries, co-trustees, or co-representatives.³⁶

It is clear that the purpose of general licenses is to introduce needed flexibility into the control system and relieve the Treasury of the burden of passing upon each matter. Accordingly certain large groups of transactions which involve no great danger of evasion of the purposes of the control were permitted by the blanket authority of a general license. The purpose and operation of the general licenses is well illustrated by the history of the general license permitting payment of salaries.

2. *Payment of Salaries to Employees.*

The Executive Order originally blocked the funds of Norway and Denmark and their respective nationals. In order to be most

³⁴GEN. LIC. No. 12.
³⁵GEN. LIC. No. 20.
³⁶GEN. LIC. No. 30.

effective, no advance notice thereof was given to either the respective governments, their nationals, the banks holding such accounts, or the press or public at large. As a result the bank accounts of these governments and their nationals were effectively tied up and payments, transfers, and withdrawals prevented. However, these governments and their nationals had employees resident in the United States who because of the blocking of these funds could not be paid. These respective governments and nationals were obliged to apply for and obtain licenses to pay their employees and delay resulted from the investigation of such applications and the issuance of the licenses.

As each new country was blocked, the delay in obtaining such licenses became greater, especially since the volume of applications received by the various Federal Reserve Banks had greatly increased. Accordingly, when on June 14, 1941, the Executive Order was amended so as to include all countries in continental Europe not yet blocked (this amendment added 16 countries to the list of blocked countries), the Treasury Department issued General License No. 46.³⁷

This general license permits payment, transfers, or withdrawals from blocked accounts in domestic banks of any blocked commercial partnership, association, corporation, or other organization for the purpose of paying current salaries, wages, or other compensation due employees, subject to the provision, however, that such employees reside in the United States and are presently employees, and that the total weekly withdrawal for such purpose shall not exceed the average weekly payroll for such employees during the period of six months immediately preceding the date of the general license. The bank effecting such payment or withdrawal is required to satisfy itself that these payments and withdrawals are made pursuant to the conditions of this general license.

This general license was issued to handle an acute transition problem. It expired on July 15, 1941. Thereafter salaries are

³⁷When the Executive Order was amended on July 26, 1941, to include China and Japan, a similar general license, No. 67, was issued which expired on August 26, 1941.

to be met under the provisions of operating licenses which are described below.

3. *Checks and Drafts Issued Prior to Blocking Date.*

Another illustration of the use of the general license device to handle the problem of the transition period is the general license relating to checks and drafts issued prior to the blocking order.

As previously stated, the executive orders blocking the accounts of the various foreign countries and their nationals were issued without any prior notice. These required the banks to refuse any checks or drafts drawn or issued against such accounts and not as yet presented. To avoid the necessity of obtaining specific licenses for checks and drafts previously drawn and issued but not yet paid, the Treasury issued general licenses simultaneously with the executive orders permitting the payment of such outstanding checks and drafts.³⁸

4. *Control of Securities.*

In the application of the Executive Order, securities may be divided into three classes:

- a. Securities imported into the United States.
 - b. Securities on which appears a stamp or seal of a blocked country or other indication that they have been in a blocked country, and securities which are physically outside the United States.
 - c. All securities.
- a. Securities imported into the United States.

General Ruling No. 5 regulates the import of securities coming from any foreign country and requires such securities to be turned over to the Federal Reserve Bank.³⁹ General Ruling No. 6 pro-

³⁸Such general licenses were issued for the countries of Norway, Denmark, Netherlands, Belgium, and Luxembourg and their nationals on May 10, 1940, GEN. LIC. No. 3; for the country of France and its nationals on June 17, 1940, GEN. LIC. No. 17; Latvia, Estonia, and Lithuania on July 15, 1940, GEN. LIC. No. 24; Rumania on October 10, 1940, GEN. LIC. No. 35; Bulgaria on March 4, 1941, GEN. LIC. No. 36; Hungary on March 13, 1941, GEN. LIC. No. 38; Yugoslavia on March 24, 1941, GEN. LIC. No. 39; Greece on April 28, 1941, GEN. LIC. No. 41; balance of continental Europe on June 14, 1941, GEN. LIC. No. 45; and China and Japan on July 26, 1941, GEN. LIC. No. 55.

³⁹Originally securities coming from Great Britain, France, Canada, Newfound-

vides, however, that a complete description of such securities being made and retained by the Federal Reserve Bank, they may be turned over to a domestic bank to be held there in a separate blocked account known as a General Ruling No. 6 account for the owner. Disposition of these securities can be made only by special license and the proceeds thereof kept in the same separate blocked account, and cannot be transferred to a regular blocked account without special license.

b. Securities on which appears a stamp or seal of a blocked country and securities which are physically outside the United States.

Section 2A(1) of the Executive Order prohibits transactions in securities of this class except as authorized by the Secretary of the Treasury. The same transactions may of course be also prohibited by Section 1 because of the identity of the persons or interests involved. To the extent that a transaction is prohibited solely by Section 2A(1) (because it bears foreign stamps or seals), it may be authorized under General License No. 25 by affixing Treasury Form TFEL-2 under the direction of the Treasury. Detachment and collection of coupons from such securities by domestic banks is permitted by General License No. 31 if such securities have been continuously in the bank's possession since July 25, 1940, even if Form TFEL-2 has not been attached thereto.

Section 2A(2) prohibits transactions in securities physically outside the United States except as authorized by the Secretary. General License No. 26 authorizes transactions in American Depository Receipts or American Shares physically situated in the United States but representing securities or evidences thereof not physically within the United States providing such Receipts or Shares have been admitted to trading on a national securities exchange on and prior to July 25, 1940.

c. All securities.

General License No. 27 permits payment to domestic banks

land, and Bermuda were excepted from this provision, but on June 17, 1940, France was removed from this exception. By GEN. RUL. No. 7 the prohibition of GEN. RUL. No. 5 was extended to securities coming from the Philippine Islands and the Panama Canal Zone.

of dividends or interest on securities held by such bank in a blocked account provided such payments are credited in the blocked account of the national owner in said bank, and further permits collection of coupons and redemption of securities under the same conditions. However, securities registered or inscribed in the name of any blocked country or national may not be presented for redemption regardless of any transfers or assignment whether before or after April 10, 1940.

5. Imports and Exports.

The general licenses governing imports and exports well illustrate the realistic approach of the Treasury. Each license is shaped with a careful eye upon the factual economic and political problems involved so as to achieve the greatest administrative efficiency and the greatest facility of trade compatible with an adequate safeguarding of the purposes of the control.

General License No. 53 defines the generally licensed trade area⁴⁰ and permits the import and export of goods, wares, and merchandise between the United States and members of the generally licensed trade area or between members of the generally licensed trade area, provided that the transaction is by or for a blocked national in the generally licensed trade area, or that it involves property in which any such national had any interest since the effective date of the Order, subject to the conditions that the transaction is not by or for any person on the Proclaimed List;⁴¹ that the transaction is not by or for any blocked country or blocked national not within the generally licensed trade area; and that the transaction does not involve property in which any person on the aforesaid List or any blocked country or blocked national not within the area had any interest since the effective date of the order. This license also permits any blocked national

⁴⁰The generally licensed trade area consists of (1) North and South America (except the United States); (2) The British Commonwealth of Nations including the colonies, protectorates, and British mandated territories; (3) U.S.S.R.; (4) Netherlands East and West Indies; (5) Belgian Congo and Ruanda Urundi; (6) Greenland and Iceland.

⁴¹The Proclaimed List of Certain Blocked Nationals issued by the Secretary of State on July 17, 1941.

in the United States doing business under a license to engage in the import and export of goods to the same extent that such national is licensed to engage in such transactions with persons within the generally licensed trade area who are not blocked

Import and export of goods, wares, and merchandise between the United States and all of China except Manchuria is permitted by General License No. 58, provided that the transaction is not by or for a blocked country other than China, a person in Manchuria, any blocked national except Chinese, unless such national is within China; and it does not involve property of any blocked country other than China, or of a person in Manchuria, and that no blocked national except Chinese, unless such national is in China, had any interest in such property since the effective date of the Order.

General Licenses No. 59 and No. 61 permit certain designated banking institutions to finance imports and exports between China (except Manchuria) and the following: North and South America, the British Commonwealth of Nations, the Union of Soviet Socialist Republics, and the Netherlands East Indies, provided however that it does not permit payments from any blocked account and that such banks must satisfy themselves that the transaction is bona fide and is or will be made pursuant to the terms of this general license. This general license does not permit transactions by or for any person whose name appears on the Proclaimed List or involving property in which any such person had an interest since the effective date of the Order.

Further, General License No. 64⁴² was issued permitting imports and exports of goods, wares, and merchandise between the Philippine Islands and China or Japan, provided that the transaction is not by or for any blocked country other than China or Japan, by or for any blocked national other than Chinese or Japanese, unless such person is within China or Japan, and the transaction does not involve property of any blocked country

⁴²This general license defines as persons within China or within Japan such persons as were situated within and doing business within such countries respectively on and since June 14, 1941.

except China or Japan; and no blocked national except Chinese or Japanese (unless such national is within China or Japan) had any interest in such property since the effective date of the Order.

The transaction must not involve payment or withdrawal from any blocked account in any bank in any part of the United States except the Philippine Islands, and any bank in the Philippine Islands making such payment or permitting such withdrawal must satisfy itself that the transaction is bona fide and is or will be made pursuant to the terms and conditions of this general license.

6. *Generally Licensed Nationals.*

Similar in principle to the broad exemptions created by the concept of generally licensed trade area are the specific exceptions made in favor of certain "generally licensed nationals", who are permitted by General Ruling No. 4 to operate as though they are citizens of the United States except for the necessity of keeping certain records and filing certain reports.⁴³

It would seem that the term "generally licensed national" as used in the general licenses should mean the same things and that persons so licensed and designated should have the same powers and privileges. However, an examination of the various general licenses on this subject reveals that in many instances this term

⁴³General licenses as "generally licensed national" were issued to certain offices of certain Netherlands Banks on May 31, 1940, GEN. LIC. No. 13; to certain offices of certain banks in Netherlands West Indies on June 4, 1940, GEN. LIC. No. 14; to New York offices of certain Greek Banks on April 28, 1941, GEN. LIC. No. 40; to New York office of French American Banking Corporation on June 7, 1941, GEN. LIC. No. 18; to certain South American, West Indian, and Near Eastern offices of certain Netherlands Banks on June 7, 1941, GEN. LIC. No. 21; to London and New York offices of Banque Belge Pour L'Etranger (Overseas) Ltd. on June 7, 1941, GEN. LIC. No. 22; to New York offices of certain Swiss Banking institutions on June 14, 1941, GEN. LIC. No. 43; to the Roman Curia of the Vatican City State on June 14, 1941, GEN. LIC. No. 44; to Banco Di Napoli Trust Company of New York and of Chicago on June 14, 1941, GEN. LIC. Nos. 47 and 47A; to Chinese offices of certain banks and institutions on July 26, 1941, GEN. LIC. No. 59; to the National Government of the Republic of China and Central Bank of China on July 26, 1941, GEN. LIC. No. 60; to certain Chinese Banks outside of the United States on July 26, 1941, GEN. LIC. No. 61; to certain Chinese institutions in the United States on July 26, 1941, GEN. LIC. No. 62; to offices in Philippine Islands of certain banking institutions on July 26, 1941, GEN. LIC. No. 63; to Hawaiian offices of certain banks on July 26, 1941, GEN. LIC. No. 66; to nationals of China and Japan residing only in the United States since June 17, 1940, on July 26, 1941, GEN. LIC. No. 68; and to California and Washington offices of certain Chinese and Japanese banks on July 26, 1941, GEN. LIC. No. 69.

has various meanings and gives various rights, privileges, and immunities which are not common to all "generally licensed nationals."

For instance the "generally licensed nationals" as licensed under General License Nos. 28, 42, and 68 besides coming within the definition set forth above and enjoying the rights and privileges set forth above need not file reports on Form TFR-300. The reason for this exemption is probably the fact that these general licenses apply only to United States citizens and those nationals who were domiciled and resided in the United States since prior to the date the blocking and freezing order became effective and have continuously resided and remained domiciled in the United States and the purpose of the Executive Order would therefore not apply to them. With respect to General License No. 68 which refers to Chinese and Japanese, an additional reason may exist in that Chinese or Japanese may not become citizens of the United States irrespective of how long they resided or were domiciled in the United States, and, therefore, Chinese or Japanese in the United States for a long time would otherwise be blocked nationals under the definition contained in the Executive Order.⁴⁴

Chief among the reports required of most "generally licensed nationals" is the new Form TFR-300 which is discussed below in connection with reports in general.

7. *Special Treatment Accorded to Certain Countries.*

a. Exemptions of Citizens of the United States.

The all-inclusive definition of nationals in the Executive Order embraces within its scope as blocked nationals those citizens of the United States who have resided or have been domiciled in any of the blocked countries at any time since the effective date of the Order. There was never any intention to block such citizens who have since returned to the United States; therefore, General License No. 28 provided that United States citizens in this category who reside in the United States may engage in any of the transactions described in the Executive Order to the same extent that the ordi-

⁴⁴40 STAT. 547 (1918), 8 U. S. C. A. § 359 (1927); 22 STAT. 61 (1882) 8 U. S. C. A. § 363 (1927).

nary United States citizen could. Originally, it would appear that a report on Form TFR-300 must be filed as to his property,⁴⁵ but a recent amendment to this general license eliminated this requirement.⁴⁶

b. Special Treatment of the U.S.S.R.

The treatment of the Union of Soviet Socialist Republics is a striking example of the use of the Executive Order as an economic weapon and as part of the United States foreign policy. When the countries of Latvia, Esthonia, and Lithuania were annexed by the U.S.S.R. the Executive Order was promptly amended to include these three annexed countries as blocked and their nationals as blocked nationals.⁴⁷ However, immediately after Germany attacked Russia, the Treasury Department issued General License No. 51, which is most sweeping in its effect. It declares the U.S.S.R. a "generally licensed country" and defines this term to mean that the U.S.S.R. is not blocked and its nationals are not blocked. As a result, for all practical purposes the U.S.S.R. is regarded by the United States as in the same category as the British Commonwealth of Nations and the American Republics, so that the only effect on the U.S.S.R. of the Executive Order is that reports on Form TFR-300 must be filed as to property of the U.S.S.R. and of its nationals.

c. Special Treatment Accorded to China and Japan.

The general licenses issued on behalf of China and Japan show a definite tendency to liberalize the workings of the Executive Order insofar as these countries are concerned in contrast to the treatment accorded most of the other blocked countries.

A general license was issued permitting any transaction prohibited by the Executive Order solely for the reason that it involved property in which China or Japan or a national thereof had an interest prior to July 26, 1941, but not since July 26, 1941. This license has the effect of changing the effective date of the Order

⁴⁵PUB. CIRC. No. 4.

⁴⁶Issued September 9, 1941.

⁴⁷Amendment to Treasury Regulations, July 15, 1940.

as to disposition of property in which China or Japan or a national thereof had any interest from June 14, 1941, to July 26, 1941.⁴⁸

Another license permits domestic banks to pay from blocked accounts of China and Japan and their nationals, checks or drafts drawn or issued prior to July 26, 1941, and to accept any pay drafts drawn prior to July 26, 1941, under letters of credit if the amount of any one payment or acceptance does not exceed \$500 or the amount of any one payment or acceptance does not exceed \$10,000 and the check or draft was in the United States for collection on or prior to July 26, 1941, and to pay drafts drawn under letters of credit issued or advised by domestic banks prior to July 26, 1941, provided that the letters of credit were not issued in favor of Japan or China or a national thereof or such drafts have not been held by or for any blocked country or blocked national since July 26, 1941.⁴⁹

Any partnership, association, corporation, or other organization, a national of China or Japan, engaged in commercial activities within Hawaii is permitted to conduct its normal business transactions within Hawaii provided no payments, transfers, or withdrawals are made from any blocked account in any bank of the United States except banks in Hawaii. Such a firm must not engage in any transaction which substantially diminishes its assets in Hawaii or prejudicially affects its financial position in Hawaii.⁵⁰ A similar license was issued for transactions within the Philippine Islands.⁵¹

The British Crown Colony of Hong Kong is not a part of China, but in view of the large number of blocked nationals in Hong Kong and its inter-relationship with the Chinese economy it is provided by General License No. 57 that the privileges of all general licenses as applied to China are extended to Hong Kong.

Special treatment has also been accorded to China and Japan with respect to imports and exports as discussed above. The National Government of China, the Central Bank of China, and

⁴⁸GEN. LIC. No. 54.

⁴⁹GEN. LIC. No. 55.

⁵⁰GEN. LIC. No. 56.

⁵¹GEN. LIC. No. 65.

certain Chinese corporations and institutions in the United States, as well as certain Philippine and Hawaiian offices of certain banks, including Japanese banks, are designated as "generally licensed nationals."⁵²

d. European Neutrals.

The use of foreign funds control as an instrument of United States foreign policy appears in a manner less obvious but equally important in the treatment accorded certain European neutrals—Sweden, Switzerland, Spain, and Portugal—who are so situated as to be within the danger of falling within the Axis orbit.

Shortly after June 14, 1941, when all the countries in continental Europe not previously blocked were brought within the system of the freezing order, the Secretary of the Treasury issued general licenses in favor of these European nationals.⁵³

Typical is the general license in favor of Sweden. Any transactions described in Section 1 of the Executive Order are permitted, if the transaction is by or for Sweden, or a national thereof, or if it involves property in which Sweden was a national thereof and had any interest since the effective date of the Order, provided however that

1. It is not by or for any other blocked country or national of any other country, and
2. It does not involve property of any blocked country or national other than Sweden or a Swedish national, or
3. It is either by or for the Swedish Government or Sveriges Riksbank (similar to our Federal Reserve Bank); or that a specially designated representative of the Minister of Sweden to the United States has certified in writing that the transaction complies with the first two conditions designated.

This license specifically provides that no payments, withdrawals, or transfers are to be made under this license from any blocked account other than blocked accounts of the Swedish Government or the Sveriges Riksbank without the certificate of the

⁵²GEN. LIC. Nos. 59, 60, 61, 62, 63, 66.

⁵³GEN. LIC. Nos. 49, 50, 52, 70.

representative of the Swedish Legation and shall not apply with respect to any Swedish national who is also a national of another blocked country.⁵⁴

The effect of this coupling of a blocking order with an unblocking license is to subject these countries to at least some measure of supervision and more important to make clear the precarious nature of their privileges which may be withdrawn or modified by administrative action without a further executive order.

B. Specific and Operating Licenses

Supplementing the system of general licenses which permit all transactions of a described character without special application therefor, is the system of specific licenses provided for by Section 130.3 of the Treasury Regulations. Specific licenses are of two kinds, those which license a particular described transaction such as the sale of certain named securities, and the so-called operating licenses which permit the licensee to conduct a described business for a specified period of time and to perform all acts incident thereto. No general rules govern the granting of special licenses, each application being considered on its own merits in the light of all the circumstances.

1. Procedure.

Applications for specific licenses are filed with the Federal Reserve Bank in the district in which the applicant resides or maintains his principal place of business. In the usual course, applications are investigated and forwarded to the Treasury Department in Washington together with a recommendation of approval or disapproval. The Treasury Department either grants or refuses the application and notifies the Federal Reserve Bank of its decision, who then notifies the applicant if disapproved or issues and forwards to the applicant the license which is generally issued by the Federal Reserve Bank in the name of the Treasury Department.

Specific licenses contain a time limit generally fifteen or thirty

⁵⁴GEN. LIC. No. 49. Similar provisions were made as to Switzerland, GEN. LIC. No. 50; Spain, GEN. LIC. No. 52; and Portugal, GEN. LIC. No. 70.

days from date of license during which time the transaction must be completed otherwise the license automatically lapses at the time set forth in the specific license, usually the last day thereof, the holder of the license must file with the Federal Reserve Bank a report as to the transactions conducted under the license giving such information as directed in the license.

Operating licenses are granted usually for either one month, two months, or three months and require the holder of the license to furnish periodical reports to the Federal Reserve Bank as to all transactions under the license and usually the report must be filed either semi-monthly or monthly.

Copies of the licenses must be furnished to the bank in which the blocked account is maintained since without such license the bank may not honor any withdrawals on the account except as authorized by the general licenses above referred to. The operating license provides definitely for the maximum amount that may be withdrawn from such account for each period and the bank will refuse to honor any checks or withdrawals in excess of the amount specified in the license for such period. It is therefore necessary in conducting a going business for a blocked national that applications for renewals be filed sufficiently in advance of expiration date of the license as to avoid a hiatus, since, during the period between the end of the license and the renewal thereof the bank will refuse to honor any check or withdrawal on the account irrespective of how large a balance is contained in the account and no matter how small the amount of the check or withdrawal.^{54*}

2. Reports.

The system of licenses is supplemented by a system of reports which has a triple function. In the first place, reports provide a means for checking on evasions and violations of the control. This is particularly effective since reports are called for not merely from one party to a transaction but from the bank clearing the transaction and in many cases from all parties including agents and inter-

^{54*}Recently, licenses are containing provisions to the effect that the banks holding the blocked accounts may honor a check dated prior to the expiration date set forth in the license.

mediaries. Secondly, the information obtained from the reports assist the Treasury in determining the desirability of new kinds of controls or on the other hand, of permitting a relaxation of the existing controls. Finally, the reports supply the government with the basic information which will make possible an effective use of financial controls as a weapon in the national interest. This is particularly true of the new census provided for by Form TFR-300, which applies not only to blocked countries and blocked nationals but to every foreign country and national (except "generally licensed nationals" under General Licenses Nos. 28, 42, and 68). Reports of this character on Form TFR-100 were required of Norway and Denmark and their nationals concerning any property situated in the United States on April 8, 1940, in which these countries or their nationals had any interest on or since April 8, 1940.

These reports were to be filed by any person in the United States holding or having title, custody, control, or possession of such property where the total value of such property was \$250 or more. The reports were to be filed by May 15, 1940.⁵⁵ As additional countries were blocked by the Executive Order, amendments to the Regulations were made requiring similar TFR-100 reports with respect to every new blocked country and national thereof, and usually one month's time was given for the making of such reports. When the control was extended to all continental Europe on June 14, 1941, a complete survey was undertaken. Form TFR-300 is required to be filed by every person in the United States holding or having title, custody, control, or possession of property of every foreign country and national where the value of such property was \$1,000 or more, and as to safe deposit boxes, patents, trade-marks, copyrights, franchises, and partnership and profit sharing agreements irrespective of the value thereof. This report must have been filed with respect to all property in the United States on June 1, 1940, and with respect to all property in the United States on June 14, 1941, irrespective of whether Form TFR-100 had ever been filed. Thereafter, these regulations were again amended so that China and Japan and their nationals

⁵⁵Amendment to Treasury Regulations, May 10, 1940.

were required to file Form TFR-300, not only as to property in the United States on the two dates given above, but also as to property in the United States on July 26, 1941. The time to file these reports originally expired on July 15, 1941, but was later extended from time to time until October 31, 1941.⁵⁶

We have already discussed in connection with special and operating licenses the requirement of reports with respect to the transactions carried on pursuant thereto. Transactions carried on under general licenses are required to be reported by the banking institutions within the United States engaging in such transactions. This requirement is contained as an express provision in the various general licenses.

IV. BURDEN ON BANKS

THE burden of submitting reports falls most heavily upon the banking institutions in whose hands a vast part of foreign assets is held and through whose hands the vast part of all transactions involving foreign assets pass.

General licenses require the banks to make certain reports immediately upon the consummation of a transaction.⁵⁷ As to transactions permitted under other general licenses, the banks are required to make monthly reports.⁵⁸ As to other types, they must make weekly reports,⁵⁹ and for still another type, quarterly reports.⁶⁰ In addition to these, the banks are required to make reports at various periods under specific and operating licenses.

The duty imposed upon the banks to satisfy themselves that certain transactions comply with the conditions set forth in the various general licenses under which the transactions are authorized,⁶¹ is also a heavy one since under the Executive Order any

⁵⁶PUB. CIRC. No. 1 as amended on September 18, 1941. On Oct. 24, 1941, the Treasury ordered (1) that on contracts of employment involving sums less than \$5,000 no report need be filed, (2) that as to imports and exports and insurance companies the filing date of the reports should be extended to Nov. 29, 1941.

⁵⁷GEN. LIC. Nos. 12, 32, 33.

⁵⁸GEN. LIC. Nos. 2, 5, 9, 11, 13, 14, 19, 21, 27, 37, 58, 59, 60, 61, 64.

⁵⁹GEN. LIC. Nos. 4, 20, 49, 50, 52, 55, 70.

⁶⁰GEN. LIC. No. 71.

⁶¹GEN. LIC. Nos. 32, 33, 56, 58, 61, 64, 65, 67, 72.

person who violates the Order is subject to a penalty not to exceed \$10,000 and imprisonment not to exceed ten years.

The burden of making all these reports in addition to the reports on Form TFR-300 is considerable since a conservative estimate would show that at least 250,000 specific and operating licenses alone have already been issued.

The Executive Order sets up no standard of how much proof banks must obtain in order to be "satisfied" that the transaction in question complies with all the terms and conditions set forth. Questions may arise involving the nationality of each of the parties, the nationality of each and every person who has any interest in the property, the scope of the license under which each of the parties is operating, the country of origin, and the country of destination of the goods involved in the transaction. The transaction may be further complicated by questions of agents and principals, both disclosed and undisclosed. To obtain absolute proof of all these various factors may be impossible under present conditions, and therefore to require absolute proof under these circumstances would be to substantially curtail commercial activities of the kind contemplated by the licenses, while reliance upon proof by affidavit for example, may subject the banks to grave future eventualities. In consequence of the responsibility thus placed upon them, the banks have naturally tended toward an extremely conservative approach in handling these problems.

CONCLUSION

WHILE normally it would seem that the freezing of assets would apply only to foreign countries and their nationals, the above facts reveal that there is a far-reaching effect upon the domestic economy.⁶² The foreign assets in the United States as of January 1, 1941, are estimated at about \$10,000,000,000. The banking institutions are very directly affected by the operation of the orders as they are directly charged with the responsibility of not permitting any of the prohibited transactions under severe penalty.⁶³

⁶²Brown, *How Freezing Affects Domestic Trade*, CRED. AND FINAN. MANAG., Aug., 1941, p. 14.

⁶³Watch "Frozen Assets" (1941) 2 INVEST. BANK. 20.

Therefore, any banking transaction in which any of the parties concerned is a blocked country or blocked national or in which any blocked country or blocked national has an interest must be carefully watched to see whether a license is required. The same condition prevails as to insurance companies of all kinds in connection with the payment of claims or benefits where either of the parties is a blocked country or blocked national or where a blocked country or blocked national has any interest in the property or claim.⁶⁴ All trusts and estates are subject to the same risks, whether donor, trustor, trustee, executor, administrator, or any beneficiary may be affected. It affects all transactions of securities under Section 2A of the Order, irrespective of the nationality of the party. It affects all corporations and their registrars and transfer agents in connection with transfer or assignments of stocks or bonds or other securities where a blocked country or blocked national has any interest in the securities.

Under Section 5 of Executive Order No. 8785, a national is defined as a person who has been domiciled in or a subject citizen or resident of a foreign country at any time since the effective date of the Order. Legalistic distinctions as to residence, domicile, etc., are unimportant since the definition is so broad and all-inclusive and the policy back of the Order is to embrace all that may possibly come within the scope of the plan. (When in doubt, block). In considering the domicile of a person the policy has been that anyone in the United States on a temporary visa, such as visitor's permits or transit visas, is not considered domiciled in the United States. Because the definition is so general it includes even citizens of the United States who may have been residing or domiciled in any of the blocked countries since the effective date of the Order. Furthermore, under this definition a person can be a national of many blocked countries depending upon his citizenship, residence, or domicile in any of the blocked countries since the effective date. And the Order provides that where a person is a national of more than one foreign country he is considered to be a national of each foreign country.⁶⁵

⁶⁴NATIONAL UNDERWRITER, June 26, 1941, p. 6.

⁶⁵Section 5 (E).

An interesting question arises as to the treatment of a peculiar class of European individuals who have been rendered stateless by the action of certain European governments. It would seem to follow that such an individual has no citizenship so that if such an individual were declared stateless prior to the effective date of the Order the definition of a blocked national as to such an individual would have to omit the requirement of citizenship and rest simply on residence and domicile.

Various theories have been advanced as to what the future may bring with respect to foreign funds in the United States. It has been proposed that such funds be taken by the United States Government and offset as against the balance due from the respective foreign countries under the debts arising out of and since World War I.⁶⁶ Such a result is inconceivable under our constitution and our system of law and government. As stated by Senator Connally during the debate on the Joint Resolution in April, 1940. "There is an international faith in the integrity of the United States Government that it will protect and safeguard and secure property of aliens that is legally and lawfully in the United States."⁶⁷

As a final word of caution, it must be borne in mind that the entire subject, the executive orders, the regulations, rulings, and licenses are all in a highly fluid state and each and every part may be amended, revoked, or cancelled solely in the discretion of the government and without any prior notice.

⁶⁶*Foreign Assets in This Country a Problem to U. S. Treasury* (1940) 20 BARRON'S 4; Travis, *supra* note 14. Polk, *Freezing Dollars Against the Axis* (1941) FOR. AFFAIRS 130.

⁶⁷86 CONG. REC., April 29, 1940, at 7927. In this speech Senator Connally stated: "But if we permit foreigners to invest their money here we owe them some duty. We owe a duty to foreign countries; and when the nationals of those countries invest in our securities we owe them at least the duty, if we can exercise it, of seeing that they are not defrauded, that they are not robbed, that they are not 'high-jacked' out of their property. We should do all we can to preserve the sanctity of investments if we permit foreigners to make them here at all. So it seems to me this proposed legislation is in the interest of good will and security. . . . Why are they now sending gold and securities to the U. S.? Because there is an international faith in the integrity of the United States Government that it will protect and safeguard and secure the property even of aliens, that is legally and lawfully in the United States."

THE "RECONSTRUCTED COURT" AND RELIGIOUS FREEDOM: THE GOBITIS CASE IN RETROSPECT

WILLIAM G. FENNELL

THE appointment of Justice Stone to be Chief Justice of United States Supreme Court brings to mind numerous decisions indicative of his liberal philosophy. Of these none deserve a higher place than his dissenting opinion in the *Compulsory Belligerent Salute* case.¹

The majority opinion by Justice Frankfurter and Justice Stone's dissent in that case present an opportunity to study conflicting attitudes of two eminent jurists—both reputedly "liberals"—on the question of the "accommodation" between the constitutional guarantee of religious freedom and the expanding doctrine of the police power, and the scope of judicial review of state legislation affecting civil liberties. No other recent case affords a better opportunity to study the approach of what one might call the "liberal democratic" jurist and the "liberal constitutionalist" jurist to the problem of conflict between rights of conscience and the proper demands of the state. The liberal democrat puts complete trust in the majority popular will to correct foolish legislation which violates the constitutional liberties of the first ten Amendments, and would reduce the participation of the Supreme Court in the process of correcting such legislation to keeping open the means by which undesirable legislation may be repealed, such as the right to vote, to disseminate information, to organize politically and to assemble. The liberal constitutionalist, however, while placing no less importance upon keeping these channels for correcting legislation open, nevertheless recognizes the important role which the Supreme Court has under the Constitution of scrutinizing even more searching legislation which comes within the specific prohibitions of the first ten Amendments, especially legislation v

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¹*Minersville School District v. Gobitis*, 310 U. S. 586, 601, 60 Sup. Ct. 1017 (1940).

tachment. One inheres in the vagueness of general terminology. The categories he would create are so broad that they would be given different meanings by different courts and by the same court at different times. Even so they could scarcely give effect to the governing policies in the enormous diversity of human affairs. The word contract, for example, covers an immense variety of situations and factors which cannot be given due weight through the usual general rules as to validity and effect. To have a just and workable system it is necessary that the rules take into account the extraordinary variety in possible situations. At this stage narrow categories rather than broad ones are the need of conflict of laws.⁴ The second difficulty comes from rejection of the indicated law and consequent continuance of variety in decision which, indeed, the system itself envisages. M. Lepaulle would make this variety possible through the doctrine of public policy. If public policy is broadly interpreted, it would mean an illusion of certainty where there is no certainty.

The method M. Lepaulle proposes and the method of narrow measures are, however, not opposed or incompatible. Each may have its place and through joint efforts on both of them there may be a greater measure of achievement of the author's ultimate desire.

ELLIOTT E. CHEATHAM.*

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* These shortcomings have been clearly pointed out by Professor Reese, *Book Review*, 48 *COL. L. REV.* 1117 (1948).

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JUDICIAL CONSTRUCTION OF THE TRADING WITH THE ENEMY ACT †

*Joseph W. Bishop, Jr.**

THE Trading with the Enemy Act has in modern economic warfare two basic objectives: to keep an enemy from using for his own purposes any property which he owns or controls, located within the United States; and to make that same property available for the purposes of the United States. Essentially simple as are these purposes, the Act — perhaps because loosely and hastily drafted — has presented to the judiciary a collection of knotty problems which are probably not surpassed by those arising under any other statute of its size and weight. It is the aim of this article to discuss some of those problems.

The first purpose, essentially defensive, has been accomplished principally by "freezing" controls. Freezing, unlike vesting, did not change the ownership of the property affected, but simply prohibited and declared void transfers not licensed by the Treasury.¹ The constitutionality of such prohibition and nullification

† In addition to the usual warning that the opinions expressed herein are not necessarily those of the Department of Justice, the author cautions readers that he has been largely responsible for the appellate litigation of some of the cases discussed herein, particularly *Clark v. Manufacturers Trust Co.* and *Matter of Herter*, and so has a certain, perhaps inevitable, bias.

This article avoids, insofar as possible, detailed discussion of the history of the Trading with the Enemy Act. An excellent symposium on this and allied topics is contained in 11 *LAW & CONTEMP. PROB.* 1-199 (1945).

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¹ The basic statutory authority for these controls is § 5(b) of the Trading with the Enemy Act, 40 *STAT.* 415 (1917), as amended, 50 *U. S. C. APP.* § 5(b) (1946). The basic Executive Order, frequently amended to extend the controls, is

of transfers of foreign-owned property is no longer open to question, and in general the courts have accorded to freezing orders the full effect intended by the legislative and executive branches of the Government.² The freezing program, by subjecting to licensing and consequent strict scrutiny transactions affecting property in the United States in which foreign countries (allied and neutral as well as enemy) or their nationals had an interest, not only prevented the Axis from using its own property in the United States as a means of obtaining credit and foreign exchange but, more important, seriously interfered with its plans for the looting of conquered countries. Without the freezing controls, utilization of dollar assets belonging either to the Axis, its nationals, or its victims would have presented few difficulties to the acute financial intellects in the German *Devisenabteilung* of the Reich Economics Ministry and their Japanese opposite numbers. The imposition of "occupation costs" or the simple pointing of a gun could secure the transfer of interests in American property to the Axis; "evidences of ownership" so obtained could easily have been exchanged in neutral countries for "hard money." As it was, few neutrals cared to speculate in evidences of ownership which American law declared null and void.

At its peak, the program affected property valued at nearly eight billion dollars;³ but it is being terminated as rapidly as possible, the general policy being either to unfreeze the assets altogether or, if they have a genuine enemy taint, to vest them in

Exec. Order No. 8389, 3 CODE FED. REGS. 645 (Cum. Supp. 1943) (issued April 10, 1940). For a comprehensive collection of Executive Orders, General Rulings, General Licenses and other regulations under the freezing program see DOCUMENTS PERTAINING TO FOREIGN FUNDS CONTROL (U. S. Treas. Dep't 1946).

² E.g., *Silesian-American Corp. v. Clark*, 332 U. S. 469 (1947); *United States v. Von Clemm*, 136 F.2d 968 (2d Cir. 1943), cert. denied, 320 U. S. 769 (1943); *Clark v. Propper*, 169 F.2d 324 (2d Cir. 1948). Some question has arisen in the courts of New York as to the effect of these regulations on transfers by judicial process, such as attachment or the appointment of a receiver. Cf. *Singer v. Yokohama Specie Bank*, 293 N. Y. 542, 58 N. E.2d 726 (1944). The *Singer* case has been criticized by commentators, see Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 COL. L. REV. 398 (1947), and rejected by the Court of Appeals for the Second Circuit. *Clark v. Propper*, *supra*. See also *Clark v. Chase Nat. Bank*, S. D. N. Y., Oct. 1, 1948. The Supreme Court has granted certiorari in the *Propper* case, and it is possible that such conflict as there is between the federal courts and those of New York may be resolved.

³ See ANNUAL REPORT, OFFICE OF ALIEN PROPERTY CUSTODIAN, FISCAL YEAR ENDING JUNE 30, 1944, 14; H. R. REP. NO. 1507, 77th Cong., 1st Sess. 2-3 (1941).

the Alien Property Custodian.⁴ With the end of shooting war and the gradual return of more or less normal economic conditions, the practical significance of the freezing program to the lawyer decreases, and it will consequently not be included within the scope of this article.⁵

The vesting of property by the Alien Property Custodian achieves the second, or offensive (in the military sense), purpose of the Trading with the Enemy Act — the seizure and utilization of *enemy* property "in the interest of and for the benefit of the United States." It accomplishes this sweeping objective by transferring the ownership of the property to the United States, there to remain unless the former owner can fit himself into one of the sections of the Act which provide for return. It will be noted that the scope of the vesting power is considerably narrower than that of the regulatory power, for the latter covers any property in which a foreign national has any interest, while the former extends only to the foreign interest itself⁶ — and, in practice, only to *enemy* interests.

The value of the property directly affected by the vesting program, while small by comparison to the sums frozen, can hardly be described as piddling. As of June 30, 1947, the Custodian had vested German and Japanese property valued at \$266,017,000 and had estimated the value of such property not yet vested to be somewhere between \$88,500,000 and \$103,500,000.⁷ These figures are, however, deceptively low, for they take no account of thousands of copyrights and patents — as, for example, the basic

⁴ This policy was expressed in detail in a letter from the Secretary of the Treasury to the Chairman of the Senate Committee on Foreign Affairs. See N. Y. Times, Feb. 3, 1948, p. 1, col. 6. By Exec. Order No. 9989, 13 FED. REG. 4891 (1948) (issued August 20, 1948), administration of the freezing program was transferred to the Attorney General, as successor to the Alien Property Custodian.

⁵ For a general survey of the wartime operation of the freezing program, see Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 LAW & CONTEMP. PROB. 17 (1945).

⁶ See *Clark v. Edmunds*, 73 F. Supp. 390 (W. D. Va. 1947); cf. *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480 (1947), discussed pp. 749-50 *infra*.

⁷ ANNUAL REPORT, OFFICE OF ALIEN PROPERTY, DEPARTMENT OF JUSTICE, FISCAL YEAR ENDING JUNE 30, 1947, 3. The value of vested Italian property never exceeded \$18,000,000, and its return has now been authorized by Congress. *Id.*, at 8-9; Pub. L. No. 370, 80th Cong., 1st Sess. (Aug. 5, 1947). Bulgarian, Hungarian, and Rumanian property vested totaled only about \$5,000,000. ANNUAL REPORT, *supra* at 18.

patents of I. G. Farben in the synthetic rubber industry⁸ — the dollar value of which the Custodian has preferred not to estimate, but which is undoubtedly substantial.⁹

Having said so much by way of preface, we may now examine in more detail some of the more important and vexing problems which have arisen out of the Custodian's exercise of the vesting powers conferred on him by the Trading with the Enemy Act and by the executive orders issued thereunder.¹⁰ It will be convenient to divide this treatment into two major sections, one dealing with the nature of the Custodian's administrative powers, the other, with the rights of property-holders affected by the exercise of those powers.

I. THE NATURE OF THE CUSTODIAN'S POWER

The urgency of war and the political impotence of enemy aliens conduced to a gorgeous and rather unusual liberality in the Congressional grant of power to the Custodian. Section 5(b), as expanded by Title III of the First War Powers Act of 1941, provides that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President . . ."¹¹ There were reasons for making Section 5(b) broad. For one thing, it expanded and ratified the freezing controls which were already in effect. For another, the

⁸ For a description of these patents, see *Standard Oil Co. v. Markham*, 64 F. Supp. 656 (S. D. N. Y. 1945), *aff'd*, 163 F.2d 917 (2d Cir. 1947), *cert. denied*, 333 U. S. 873 (1948).

⁹ ANNUAL REPORT, *supra* note 7 at 3, 57, 69.

¹⁰ The Office of Alien Property Custodian was created and authority to exercise powers under the Trading with the Enemy Act was conferred upon the Custodian by Exec. Order No. 9095, 7 FED. REG. 1971 (1942) (issued March 11, 1942), later amended by Exec. Order No. 9193, 7 FED. REG. 5205 (1942) (issued July 6, 1942), and Exec. Order No. 9567, 10 FED. REG. 6917 (1945) (issued June 8, 1945). By Exec. Order No. 9788, 11 FED. REG. 11981 (1946) (issued October 14, 1946), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this article the term "Custodian" will be employed to describe both the Alien Property Custodian and the Attorney General as his successor.

¹¹ Some idea of the sense of urgency which spurred the Congress on as it amended § 5(b) may be gathered from the bare statement that on December 18, 1941, precisely one week after the original bills were introduced in the House and Senate, it had shot through committees, been debated and passed, and been signed by the President. 87 CONG. REC. 9704, 9706, 9753, 9789, 9801, 9828, 9837-46, 9855-68, 9893-95, 9946-47 (1941); 55 STAT. 841 (1941), 50 U. S. C. APP. § 621 (1946).

legislative mind was in a state of great vagueness as to whether the World War I Trading with the Enemy Act was alive, dead, or half-dead¹² and many legislators undoubtedly regarded the amended Section 5(b) as a capsule Trading with the Enemy Act, conferring anew any of the old powers which might have lapsed and adding some new ones.

In practice the question of the extent of the survival of the old Act has not proved embarrassing. It seems to have been assumed from the first by both administrators and courts that the World War I provisions (except such of them as in terms were applicable only to that war) had not been dead but only sleeping, and that they automatically became effective upon the outbreak of World War II. The President transferred to the new Custodian the powers and functions exercised by his counterpart during the first World War;¹³ the Custodian carefully avoided any implication in his vesting orders and other pronouncements that he was limiting himself to Section 5(b); the lower courts persistently cited the sections of the old Act and cases construing it;¹⁴ and at length the Supreme Court made it official by holding that the new Section 5(b) and the holdover sections of the Act were "parts of an integrated whole" and that the old sections were to be treated as operative, so far as that could be done without defeating the purpose of the later enactment.¹⁵ Consequently, it is clear that Section 7(c),¹⁶ as construed by the courts during and after World War I, is still in force. While not so simple as Section 5(b), it is rather more explicit, for it expressly provides that the Custodian's administrative determination shall be conclusive for purposes of an initial transfer of possession: "Any money or other property including (but not thereby limiting the generality of

¹² "Title III of the bill deals with the Trading with the Enemy Act, which originally became law on October 6, 1917, during the last war. Some sections of that Act are still in effect. Some sections have terminated, and there is doubt as to the effectiveness of other sections." H. R. REP. NO. 1507, 77th Cong., 1st Sess. 2-3 (1941).

¹³ Exec. Order No. 9142, 3 CODE FED. REGS. 1148 (Cum. Supp. 1943).

¹⁴ E.g., *The Pietro Campanella*, 47 F. Supp. 374 (D. Md. 1942); *Draeger Shipping Co. v. Crowley*, 49 F. Supp. 215 (S. D. N. Y. 1943); *The Aussa*, 52 F. Supp. 927 (D. N. J. 1943); *Stern v. Newton*, 180 Misc. 241, 39 N. Y. S.2d 593 (Sup. Ct. 1943).

¹⁵ *Markham v. Cabell*, 326 U. S. 404, 411 (1945).

¹⁶ 40 STAT. 416 (1917), as amended, 40 STAT. 1020 (1918), 50 U. S. C. APP. § 7(c) (1946).

the above) . . . choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy . . . which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian"

A. The Power of Summary Seizure

The Supreme Court, when the World War I Custodian took to the courts to enforce his summary demands for possession,¹⁷ showed no disposition to be niggardly in honoring this grant of power, for it held in substance that the Custodian's suit to enforce his demand was tantamount to taking with a strong hand¹⁸ and "not to be defeated or delayed by defenses, its only condition . . . being the determination by the Alien Property Custodian that it was enemy property."¹⁹ The lower courts gave equally short shrift to attempts to resist or delay compliance with the Custodian's demands.²⁰

Permissible Defenses. — In the light of this legislative and judicial language, it might at first blush be supposed that resistance to the Custodian's summary demand for property which he determines to be owned by or owing to an enemy would be a waste of time and counsel fees. In practice, however, some holders of such property — especially banks and large commercial organizations — seem to have a deep-rooted, probably instinctive, aversion to the handing over of large sums of money upon the naked demand of a Government agency. In fact, the tenacity of holders of vested property and the fertile imaginations of their counsel have succeeded at least in casting doubt upon the Custodian's power of summary seizure in two rather common situations — where the holder disputes the Custodian's finding of the existence of an indebtedness to an enemy, and where the holder asserts a possessory lien on the enemy's property.

Both these questions were presented to the Court of Appeals for the Second Circuit in *Clark v. Manufacturers Trust Co.*,²¹ recently decided. The Custodian had found the Trust Company to be indebted to the Deutsche Reichsbank in the amount of \$25,000 and had demanded that that sum be paid over. The Trust Company refused to comply, asserting first, that it was not indebted in any amount, because its obligation to the German bank was more than set off by a claim against that bank; and second, that this obligation created a "banker's lien" on the Reichsbank's deposit, by virtue of which the Trust Company was entitled to retain possession of the money, under Section 8(a) of the Act.²² The district court had, without opinion, ordered the Trust Company to pay over the sum demanded, with interest at 6 per cent from the date of the demand.

The court of appeals, remarking that the appeal presented "several interesting questions upon which there is surprisingly little direct authority," itself created but little new authority on the two principal questions. By holding that a setoff is "technically . . . a money demand independent of and unconnected with the plaintiff's cause of action,"²³ the Court felt able to fall back on the well settled proposition that a debtor must pay to the Custodian an undisputed debt.²⁴ But, by way of dictum, the court said that it would "hesitate" to hold that the Custodian's power to seize money which he determines to be owing to an enemy

²¹ 169 F.2d 932 (2d Cir. 1948), *cert. denied*, 335 U. S. 910 (1949).

²² 40 STAT. 418 (1917), 50 U. S. C. APP. § 8(a) (1946).

²³ *Clark v. Manufacturers Trust Co.*, 169 F.2d 932, 934, 935 (2d Cir. 1948), *cert. denied*, 335 U. S. 910 (1949). The court distinguished New York cases which had stated that where a bank asserts a setoff against a depositor's claim, "it is only the balance which is the real or just sum owing . . ." *Long Beach Trust Co. v. Warsaw*, 264 N. Y. 331, 334, 190 N. E. 659, 660 (1934); *Kress v. Central Trust Co.*, 246 App. Div. 76, 79, 283 N. Y. Supp. 467, 471 (4th Dep't 1935), *aff'd*, 272 N. Y. 629, 5 N. E.2d 365 (1936), on the ground that "this language is appropriate to the cases where it was used but would seem to have little bearing on the question now before us." *Clark v. Manufacturers Trust Co.*, *supra* at 935.

²⁴ *American Exchange Nat. Bank v. Garvan*, 273 Fed. 43 (2d Cir. 1921), *aff'd*, 260 U. S. 706 (1922); *Kohn v. Jacob & Josef Kohn*, 264 Fed. 253 (S. D. N. Y. 1920).

¹⁷ Section 17 of the Act gives the federal district courts jurisdiction to enforce the provisions of the Act. 40 STAT. 425 (1917), 50 U. S. C. APP. § 17 (1946).

¹⁸ *Mr. Justice Holmes in Central Trust Co. v. Garvan*, 254 U. S. 554, 566, 568-69 (1921).

¹⁹ *Mr. Justice McKenna in Commercial Trust Co. v. Miller*, 262 U. S. 51, 56 (1923). See also *Stoehr v. Wallace*, 255 U. S. 239 (1921).

²⁰ *E.g.*, *American Exchange Nat. Bank v. Garvan*, 273 Fed. 43 (2d Cir. 1921), *aff'd*, 260 U. S. 706 (1922); *Columbia Brewing Co. v. Miller*, 281 Fed. 289 (5th Cir. 1922); *Hicks v. Baltimore & Ohio R. R.*, 10 F.2d 606 (D. Md. 1926), *aff'd sub nom. Baltimore & Ohio R. R. v. Sutherland*, 18 F.2d 560 (4th Cir. 1927).

extends to a debt the validity or extent of which the debtor does not acknowledge.²⁵ What seemed to stick in the judicial craw were the "exceedingly drastic" consequences which such a power might entail, and specifically the possibility that one who was in fact not indebted might be compelled hastily to liquidate property in order to satisfy the Custodian's demand and might thereby suffer damage for which the Act provides no remedy. All this may be conceded, but there are certain factors — aside from the rather plain language of the statute²⁶ — which may make the Custodian's position morally as well as legally tenable. In the first place, it must be assumed that the Custodian will, as he has in the past, exercise reasonably the sweeping discretion which Congress has given him. After all — as a judge of the second circuit once pointed out — he could, if he were so minded, "capture enemy property with a sergeant and file or otherwise *vi et armis*,"²⁷ although in practice the Custodian has never called on the Military Police to reason with recalcitrants. Neither would he be likely to compel a small debtor to sell his home in order to comply with a summary demand under Section 5(b) or 7(c). And indeed, in the *Manufacturers Trust Co.* case, it is reasonable to assume that the Trust Company was in a position to raise \$25,000 without recourse to the auction block.

More important from the Custodian's standpoint is the consideration that the creation — or even the adumbration — of a

²⁵ See *Clark v. Manufacturers Trust Co.*, 169 F.2d 932, 935 (2d Cir. 1948), cert. denied, 335 U. S. 910 (1949). The United States District Court for Hawaii has recently followed this dictum, holding that the Custodian could not summarily collect the amount of a debt which he determined to be owing to an enemy, when the respondent flatly denied the existence of any debt whatsoever. *Clark v. Nii*, Civil No. 837, D. Hawaii, Nov. 19, 1948. This judicial reluctance finds support in some World War I dicta by Judge Learned Hand. See *Simon v. Miller*, 298 Fed. 520, 523 (S. D. N. Y. 1923). However, Judge Hand did not have to face the problem squarely in the *Simon* case, for the Custodian had in fact gotten possession of the disputed property and the suit was one which the claimant could clearly maintain to recover it, under § 9(a) of the Act. See pp. 749-58 *infra*.

²⁶ "Any money . . . owing . . . to . . . an enemy . . . which the President after investigation shall determine is so owing . . . shall be . . . paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian . . ." 40 STAT. 416 (1917), as amended, 40 STAT. 1020 (1918), 50 U. S. C. APP. § 7(c) (1946).

²⁷ Hough, J., concurring in *American Exchange Nat. Bank v. Garvan*, 273 Fed. 43, 48 (2d Cir. 1921), *aff'd*, 260 U. S. 706 (1922). See also *Garvan v. \$20,000 Bonds*, 265 Fed. 477, 478 (2d Cir. 1920), *aff'd sub nom.* *Central Trust Co. v.*

ground on which to resist his demand for possession threatens to "entangle this power in incidental litigations" and thereby hinder the purpose of this part of the Act, which is to "accomplish a swift, certain, and final reduction to possession of vast quantities of property involved in incredible complication of ownership and interest";²⁸ for the grounds on which a debt may be disputed are many and complex. It may be anticipated that counsel of ordinary ingenuity will not be at a loss for grounds on which to deny indebtednesses which the Custodian has found to exist.

Moreover, while the power is drastic, it is far from the most drastic of the war powers exercised by Congress. A bank complaining of the severity of the Trading with the Enemy Act would probably receive little sympathy from an individual compelled to "comply with the immensely more grievous demand for the possible sacrifice of life and limb."²⁹ Perhaps for reasons such as these, two federal courts which have squarely faced the problem have taken the statutory language at face value and ordered the protesting debtor to pay over.³⁰

The second circuit, also in the *Manufacturers Trust Co.* case, left equally unsettled the question presented by Section 8 of the Act, which provides in substance that any nonenemy "holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy . . . may continue to hold said property . . ." The Custodian took the position that this section was designed not to protect lienors from the temporary dispossession to which all property holders are subject, but to ensure that an American holder of a possessory lien might, in a suit under Section 9(a) of the Act, recover not merely the value of his

²⁸ The quotations, like so many other lapidary phrases in current legal writing, are borrowed from Judge Learned Hand. See *Kahn v. Garvan*, 263 Fed. 909, 916-17 (S. D. N. Y. 1920). Although written in another context, they are not easy to reconcile with the reluctance to recognize this aspect of the Custodian's power which that eminent jurist displayed in *Simon v. Miller*, 298 Fed. 520, 523 (S. D. N. Y. 1923).

²⁹ Judge Learned Hand in *Silesian-American Corp. v. Markham*, 156 F.2d 793, 798 (2d Cir. 1946), *aff'd sub nom.* *Silesian-American Corp. v. Clark*, 332 U. S. 469 (1947).

³⁰ *Camp v. Miller*, 286 Fed. 525 (5th Cir. 1923); *Clark v. E. J. Lavino & Co.*, 72 F. Supp. 497 (E. D. Pa. 1947); cf. *Miller v. Rouse*, 276 Fed. 715 (S. D. N. Y. 1921) (refusal to consider executor's contention that sum determined to be owed to an enemy and demanded by Custodian was really an unexecuted gift rather

equity in the property, but actual possession of the whole of the property.³¹ In avoiding the question of the right of a lienor to resist the Custodian's summary demand for possession, the court was clearly on firm ground, for a "banker's lien" is not in fact a lien, but merely a right to setoff,³² and, *a fortiori*, could not be an interest in property of an enemy, given the elementary proposition that funds deposited in a bank cease to be the property of the depositor the moment they are deposited, so that the relationship is that of creditor and debtor rather than that of bailor and bailee. Nevertheless, it is to be regretted that the problem was not squarely presented, for the question of the right of a holder of enemy property to plead a possessory lien as a defense to a suit by the Custodian to enforce a demand for possession is left in almost total darkness. *Almost* total, but not quite: a dissenting opinion in the Court of Appeals for the First Circuit contains dicta to the effect that even holders of liens within the scope of Section 8(a) must comply with the Custodian's demand for possession, their remedy being a suit to regain possession under Section 9(a);³³ and the unqualified language of Mr. Justice Holmes in *Central Trust Co. v. Garvan*³⁴ was employed in the face of vigorous argument that the appellants were within the class of lienors protected by Section 8 and hence entitled to raise a defense against the Custodian's possessory action. Holmes ignored dicta in the unreported opinion of Judge Augustus Hand in the District Court which seemed to favor the proposition that a lienor could resist the vesting order.³⁵

The question is one which is bound, sooner or later, to be presented in such form that decision is inescapable. The court to

³¹ See *Clark v. Manufacturers Trust Co.*, 169 F.2d 932, 936 (2d Cir. 1948), *cert. denied*, 335 U. S. 910 (1949). The right to liquidate the security may in itself be important, for the lienor, being presumably more familiar with the business, may be in a better position than the Custodian to obtain the full value of the hypothecated property. See *Mayer v. Garvan*, 278 Fed. 27, 35 (1st Cir. 1922). Of course, upon liquidation of the security the lienor would be obliged to pay over to the Custodian any surplus remaining after the satisfaction of his claim against the enemy.

³² *Furber v. Dane*, 203 Mass. 108, 117-18, 89 N. E. 227, 230 (1909). See Note, 38 HARV. L. REV. 800 (1925).

³³ See Anderson, J., dissenting on other grounds in *Mayer v. Garvan*, 278 Fed. 27, 35 (1st Cir. 1922).

³⁴ 254 U. S. 554, 566, 568-69 (1921); see p. 726 *supra*.

³⁵ See Brief for Plaintiffs in Error, *Marshall, Rosen and Metz*, p. 138, *Central*

which this happens may well find itself in something approaching a quandary. On the one hand, it is a strain on the normal import of the phrase "continue to hold" to say that it means to surrender, and thereafter recover, possession; on the other, a Congressional intent to confer on a mere lienor an immunity from temporary dispossession, an immunity which is denied to an outright owner of property, would be, to say the least, capricious. Lacking controlling precedent, a court might well be required to delve into the legislative history of the section. The provision seems to have been added at the instigation of the New York Stock Transfer Association, which feared that otherwise the Act might be open to a construction permitting the *permanent* destruction of possessory rights of American security holders.³⁶ Such a purpose implies a recognition that the Act does require an initial surrender of possession at the Custodian's demand.

Interest on Vested Funds. — The practical significance of these questions depends in part upon the answer to another disputed point: is the Custodian entitled to recover interest on a sum demanded by him, from the date of his demand, if the holder refuses to comply until ordered to do so by a court? If the X Bank, holding a \$350,000 deposit in the name of Hans Schmidt of Berlin, knows that there is *no* defense to the Custodian's demand and knows also that the demand will bear interest at the rate of six per cent³⁷ from the date of service, it may reasonably be supposed that the Custodian's turnover directive will be obeyed with gratifying promptitude. If, on the other hand, there *are* permissible defenses, and if it costs nothing to try them, the directors of X Bank may be expected to postpone, by the most protracted litiga-

³⁶ See *Hearings before Senate Subcommittee on Commerce on H. R. 4960*, 65th Cong., 1st Sess. 59, 160 (1917); H. R. REP. NO. 85, 65th Cong., 1st Sess. 3 (1917); SEN. REP. NO. 113, 65th Cong., 1st Sess. 8 (1917). The hypercaution of the stockbrokers may have been founded on the somewhat loose generality that a possessory lien does not survive surrender of possession. See RESTATEMENT, SECURITY §§ 11, 80 (1941); JONES, PLEDGES & COLLATERAL SECURITIES §§ 23, 34, 40 (2d ed. 1901).

³⁷ Since the obligation to comply with the Custodian's demand is created by federal law, the rate of interest provided by state law would not be controlling. *Board of Comm'rs v. United States*, 308 U. S. 343 (1939); *Royal Indemnity Co. v. United States*, 313 U. S. 289 (1941). It is, however, a handy yardstick of fairness of which the federal courts may avail themselves. *Ibid.*; *Massachusetts Bonding & Ins. Co. v. United States*, 97 F.2d 879 (9th Cir. 1938). In most states, the legal rate of interest is in the neighborhood of 6%. *E.g.*, N. Y. GEN. BUS. LAW § 370;

tion possible, the loss of the revenue from the \$350,000. A majority of the second circuit in the *Manufacturers Trust* case (Judge Clark dissenting) reversed the district court and resolved this question against the Custodian, principally on the grounds that the Act does not provide for the payment of interest "or any other penalty" in the event of noncompliance with the Custodian's demand and that "the summary procedure provided by Section 17 enables the Custodian, without delay if he immediately invokes it, to obtain an order directing compliance."³⁸

On the other hand, Congressional failure to provide for interest in a statute creating an obligation has been held not to preclude the courts from awarding interest on the obligation, pursuant to "the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained."³⁹ The Supreme Court, where Congress is silent on the interest question, in effect appraises the Congressional purpose to see whether the main purpose of the statute creating the obligation was to enrich the obligee or penalize the obligor. The courts will not impose interest on criminal fines,⁴⁰ nor even on non-criminal penalties such as those imposed under the Agricultural Adjustment Act.⁴¹ They will allow interest where the obligation to the United States has been created as a revenue measure.⁴² The obligation to turn over property demanded by the Alien Property Custodian is obviously not in the nature of a fine or penalty. The Act may, in fact, be analogized to a revenue measure if one recalls its purpose to compel the use of certain property in the best interests of the United States, and recalls, further, that the most recent Congressional amendment in substance provides that the proceeds of vested German and Japanese property shall be covered into the Treasury⁴³ and that the former owners shall recover neither their property nor compensation therefor. The

morals of this confiscation will be discussed below;⁴⁴ it is sufficient for the present discussion that seizures of enemy property under the Trading with the Enemy Act *do*, under the existing legislative policy, redound to the "financial advantage" of the United States.

This reasoning is not affected by the fact that the Custodian's determination may be wrong and the nonenemy possessor of the property may be enabled to recover it in a suit under Section 9(a) of the Act. The same thing is true of tax procedure, where the taxpayer is frequently required to pay first and litigate his rights thereafter.⁴⁵ In this procedure the government is given the right to possess and use the money during the interim between the administrative demand for it and the ultimate judicial review of the administrative determination.⁴⁶ Extension of the analogy from tax procedure, however, might lead to the result that if the government were ultimately proved wrong, the holder of the seized property would in his turn be entitled to interest from the time of payment. While the point has never been decided — and obviously cannot be until the courts dispose of the question whether the Custodian is entitled to interest in the first place — it might be held that a nonenemy who has paid over property to the Custodian, with interest, and who has thereafter established his right to the property, should recover not only the property itself but also at least the interest which he paid.⁴⁷

B. Vesting without Summary Seizure

So far, we have considered only the most summary type of exercise of the Custodian's vesting power — a demand for specific

³⁸ See p. 744 *infra*.

³⁹ *Phillips v. Commissioner*, 283 U. S. 589, 595 (1931). *Cf. Yakus v. United States*, 321 U. S. 414, 442-43 (1944).

⁴⁰ See *Salamandra Ins. Co. v. New York Life Ins. & Trust Co.*, 254 Fed. 852, 860-61 (S. D. N. Y. 1918), which analogizes the two procedures.

⁴¹ The Supreme Court has held that an American whose property was seized under an erroneous determination that it was enemy property could recover not only the proceeds of the sale of such property, but also whatever interest was actually earned on the proceeds while they were in the possession of the Government. *Henkels v. Sutherland*, 271 U. S. 298 (1926). If the property is considered to have been in the constructive possession of the Government from the moment of the Custodian's demand, *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746, 752 (2d Cir. 1922); *Application of Miller*, 288 Fed. 760, 767 (2d Cir. 1923), the interest awarded to the Custodian might well be regarded as "earnings" within the rule of the *Henkels* case.

³⁸ 169 F.2d 932, 936 (1948).

³⁹ See *Rodgers v. United States*, 332 U. S. 371, 373 (1947); *cf. United States v. U. S. Fidelity Co.*, 236 U. S. 512 (1915); *Billings v. United States*, 232 U. S. 261 (1914); *Royal Indemnity Co. v. United States*, 313 U. S. 289 (1941).

⁴⁰ *Pierce v. United States*, 255 U. S. 398, 405-06 (1921).

⁴¹ *Rodgers v. United States*, 332 U. S. 371 (1947).

⁴² *Billings v. United States*, 232 U. S. 261 (1914).

⁴³ 62 STAT. 1246 (1948), 50 U. S. C. A. APP. § 2011 (Supp. 1949).

property, which may take the form of a "res-vesting order," or a "turnover directive," issued subsequent to an order vesting right, title, and interest. When the Custodian issues such an order, it means that he has determined that a particular thing is enemy property; and for the purposes of immediate possession of that thing his determination is conclusive, "whether right or wrong,"⁴⁸ subject only to the qualifications indicated in the preceding paragraphs. The practical effect of this is that the Custodian has the use of the property during the interim between his administrative determination of its enemy character and ultimate judicial review of the correctness of that determination, every argument about the existence or extent of enemy interest in the property being deferred until suit is brought against the Custodian under Section 9(a) of the Act.⁴⁹

Where, however, there is no urgent need for an immediate transfer of possession, the Custodian usually follows a course calculated to minimize the dislocation of local judicial proceedings and business, vesting in himself simply the "right, title and interest" of the enemy in and to the property. Under such an order, if there be any controversy concerning the nature or extent of the enemy's interest in the property, the Custodian finds himself in much the same position that the enemy himself would have occupied — he is a litigant. As such, he participates in numbers of lawsuits differing widely from those ordinarily engaged in by the Federal Government, for they may and often do turn on questions of chemically pure state law. The Custodian, unsupported by his hypothetical sergeant and file, has about the same rights and duties as any other suitor.

To this last generalization, however, an important qualification must be appended: the Custodian can, in theory at least, choose his own time and — as between state and federal court — his own forum. It has, in fact, been flatly stated that "neither the [district] court nor any other tribunal in or of the United States [has] jurisdiction to compel the Custodian to come into court and . . . litigate or forego his demand He can use his own method of procedure; courts cannot coerce him *in limine*."⁵⁰

⁴⁸ Central Trust Co. v. Garvan, 254 U. S. 554, 566 (1921).
⁴⁹ E.g., Stoehr v. Wallace, 255 U. S. 239 (1921). See pp. 749-58 *infra*.
⁵⁰ Hough, J., concurring in American Exchange Nat. Bank v. Garvan, 273 Fed. 43, 48 (2d Cir. 1921).

Since a suit against the Custodian is a suit against the United States,⁵¹ any action against him must be brought within the terms of Congressional consent.⁵² Section 9(a) of the Act does not authorize suit unless and until the Custodian has taken possession of the property in which the nonenemy seeks to establish an interest.⁵³ Thus, where the Custodian has vested the right, title and interest of an enemy in a piece of property, one who asserts an interest adverse to the enemy's in that piece of property cannot sue under Section 9(a).⁵⁴ Consequently, he must wait for the Custodian to initiate litigation.

The Custodian's possession of the initiative may not be complete, however. Section 17 of the Act gives to federal district courts plenary jurisdiction "to enforce the provisions of this Act," and in at least one case this grant has been held (by Judge Learned Hand, reasoning on a "sauce-for-the-gander" basis) to empower the court to entertain a trustee's suit to determine the beneficial interests in the trust, where the Custodian had vested the unascertained interest of some of the beneficiaries, but not the trust *res* itself.⁵⁵ Moreover, many proceedings in state courts affecting property in which the Custodian has vested an interest, notably probate proceedings, are *in rem*. Since a decree in such a suit is binding upon all the world, including persons not within reach of the court's process, the fact that the state court could not compel the appearance of the Custodian⁵⁶ loses some of its significance, for practical considerations will compel him to come into court and make the most of the interest which he has vested.⁵⁷

⁵¹ Banco Mexicano v. Deutsche Bank, 263 U. S. 591 (1924); Cummings v. Deutsche Bank, 300 U. S. 115 (1937). See Cummings v. Societe Suisse pour Valeurs de Metaux, 85 F.2d 287, 289 (D. C. Cir. 1936), *cert. denied*, 306 U. S. 631 (1939).

⁵² Stanley v. Schwalby, 162 U. S. 255, 269 (1896); United States v. Alabama, 313 U. S. 274, 282 (1941).

⁵³ Sigg-Fehr v. White, 285 Fed. 949, 954 (D. C. Cir. 1923); *cf.* Hunter v. Central Union Trust Co., 17 F.2d 174 (S. D. N. Y. 1926); Koehler v. Clark, 170 F.2d 179 (9th Cir. 1948).

⁵⁴ *Ibid.*
⁵⁵ Kahn v. Garvan, 263 Fed. 909 (S. D. N. Y. 1920). It should be noted, however, that the trustee himself asserted no interest adverse to the Custodian, for he paid the money into court and simply requested instructions as to its disposition.

⁵⁶ *Cf.* Propper v. Taylor, 270 App. Div. 890, 62 N. Y. S.2d 601 (1st Dep't 1946), *reversing pro tanto* 186 Misc. 72, 58 N. Y. S.2d 821 (Sup. Ct. 1945).

⁵⁷ See, e.g., Von Hennig v. Clark, 191 Misc. 261, 76 N. Y. S.2d 350 (Sup. Ct. 1948), *aff'd mem.*, 274 App. Div. 759, 80 N. Y. S.2d 727 (1st Dep't 1948). The

The Supreme Court has finally placed beyond question the right of the Custodian, at least at any time prior to an adjudication *in rem* by a state tribunal, to resort to the federal courts to quiet his title against other claimants.⁵⁸ For example, in a recent proceeding under Section 17, a federal court determined that property in administration in a state surrogate's court was impressed with a constructive trust in favor of an enemy to whose interest the Custodian had succeeded.⁵⁹ Such an exercise of federal jurisdiction requires neither control over the property nor interference with the local tribunal's possession thereof; yet the state court is bound to recognize the right adjudicated by the federal court.⁶⁰ Even in his role as private litigant, therefore, the Custodian may, if he so desires, avail himself of certain legal advantages accorded to the sovereign.

C. Interests Subject to the Vesting Power

Adequate consideration of the limits upon the types of enemy interests which are capable of being vested by the Custodian entails an appraisal of the purposes of the Act. If an interest is not within the scope of the Trading with the Enemy Act, a court in which the Custodian seeks to assert it may not recognize his title; or, if he vests by summary process the *res* to which the interest attaches, he cannot retain it.

Custodian is authorized to seize property even if it is in the possession of a court. Section 2(f), Exec. Order No. 9193, 7 FED. REG. 5205 (1942). Cf. *In re Miller's Estate*, 193 P.2d 539 (1948) (holding that the Custodian's vesting order divested a state probate court of jurisdiction over the subject matter of the vesting order). *But cf. Miller v. Clausen*, 299 Fed. 723 (8th Cir. 1924), *appeal dismissed*, 269 U. S. 595 (1925). It must be borne in mind that the Custodian may be able to foreclose litigation in the state court by the somewhat draconic method of administratively determining the extent of the enemy's interest in the property and "res-vesting" that amount. If he thus gains possession of the bone of contention, persons asserting interests adverse to the enemy's are relegated to suit in a federal court, under § 9(a) of the Trading with the Enemy Act, to establish those interests.

⁵⁸ *Markham v. Allen*, 326 U. S. 490 (1946). Specifically, the decision affirmed federal jurisdiction over a suit by the Custodian to determine the extent of the rights which he had vested in a decedent's estate in administration before a state court. Cf. *Clark v. Propper*, 169 F.2d 324 (2d Cir. 1948).

⁵⁹ *Clark v. Tibbetts*, 167 F.2d 397 (2d Cir. 1948).

⁶⁰ *Markham v. Allen*, 326 U. S. 490, 494 (1946). Cf. *Commonwealth Co. v. Bradford*, 297 U. S. 613 (1936) (affirming federal jurisdiction over suit by receiver of national bank to establish interest in mortgage pool administered by state court trustee).

A recent New York decision, *Matter of Herter*,⁶¹ graphically presents the problem. An enemy-owned property in New York. Before the Custodian got around to vesting it, the enemy died, leaving a widow, also an enemy national, and a will. The will left to the widow a sum much less than the share she would have taken in the event of intestacy, and the bulk of the property to certain nonenemy cousins of the testator. In these circumstances, New York law gives to a widow a "personal" right to elect to take her intestate share, in derogation of the will.⁶² The Custodian promptly vested all the right, title and interest of the widow in the New York estate of her husband, including specifically her right of election.⁶³ The surrogate held, in substance, that since the right of election was "personal" to the widow, it could not be vested or exercised by the Custodian, or by any person "acting in hostility" to her, and that the action of the Custodian was in consequence a nullity.

The decision presents certain difficulties. The Act, as we have seen, gives to the Custodian the broadest imaginable powers with respect to enemy property — it speaks of "any property or interest"⁶⁴ and "chooses in action, and rights and claims of every character and description."⁶⁵ Of course, some very pretty questions might be posed as to what is "property." (Suppose, for example, a German film company had contracted for the exclusive services of a talented and glamorous actress, on very advantageous terms, for a period of years: could the Custodian vest the enemy's right to performance? So far, to the regret of his legal staff, that official has encountered no such intriguing questions.) But no such question can rationally be raised as to the nature of the right of election

⁶¹ 193 Misc. 602, 83 N. Y. S.2d 36 (Surr. Ct. 1948), *aff'd*, 84 N. Y. S.2d 913 (App. Div. 1st Dep't 1948).

⁶² N. Y. DEC. EST. LAW § 18.

⁶³ Vesting Order No. 8407, 12 FED. REG. 1828 (1947), as amended, 12 FED. REG. 2966 (1947).

⁶⁴ 55 STAT. 839 (1941), 50 U. S. C. APP. § 5(b) (1946).

⁶⁵ 40 STAT. 1020 (1918), 50 U. S. C. APP. § 7(c) (1946). It is clear that the Custodian may vest and litigate an unliquidated claim for breach of contract. *E.g., Mutzenbecher v. Ballard*, 16 F.2d 173 (S. D. N. Y. 1925), *aff'd*, 16 F.2d 174 (2d Cir. 1926), *cert. denied*, 273 U. S. 766 (1927); *Nord Deutsche Ins. Co. v. J. L. Dudley, Jr., Co.*, 169 N. Y. Supp. 303 (Sup. Ct. 1918) (not officially reported), *aff'd*, 183 App. Div. 887, 169 N. Y. Supp. 1106 (1st Dep't 1918); *Rothbarth v. Herzfeld*, 179 App. Div. 865, 167 N. Y. Supp. 199 (1st Dep't 1917), *aff'd*, 223 N. Y. 578, 119 N. E. 1075 (1918).

conferred by the New York Decedent Estate Law. It is, in effect, an option to acquire an intestate share of an estate and as such would seem to be within the scope of the Trading with the Enemy Act.

It is well settled, at least, that restraints imposed by state law on the alienability of more prosaic interests in property cannot defeat the Custodian's power to vest⁶⁶ and, in particular, the New York courts have sustained the Custodian's power to vest the beneficial interest in a spendthrift trust, notwithstanding the facts that under New York law the spendthrift himself could not have alienated his interest, and his creditors could have reached only the portion, if any, in excess of what was required to support him in suitable style.⁶⁷ The New York Court of Appeals has held that an enemy's inchoate right of dower (for which the right of election is a statutory substitute) could be divested by the Custodian.⁶⁸ But there remains unsettled the question whether an interest in property can be so "personal" that the Custodian cannot be substituted for an enemy owner.

A closely allied question is the right of an individual testator or settlor to condition a bequest or gift to an enemy upon the enemy's capacity personally to take and enjoy the property. Thus, a New York testatrix provided that if, in her executor's opinion, "the transferring of this money to my beloved relatives," who were residents and nationals of Germany, "shall be frustrated by political conditions and laws which substantially deprive my beloved relatives of the full use and fruit of such bequests," the executor should hold the funds in trust until such time as the beloved relatives *could* enjoy the full use and fruit of the bequests.

⁶⁶ *Great Northern Ry. v. Sutherland*, 273 U. S. 182, 193-94 (1927); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746, 751 (2d Cir. 1922).

⁶⁷ *Matter of Bendit*, 214 App. Div. 446, 212 N. Y. Supp. 526 (1st Dep't 1925); *accord*, *Central Hanover Bank & Trust Co. v. Markham*, 68 F. Supp. 829 (S. D. N. Y. 1946). The court reasoned that the Custodian was not merely a transferee, but was actually substituted for the enemy beneficiary in every respect concerning the trust. *Cf. Great Northern Ry. v. Sutherland*, 273 U. S. 182, 193-94 (1927); *Keppelmann v. Palmer*, 91 N. J. Eq. 67, 108 Atl. 432 (Ct. Err. & App. 1919) (state legislation in conflict with the Trading with the Enemy Act must give way before the federal exercise of the war power).

⁶⁸ *Miller v. Lautenbourg*, 239 N. Y. 132, 145 N. E. 907 (1924). The common law right of dower was "personal" to precisely the same extent as the statutory substitute. *Flynn v. McDermott*, 183 N. Y. 62, 75 N. E. 931 (1905); *Camardella v. Schwartz*, 126 App. Div. 334, 110 N. Y. Supp. 611 (2d Dep't 1908); *see Matter of Zalewski*, 292 N. Y. 332, 337, 55 N. E.2d 184, 186 (1944).

In such a situation as this the Custodian, when he has vested the right, title and interest of the enemy legatee or beneficiary, may make two arguments. In the first place he may contend that a sort of statutory transubstantiation has taken place — that to all legal intents he has become identified with the enemy, so that payment to him satisfies the provisions of the will or trust instrument.⁶⁹ A less conceptual and more practical approach is embodied in the contention that such provisions are simply attempts to evade the Trading with the Enemy Act and hence are void as against public policy.⁷⁰ The Custodian must of course contend further that if the condition is considered void, the bequest operates as though the condition had been fulfilled, a rather questionable contention in those jurisdictions which treat gifts on void conditions according to the presumed intent of the testator.

Rather surprisingly, considering how frequently some such device might have been expected to suggest itself to lawyers drawing wills for testators with relatives in enemy (or potential enemy) countries, research reveals but two reported cases, both in lower courts.⁷¹ Each involved the sort of artless testamentary provision quoted above, and in each case the court ordered immediate distribution to the Alien Property Custodian. The moral would seem to be that testators, unless filled with natural love and affection for the Alien Property Custodian, should not attempt to leave their property, directly or indirectly, to persons who are, or are likely to become, enemies within the meaning of the Trading with the Enemy Act. Such devices *may* eventually be upheld by appellate courts; but the question is at least doubtful, and — until such time as it is definitely laid to rest — such provisions are pretty likely to entail complex and costly litigation.⁷²

⁶⁹ *Cf. Matter of Bendit*, 214 App. Div. 446, 212 N. Y. Supp. 526 (1st Dep't 1925).

⁷⁰ *Cf. Commissioner v. Procter*, 142 F.2d 824 (4th Cir. 1944), *cert. denied*, 323 U. S. 756 (1944) (holding void as against public policy a condition subsequent that a transfer should be deemed to be revoked if it were determined that the federal gift tax was applicable); *Matter of Rosenberg*, 269 N. Y. 247, 199 N. E. 206 (1935) (holding that, regardless of the state's policy on reaching the income of a spendthrift trust, a federal tax lien could be imposed).

⁷¹ *Matter of Reiner*, 44 N. Y. S.2d 282 (Surr. Ct. 1943); *Thee's Estate*, 49 Pa. D. & C. 362 (Orphans Ct. 1942). *But cf. In re Thramm's Estate*, 183 P.2d 97 (Cal. App. 1947).

⁷² Much more difficult problems from the Custodian's standpoint are presented by a testamentary provision that, if the alien is unable to take personally at the time of distribution, the property shall be paid over to an alternate, nonenemy,

D. "Revenue" Aspects of the Vesting Power

The *Herter* case suggests another interesting problem, and one which colors strongly the judicial approach to construction and enforcement of the Act. The lower court pointed out that the effect of his holding was to place the property in the hands of American citizens and said that if that were the consequence, "no wrong to the United States is done."⁷³ But this reasoning is not easy to reconcile with one of the basic purposes of the Trading with the Enemy Act. Carried to its logical conclusion, it would mean that, so long as the property is prevented from being used by an enemy government in aid of its war effort against the United States — whether by being awarded to the Custodian or to some deserving American or left with the enemy subject to certain restraints — the essential purpose of the Act is achieved. A court with such a view of the statute cannot be expected to display much enthusiasm when asked to help the Custodian scoop up the scattered assets of enemies, some of them widows and orphans, long after the defeat of Germany and Japan. The jaundiced judicial eye sees the Custodian as combining the least attractive qualities of Shylock, Uriah Heep, and the unreformed Ebenezer Scrooge, and tends to construe the Act narrowly against this unamiable character.

This sort of judicial approach was taken by a majority of the Court of Appeals for the Second Circuit in *Josephberg v. Markham*.⁷⁴ X, a naturalized American citizen of Italian birth, returned to Italy in 1931 for the sake of his mental health. He never came back to the United States and, apparently, never fully regained his sanity. In 1937 he inherited property of substantial value located in New York, and in 1939 a New York court, determining him to be an incompetent, appointed Josephberg as his committee. In 1943 the Alien Property Custodian, determining X to be an enemy, vested his property. Josephberg brought suit, under Section 9(a) of the Trading with the Enemy Act, to recover

beneficiary, rather than held indefinitely by the executor or trustee until such time as the enemy's disability shall be removed. Although there seems to be no reported case involving such a provision, several state probate courts have sanctioned distribution to the alternate legatee in such cases.

⁷³ 193 Misc. 602, 605, 83 N. Y. S.2d 36, 40 (Surr. Ct. 1948), *aff'd*, 84 N. Y. S.2d 913 (App. Div. 1st Dep't 1948); *Stoehr v. Miller*, 296 Fed. 414, 425 (2d Cir. 1923).

⁷⁴ 152 F.2d 644 (1945).

the property. Strictly, the sole question before the Court was the correctness of the Custodian's determination that X was an enemy. Since, under the statute and the executive orders, enemy character normally depends upon residence at the time of vesting,⁷⁵ the ultimate question was whether X was a resident of Italy. The majority held that he was not, and backed up its conclusion with the following considerations:⁷⁶

In determining whether [X] falls within the provisions of the statute . . . , his physical presence . . . is not decisive. . . . [X's] property in New York was in no way threatened with subjection to enemy uses by reason of his presence in Italy. He had no control over it himself since it was being administered by a committee appointed by the New York court; and, consequently, Italy could exercise no control over it through the control of him. Furthermore, the New York court would not have permitted its use for the benefit of an enemy. . . . Such use could also have been prevented by a freezing order issued by the Treasury. . . .

The property being in cash and securities its confiscation was not required, as, for instance, is the case of assets consisting of, or controlling, manufacturing facilities usable to secure production of materials to aid this government in the prosecution of the war; and, as a means for the purchase of such materials, it was comparatively negligible.

The purpose of confiscation under the Trading with the Enemy Act is either to lessen the ability of the enemy government to make war upon the United States by depriving it of the means so to do which would otherwise be within its reach or to enhance the ability of this country to prosecute the war. . . .

When this significance is, as it should be, given to term "resident" in the Trading with the Enemy Act . . . and in the Executive Orders promulgated thereunder, it does not include a citizen in [X's] situation.

Judge Clark dissented, saying that "the whole purpose of the legislation may be frustrated if courts attempt to decide the validity of seizure upon the equities of individual cases."⁷⁷

The majority opinion amounts to a holding that an owner of property is a "resident" of an enemy country only if there is a possibility that the enemy government can exercise control of the

⁷⁵ 40 STAT. 411 (1917), 50 U. S. C. APP. § 2(a) (1946); Exec. Order No. 8389, 6 FED. REG. 2897 (1941); Exec. Order No. 9193, § 10(a), 7 FED. REG. 5205 (1942).

⁷⁶ 152 F.2d 644, 648 (1945).

⁷⁷ *Id.* at 650.

property through him, or if the United States (in the opinion of the court) really needs the property for its war effort. The upshot is that the enemy's beneficial interest in the property is left undisturbed. The *result* may be defended upon the ground, sketchily indicated by the court, that X's insanity deprived his physical presence of the element of intent requisite to "residence" — although it is, as Judge Clark suggested, doubtful whether there is any such requirement, if the physical presence be not positively against the will of the individual.⁷⁸ At least one district court, in another circuit, has "preferred" to treat the cited language as dictum.⁷⁹ Whatever the possibility of distinguishing the case out of existence, it is evident that the quoted considerations were fundamental to the court's decision.

If the court's basic premise were correct — that the Act has no other purposes than to deprive enemy governments of the sinews of war and to enhance the war-making ability of the United States by making those sinews available to it — its decision would be more defensible, although still open to the charge that the court substituted its discretion for that of Congress and that of the President in deciding what property is needed by the United States for its war effort. (The argument that X's property, as a means for purchasing war material, was "comparatively negligible" has not much force in any case — on such reasoning many a citizen would be justified in refusing to pay his income tax.) But if the Act had no other purposes than these, the vesting provisions of the Trading with the Enemy Act would now be quite obsolete, for the freezing program — as the court pointed out — adequately achieved the first purpose, and the war against Germany and Japan has been won.

In fact, as has been indicated, the purposes of the Act are now much broader. Simply stated, one purpose is to help the United

⁷⁸ An American prisoner of war (to select an extreme example adduced by the majority opinion) would evidently not be a "resident" for purposes of vesting under the Act. *Cf.* *Stadtmuller v. Miller*, 11 F.2d 732 (2d Cir. 1926); *Vandyke v. Adams*, [1942] All Eng. 139 (Ch.). The Custodian has, of course, never attempted to vest the property of such persons. On the other hand, a British court has held under the similar British Trading with the Enemy Act of 1939 that a British subject, temporarily visiting Jersey and trapped there by the German occupation, was a resident in enemy territory within the meaning of the Act. However, the question was presented only collaterally. *In re Hatch* (deceased), [1948] 2 All Eng. 288 (Ch.).

⁷⁹ See *Blank v. Clark*, 79 F. Supp. 373, 377 (E. D. Pa. 1948).

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States defray some of the expenses which, although caused by the war, did not really begin to accrue until actual hostilities had ended. Moreover, in signing the Final Act of the Paris Conference on Reparations from Germany,⁸⁰ the United States agreed in substance that German enemy property within its jurisdiction should constitute a charge against reparations which might otherwise be claimed from Germany.

There may properly be included among these expenses the cost of putting the conquered populations back on their feet, through Marshall Plan aid and otherwise, and the satisfaction of war claims of American citizens against the Axis powers. In fact, the vested German and Japanese property which the most recent amendment to the Trading with the Enemy Act directs to be turned over to the Treasury (instead of being returned to its former owners), is to be used to create "a trust fund to be known as the War Claims Fund," from which some (although not all) types of war claims are authorized to be paid.⁸¹ The act, known as the War Claims Act of 1948, of which this amendment is a part creates a War Claims Commission with authority to receive and adjudicate various classes of claims and to make recommendations to Congress as to the payment of war claims not provided for by the War Claims Act itself.⁸² Any surplus would presumably be available for the general purposes of the United States, including the defrayment of occupation costs and Marshall Plan aid.

This is a logical implementation of the general legislative intent to use vested property "in the interest of and for the benefit of the United States."⁸³ There is no doubt that the seizure and use of enemy property in the United States is sanctioned not only by the Constitution of the United States,⁸⁴ but by international law.⁸⁵

⁸⁰ U. S. TREATY SER., No. 1655 (Dep't State 1946).

⁸¹ 62 STAT. 1247 (1948), 50 U. S. C. A. APP. § 2012 (Supp. 1949).

⁸² It should be noted that the decision in the *Josephberg* case antedated this unequivocal expression of Congressional intent.

⁸³ H. R. REP. No. 1507, 77th Cong., 1st Sess. 2-3 (1941); 55 STAT. 839 (1941), 50 U. S. C. A. APP. § 5(b)(1) (1946).

⁸⁴ *Miller v. United States*, 11 Wall. 268, 305 (U. S. 1870). See McNulty, *Constitutionality of Alien Property Controls*, 11 LAW & CONTEMP. PROB. 135 (1945). The author suggests that, even without Congressional sanction, the war powers of the president might include the power to seize enemy property. *Id.* at 137.

⁸⁵ See Rubin, "Inviolability" of Enemy Private Property, 11 LAW & CONTEMP. PROB. 166 (1945). But *cf.* Sommerich, *A Brief against Confiscation*, *id.* at 152 *et seq.*

744 Not less important, it seems justified according to the canons of international morality, despite the lawyer's instinctive reaction against confiscating the property of private persons who may not fairly be chargeable with the misconduct of their governments. Perhaps the most persuasive argument advanced is that which starts from the premise that the war has compelled allied nations, notably France and Great Britain, to seize and liquidate the dollar assets of their nationals in the United States in order partially to cover essential purchases. It would be an anomaly if German and Japanese private citizens should emerge from the war with their dollar assets intact.⁸⁶ Of course, friendly nationals have been compensated — after a fashion — by their own governments, in that they have received soft local currency, often at an arbitrary and inadequate rate of exchange, for their hard dollars; but there is no reason why the German and Japanese governments should not do as much after the peace treaties have been signed; and, indeed, the treaties might so provide.

Giving due weight to all these considerations, the courts might well regard the Trading with the Enemy Act, in its present phase, as a revenue measure, and enforce it accordingly. Preoccupation with the purely defensive aspects of the Act is likely to make many current cases seem hard; and every lawyer knows the traditional effect of hard cases.

II. THE RIGHTS OF THE PROPERTY HOLDER

A. Exculpatory Provisions of the Act

A natural and necessary complement to the summary powers conferred on the Custodian is a provision exculpating persons who obey or act in reliance upon his orders. Section 7(e), enacted during World War I, provides that "No person shall be held liable in any court for or in respect of anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."⁸⁷ This seems both broad and plain, and the courts repeatedly implemented it fully.⁸⁸ This

⁸⁶ See Rubin, *supra* note 85, at 178.

⁸⁷ 40 STAT. 416 (1917), 50 U. S. C. APP. § 7(e) (1946).

⁸⁸ E.g., Commercial Trust Co. v. Miller, 262 U. S. 51 (1923); Great Northern Ry. v. Sutherland, 273 U. S. 182 (1927); Columbia Brewing Co. v. Miller, 281 Fed. 289 (5th Cir. 1922); Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft, 283 Fed. 746 (2d Cir. 1922).

provision was substantially re-enacted in the World War II amendment of Section 5(b)⁸⁹ with the addition of the words "in good faith" after "done or omitted."⁹⁰ While, in general, the courts have not discriminated between the World War II provision and Section 7(e),⁹¹ the words "in good faith," undoubtedly somewhat ambiguous in the context, have led one federal court of appeals to hold that the failure of the Japanese officials of a Japanese bank in Hawaii to apply for the reissuance of their license to operate — which had been revoked immediately after Pearl Harbor — showed such a lack of good faith as to render the bank liable to its depositors for losses incurred through the bank's suspension of operations.⁹² The net effect of the decision was to reduce to the vanishing point the bank's surplus, which would otherwise have gone to American minority stockholders and to the Custodian. A mild comment upon this holding, on the facts, is that it is unrealistic. It contains the mischievous implication that it is the bounden duty of every person affected by a regulation or order under the Trading with the Enemy Act to seek to evade or resist it by every lawful means, administrative or judicial, no matter how dim his prospects of success. Such a result would do considerable violence to the fundamental scheme of the Act, which is to facilitate the swift and summary conduct of economic warfare.

⁸⁹ Any re-enactment would seem to have been rather unnecessary, in the light of *Markham v. Cabell*, 326 U. S. 404 (1945).

⁹⁰ Section 5(b)(2) provides that "no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder." 55 STAT. 839 (1941), 50 U. S. C. APP. § 5(b)(2) (1946). Both this subsection and § 7(e) also provide in substance that payment in compliance with the Act or an order of the Custodian shall operate as a full acquittance of the obligation of the payor.

⁹¹ See, e.g., *Silesian-American Corp. v. Clark*, 332 U. S. 469 (1947) (§§ 5(b)(2) and 7(e) protected a corporation from liability to existing holders of its stock certificates arising out of compliance with the Custodian's demand for the issuance to him of new certificates); *Alexewicz v. General Aniline & Film Corp.*, 181 Misc. 181, 43 N. Y. S.2d 713 (Sup. Ct. 1943) (the section exonerated an employer who discharged an employee pursuant to an order issued under the Act).

⁹² *Fujikawa v. Sunrise Soda Works Co.*, 158 F.2d 490 (9th Cir. 1946), *cert. denied*, 331 U. S. 832 (1946); *cf. Dezsöfi v. Jacoby*, 178 Misc. 851, 36 N. Y. S.2d 672 (Sup. Ct. 1942).

B. Representation in Actions to Which the Custodian Is a Party

A knottier problem — or, at any rate, one as to which there is some lack of judicial harmony — is the right of the Custodian to be the exclusive representative in litigation of interests which he has vested, or, as judicial latinists like to put it, *dominus litis*. The divested property holder may well desire to be personally represented in the litigation, in the hope that the property will eventually be returned to him. It is inevitable that enemies whose interests have been vested will remember the generous attitude of Congress after World War I,⁹³ despite the cold, unsympathetic attitude of the post-World War II Congress.⁹⁴ A person nursing such hopes with respect to interests which have been vested may fear lest the Custodian's defense of them in litigation be insufficiently solicitous — especially where the United States, in some other capacity, has interests adverse to those vested.⁹⁵ It is also conceivable that a divested enemy, not so sanguine about the chances of Congressional return, might prefer to have the property awarded to an American relative or business associate with a claim adverse to his own, rather than to the Government. Such a person might regard vigorous litigation of the interest by the Custodian as nothing short of officious — might, in brief, desire

⁹³ In 1923 Congress authorized the return to enemies of a maximum of \$10,000 of their seized property. 42 STAT. 1511 (1923). The Settlement of War Claims Act of 1928 authorized the return of 80% of such property, and would have permitted the return of it all, had not Germany wrenched on her own obligations to Americans. 45 STAT. 254, 50 U. S. C. APP. § 9, *et seq.* (1946). The Joint Resolution of June 27, 1934, suspended returns of German property vested during World War I. 48 STAT. 1267 (1934).

⁹⁴ The latest amendment to the Act declares that "No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agent of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." 62 STAT. 1246 (1948), 50 U. S. C. A. APP. § 2011 (Supp. 1949).

⁹⁵ *E.g.*, *Hamburg-American Line v. United States*, 71 F. Supp. 314 (D. Puerto Rico, 1947), *aff'd*, 168 F.2d 47 (1st Cir. 1948). Prior to the outbreak of war, the United States filed in admiralty a libel for salvage against a German ship, in which proceeding the German owners appeared as claimants. Thereafter the Custodian vested the right, title, and interest of the owners in and to the vessel. The district court, in a curious and somewhat inconsistent order, substituted the Custodian as a party in all respects in place of the German owner, but nonetheless permitted counsel for the enemy to appear and defend against the libel.

an opportunity to present his former interest in its worst light. From another viewpoint, restrictions on easy intervention may be desirable. Thus, it may occur to a suspicious mind that American counsel for enemy former owners are not averse to appearing in proceedings *in rem* and performing services compensable out of the *res*, on the comfortable reasoning that no one save the Government will be the poorer thereby.

Despite these considerations, or perhaps because of them, the Custodian has been intolerant of the presence in court of representatives of enemies whose interests have been vested. Prior to vesting, while the Custodian is entitled to represent an enemy in judicial or administrative proceedings concerning the enemy's property interests,⁹⁶ and while his discretion in such a case is absolute,⁹⁷ he cannot properly object to an appearance by an authorized representative of the enemy owner.⁹⁸ Where, however, the Custodian has vested the enemy's interest, the appearance of the enemy in court seems at least anomalous.

This is so not because the enemy is an enemy,⁹⁹ but simply because he no longer owns any interest in the property which is the subject of the suit, any more than if he had sold or assigned his interest.¹⁰⁰ It is a familiar and self-evident principle that one who has no interest in property cannot ordinarily participate in litigation concerning it,¹⁰¹ and there seems to be no special reason for according to enemies any more favorable treatment than to anyone else. The only federal appellate court which has squarely considered this problem held that the mere hope nourished by a

⁹⁶ Exec. Order No. 9193, § 5, 7 FED. REG. 5205 (1942).

⁹⁷ See *Petschek v. American Enka Corp.*, 182 Misc. 503, 504, 49 N. Y. S.2d 49 (Sup. Ct. 1944); *Farmers & Merchants Nat. Bank v. Superior Court*, 150 P.2d 241, 250 (Cal. App. 1944), *aff'd*, 25 Cal.2d 823 (1945); *Estate of Ferraro, Orphans Ct., Allegheny County, Pa.*, No. 6165 (1941).

⁹⁸ *Cf.* *Matter of Renard*, 179 Misc. 885, 39 N. Y. S.2d 968 (Surr. Ct. 1943).

⁹⁹ The Trading with the Enemy Act expressly provides that an enemy may defend by counsel any action brought against him, although he may not prosecute one. 40 STAT. 416 (1917), 50 U. S. C. APP. § 7(b) (1946). *Cf.* *McVeigh v. United States*, 11 Wall. 259 (U. S. 1870); *Watts, Watts & Co. v. Unione Austriaca de Navigazione*, 248 U. S. 9, 22 (1918).

¹⁰⁰ See *Commercial Trust Co. v. Miller*, 262 U. S. 51, 56 (1923); *Cummings v. Deutsche Bank*, 300 U. S. 115, 121 (1937).

¹⁰¹ *Cf.*, *e.g.*, *United States v. 422 Casks of Wine*, 1 Pet. 547, 549 (U. S. 1828); *White v. Hardy*, 180 Misc. 63, 39 N. Y. S.2d 911 (Sup. Ct. 1943), *aff'd mem.*, 266 App. Div. 660, 41 N. Y. S.2d 210 (1st Dep't 1943).

divested enemy is not a sufficient interest to give him standing in court.¹⁰² On the other hand, two district courts in other circuits, drawing from the true premise that an enemy may defend a suit against himself or his property¹⁰³ the fallacious conclusion that he may defend an interest in property which he no longer owns, have permitted enemy former owners to participate in proceedings after the Alien Property Custodian had vested their interests and intervened.¹⁰⁴ Similarly, the New York appellate division has sanctioned the appointment of a guardian *ad litem* for infant beneficiaries (in a trustee's suit for an accounting), despite the fact that the infants' interest in the trust *res* had been vested and was being actively represented by the Custodian.¹⁰⁵ On the whole, it is probable that the last word on this question has not yet been spoken. In one situation at least, the former owner of the property would seem in fairness entitled to a hearing — where he either has commenced or is about to commence proceedings under the Act to recover the interest vested by the Custodian. It might not normally be practicable to postpone the proceedings concerning the extent of the interest to await the outcome of the litigation concerning its ownership; but in such a case it is suggested that the claimant should be allowed to appear as *amicus curiae*.

¹⁰² The Antoinetta, 49 F. Supp. 148, 150-51 (E. D. Pa. 1943), *aff'd*, 153 F.2d 138, 143 (3d Cir. 1945), *cert. denied*, 328 U. S. 863 (1946).

¹⁰³ See note 99 *supra*.

¹⁰⁴ The Pietro Campanella, 47 F. Supp. 374 (D. Md. 1942); United States v. The San Leonardo, 51 F. Supp. 107 (E. D. N. Y. 1942).

¹⁰⁵ Matter of von der Decken, 274 App. Div. 764, 80 N. Y. S.2d 109 (1st Dep't 1948). Neither the supreme court nor the appellate division wrote an opinion, and the ground of the decision is consequently obscure. No motion had been made to drop the infants as parties, and the appellate court may have believed that, since they were named as parties, the Civil Practice Act made mandatory the appointment of a guardian. N. Y. CIV. PRAC. ACT § 1313. A recent opinion of the New York Supreme Court indicates that in some cases a guardian *ad litem* may be regarded as necessary for the protection of *unborn* members (whose interests the Custodian has not vested) of the class of which the enemies are the representatives *in esse*. *In re Bank of New York*, 85 N. Y. S.2d 413, 414 (Sup. Ct. 1948). Where the interests of the enemies are vested (in the ordinary legal sense of the term) and presently payable, the same court has held that vesting by the Custodian deprives the enemies of any interest in the property so that they cease to be necessary or proper parties and may be excluded. Matter of Title Guarantee & Trust Co. (Winnege), N. Y. L. J., Dec. 15, 1948, p. 1540; *cf.* Matter of Winburn, N. Y. L. J., Feb. 5, 1948, p. 468.

C. Actions to Recover Vested Property: Judicial Review of the Administrative Seizure

Unlike the proceedings which have so far been discussed, proceedings to *recover* or establish an interest in property which the Custodian has vested properly call into question the correctness of his administrative determination. Such a proceeding can be brought only under Section 9 of the Act. Congress was explicit on this point,¹⁰⁶ and the courts have consistently refused to entertain suits which could not be fitted within the framework of that section.¹⁰⁷ In effect, the plaintiff in such a suit must establish that property seized by the Custodian (whether an interest or a *res*), and which the plaintiff claims, is not enemy property. For example, the Custodian, determining that Blackacre is the property of Hans Fritz and that Hans is an enemy, vests Blackacre. Hans Fritz may allege that in fact he was a loyal resident of the United States and bring suit to recover his property. Or John Smith, concededly a resident of the United States, may bring suit alleging that Hans Fritz conveyed Blackacre to him in 1939, or, perhaps, that he has a mortgage on Blackacre to secure a past due loan to Hans Fritz. Under a recent decision of the Supreme Court, *Clark v. Uebersee Finanz-Korporation*,¹⁰⁸ in fact, *any* person who comes within the requirement of Section 9(a) that he be "not an enemy or ally of enemy,"¹⁰⁹ say a Swiss corporation, may bring such a suit.

This last proposition, apparently so clearly required by the language of Section 9(a), was decided by the Supreme Court, not without some difficulty. The trouble was caused by the apparent conflict between the quoted language of Section 9(a) and the authority, conferred by the First War Powers Act of 1941,¹¹⁰ to vest "any property or interest of any *foreign* country or national

¹⁰⁶ Section 7(c) of the Act provides in substance that the "sole relief and remedy of any person having any claim" to any property seized by the Custodian shall be that provided by the Act. Section 9 of the Act is the only one which authorizes suit against the Custodian to recover or establish an interest in vested property.

¹⁰⁷ *E.g.*, Banco Mexicano v. Deutsche Bank, 263 U. S. 591 (1924); Sigg-Fehr v. White, 285 Fed. 949 (D. C. Cir. 1923); Crone v. Sutherland, 63 F.2d 895 (D. C. Cir. 1933); Von Hennig v. Clark, 191 Misc. 261, 76 N. Y. S.2d 350 (Sup. Ct. 1947), *aff'd*, 274 App. Div. 759, 80 N. Y. S.2d 727 (1st Dep't 1948).

¹⁰⁸ 332 U. S. 480 (1947).

¹⁰⁹ 40 STAT. 419 (1917), 50 U. S. C. APP. § 9(a) (1946).

¹¹⁰ 55 STAT. 839 (1941), 50 U. S. C. APP. § 5(b) (1946).

thereof," including friendly and neutral foreign countries. There seemed to be little substance to such authority if a friendly or neutral owner could recover his property as soon as vested, and the Government in effect argued that the later enactment must be construed to have amended Section 9(a) to require that plaintiffs show that they are not foreigners.

The Court avoided the difficulty by substantially rewriting Section 2 of the statute. Since Section 2 defines the term enemy as used in Section 9(a), a broadening of this definition enabled the Court to reach the desired result without ignoring the fact that Section 9(a) was limited to an "enemy or ally of enemy." Section 2 defined "enemy" in substance as any individual (regardless of nationality) resident (or corporation incorporated) in enemy territory; or resident (or incorporated) outside the United States and doing business within enemy territory. Under this section, the Court had previously held that the ownership and control of a corporation were irrelevant: so long as it was neither incorporated nor doing business within enemy territory, it was not an "enemy or ally of enemy."¹¹¹ Such "rigidity and inflexibility"¹¹² was, of course, a standing invitation to adroit German and Japanese financial experts, particularly the Germans, who were conveniently near Switzerland and Sweden. The concealment of German interests in the United States was frequently attempted through the medium of neutral or American corporations, whose German affiliations were more or less camouflaged.¹¹³ The Court recognized that Section 5(b), as amended, was intended to plug this breach in the nation's economic defenses. But it could hardly have that effect unless the phrase "enemy or ally of enemy" were either given a meaning broad enough to prevent recovery of property by Axis associates in neutral territory or were read out of Section 9(a) altogether. Thus, in effect the Court had either to rewrite Section 2 or Section 9(a).

Recognizing that "the problem is not without its difficulties

¹¹¹ Behn, Meyer & Co. v. Miller, 266 U. S. 457 (1925); Hamburg-American Line v. United States, 277 U. S. 138 (1928).

¹¹² See Clark v. Uebersee Finanz-Korporation, 332 U. S. 480, 484 (1947).

¹¹³ See ADMINISTRATION OF WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT 29-31 (U. S. Treas. Dep't 1942); *Hearings before a Subcommittee of the Senate Committee on Military Affairs Pursuant to S. Res. 107 and S. Res. 146*, 79th Cong., 1st Sess. 49, 52, 68-69, 564-85, 969-77, 1063, 1203-21 (1945); H. R. REP. No. 2398, 79th Cong., 2d Sess. 3 (1946).

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 whichever way we turn,"¹¹⁴ a unanimous Court decided that revision of Section 2 to harmonize with Section 5(b), as amended by the Act of 1941, was the less drastic operation. Accordingly, it held the definitions contained in that section to be "merely illustrative, not exclusionary";¹¹⁵ an "enemy taint" would be enough to make a neutral, friendly or American corporation an "enemy or ally of enemy" for the purposes of the Trading with the Enemy Act. Prudently, if tantalizingly, the Court refrained from defining "enemy taint," for the procedural posture of the *Uebersee* case was such that the plaintiff was assumed to be free of any enemy interest whatsoever.¹¹⁶

It may at least be supposed that enemy control would constitute an "enemy taint." The federal courts have in other contexts given some provocative definitions of "control," which will probably not be lost upon the Custodian. Thus, it has been remarked that "under some circumstances controlling influence may spring as readily from advice constantly sought as from command arbitrarily imposed";¹¹⁷ and under the Public Utility Holding Company Act "control" and "controlling influence" have been held to "include the power to control and the power to exert a controlling influence as well as the actual exercise of such power."¹¹⁸ And the Supreme Court has emphasized that questions of control turn upon "actualities" rather than upon any "artificial test"

¹¹⁴ Clark v. Uebersee Finanz-Korporation, 332 U. S. 480, 488 (1947).

¹¹⁵ *Id.* at 488-89.

¹¹⁶ On remand to the district court, however, it was held that various factors, including a "usufructuary" interest in the property by German nationals and a certain fishiness in the claimed neutral (*Liechtensteiner*) status of the owner of the remaining interest, constituted a sufficient "enemy taint." *Uebersee Finanz-Korporation v. Clark*, 17 U. S. L. WEEK 2394 (D. D. C. Feb. 21, 1949). A curious contrast to the *Uebersee* case is furnished by the Court's opinion, handed down the same day in *Silesian-American Corp. v. Clark*, 332 U. S. 469 (1947). Although not actually inconsistent with the *Uebersee* case, for it holds only that the Custodian may summarily reduce to possession neutral or friendly alien property, it speaks of the nonenemy alien's right to "just compensation" for the taking of his property. *Id.* at pp. 479-80. But such a right would seem not to exist, or at least to be redundant, if he may recover the property itself in a suit under Section 9(a) of the Trading with the Enemy Act, for in that case there would be no "taking."

¹¹⁷ See *American Gas & Elec. Co. v. SEC*, 134 F.2d 633, 642 (D. C. Cir. 1943), *cert. denied*, 319 U. S. 763 (1943).

¹¹⁸ *Public Serv. Corp. v. SEC*, 129 F.2d 899, 903 (3d Cir. 1942); *Detroit Edison Co. v. SEC*, 119 F.2d 730, 739 (6th Cir. 1941), *cert. denied*, 314 U. S. 618 (1941).

and are issues "of fact to be determined by the special circumstances of each case."¹¹⁹

At any rate, the *Uebersee* decision insures that the property of genuinely friendly or neutral aliens will not be confiscated. The Court's reluctance to find such a Congressional intent seems justified in the light of recent amendments to the Act which authorize (although they do not compel) the return of vested property to "technical enemies" such as nationals and residents of allied or neutral countries whose "enemy" status was involuntarily acquired via German or Japanese occupation;¹²⁰ victims of Nazi racial, religious, and political persecution who were similarly enemies in name only; and Italians, who are considered to have restored themselves to the friendship of the United States.¹²¹

A new twist to the problem of eligibility for return has been given by the most recent amendment of the Act.¹²² That section expressly forbids return of any vested property to any "national" (*i.e.*, citizen) of Germany or Japan. But, it will be recalled, the test of enemy status under Sections 2 and 9(a) of the Act has normally been residence rather than citizenship. Thus, a case recently decided by the United States District Court for the Southern District of New York presented facts virtually identical with those of *Josephberg v. Markham*¹²³ except that the incompetent whose property had been vested was admittedly a citizen of Germany. There was no doubt that the Custodian had been authorized to *vest* the property, for Section 5(b) authorizes the vesting of the property of any "foreign national;" the question,

¹¹⁹ *Rochester Tel. Corp. v. United States*, 309 U. S. 125, 145 (1939).

¹²⁰ "Enemy" status is fixed as of the time of vesting, and would not be affected by any subsequent change of nationality, residence, or international relations. *Swiss Ins. Co. v. Miller*, 267 U. S. 42, 44 (1925). In that case, the Custodian had vested the property of a Swiss corporation, after finding that it was doing business in Germany and was consequently an "enemy." The corporation attempted to recover its property under § 9(a), arguing that it was no longer an enemy because, in the first place, it had ceased to do business in Germany and, in the second place, a treaty of peace had been concluded between the United States and Germany. The Supreme Court rejected both arguments.

¹²¹ 60 STAT. 784 (1947), 50 U. S. C. APP. § 32 (Supp. 1948). Although § 32 is cast in discretionary language, one district court has recently held that return thereunder is a matter of right, so that the Custodian's denial of a claim under the section is subject to judicial review under the Administrative Procedure Act. *Zander v. Clark*, 80 F. Supp. 453 (D. D. C. 1948). The Custodian has appealed.

¹²² 62 STAT. 1246 (1948), 50 U. S. C. A. APP. § 39 (Supp. 1949).

¹²³ See pp. 740-42 *supra*.

as in the *Uebersee* case, was whether he could *retain* it in the face of an action under Section 9(a). In a curt opinion, the district court held that, regardless of the incompetent's residence, Section 39 forbade the return of his property, and dismissed the complaint.¹²⁴ In effect, Section 39 was held to have amended Section 9(a) by adding to the category of "enemies" not only those who are enemies under Section 2 (as construed by the *Uebersee* case) but those who are nationals of enemy countries. Technically, the holding would seem to make possible the taking and retention of the property of German and Japanese nationals resident in the United States; in practice, it may safely be predicted that the Custodian will not embark upon any such campaign.

The Court's decision in the *Uebersee* case, by permitting the Government to look behind the corporate veil, opens new vistas of "cloaking" litigation. "Cloaking" may be concisely defined as an attempt to cover enemy property in the United States with a cloak of apparent nonenemy ownership; and its forms are as various as the ingenuity of enemy financial and economic experts would allow—which is very various indeed. For example, real ownership has been concealed by the use of nominees and the elaboration of complex holding company structures; and the stock of the top holding companies is often in the form of bearer shares, the ownership of which is obviously not easy to trace. Control was often divorced from ownership and exercised through options, contractual relationships, possession of vital technical information, and loyalty (or family relationship) of key personnel.¹²⁵ Despite the variations of technique, the general pattern is always the same; the Custodian, having determined that certain property or interest therein is really beneficially owned or controlled by an enemy, vests it, and is presently sued under Section 9(a) by a virtuous and fearfully indignant American citizen (Swiss corporation, Swedish bank) who alleges acquisition of all the enemy interest, with no strings attached, long before the war; and further that the Custodian is arbitrarily, unlawfully, and unconstitutionally attempting to confiscate the hard won property of this same virtuous and indignant American citizen (Swiss corporation, Swedish bank).

¹²⁴ *Bellman v. Clark*, S. D. N. Y., 1948.

¹²⁵ See Brief for Petitioner, pp. 14-15, *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480 (1947).

A highly typical cloaking case was *Kind v. Clark*, decided by the Court of Appeals for the Second Circuit.¹²⁶ A large and long-established German manufacturer owned a subsidiary in the United States, nominally operated by a closely knit group of descendants of an agent of the German company who had settled in the United States, but actually controlled by a director of the German company whose instructions the Americans invariably followed to the letter. The German company owed the Americans a sum of money, secured by a pledge of the stock of the American corporation, which stock was worth much more than the amount of the debt. In 1939, shortly after the outbreak of war in Europe, the Germans purported to transfer all the stock outright to the Americans in exchange for the release of the indebtedness. But correspondence between the parties showed plainly a secret understanding (which they called a "gentlemen's agreement") that the Americans would hold for and eventually pay over to the Germans the difference between the true value of the stocks and the amount of the debt: in other words, that the Germans should retain their equity in the pledged shares. As the German director expressed it in one of his letters, the shares were to be transferred to ostensible American ownership "in order that the enterprises over there could be saved from a foreign seizure." Unfortunately — from the standpoint of the American cloaks — the Germans, who had the national taste for comprehensive records, who did not foresee the result of the war, and who did not, perhaps, wholly trust their American confederates, preserved all this interesting correspondence in files which eventually became available to American occupation forces. In the light of these records, and having regard to certain unbusinesslike aspects of the deal considered as an ordinary commercial transaction, the court of appeals had little difficulty in deciding that the ostensible transfer was a nullity, because neither party had the intent necessary to validate the "sale." Consequently the stock was still enemy property and fair game for the Custodian. The same result would have been reached by a slightly different route had the Court decided that the Germans' continued control over the property left it still enemy property, for the purposes of the Trading with the Enemy Act. It is noteworthy that prize cases invariably make

¹²⁶ 161 F.2d 36 (2d Cir. 1947), cert. denied, 332 U. S. 808 (1947).

control, rather than common law rules as to passage of title, the test of the enemy character of property.¹²⁷

All this, of course, was almost a pure question of fact — the true intent of the parties — and so, in essence, are most of the reported cloaking cases.¹²⁸ But the Government, by petition for certiorari from the opinion of the court of appeals in the *Kind* case,¹²⁹ attempted to raise a significant question of law. The court of appeals, while holding the transfer to be a nullity, held further that the Americans consequently retained their secured claim against the Germans and hence retained and could enforce a lien on the property vested by the Custodian.¹³⁰ The Government sought to contend, in substance, that the American cloaks had lost even the right to enforce their original lien. Moreover, there were fairly strong grounds for this position.

In the first place, suits under Section 9(a) are, by the terms of that section, "in equity." One who has been engaged in a sincere and industrious effort fraudulently to circumvent an important federal statute may well be thought to have dirtied his hands in the process. There is a solidly established corollary of the clean-hands doctrine, applied in a variety of situations, that one who has misused his property in the attempted perpetration of a fraud cannot invoke the aid of equity to enforce his rights in that property¹³¹ — a doctrine which is applied with particular breadth and vigor where the public (or the Government) is the intended victim of the misconduct, so that "the financial element of the transaction is not the sole or principal thing involved."¹³² In *Standard Oil Co. v. Clark*,¹³³ however, the second

¹²⁷ See, e.g., *The Benito Estenger*, 176 U. S. 568, 578-79 (1900). Judicial use of control as the test of taxability also affords a parallel. Cf. *Helvering v. Clifford*, 309 U. S. 331 (1940).

¹²⁸ For other typical cloaking cases, see *Standard Oil Co. v. Markham*, 64 F. Supp. 656 (S. D. N. Y. 1945), *aff'd sub nom. Standard Oil Co. v. Clark*, 163 F.2d 917 (2d Cir. 1947), cert. denied, 333 U. S. 873 (1948); *Brassert v. Clark*, 162 F.2d 967 (2d Cir. 1947).

¹²⁹ *Clark v. Kind*, 332 U. S. 808 (1947).

¹³⁰ *Clark v. Kind*, 161 F.2d 36, 47 (2d Cir. 1947).

¹³¹ Cf., e.g., *Milwaukee & Minn. R. R. v. Soutter*, 13 Wall. 517, 523 (U. S. 1871); *Commonwealth Finance Corp. v. McHarg*, 242 Fed. 560, 571 (2d Cir. 1922); *Baldwin v. Short*, 125 N. Y. 553, 560, 26 N. E. 928, 929 (1891).

¹³² *Pan American Co. v. United States*, 273 U. S. 456, 509 (1927); *Worden v. California Fig Syrup Co.*, 187 U. S. 516 (1903); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488, 493-94 (1942).

¹³³ 163 F.2d 917 (2d Cir. 1947), cert. denied, 333 U. S. 873 (1948).

786 circuit rejected a contention that the plaintiff's unclean hands deprived it of the right to sue under Section 9(a), pointing out that "nowhere in the statute is there written any restriction of the right to the return of property or any enlargement of the Government's power of seizure because of violation of law in the claimant's original acquisition of it."¹³⁴ But this language referred to a contention that, even if Standard had genuinely become the owner of some of the property in suit, through agreements made long before the war, it had done so as part of a conspiracy to violate the antitrust laws. In the *Standard* case, it was not necessary for the court to consider the effect of unclean hands acquired in the attempt to cloak enemy property, for, having found that this transaction was a nullity, it could not in any event return to Standard property of which that corporation had never become the true owner. A rough analogy to the situation in the *Kind* case would have been presented if, for example, Standard — in order to provide corroborative detail lending verisimilitude to an otherwise bald and unconvincing transaction — had purported, in exchange for I. G. Farben's property, to assign to I. G. valuable patents, and if the Custodian had vested those patents. If the transaction were a sham, equitable ownership would remain in Standard; but could it have invoked equitable process to reassert that ownership? There appears to be no definitive answer to this question, but one is suggested by an aspect of the court's decision in the *Standard* case.

As part of a prior consent decree, the Standard companies had been ordered to place certain of their patents in an American corporation, Jasco, Inc., which was declared in the consent decree to be wholly owned by Standard. In the Section 9(a) suit, Jasco was found to have been half owned by I. G. Farben, and hence by the Custodian through his vesting order. Standard thereupon asked the 9(a) court to direct that the Custodian should not get any of the royalties from the Standard patents which had been placed in Jasco by the consent decree. The court of appeals denied any relief on the ground that Standard's predicament was the result of its own attempted fraud on the Government. The hypothetical situation is perhaps more favorable to the Government's contention than is the situation in the *Kind* case, however, since in the former Standard is attempting to assert the nullity of

¹³⁴ 163 F.2d 917, 926 (2d Cir. 1947).

1949] its own transaction, whereas in the latter it is the Government which is asserting that the transfer is void.

This clean-hands principle interlocks neatly with an ancient rule of prize law — a closely related field — that one who has misused his name and property in order to cloak enemy property cannot, when the cloak has been thrust aside and the property seized, recover his own property employed in the "iniquitous adventure."¹³⁵ There seems good reason to deal with the subtler financial blockade runners of modern war in much the same manner. Indeed, Section 16 of the Act¹³⁶ provides that any property — presumably including American property — "concerned" in a willful violation of the Act or of the regulations issued thereunder shall be forfeited to the United States. Apparently this sweeping sanction has never been invoked, but it offers intriguing possibilities. How much of the property of the Standard Oil Company of New Jersey, for example, might have been held to be "concerned" in its unsuccessful efforts to cloak the American assets of I. G. Farben? The subject is one on which attorneys for cartel-minded corporations may well pause to ponder.

A collateral question, adumbrated by the decision in the *Standard* case, is the status of a nonenemy who has, in effect, been the agent of an enemy in a cloaking transaction. The executive order implementing the Act defines "national of a designated enemy country" to include any person whom the Custodian determines to be "controlled by or acting for or on behalf of [including cloaks for] a designated enemy country or a person within such country."¹³⁷ Thus, Judge Clark indicated,¹³⁸ Standard's concealment of I. G. assets after Germany's declaration of war, might have made it an "enemy" for the purposes of Section 9(a). The court's view of the case made the question academic, for to the extent that Standard genuinely acquired the ownership of

¹³⁵ See, e.g., *The Saint Nicholas*, 1 Wheat. 417, 431 (U. S. 1816); *The Fortuna*, 3 Wheat. 236, 245 (U. S. 1818); *Carrington v. Merchants Ins. Co.*, 8 Pet. 495, 520-21 (U. S. 1834).

¹³⁶ 40 STAT. 425 (1917), 50 U. S. C. APP. § 16 (1946).

¹³⁷ Exec. Order No. 9193, par. 10(a)(i), 7 FED. REG. 5205 (1942); cf. Exec. Order No. 8785, par. 5E(iii), 6 FED. REG. 2897 (1941), which, for the purposes of the freezing regulations, in substance defines "foreign national" to include any person to the extent that he has been acting directly or indirectly for the benefit of or on behalf of a national of a foreign country.

¹³⁸ See *Standard Oil Co. v. Clark*, 163 F.2d 917, 925 (2d Cir. 1947), cert. denied, 333 U. S. 873 (1948).

I. G.'s property, it was acting for itself. But, as above indicated, if its concealment of I. G. assets had been accomplished in part through a colorable transfer to I. G. of some of its own United States property, as was the case in *Kind v. Clark*, this question, as well as the problem of the effect of unclean hands, would have been squarely presented. In at least one case, it has been held that the Custodian was authorized to seize the stock of an American corporation, owned by an American citizen, but operated by him in the interest of a German concern.¹³⁹

Section 9(a) raises, or has raised, a number of other questions, some of which have been laid to rest within the year or so by legislation. Thus, for example, Section 34 now affords an exclusive method whereby American creditors may reach the vested assets of enemy debtors, thereby obviating the World War I provisions of Section 9(a), which authorized suit by such creditors.¹⁴⁰ Secured creditors, who may be said to have an interest in the vested property, have still a cause of action under Section 9(a), and hence there may be anticipated a rash of suits under that section alleging the existence of various species of liens on vested property.¹⁴¹

CONCLUSION

It has been the purpose of this article briefly to outline some of the intricacies of judicial construction of the Act as it now stands, rather than to consider potential amendatory legislation. There is a temptation to end the discussion in facile fashion by briefly recommending legislation designed to cure all the ills of the world, or at least that portion of them which arises from the ambiguities and inconsistencies of the Trading with the Enemy Act, as amended and judicially construed. Perhaps some such

¹³⁹ *Draeger Shipping Co. v. Crowley*, 55 F. Supp. 906 (S. D. N. Y. 1944).
¹⁴⁰ Prior to the enactment of § 34, Pub. L. No. 671, 79th Cong., 2d Sess. (1946), the Supreme Court had held that these provisions of § 9(a) had continued vitality, despite a time limitation contained in § 9(e), which limited claims thereunder to those owed to or owned by the claimant prior to October 6, 1917. *Markham v. Cabell*, 326 U. S. 404 (1945). After the enactment of § 34, Cabell's suit under § 9(a) was dismissed on the ground that the new section was the exclusive remedy for American creditors. *Cabell v. Markham*, 69 F. Supp. 640 (S. D. N. Y. 1946), *aff'd sub nom.* *Cabell v. Clark*, 162 F.2d 153 (2d Cir. 1947). For a comprehensive description of the new remedy, see Mason and Efron, *The Payment of American Creditors from Vested Assets*, 9 FED. BAR J. 233 (1948).

¹⁴¹ *Cf.* *Cabell v. Clark*, *supra* note 140.

legislation is or may be desirable, but I am beginning to suspect that the complexity and unpredictability of the situations and tactics with which the Act is designed to deal make the filling up of its interstices a job more suitable to the judicial than to the legislative process. Certainly, a little more judicial uniformity would be desirable. Judicial interpretation in ten circuits and eighty-odd districts (not to speak of occasional swipes at the statute by the courts of the forty-eight states) has proved the hard way to forge a sword of economic warfare; but it may be the best.

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THE TREATMENT OF ENEMY PROPERTY

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I

Article IV, paragraph 3 of the Potsdam Agreement¹ provides:

"The reparation claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the western zones and from appropriate German external assets."²

In his report to the nation on the Berlin (Potsdam) Conference, President Truman appropriately remarked:

"No one can foresee what another war would mean to our cities and to our own people. What we are doing to Japan now—even with the new atomic bomb—is only a small fraction of what would happen to the world in a third world war."³

So much law has gone by the board because of the hysteria engendered by the so-called second World War that it is impossible to say that any legal institution, no matter how well fortified, will resist the impact of belligerent action. That self-restraint, which is the mark of civilization, has been dissipated under the stress of modern war, John Bassett Moore⁴ has remarked:

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¹(1945) 13 DEP'T. OF STATE BULL. 157.

²To show the curious ideas which were entertained on the subject of making peace, we find under the head of "Political Principles" the following paragraph: "To convince the German people that they have suffered a total military defeat and that they cannot escape responsibility for what they have brought upon themselves, since their own ruthless warfare and the fanatical Nazi resistance have destroyed German economy and made chaos and suffering inevitable." *Id.* at 155. The knowledge that these conditions might spread to all Europe increases enormously the American burden, jeopardizes the safety of every intergovernmental loan made, and does not promote the hope of a restoration of trade or lifting of trade barriers.

³*Id.* at 208.

⁴MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (New York, 1924) 24.

"Of all the illusions a people can cherish, the most extravagant and illogical is the supposition that, along with the progressive degradation of its standards of conduct, there is to go a progressive increase in respect for law and morality."

War is increasing its pace as well as its devastation, until all modern civilization is now definitely under a threat of destruction. It is therefore quite consistent with current trends that many rationalizations should be afforded for doing away with the well established rule that private property of the enemy shall be protected against confiscation. The Treaty of Versailles, Article 297, left confiscation optional; the Potsdam declaration seems to make it somewhat more obligatory. The change, it is to be feared, marks the deterioration in legal and moral conceptions between the two wars.

Mr. Seymour J. Rubin, United States representative in the Allied-neutral negotiations on the subject of German external assets and related problems,⁵ believing Alexander Hamilton to have been quite wrong in his opinion on alien property, furnishes a number of reasons or rationalizations in his article entitled "'Inviolability' of Enemy Private Property,"⁶ as to why it is now proper to confiscate private property.⁷ It is probably true that the Nazi government employed much private property for public purposes, and there would be a justification for withholding that property, if proved to be Nazi-owned, from return. But the bulk of the private property in this country was doubtless invested for the same reason that private property exists, namely, as a source of wealth and income to the owner.

John Bassett Moore, tracing the administration of the Trading with the Enemy Act in the first war from that of trusteeship to that of occasional spoliation, remarked:⁸

"In the original statute the function of the alien property custodian was defined as that of a trustee. Subsequently, however, there came a special revelation, marvelously brilliant but perhaps not divinely inspired, of the staggering discovery that the foreign traders and manufacturers whose property had been

⁵Mr. Rubin has been appointed as successor to Mr. Randolph Paul and will presumably have charge of the negotiations with neutral countries to effect an expropriation of the private property of Axis nationals.

⁶Rubin, "Inviolability" of Enemy Private Property (1945) 11 LAW & CONTEMP. PROB. 166.

⁷Mr. Rubin does not like the word "confiscation," though no other word so well describes the expropriation without compensation of private resources, nor does he like the words "private property." No more do the Soviets like this term, and they have shown their contempt for the institution by wholesale expropriation.

⁸MOORE, *op. cit.* *supra* note 4, at 22.

taken over had made their investments in the United States not from ordinary motives of profit but in pursuance of a hostile design, so stealthily pursued that it had never before been detected or even suspected, but so deadly in its effects that the American traders and manufacturers were eventually to be engulfed in their own homes and the alien plotters left in grinning possession of the ground. Under the spell engendered by this agitating apparition, and its patriotic call to a retributive but profitable war on the malefactors' property, substantial departures were made from the principle of trusteeship."

We are now informed that the established rule of 19th century law guaranteeing the immunity of alien private property ought to disappear—presumably with other rules of law—and that it is now proper to expropriate the property, thus impoverishing further the unlucky owner and leading to results which are not thought through. It is admitted that the rule of immunity grew with international trade, but the conclusion is not drawn that the abrogation of the rule of immunity will stifle international trade. In fact, it seems to be overlooked that rules of international law were based on their economic foundation, and that with the violation of the rule will also go those economic purposes which it was designed to safeguard. If it becomes an established fact that the safety of private property depends upon a preponderance of force alone, and can no longer rely upon law for its protection, the financial community must prepare itself for further wars, for an end of all talk of disarmament, for the axiom that it is safer to invest in a weak than in a strong country, and for the uncompensated encroachment upon 11 billions of American property abroad. Economic are stronger than political enmities, and one can never tell what will happen to a foreign investment that no longer enjoys legal protection. Besides, the Eastern peoples who are being taught the lesson of confiscation by the West, will profit by the example and are not likely to draw those fine distinctions between nationalities upon which the West has prided itself. Whether anything will be recovered depends entirely upon accident. I have before me a resolution of the National Foreign Trade Council objecting to the seizure of American property abroad as war booty or reparations and for other purposes—a practice in which the Russian Government seems to have indulged rather promiscuously and freely. It is said:⁹

"At the close of hostilities, there existed in Europe considerable property.

⁹N. Y. Times, May 29, 1946, p. 29, col. 2. *Resolution on the Protection of American Foreign Property* adopted by the Board of Directors of the National Foreign Trade Council, Inc., May, 1946, p. 2.

owned by American citizens and corporations, a substantial amount of which was located in Germany and in Eastern and Southeastern European countries generally. . . . In some cases the property has been seized as 'war booty' or reparations. In other cases, nationalization programs have engulfed American properties, while in still other instances, repossession or use has been prevented or impaired through stultifying regulations and controls.

"The loss or prospective loss of this American property is of direct interest to the American taxpayer because of the result, both immediate and long-range, which such loss may produce. . . . Apart from the problem of individual financial loss, the long-range position and prestige of the United States in the areas concerned will be impaired by the loss of the properties in question. Moreover, should American property rights abroad be subordinated to temporary political considerations, the impact upon the flow of private investments abroad, both as to volume and direction, may be serious."

II

It is true that in ancient times distinctions between combatants and non-combatants were not made, and private and other property was confiscated just as the enemy nationals were either killed or enslaved. Not much property was found abroad. But we had assumed that we had advanced beyond ancient times, whereas the Potsdam declaration has implications indicating that the progress of civilization has come to an end, and that under the passions aroused by war we must return to ancient times. Even in *Magna Carta*, 1215, the interests of trade had prohibited an outright confiscation of the enemy property, for the enemy merchant was to be dealt with on a basis of reciprocity. In later years the rule of immunity in the interests of trade was more completely observed until it finally established itself as international law, first by treaty, then by custom, throughout the 19th century. The old practice of confiscation was denounced everywhere as a relic of barbarism. It was not thought possible that the human race would so far forget itself as to recur to the practices of ancient times. Yet that is the situation we confront and rationalizations are afforded as to why the new practice of confiscation is most desirable. John Bassett Moore has wisely remarked:¹⁰

"The world never will be rid of the problem of preserving its elementary virtues. Three hundred years ago Grotius declared that, as he who violated the laws of his country for the sake of some present advantage to himself, 'sapped the foundation of his own perpetual interest, and at the same time that of his posterity,' so the people that 'violated the laws of nature and nations' broke down 'the bulwarks of its future happiness and tranquillity.'"

¹⁰MOORE, *loc. cit. supra* note 4.

Mr. Moore adds, quoting Alexander Hamilton:¹¹

"No less pertinent is the confession of Alexander Hamilton, made a century-and-a-quarter ago, that, serious as the evil of war had appeared to him to be, yet the manner in which it might be carried on was in his eyes 'still more formidable.' It was, said Hamilton, 'to be feared that, in the fermentation of certain wild opinions, those wise, just, and temperate maxims, which will forever constitute the true security and felicity of a state, would be overruled,' and that, one violation of justice succeeding another, measures would be adopted which even might 'aggravate and embitter the ordinary calamities of foreign war.'"

This deterioration has gone so far as to compel neutral countries to surrender property which the belligerents regard as belonging to enemy nationals.¹²

We are informed, first, that the admitted rule of immunity is not clear, since American courts during the 19th century have uttered *dicta* supporting the ancient practice of confiscation. It is not observed, however, that practically no case of confiscation is known in the 19th century, that Congress has carefully avoided such implication, and that the Supreme Court has condemned it in *ratio decidendi*.¹³ Utterances of uncertain tenor would doubtless be made of any rule which has been in process of evolution during the centuries. Courts ought to be at least as careful as Congress in observing the obligations of statesmanship.

We are next informed that the private property of nationals abroad is subject to requisition by the nation and the example is cited of British expropriation against compensation of part of the property of their nationals in the United States. The difference lies in a confiscation by the country in which the investment is made and a requisition against compensation by the alien's own country. Besides, the British requi-

¹¹*Id.* at 24-25.

¹²Agreement with Switzerland providing for surrender of 50 percent (250 million Swiss francs) of the German property belonging to non-residents, plus \$58,140,000 in gold, signed May 26, 1946. It is understood that the gold is considered Nazi loot acquired from France. Why the United States should assume the onus of undertaking this distasteful business for all the Allies, for the benefit of a reparation pool ((1946) 14 DEP'T OF STATE BULL. 114) is not known. Switzerland is to retain 250,000,000 francs and about 32 million dollars in gold to liquidate its own debts frozen in Germany. The owner is to receive German marks, presumably at the official exchange rate, for his Swiss franc assets. Why German nationals are still prohibited from trading with Sweden and Switzerland, and why the neutral blacklists are still kept in force—over a year after VE Day—is unknown. The financial injury to neutrals must be considerable.

¹³*Brown v. United States*, 8 CRANCH 110 (U. S. 1814); *United States v. Percheman*, 7 PET. 51 (U. S. 1833).

sitions took place in few places only, for British subjects still possess large investments in the United States, Canada, Argentina and elsewhere which have not been impaired by the British Government. In the few cases where the requisition did occur, the owners received British pounds to an amount fully compensating them for the property requisitioned. It is needless to add that the pounds were the bonds or currency of a government then solvent, and that the owners have thus been protected against confiscation.

The only reason Axis nationals were not exposed to the expropriation of their own government was doubtless the fact that the United States and other Allied governments by "freezing" and sequestration did not permit such requisition. One might even say that the owners were the beneficiaries of a happy accident. But this is no ground for following the freezing by confiscation which would do damage to all foreign investments and perhaps put a quietus on foreign business. It will be noted that the National Foreign Trade Council, protesting against the use of American property for Russian and other reparations, resolved:¹⁴

"... in certain of these foreign countries they are being totally deprived of these properties through various forms of confiscation or sequestration or other measures having a like result."

If confiscation in any form is a risk that the trader must run, both trade and investment will suffer a fatal blow. The 19th century seems to have realized this consequence.

III

We may now address ourselves to a few of the considerations advanced in the clever article of Mr. Rubin. What had heretofore been considered the unanswerable arguments of Alexander Hamilton in favor of immunity,¹⁵ now become merely a "notion" of Hamilton,¹⁶ whereas the true gospel is presumably to be found in the proposal for confiscation advanced by Mr. Rubin. If there is no promise of immunity against confiscation attending a foreign investment, and if, as Mr. Rubin says, the alien has been warned by the previous American practices—there is no such practice—that he is in danger of losing his property completely, very little foreign property will find its way into the country. Some countries needing foreign capital may thus be greatly handicapped.

¹⁴Resolution, *op. cit. supra* note 9, at 4.

¹⁵*Infra*, part VI of this article, cited to footnotes 38 and 39.

¹⁶Rubin, *op. cit. supra* note 6, at 175.

It is recalled that down to 1861 American railroads were largely built by foreign money, and a certain reputation for probity was built up by the United States. This investment would not have taken place had confiscation been considered a legal possibility. Neither the South nor the North could have prosecuted the Civil War without the aid of foreign commercial transactions which would doubtless not have been undertaken had such a risk as confiscation been implied. The State Department, it is believed, still proceeds under the theory that confiscation is dangerous in many respects,¹⁷ but we are now informed that the alien trader should take that risk into account in entering into a foreign transaction. The borrower would doubtless have to pay for the lender's risk.

We may in addition take up some of the other arguments that are advanced to justify confiscation. In earlier articles I have ventured to point out that the rule of immunity for foreign property grew in large measure as the result of a desire to permit the owner to resume the thread of life and continue to earn his living. We are already discovering that too great a deprivation of livelihood of the vanquished merely imposes on the United States and its taxpayers the burden of sustaining and supporting the victim. This practice will not leave the psychology of the vanquished untouched, for the beneficiary is not likely to feel that gratitude which might be thought to replace resentment. If the assets of foreign nationals were confiscated as a regular practice, it would enhance the reparation bill sufficiently to include these assets. The Crimea conference made the bill against Germany alone—not to speak of other Axis Powers—20 billion dollars.¹⁸ How that is to be produced is of course a mystery, but it is not a sacred sum which implies that in all peace treaties with the other Axis nations, Austria, Hungary, Rumania, Bulgaria, the foreign assets of nationals must go by the board. If this should prove to be the case we are, it is to be feared, nearing the end of the capitalist system. Why the United States should support such a principle is curious.

It is further argued that if the business community realizes the dangers involved it will use its influence for peace.¹⁹ This assumes that the investment would already have been made, which under the risks

¹⁷*Infra*, part VI of this article, cited to footnotes 40 and 41.

¹⁸See note 1 *supra*, at 210. The sum was proposed at the Crimea conference. At the Potsdam conference no figure was mentioned.

¹⁹Rubin, *op. cit. supra* note 6, at 176.

implied seems like a bold assumption. It is in fact doubtful how much individual nationals have to do with the decision made by administrators to enter or not to enter a particular war.

In this connection an assertion frequently heard should be dissipated. That is that property accompanied by its owner is entitled to more treaty protection than property not so accompanied. Justice Van Devanter undertook to make this distinction in *Stoehr v. Wallace*.²⁰ It has been the general assumption that foreign property is entitled to protection regardless of the domicile of the owner. It would be most unfortunate if only that property were protected which is accompanied by its owner.

The article under discussion makes a sensible suggestion that all Parties must keep the peace. If there could be a way of accomplishing this result it would doubtless be most desirable. Unfortunately, though the human race has at hand the instruments of self-destruction, it shows little tendency to avoid occasions for conflict. Indeed, some of the poor arrangements recently made, which postpone tranquillity indefinitely, make it seem likely that short-tempered statesmen will reach for the gun on slightest provocation. So far as is now apparent, the new devices for bringing nations into harmony have not achieved their anticipated result.

The article under discussion in the name of a just distribution of the burdens maintains that if the expropriated owner is relegated to his own government, even bankrupt, for compensation, the obligations of the victor have been performed. It is strange that such an argument was unheard of before the 20th century dawned. The argument would be more plausible if the victim's nation were solvent, but even so, the relegation of the victim to his own nation for compensation is what the Frenchman de Lapradelle calls "transparent hypocrisy." No reference will be made to the destruction of economic values involved in compulsory sale.

IV

This argument was used to a considerable extent after the first war, and deserves consideration because of the frequency of utterance. By the Treaty of Peace, Article 297 (i), Germany undertook "to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States."²¹ This provision is regarded

²⁰255 U. S. 239, 251 (1921).

²¹3 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS

by some as mitigating or relieving the onus of the charge of confiscation. My own belief is that such a provision, while unnecessary to accomplish reimbursement, where that is possible, may be deemed to evidence the guilty conscience of the draftsmen of the treaty stipulation, since it would always enable a responsible appropriator of the private property to relegate the victim back to an irresponsible debtor, not to speak of the destruction of the fabric of foreign investment.

At this point it might be said that a Republican Congress from 1921 to 1933²² resisted firmly this supposedly persuasive argument and declined to consider it a mitigation of confiscation. This country, therefore, has never done what Mr. Rubin advocates it should now do. The British Trading with the Enemy Act of September 5, 1939, states, with a view to "preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint Custodians of Enemy Property." Some countries, like Italy, have not even sequestered. Germany has undertaken to follow a policy of reciprocity, doing to foreign property of the nationals of a particular country what is being done by that country to German-owned private property. The principles of the National Foreign Trade Council require the Axis countries to restore any property beneficially owned by a national of the United Nations.²³

The United States, by the First War Powers Act, seems to have gone further than any other country in authorizing the seizure or use of the property "in the interest of and for the benefit of the United States."²⁴ There is some difference of view as to what this means. The Custodian's existing practice in the licensing of patents has been considerably criticized.

The nearest ostensible, though not actual, support in any authoritative

BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, 1910-1923 (Washington, 1923), 3329, 3464.

²²If Representative Gearhart had examined more closely the page from which he quoted, making an unwarranted charge, he would doubtless have refrained from making the charge. *Hearings before a Subcommittee of the Committee on Ways and Means, Sitting in Conjunction with a Subcommittee of the Committee on Interstate and Foreign Commerce, on H. R. 10820* [a bill to provide for the payment of the awards of the Mixed Claims Commission (1926)], 69th Cong., 1st Sess. (1926) 374. See also *Hearings before the Interstate and Foreign Commerce Committee on H. R. 13496*, 67th Cong., 4th Sess. (1923) 195-235. On page 195 the speaker stated his interest in claims of the 1914-18 war.

²³Resolution, *loc. cit. supra* note 9.

²⁴55 STAT. 838, 840 (1941); 50 U. S. C. § 616 (1) (SUPP. IV 1941-1945).

work for the views expressed by Mr. Rubin may be found in Hyde, *International Law*. Professor Hyde says:²⁵

"It has been observed that the treaty of Versailles of June 28, 1919, permitted the utilization of the property of German nationals within the territory of any of the Allied and Associated Powers for the purpose of satisfying war claims against the German Government. Technically such action was not confiscatory in character because of the undertaking of that Government to reimburse its nationals whose property was thus taken. Inasmuch, however, as the actual value of that undertaking was necessarily slight by reason of the fiscal burden imposed upon the German territorial sovereign, the agreement signified consent to what amounted to a practical confiscation of private property by its enemies."

My own belief is that the practice amounts to an actual confiscation, since relegation of the expropriated owner to any one else than the taker merely recognizes that he seizes private property but does not absolve the taker in any way. The principle of international law is violated with or without such relegation. A principal witness for this view is the draftsman of the clause, Mr. Fred K. Nielsen, formerly Solicitor for the Department of State and American Representative on the Peace Conference Committee which wrote the clause. In comment upon the paper of Mr. Lutz at the 1933 Annual Meeting of the American Society of International Law, Mr. Nielsen made the following comment upon the clause or stipulation in question:²⁶

"The stipulation was inserted there through the effort of a very insignificant member of the Peace Conference who had nothing to do with the provisions with regard to confiscation which have been denounced as obsolete and as relics of barbarism—and very properly so denounced, I think. It was because those stipulations seemed to be a blot on the record of the Allied and Associated Powers, that some feeble and, I might say, crude, attempts were made to afford a little remedy. The author had this in mind: that the Allied and Associated Powers could never defend this feature of their own record. They could not ground their action on international law.

"And now the next confession I might make is not a very satisfactory one, because one idea in putting that stipulation into the treaty was that it might give a little defense to the act of confiscation. I do not think it is much of a defense, if I knock down a man and take his money away from him illegally, to impose upon him the obligation to pay himself. So that there is not much

²⁵2 HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* (Boston, 1922) 240-241. In the Second Revised Edition (Boston, 1945) only the first sentence of this extract is printed. 3 HYDE, *INTERNATIONAL LAW* (Boston, 1945) 1737.

²⁶Twenty-Seventh Annual Meeting of the American Society of International Law held at Washington, D. C., April 27-29, 1933. (1933) 27 *Proc. Am. Soc. Int. L.* 120-121, 121-122.

defense in the contention that there can be no confiscation if Germany fails to pay.

"I think the principal speaker, whom I heard only in part, analyzed the evidence of international law and showed that we had, as far as we can generally get in any case, the general assent of the nations of the world to that rule of law and a principle of civilization safeguarding private property. Our government did not take a firm stand at the conference in line with its traditional position in opposing this confiscatory provision. In any event, I think we should stop talking about that little subterfuge concerning which I have both a good conscience and also a guilty conscience. It is not of any value now when Germany cannot carry out the stipulation and when German courts will not give effect to it."

Answering the doubt raised by Mr. Charles Henry Butler as to how much the expropriated German nationals might have received and whether inflation was not the cause of their misfortune, Mr. Lutz remarked:²⁷

"... in fact they did not receive compensation, and it was not due to merely the inflation. They received only a very small percentage of the amount in some cases and in other cases they received practically nothing."

Professor A. H. Feller, now General Counsel of the UN, at the same meeting, referring to the stipulation for reimbursement, made the following remarks:²⁸

"As I see it, ladies and gentlemen, and particularly Mr. Butler, the great defect of that provision in the Treaty of Versailles was that while it provided that Germany received credit against reparations payments for the compensation which she undertook to pay to her own citizens, the fact that reparations sums were not fixed made that credit entirely fictitious, and Germany did not know at the time of signing the Treaty of Versailles how much she was to pay in reparations and then be credited with the amount which could be fixed. She had no idea at all what she was to pay her citizens, it meant absolutely nothing at all. As to the subsequent events in Germany which led to, one might almost say, the defrauding of the persons whose property was actually confiscated, I have, of course, nothing to say, but I do not think the provisions of the Treaty of Versailles could be said to have in any way canceled the blot against the practice of the Allied and Associated Powers."

The late Jackson H. Ralston, umpire in various claims commissions, also took part in the discussion. He deprecated the practice here under comment in picturesque language that I should prefer not to quote. It can be read at page 120 of the *Proceedings* under reference:

²⁷*Id.* at 119.

²⁸*Id.* at 119-120.

I also participated in the discussion. I stated:²⁹

"Of course, substitution of a bad debtor for a good debtor under Article 297 (i) is a mere subterfuge, doing no credit to the integrity of modern times. It is the tribute vice pays to virtue. It was a subterfuge to avoid the inevitable charge of confiscation."

Dr. Sterling E. Edmunds, author of a monograph which he entitled *The Lawless Law of Nations*,³⁰ calls it a "disreputable practice, suited to the Dark Ages with which it disappeared."

Mr. A. G. Hays, in his book, *Enemy Property in America*, says:³¹

"To substitute the German Government as a debtor to her nationals for the American Government which has taken their property is not in accord with moral principle. To shift a debtor in such manner is taking away property and, as a practical matter, is confiscating it."

One other fact deserves mention. After the adoption of the Dawes Plan of 1924, the German Government maintained that since this Plan determined her ultimate obligations under the Treaty of Versailles, she had the right to deduct from the total amount to be paid, whatever sums she was obliged by Article 297 (i) to pay her expropriated nationals. This claim was arbitrated before the Dawes Plan Arbitral Tribunal, and Germany lost. We may infer, without endorsing the view of several writers to the effect that obstacles were thrown in Germany's way, that the Allies were little concerned about Germany's ability to discharge her treaty obligations to her own nationals.³²

V

The rules which civilization has developed, as already observed, are little but cautions of self-restraint. If experience should prove that the human being is incapable of self-restraint in time of stress, the veneer of civilization will readily wash away. Rules of law, contrary to Mr. Rubin, represent far greater restraints than mere hopes. They are the result of hard experience as to what is soundest for the preservation of the race. It is unfortunately true that the restraints both of law and of civilization are often thrown off in time of stress. That merely shows

²⁹*Id.* at 123.

³⁰EDMUNDS, *THE LAWLESS LAW OF NATIONS* (Washington, 1925) 275-276.

³¹HAYS, *ENEMY PROPERTY IN AMERICA* (Albany, 1923) 68.

³²*Report of the Agent General for Reparation Payments*, June 10, 1927, p. 11. *Ibid.*, June 7, 1928, p. 15. Award, No. 2, January 29, 1927, *Die Entscheidungen des Internationalen Schiedsgerichts zur Auslegung des Dawes-Plans*, 2d Sess. 1927, p. 220.

how close to primitive man the human being still is and what dangers he incurs. If the rule of no confiscation were based on reciprocity, such reciprocity is in fact afforded by the requirement of the Potsdam declaration that the Axis governments make good all losses sustained by the Allies, including, presumably, restoration of Allied property.³³ A rule which works only in favor of the victors is not likely to command the respect it deserves.

The mere fact that the Axis Powers practiced confiscation and would have practiced it after the war had they won, affords no ground for the Allies following in their footsteps. Mr. Rubin speaks of the vicissitudes attending sequestration, which he regards as a permitted practice. It is true that we have found no way to avoid sequestration, since the property could be used for warlike purposes by the government of the owner. The very fact that sequestration is permitted may make return more difficult, but by no means impairs the principle. To use the property as a means of making war upon the enemy or to make sales for the purpose of "Americanization," is a retrogression in the purposes for which sequestration is permitted. The very use of the word "vested" is a foreignism which should be eradicated from American public law, since it adds nothing of value. The property is not "captured," as several courts have thought,³⁴ since capture assumes hostile intent heretofore absent from sequestration. It is not for nothing that chambers of commerce and persons interested in foreign trade seem to have united in their condemnation of the practice of confiscation. They realize the effect of this practice upon the business in which they are engaged.³⁵

The article under discussion regards the private property as the "assets of the nation"³⁶ of which the owner is a national. If this is so it goes a long way toward sustaining the Soviet theory of wiping out the distinction between private and public property and regarding all private property as the assets of the nation. In a sense it is of course

³³See note 1 *supra*; *Resolution, loc. cit. supra* note 9.

³⁴*Miller v. Rouse*, 276 Fed. 715, 716 (S. D. N. Y. 1921).

³⁵*Resolution, loc. cit. supra* note 9; CHAMBER OF COMMERCE OF THE UNITED STATES, *TREATMENT OF UNITED STATES PROPERTY IN ENEMY COUNTRIES* (September, 1943). [Cited by Mr. Rubin] See also Dickinson, *Enemy Owned Property: Restitution or Confiscation* (1943) 22 FOREIGN AFFAIRS 126; NATIONAL FOREIGN TRADE COUNCIL, *WAR CLAIMS, REPORT OF THE LAW COMMITTEE* (New York, 1944); COUNCIL ON FOREIGN RELATIONS, *THE POSTWAR SETTLEMENT OF PROPERTY RIGHTS* (New York, 1945).

³⁶Rubin, *op. cit. supra* note 6, at 178.

true that the nation has the power of requisition and a certain control over foreign exchange, and that even the property of its citizens at home is subject to national controls. But we had heretofore drawn a line between private property and police power control. If that line is now to be wiped out we might as well adopt the theory of state socialism and no longer concern ourselves about private property. However, the mere power to requisition or exert control over private property, even abroad, by no means converts the private into public property. An argument designed to accomplish that result does not serve the purposes of the western system of life. We had heretofore come to the conclusion that the distinction between private and public property was fundamental and that private property could not be taken to discharge public claims. If we have been mistaken in this assumption and private property is now a national asset to be used for the discharge of national claims, the end of the capitalist system is foreshadowed. Private property, if sustained at all, is a mere loan by the state which is the ultimate owner and controller of the asset. Heretofore we have thought that only the Soviets could make this argument, but we find that we are mistaken.

The Potsdam declaration has gone further than the mere confiscation of foreign assets. It requires neutrals to turn over to the victors the assets of the private nationals of the vanquished. It thus disregards the obligations attaching to their sovereignty and neutrality, requires them to violate their own law and international law, and imposes Axis obligations upon neutral Powers. This is done by threatening the neutral Powers with sanctions, a new form of pressure available only to the few, a form of coercion which threatens the very foundations of international law.⁸⁷ Where this practice will lead is exceedingly dubious.

Finally, it is argued that the rule of immunity is futile because the owner would be expropriated anyway by his own government. Apart from the fact that it is quite possible to safeguard against this possibility by an appropriate provision of the peace treaty, it is not the concern of the host to govern his actions by the dangers from his own government that the guest might incur. If we must sustain a breakdown of the institution of private property it would be better than to impose confiscation to assess an obligation upon the vanquished country to find the assets necessary to meet its reparation obligations from

⁸⁷F. X. PETER, SHALL SWITZERLAND SURRENDER ITS GERMAN-OWNED PROPERTY? (Privately printed, 1946).

whatever source derived. It may be impossible to avoid such an outcome, which would indicate a western disregard of the institution of private property which has not heretofore disgraced modern western civilization. If victors must proceed in this fashion, the consequences cannot be escaped. Should the vanquished Powers contain nothing but poverty-stricken Helots, the life of Europe and Asia and of the West will be in constant turmoil and jeopardy. Heretofore statesmen have had some regard for the continuance of western civilization. If now they show that that consideration means little, the necessary consequences must be drawn.

VI

To show that the confiscation of private property had for the strongest of economic reasons become a rule of law in the 19th century, and had established itself as part of the mores of western civilization, we may quote from a few of those who have given the matter thought. If there were any doubt as to the law on the subject, it would be dissipated by the fact that even as to foreign enemy territory private property was to be immune and untouched by the military occupant. Articles 46 and 53 of the Annex to Convention IV of The Hague Regulations definitely assured the immunity of private property even in occupied territory. Looting was definitely taboo. *A fortiori*, was property in one's own territory to be definitely immune. So natural did this seem to the Brussels codifiers of 1874 and The Hague draftsmen of 1899 and 1907, that they did not even think it necessary to mention so elementary a rule. The very fact that confiscation can today be advocated as desirable—no personal aspersion is intended—is an indication of the retrogression in public morality which has taken place.

To show that the rule of immunity has strong support in the literature, we may quote the following from Alexander Hamilton:⁸⁸

"The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security.

* * *

"The property of a foreigner placed in another country, by permission of

⁸⁸WORKS OF ALEXANDER HAMILTON (Lodge's ed.), 414, 415, 416-418. See the extended quotations from Hamilton and the references to the treaties concluded by the United States in MOORE, *op. cit. supra* note 4, at 14 *et seq.*

its laws, may justly be regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner, when he has personally given no cause for the deprivation?

"There is no parity between the case of the persons and goods of enemies found in our country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defence against our violence; they are deemed to owe a temporary allegiance; and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and equity; it is to add cowardice to treachery."

"Moreover, the property of the foreigner within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to the treasury, in common with other similar property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction, upon the breaking out of a war, the confiscation of a property, which, during peace, serves to augment the resources and nourish the prosperity of a state?"

In his *Camillus Letter XVIII*, Mr. Hamilton stated:³⁹

"No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation. In my view, every moral and every political sentiment unite to consign it to execration."

Said Secretary Hughes in his address at Philadelphia November 23, 1923:⁴⁰

"A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful cooperation, is possible. . . . Rights acquired under its laws by citizens of another State, [a State] is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles."

As recently as May 27, 1935, Secretary Hull stated in a letter to Senator Capper:⁴¹

³⁹S. WORKS OF ALEXANDER HAMILTON, *op. cit. supra* note 38, at 405-406.

⁴⁰Borchard, *Enemy Private Property* (1924), 18 AM. J. INT. L. 523, 531.

⁴¹Borchard, *Confiscations: Extraterritorial and Domestic*, (1937) 31 AM. J. INT. L. 675, 680.

"Such action would not be in keeping with international practice and would undoubtedly subject this Government to severe criticism. Moreover, the confiscation of these private funds by this Government and their distribution to American nationals would react against the property interests (some very large) of American nationals in other countries. It would be an incentive to other governments to hold American private property to satisfy claims of their nationals against this Government and to pass upon such claims in their own way. It is important from my point of view, therefore, that the United States should not depart in any degree from its traditional attitude with respect to the sanctity of private property within our territory whether such property belongs to nationals of former enemy powers or to those of friendly powers. A departure from that policy and 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."

Mr. John P. Bullington of Texas, later chairman of a committee dealing with a related subject, remarked in 1943:⁴²

"With modern business organizations and the increasing volume and complexity of international economic relations the problem is admittedly a difficult one not to be solved in twenty-minute papers. Broad principles of policy may, however, be formulated and the details of carrying them out, whether by treaty, codification, or practice,⁴³ made the subject of further study. The principle of non-confiscation of enemy-owned private property within our country should in fact, as well as in form, be recognized as a binding rule of international law. On the other hand, we are entitled, under established principles of that law, to take measures designed to prevent the effective use of such property by our enemies during the war. There is no incompatibility between these two principles, and I do not believe that American ingenuity would be greatly taxed to discover means for sterilizing without destroying or confiscating enemy property within our domain. . . . I submit that the practice of making the outbreak of war an excuse for seizing the industrial property of people who have made greater progress in certain fields than we is a sign of national weakness, an invitation to further wars, and, however much of immediate material advantage, contrary to our interests in the long run. We are a great and powerful nation, strong enough and great enough, I hope, to resist the temptation to expand our material well-being through appropriating the property of others without compensation. Indeed our present world predominance should make us the more scrupulous in our observance of international probity and fair dealing. A world where only the weak can be honest and only the strong can have rights is not the kind of a world for which we say we are fighting today."

⁴²Thirty-Seventh Annual Meeting of the American Society of International Law held at Washington, D. C., April 30-May 1, 1943, (1943) 37 PROC. AM. SOC. INT. L. 66-67.

⁴³Mr. Bullington's footnote: "If confiscatory practices be continued during the present war, it may be necessary to buttress the formerly accepted rule of nonconfiscation by treaties. It is to be hoped, however, that alien enemy property will not be so treated as to make this retrogression necessary."

"It is most difficult, in the heat and passions engendered by war, to maintain the calmness of intellect and spirit necessary for the maintenance of those elementary standards of right and decency which have been established through hundreds of years of gradual evolution. The temptation is great, particularly when at war with a people whose leaders have done so much violence to those standards, to yield to the not unnatural impulse to subordinate all other considerations to the desire to inflict damage on the enemy. If we, as lawyers, yield to such impulses, we do a disservice to our profession and, in my judgment, to the long term best interests of our nation. I earnestly hope that we will not do so."

The Treaty of Versailles was so incompatible with peace that Mr. Herridge, Minister of Canada to the United States a few years ago, characterized it as "a declaration of war."⁴⁴ Compared with the Potsdam declaration, the Treaty of Versailles may be characterized as a charter of benign benevolence. If the prospect of peace is to be found within its terms it has escaped the cognizance of the writer.

The amount of assets held by the Alien Property Custodian on behalf of German, Japanese, possibly Italian, Austrian, Rumanian, Hungarian, and Bulgarian nationals is about 200 million dollars, which by compulsory sale would doubtless shrink by half. The Treasury holds under its "freezing" orders some 300 million dollars in cash belonging to these nationals. Thus, for the paltry sum of approximately 400 million dollars a fundamental principle of Western civilization would be violated with consequences amounting to billions of dollars. It seems a rather short-sighted procedure for the United States to indulge.

Somehow, the result of the ripe experience and knowledge of human affairs of the statesmen quoted above, seems more weighty than the persuasive arguments of a modern writer even though he have charge of the Government policy of effecting the confiscation of enemy property in neutral territories.

⁴⁴HERRIDGE, WHICH KIND OF REVOLUTION? (Boston, 1943) 23; see also Bullitt, *The Tragedy of Versailles*, Life, March 27, 1944, p. 99; the late Senator Robert M. La Follette's contemporary characterization of the "peacemakers" of Versailles as "war makers," reprinted in *The Progressive*, June 26, 1944, p. 1, col. 3; and Mrs. Clare Booth Luce's statement: "This war began at Versailles . . ." N. Y. Times, June 25, 1944, sec. 1, p. 23, col. 5. John Bassett Moore remarked that: "In a current volume on China, a Chinese sage is reported to have declared that the Versailles Treaty was 'the most uncivilized paper written since men knew how to record thought' and to have prophesied that it would 'not only upset the economic balance of the world but lead to more wars.'" 6 COLLECTED PAPERS OF JOHN BASSETT MOORE (New Haven, 1944) 432.

THE FEDERAL ADMINISTRATIVE PROCEDURE ACT

FREDERICK F. BLACHLY* AND MIRIAM E. OATMAN**

SENATE BILL 7, "An Act to improve the administration of justice by prescribing fair administrative procedure", has recently been passed by both Houses of Congress and signed by the President.¹ This is one of the most sweeping measures ever acted upon by Congress in the field of administration and administrative law. According to the report of the House Judiciary Committee, it is intended "to assure that the administration of government through administrative officers and agencies shall be conducted according to established and published procedures which adequately protect the public interests involved, the making of only reasonable and authorized regulations, the settlement of disputes

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¹Pub. L. No. 404, 79th Cong., 2d Sess. (June 11, 1946). In order to avoid repetition all further citations to this Act will be by Section number only.

For example, the Senate required only 1½ months to approve the Four-Power and Nine Power Pacts of 1922 and only 2½ months to approve the London Naval Treaty of 1930. In these instances, the Senatorial members of the negotiating commission were able to reflect the various wishes and varying tempers of their respective parties in the Senate and in this way it was possible to meet legitimate objections from them as far as practicable in the drawing up of the very terms of the treaties themselves.

The recent action of Secretary Cordell Hull in consulting with ranking members of the Senate on post-war problems is politically realistic and at the same time is in accord with the apparent intention of the framers of the Constitution when they provided for the "advice" of the Senate as well as its "consent" to the ratification of treaties negotiated by the President.

HERBERT WRIGHT

THE UNRRA AGREEMENT AND CONGRESS

Briggs

The method by which the United States "joined" the international organization known as UNRRA (United Nations Relief and Rehabilitation Administration) seems worthy of comment on three points: (1) the legal character of the act by which the United States accepted membership, (2) the policy of encouraging the participation of Congressional leaders in the drafting of international agreements, and (3) the amendments and reservations qualifying participation by the United States in the UNRRA.

It will be recalled that objections to submitting treaties to the Senate for its advice and consent under the two-thirds rule have been based on charges that the Senate has rejected, delayed, or altered by disfiguring amendment a large number of treaties. Although the case against the Senate appears quite often to be grossly over-stated (at least, with regard to rejection and procrastination),¹ memories of the failure of the Senate to approve United States membership in the League of Nations have spurred a search for a practical alternative to the Constitutional provision that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." At the same time the greatly increased recourse to the executive agreement as a means of depriving the Senate of its constitutional prerogatives has been seriously criticized.

It has sometimes been stated that the United States "joined" the International Labor Organization by joint resolution of Congress. What actually happened was that in 1934 the Congress passed, and the President approved, a joint resolution by which the President was "authorized to accept membership" in that organization for the United States; the text of the joint resolution was communicated to the International Labor Office; the International

1929, p. 171. For instance, the Senate approved the treaties with Ecuador and Greece in 7 days, with Sweden in 9 days, with France, Great Britain and Spain in 10 days and with Russia in 12 days after signature.

¹ Royden J. Dangerfield, *In Defense of the Senate*, Norman, Okla., 1933.

Labor Conference invited the United States to accept membership in the International Labor Organization; and the President of the United States, exercising the authority conferred on him by the joint resolution approved June 19, 1934, accepted the invitation, thereby causing the United States to assume "such treaty obligations as are involved in membership in the International Labor Organization."²

In 1943 an attempt was ostensibly made to substitute the joint resolution for Senatorial approval in the accomplishment of an international transaction by which the United States would convey certain property rights and money to Panama. The normal procedure would have been to conclude with Panama a treaty by and with the advice and consent of the Senate, and then to ask Congress to pass the legislation necessary for the fulfillment of the obligations assumed in the treaty. Whether or not the employment of the joint resolution in this case was an attempt to secure fulfillment of an obligation previously assumed in the as yet unpublished executive agreement concluded between Panama and the United States by exchange of notes in Washington on May 18, 1942, is not clear.³ It seems quite clear, however, that a Congressional joint resolution, unlike an international agreement, can neither confer rights nor impose obligations under international law on a foreign state.

Several weeks after the approval of the Panama Joint Resolution, the Department of State discussed informally with the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs the text of a draft agreement to set up a United Nations Relief and Rehabilitation Administration. The brief history of this UNRRA draft of June 10, 1943, is as follows:⁴ In September, 1941, representatives of certain European governments-in-exile, meeting in London with the British Government to consider problems of relief and rehabilitation in liberated areas, formed the Inter-Allied Committee on Post-War Requirements. This Committee had neither operating powers nor an executive, but was serviced by a technical staff of British officials headed by Sir Frederick Leith-Ross. In 1942 both

² Manley O. Hudson, "The Membership of the United States in the International Labor Organization," *this JOURNAL*, Vol. 28 (1934), pp. 669-684. Since the joint resolution was adopted by a unanimous vote in the Senate Judge Hudson regards it as expressing the Senate's advice and consent in such a way as to meet the requirement of the two-thirds rule. *Ibid.*, p. 675.

³ Herbert W. Briggs, "Treaties, Executive Agreements, and the Panama Joint Resolution of 1943," *American Political Science Review*, Vol. 37 (1943), pp. 686-691; Lester H. Woolsey, "Executive Agreements Relating to Panama," *this JOURNAL*, Vol. 37 (1943), pp. 482-489.

⁴ Hearings before the Committee on Foreign Affairs, House of Representatives, 78th Cong., 1st and 2nd Sess., Dec. 1943-Jan. 1944, on H. J. Res. 192, "To Enable the United States to Participate in the Work of the United Nations Relief and Rehabilitation Administration," pp. 8, 158, 163 (Cited as House Hearings); House Report No. 994 and Senate Report No. 688 (both 78th Cong., 2nd Sess.). For the text of the Draft Agreement for UNRRA submitted on June 10, 1943, see Department of State Bulletin, Vol. VIII, No. 207 (June 12, 1943), pp. 523-527.

the Soviet Government and the United States Government (which had observers with the Committee) suggested the creation of a truly international relief organization with an international staff. After more than a year of negotiations between the United States, Great Britain, the Union of Soviet Socialist Republics, and China, the United States, on June 10, 1943, submitted a draft agreement for a United Nations Relief and Rehabilitation Administration to the Governments of all the United Nations and other nations associated with them in the war. These Governments were informed that, although the draft proposal met with the approval of the four Governments initiating the plan, it was still tentative and subject to further discussion.

The UNRRA draft agreement of June 10, 1943, was informally communicated to the members of the Senate and House committees in July, 1943, as an executive agreement. (In the words of Senator Connally: "... it was proposed that it take the form of an executive agreement by the executive department with other nations, without any reference whatever to Congressional or Senatorial action.")⁵ Since various Senators believed that the UNRRA draft agreement should be considered as a treaty and acted upon under the two-thirds rule, a sub-committee of the Senate Committee on Foreign Relations was appointed to discuss this question with the Department of State. What followed can best be described by quoting the Statement submitted by Mr. Francis B. Sayre of the Department of State to the House Committee on Foreign Affairs:⁶

In the ensuing discussions which took place between the members of this subcommittee and Assistant Secretary Acheson and myself, representing the State Department, it was made clear that the draft agreement was not intended to impose binding obligations on the part of the United States but to set up the machinery for an international organization to administer relief and rehabilitation providing that contributions of funds should be made by each member government "within the limits of its available resources and subject to the requirements of its constitutional procedure."

After considerable discussion, the subcommittee reached the conclusion that in view of certain modifications which Senator Vandenberg and others had suggested in the text of the agreement and which were incorporated in the final text, the best method of procedure would be along the following lines: That an effort be made to secure the agreement of the other 43 United Nations and associated governments to the changes proposed by Senator Vandenberg and by others in the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs and that if this could be done the President should sign the agreement and the Administration should be organized in accordance with the agreement. Following this a joint resolution should be introduced in Congress authorizing the President to expend such moneys as

⁵ Congressional Record, Vol. 90 (78th Cong., 2nd Sess.), p. 1737 (daily edition, Feb. 18, 1944). He added that that conception was "combated" by the Senate Foreign Relations Committee.

⁶ House Hearings, pp. 158-159.

Congress might from time to time appropriate for participation by the United States in the United Nations Relief and Rehabilitation Administration. Such a joint resolution presumably would be discussed and considered both in the House Committee on Foreign Affairs and in the Senate Committee on Foreign Relations and would also be debated on the floors of the House and Senate. This would give to Congress full opportunity to consider the extent to which the United States should participate in the work of the United Nations Relief and Rehabilitation Administration.

Following the passage of the joint resolution, appropriation bills would then be introduced and would be considered first by the Appropriation Committees of the House and the Senate and then on the floor by the House and the Senate. In this way everyone concerned would have full opportunity to consider the whole program. I understand that the subcommittee of the Foreign Relations Committee concluded that if the changes which had been proposed were made in the text and the above program were followed, the introduction of a joint resolution would be an appropriate constitutional procedure.

In accordance with this program, the changes proposed in the text of the United Nations Relief and Rehabilitation Administration agreement were then put before the other 43 nations and their agreement was secured to them. We also set about drafting a joint resolution to be introduced in Congress in accordance with the program.

The international agreement establishing the United Nations Relief and Rehabilitation Administration was signed in Washington on November 9, 1943, and on November 10 representatives of the forty-four signatory governments and authorities met at Atlantic City to provide for the organization and operation of the Administration.⁷ On November 15, 1943, House Joint Resolution 192, embodying the text of the international agreement as signed, was introduced in the House of Representatives.

In the light of this chronology, the alleged novelty of the method by which the United States joined the UNRRA appears to have been greatly exaggerated. The United States became a member of UNRRA by executive agreement. The international agreement was binding on the United States from the date of its signature by President Roosevelt,⁸ without its submission to the Senate for advice and consent, and some days prior to the introduction of the joint resolution in Congress.

⁷ First Session of the Council of the United Nations Relief and Rehabilitation Administration: Selected Documents. Department of State, Conference Series 53 (1944), p. 1. For the text of the UNRRA Agreement as signed see pp. 7-20.

⁸ By Article IX of the Agreement for United Nations Relief and Rehabilitation Administration "this Agreement shall enter into force with respect to each signatory on the date when the Agreement is signed by that signatory, unless otherwise specified by such signatory." It is perhaps curious—in the light of our Constitutional provision as to the making of treaties—that, although the United States did not sign subject to Senatorial advice and consent, the Agreement was signed on behalf of fourteen Governments (Chile, Colombia, Cuba, Ecuador, Ethiopia, Guatemala, India, Iran, Iraq, Mexico, Nicaragua, Peru, Uruguay, Venezuela) with a reservation or statement to the effect, in each case, that the Agreement was signed subject to ratification or legislative approval. Same, pp. 15-20.

Nevertheless considerable confusion is reflected in certain statements on the matter. Mr. Sayre assured members of Congress that the international agreement was "not intended to impose binding obligations on the part of the United States."⁹ Senator Connally assured the Senate that the whole spirit of the joint resolution containing the international agreement was "that the United States is not assuming any compulsory obligations whatever."¹⁰ Senator Vandenberg informed the Senate that the conferences between the Senate subcommittee (of which he was a member) and the State Department had "produced what we both understand is to be not merely an executive agreement, but an agreement approved by Congress"; that "the theory upon which the agreement now comes to Congress is that it has ceased to be an executive agreement alone, which in our opinion would have been a gross violation of the proprieties as well as of the law. It has been submitted to Congress for congressional approval and not merely for congressional information."¹¹

The implication that the United States would not be bound by the UNRRA Agreement until Congress had approved it by passing the joint resolution incorporating its text is negated by the terms of the Agreement itself and by international law. Senator Taft saw the point when he observed that if the President "has power to make an executive agreement, then it is an agreement . . . which is binding on the United States."¹²

The statements by Mr. Sayre and Senator Connally reveal a misunderstanding of another sort: a failure to distinguish between the formal effectiveness of an international agreement and its content, or (to phrase it differently), between becoming a member of UNRRA and the extent to which members are obligated by the terms of the UNRRA Agreement to participate in the work of that organization. The confusion rests partially on the wide discretion left by the UNRRA Agreement to member Governments in the fundamentally important matter of the amount and character of their contributions to the work of the organization. Since this latitude was possibly increased by Senatorial amendments to the Agreement they require examination.

A comparison of the final text of the UNRRA Agreement with the text released on June 10, 1943, reveals some 27 or 28 variations between the two, of which but six or seven could, however, be called significant. How many of these were suggested by Congressional leaders, and how many by foreign Governments, we are not informed. Senator Vandenberg, however, told the Senate that as a result of the meetings of the Senate subcommittee with

⁹ See Mr. Sayre's Statement, quoted above.

¹⁰ Congressional Record, Vol. 90, p. 1745 (daily ed., Feb. 16, 1944).

¹¹ Same, p. 1746. Compare Senator Taft's comment: "Apparently the Senator suggests that it is a new kind of thing, an executive-congressional agreement, which may be entered into with foreign nations". He was quick to add that it "involves the implication that there are certain things which the President cannot do by executive agreement, but which he can do by executive agreement approved by Congress"; same. ¹² Same, p. 1745.

State Department officials: "The entire agreement was rewritten in its fundamental character. It was stripped of every general obligation and responsibility. It was brought back to a simple authorization of appropriations for an international purpose, and it was written in a form which textually undertakes to limit our obligation without any question whatsoever to the specific appropriations that are to be made under the authorization from time to time by the Congress. I repeat, we entirely changed the character of the document, and obviously I think it ceased to be a treaty."¹³

In the context formulated by the statements of Sayre, Connally, and Vandenberg perhaps the most important change came in the phraseology of Article V of the Agreement. The June 10 draft stipulated that "each member government pledges its full support to the Administration, within the limits of its available resources and subject to the requirements of its constitutional procedure, through contributions of funds, materials, equipment, supplies, and services" to accomplish the purposes of UNRRA. The final text reads: "In so far as its appropriate constitutional bodies shall authorize, each member government will [sic] contribute to the support of the Administration in order to accomplish the purposes . . . [of UNRRA]. The amount and character of the contributions of each member government under this provision will be determined from time to time by its appropriate constitutional bodies."

Here, undoubtedly, is the key to the statements that the international agreement to which the United States was a party imposed no binding obligations on the United States: without contributions, which by the terms of the Agreement are largely discretionary, the Agreement is sterile. However, the passage of the joint resolution by Congress in itself neither appropriated money nor authorized United States membership in the UNRRA. The United States was already a member of UNRRA from the date of signature of the Agreement—without reservation, and with whatever international obligations that Agreement stipulates for member Governments.

There remains the question of the Congressional reservations. Not content with the incorporation in the Agreement of amendments suggested by Congressional leaders (and, of course, these amendments had to be accepted by the other 43 signatory Governments), Congress adopted a number of reservations conditioning United States participation in the UNRRA. The joint resolution "authorized to be appropriated to the President such sums, not to exceed \$1,350,000,000 in the aggregate, as the Congress may determine from time to time to be appropriate for participation by the United States" in the work of the UNRRA. In form the reservations were sections incorporated in the joint resolution, either conditioning the expenditure of funds to be appropriated from time to time by Congress under the

¹³ Same, p. 1749.

¹⁴ House Joint Resolution 192, 78th Cong., 2nd Sess. Approved by the President March 28, 1944. Public Law 267.

joint resolution or placing restrictive interpretations upon the language of the international UNRRA Agreement. In effect the reservations were probably intended¹⁵ to be akin to Senate reservations to a treaty. It should be noted, however, that in the case of Senate reservations to a treaty the United States becomes a party to the international instrument subject to the Senate reservations incorporated in the resolution advising and consenting to ratification. In the case of the UNRRA Agreement, the United States was already a party to the international instrument, without reservation, several months prior to the passage of the joint resolution containing the Congressional reservations.

Some of the reservations require further comment. Article VIII (a) of the UNRRA Agreement stipulates that "Amendments involving new obligations for member governments shall require the approval of the Council by a two-thirds vote and shall take effect for each member government on acceptance by it." Various Senators feared that the President alone, without further consulting Congress, might commit the United States to new obligations. Senator Vandenberg thought the last word "it" in Article VIII (a) included Congress as well as the President ("the same legislative process by which the agreement is approved in the first instance"),¹⁶ but the Senate adopted a reservation (Sec. 5) reading: "No amendment under Article VIII (a) of the agreement involving any new obligation for the United States shall be binding upon the United States without approval by joint resolution of Congress." The next reservation was of a similar nature. Referring to Article V of the UNRRA Agreement,¹⁷ it read: "Sec. 6. In adopting this joint resolution the Congress does so with the following reservation: That in the case of the United States the appropriate constitutional body to determine the amount and character and time of the contributions of the United States is the Congress of the United States." Sec. 7, referring to a resolution adopted by the Council of the UNRRA reading that "the task of rehabilitation must not be considered as the beginning of reconstruction—it is coterminous with relief", stipulated that "in adopting this joint resolution the Congress does so with the following reservation: That it is understood that the provision . . . [quoted] contemplates that rehabilitation means and is confined only to such activities as are necessary to relief." By Sec. 8 Congress attempted to control the UNRRA in the following terms: "In adopting this joint resolution the Congress does so with the following reservation: That the United Nations

¹⁵ Of the reservation contained in Sec. 7 of the joint resolution, Senator Connally said: ". . . we tie all this organization's activities down to relief only. We exclude rehabilitation." Of Sec. 8, he said: "We are tying the whole Administration, not simply our contribution, but we are tying the whole UNRRA to the proposition. . . ." 90 Cong. Rec., p. 2850 (daily ed., March 21, 1944). Senator Vandenberg told the Senate that he supported the joint resolution on the theory "that we have tied down Dean Acheson, who speaks for us in the UNRRA, and that we have tied down Director General Lehman." Same, p. 1740 (Feb. 16, 1944).
¹⁶ Same, p. 1746. ¹⁷ See above, p. 23.

Relief and Rehabilitation Administration shall not be authorized to enter into contracts or undertake or incur obligations beyond the limits of appropriations made under this authorization and by other countries and receipts from other sources." Although these reservations may in practice condition United States participation in the work of the UNRRA, in international law they are probably without legal effect in so far as the competence of the UNRRA is concerned.

One may conclude that the procedural novelty in this case lay not in joining the UNRRA by joint resolution (either alone or by "congressional-executive agreement"), but in the elaborate efforts made by the executive to cultivate Congressional approval, even to the extent of accepting amendments "stripping" the Agreement of international obligations and ostensibly changing its fundamental character, securing the consent of 43 other Governments to these amendments, and then accepting reservations which were partially a projection into the international sphere of legislative mistrust of an executive penchant for the expenditure of large sums of money and partially an attempt to control the policies of the international organization. The unusual and flattering experience of being permitted to participate in the "making" of an international agreement both by amendment and through reservations appears to have given Congress something of a field day. At the same time the close cooperation of the executive with Congress in this instance undoubtedly resulted in the prompt acceptance by Congress of the United States quota of \$1,350,000,000 which was determined¹⁸ in the first instance not by Congress but by an international organization to which the United States had become a party by executive agreement.

One feature of the procedure in this case—the stripping of an international agreement of its positive obligations on the parties—can scarcely be duplicated very often if the agreement is to have any meaning. For example, it is inconceivable that the articles of agreement on the International Monetary Fund, the International Bank for Reconstruction and Development, or the proposed General International Organization could be so amended as to provide that a party should have only such obligations as might be "determined from time to time by its appropriate constitutional bodies" without rendering the proposed organizations futile. In this respect the UNRRA Agreement may well be *sui generis*.

The problem remains largely unsolved. The full and generous participation of the United States in efforts to maintain international peace and security and to promote the common welfare is basic. It seems undesirable that the executive alone should commit the United States to strange new obligations, if only because full collaboration by the United States will often require Congressional action. At the same time it is equally undesirable

¹⁸ Technically, of course, the Council of the UNRRA only "recommends" the amount of a national contribution: Council of UNRRA, 1st Session, Res. 14 (Financial Plan), Sec. 4; State Department Conference Series 53, p. 45.

that a carefully integrated draft of an international organization should be subjected to Congressional amendments based on prestige or a misunderstanding of the functional requirements of world order and well-being. Perhaps the most promising feature of the experiment with regard to United States participation in the UNRRA is the informal consultations carried on between the Department of State and the Senate sub-committee and House leaders. It is a hopeful augury that the method is being continued;¹⁹ and it can be further developed. Experience and mutual education of this kind may in time lessen the threat of crippling amendments, as well as the anti-theoretical dangers of the unfettered use of the executive agreement, or, alternatively, Senate rejection of treaties.

HERBERT W. BRIGGS

STATUS OF INTERNATIONAL ORGANIZATIONS: PRIVILEGES AND IMMUNITIES OF THEIR OFFICIALS

There is nothing new in the problem of providing appropriate immunities for officials of international organizations but the proliferation of such organizations today raises the problem afresh and brings about a realization that some uniform practice is desirable in this connection. Particularly under present conditions, where different bodies of subject matter are handled by experts drawn from various Government Departments, a lack of uniformity in this matter is very natural. Even where foreign office officials participate, the representatives may be from one of the technical divisions of the service and may not be familiar with diplomatic precedent on this particular topic. Some of these points will be found reflected in the history of the United Nations Monetary and Financial Conference held from July 1 to July 22, 1944, at Bretton Woods, New Hampshire. Before that they had come to light at the First Session of the Council of UNRRA at Atlantic City, in December, 1943.¹

It is not to be assumed out of hand that identical provisions on the point in question are suitable for inclusion in every agreement establishing an international organization. It might be safer to begin with the opposite assumption. Nevertheless, there will probably always be some factors in common among the various organizations and it is at least desirable that the various precedents be kept in mind as we progress from conference to conference and from organization to organization.

The questions which were raised at Bretton Woods in the Monetary and Financial Conference had to do with the status of the proposed International Monetary Fund and its property and officials and likewise with the status of

¹⁹ See the remarks of Senator Connally to the Senate at the time of the Dumbarton Oaks Conference: *Congressional Record*, Vol. 90, pp. 7255, 7256 (Aug. 22, 1944).

¹ See this *JOURNAL*, Vol. 38, pp. 105-106. The progress made by UNRRA in putting into effect the resolutions of its Council are summarized in: *United Nations Relief and Rehabilitation Administration, Report of the Director General to the Second Session of the Council (Council II, Document 1)*, Washington, 1944, pp. 87-95.

the proposed International Bank for Reconstruction and Development, and its property and officials. In the study of these questions consideration was given to the recent experience of UNRRA and to preparatory discussions which have been taking place in connection with the work of the Interim Commission on Food and Agriculture. The Conference was organized in three commissions of which Commission I dealt with the Fund and Commission II with the Bank. It was inevitable that, to a certain extent, work should progress separately in the two commissions and it was not until the Conference had progressed considerably that the Fourth Committee of each of the two Commissions, which were charged respectively with such problems, began really to coordinate the proposals on this subject.

One of the principle problems to be solved was that of the nature and status of these two new organizations. This whole question of the status of international organizations is one which has long concerned international lawyers and has recently received interesting treatment by Mr. W. Friedman in the *Modern Law Review*.² No serious difference of opinion was manifested at the Bretton Woods Conference relative to the desirability of giving to these organizations some kind of legal personality. The provisions finally adopted were as follows:

"The Fund [Bank] shall possess full juridical personality, and, in particular, the capacity [:]

- "(i) to contract;
- "(ii) to acquire and dispose of immovable and movable property;
- "(iii) to institute legal proceedings."³

Similarly Article XV of the proposed Constitution of the Food and Agriculture Organization of the United Nations provides:

"The Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution."⁴

Because of the difference in the nature of their operations, differing provisions were adopted for the Fund and the Bank relative to judicial process.⁵

Fund

Bank

"Immunity from judicial process. The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy im-

"Position of the Bank with regard to judicial process.—Actions may be brought against the Bank only in a court of competent jurisdiction in the

² "International Public Corporations," in *Modern Law Review*, Vol. 6, p. 185.

³ Article IX, Section 2, of the Articles of Agreement of the Fund, and Article VII, Section 2, of the Articles of Agreement of the Bank. United States Treasury, *Articles of Agreement of the International Monetary Fund and International Bank for Reconstruction and Development*, United Nations Monetary and Financial Conference, Bretton Woods, N. H., July 1-32, 1944, pp. 19 and 77.

⁴ First Report to the Governments of the United Nations by the Interim Commission on Food and Agriculture, Washington, August 1, 1944, p. 46. ⁵ Articles cited, Section 3.

1942/4/3

Munich agreement. As matters stand at the moment, legal significance can hardly be attributed to the declaration and its political value is not at all certain. However, it does furnish a measuring rod for judging what the London Czech group sought also to obtain from the British and how the British statement falls short of Czech desires. After calling attention to the friendship which always existed between the Czechoslovak and French peoples, the French document proceeds to say that "in this spirit the French National Committee, rejecting the agreements signed in Munich on September 29, 1938, solemnly declare that they consider these agreements as null and void as also all acts accomplished in the application or in consequences of these same agreements. Recognizing no territorial alterations affecting Czechoslovakia supervening in 1938 or since that time, they undertake to do everything in their power to insure that the Czechoslovak Republic within frontiers prior to September, 1938, obtains all effective guarantees for her military and economic security, her territorial integrity, and her political unity."

The de Gaulle pronouncement thus clearly contemplates restoration of Czechoslovakia in its pre-Munich boundaries and brings into clearer relief the fact that Mr. Eden's message to Mr. Jan Masaryk does not do so. What General de Gaulle means by "all acts accomplished in the application or in consequence of these same agreements" and by "political unity" is not defined. If he refers to internal Czechoslovak problems, such as decentralization of the governmental structure, or the present claims of former incumbents to offices vacated while Czechoslovakia, though mutilated by Munich, was still an independent State, then, of course, we are dealing with a new departure in the conduct of international relations. Heretofore such matters have been considered as purely internal and outside the range of international concern.

The British declaration, which obviously is of major importance, appears to be a wholly unilateral act of His Majesty's Government. As yet there has not come to light any evidence which would warrant one in assuming that other Allied countries take the view that, following an Allied victory, all of Central Europe is to be returned to the melting-pot. That a stand of this kind complicates, rather than simplifies, permits hardly of any doubt. Yet simplification seems to be called for. A quest for simplification leads to the thought that the first post-war task should be the undoing of all results of aggression and restoration of the pre-aggression international status without interference in purely domestic affairs of the liberated countries. This would not necessarily mean, and should not mean, a petrification of the international order. Provision could be made for subsequent elimination after mature consideration and investigation, of international areas of friction.

CHARLES PERGLER

¹ The Inter-Allied Review, Oct. 15, 1942.

THE DEPARTMENT OF STATE IN WARTIME¹

Participation by the Department of State in the war effort has had a marked effect on the organization and functions of the Department. The most obvious change has been the inevitable increase in personnel. In 1932 there were 833 employees in the Department of State; this number has now grown to more than 2,500. New divisions and offices have been created and older divisions have expanded to handle problems arising out of the war and the entry of the United States into the conflict in December 1941. The Bulletin has carried announcements of the establishment of these new offices.

More significant, although less obvious, have been the broadened scope of the Department's activities and the changes in methods of operation and procedure in the Department as a whole.

The Department's normal governmental contacts have broadened to cover associated activities of all other Government agencies and involve close technical relations with the agencies and interdepartmental policy groups participating in the war effort. For two principal reasons the Department of State is associated in the operations of these agencies: First, it is the department primarily responsible under the President for the conduct of our foreign relations; and, secondly, the Foreign Service forms the official channel between this government and foreign governments. Thus participation by the Department at two points in all international operations is required: it must coordinate, in the foreign-relations field, the many complex war activities of other departments and agencies, including a number of war emergency agencies; and it must, in large part, furnish the means of carrying out these activities so far as they require action in foreign countries. The effective discharge of these responsibilities by the Department has a vital bearing upon the success of the war effort.

In many cases other agencies must depend upon the Department not only for coordinating their activities in the foreign relations field with foreign policy considerations but also for the specific information upon which their operations must be based. For example, the Liaison Office in the Office of the Under Secretary of State expedites the consideration of and action upon urgent politico-military questions of common interest to the State, War, and Navy Departments and operates as part of the Secretariat of the Liaison Committee, composed of the Under Secretary of State, the Chief of Staff, and the Chief of Naval Operations. The Office receives urgent communications or inquiries from and transmits to the War and Navy Departments, and often to such military bodies as the Inter-American Defense Board, despatches and daily technical reports of a confidential nature from our diplomatic missions and consular offices abroad, which are essential to the proper functioning of certain military and naval operations.

Similarly, the four Advisers on Political Relations maintain close relations with other Government agencies; the work of the adviser on Far Eastern

¹ Reprinted from the Department of State Bulletin, Oct. 24, 1942, Vol. VII, p. 855.

affairs, for example, includes participation as a member of the Subcommittee of the Joint Intelligence Committee of the Joint Chiefs of Staff, which Subcommittee processes material, evaluates information, and prepares recommendations for the use of the Joint Chiefs of Staff; collaboration with the Lend-Lease Administration and with the Administrative Assistant to the President charged with duties relating to the furnishing of lend-lease and other assistance to China; consideration of policy in collaboration with the Division of Defense Materials in the Department and with the Board of Economic Warfare in obtaining strategic materials from China; collaboration with the Division of Current Information and with appropriate officials of the War and Navy Departments, the Office of War Information, and the Office of Strategic Services in planning psychological warfare; and cooperation with the Department's Division of Cultural Relations and with the Office of War Information in the formulation of plans and the preparation of material for dissemination in China, designed to promote understanding and the interchange of culture between the American people and the Chinese.

Many situations involve not only the interplay of political and military considerations but also decision and action in the economic field by several of the interested agencies. Just prior to the United States' entry into the war the Secretary of State set up the Board of Economic Operations, composed of certain officials and six divisions in the Department, for the purpose of coordinating the general economic foreign policy of this Government, and, in particular, the program of economic warfare. This program requires collaboration with numerous officials of the United Nations and with such international agencies as the Combined Shipping Adjustment Board, the Combined Raw Materials Board, the Inter-American Development Commission, and the Inter-American Financial and Economic Advisory Committee, as well as the correlation of the programs of such United States Government agencies as the Board of Economic Warfare, the War Production Board, the Office of the Coordinator of Inter-American Affairs, the Reconstruction Finance Corporation, the War Shipping Administration, the Export-Import Bank, and others.

In the program of psychological warfare the Department, through its Division of Current Information in collaboration with the Division of Cultural Relations and the geographic divisions of the Department, works in liaison with other agencies in the war information field, including the Office of War Information, the Office of Censorship, the Office of the Coordinator of Inter-American Affairs, and the Joint Psychological Warfare Committee of the Joint Chiefs of Staff, in planning and directing psychological warfare in various parts of the world by means of the radio, the press, and motion pictures. The Department supervises the use of informational material, conforming to our general foreign policy, which will be suitable for dissemination by our diplomatic missions in countries outside of the Western Hemisphere; furnishes recommendations to the Office of War Information based on reports

from the field; and studies reports on enemy propaganda and intelligence activities in the American republics.

The embassies, legations, and consular offices in the Foreign Service have necessarily become the headquarters or centers of wartime activity in all countries with which we maintain diplomatic relations. An Auxiliary Service has been created on a temporary basis to supplement the permanent Foreign Service staff in handling new responsibilities created by the war and in serving other Government agencies, such as the Board of Economic Warfare, the Office of Strategic Services, the Lend-Lease Administration, the Office of the Coordinator of Inter-American Affairs, and the Office of War Information, whose operations relating to foreign countries are of major interest to the Foreign Service establishments in those countries. In 1932 there were fewer than 4,000 persons in the Foreign Service; now, the personnel of the Foreign Service, including the members of the new Auxiliary Service, totals more than 4,500.

In addition to its broad rôle in coordinating economic and political action relating to foreign policy and in maintaining the foreign outposts of this Government, the Department directly is charged with a number of duties closely related to the war. An example of this is the designation of the Secretary of State to prepare the Proclaimed List of Certain Blocked Nationals, with the cooperation of other agencies. Similarly, the Department has broad responsibilities with respect to the representation of the United States in intergovernmental committees, an example of which is the Inter-American Financial and Economic Advisory Committee, of which the Under Secretary of State is the delegate of the United States and the chairman. The Department's efforts in the promotion of hemispheric solidarity have been intensified, and these efforts have been implemented by meetings of the Foreign Ministers of all the American Republics, such as the meeting held at Rio de Janeiro in January 1942, to insure full cooperation in joint problems of defense.

A detailed survey of the functions of one of the long-established divisions of the Department of State, such as the Division of the American Republics, reveals a diversification of duties which requires experts with first-hand knowledge of conditions in every field of social, political, and economic activities in those countries in order to handle the complexity of problems related thereto.

This Division has charge of coordinating relations with the 20 other American Republics and with inter-American organizations and directs a greatly expanded program of cooperation and solidarity between the United States and these nations.

In the field of political warfare, the Division of the American Republics studies reports of non-American and enemy activities in the hemisphere, including political penetration, radio and press propaganda, economic penetration by agreements and concessions, fifth-column activities, espionage,

use of telecommunications, etc. Suggestions and recommendations for counteracting and eliminating such activities, requiring familiarity with foreign methods of secret intelligence, are a frequent result.

The Division maintains liaison with the Pan American Union, the Inter-American Defense Board, and the Coördinator of Inter-American Affairs, among others, on a variety of social, cultural, political, and defense problems, and with the Divisions of Cultural Relations and Current Information of the Department. Contacts with high officials, visitors, and members of the diplomatic corps of the other American Republics are frequent and essential. This Division studies political developments arising from inter-American conferences and cooperates with other divisions and offices of the Department in handling matters relating to various treaties and agreements, such as water and boundary settlements, the Inter-American Highway, the Inter-American Coffee Agreement and negotiations for the Inter-American Cocoa Agreement, and the International Sugar Agreement; agrarian cases, immigration and protection; aviation developments; commercial relations, and export control and priorities. Officers of this Division analyze and prepare digests covering reports from the Foreign Service in the other American Republics and from Army and Navy officers attached to these missions; study and observe current trends and developments—political, economic, and social—in these countries; and prepare instructions to the Foreign Service in accordance with the policies of the Department. The Division renders technical assistance in connection with the detail to the other American Republics of military, naval, and air missions; reviews with special attention to the effect upon the Department's policy all material for the press and other modes of publication, including radio scripts and motion-picture newsreels, having reference to the other American Republics. As may be seen, the responsibilities of this Division, as well as others in the Department, cover virtually every aspect of life within the regions to which its work is directed.

The rôle of the Department of State, so highly important in time of peace, is even more vital in time of war, since its vigorous conduct of our foreign relations in the political, economic, social, cultural, and administrative fields comprises one of the most effective means which the United States possesses, not only for combating the Axis Powers but for insuring and continuing long-term friendships with the other nations of the earth.

REGIONALISM IN INTERNATIONAL JUDICIAL ORGANIZATION

Proposals are made from time to time, and have again been current recently, for the establishment of regional international courts which it is alleged would be more readily available for litigation between States of the same region of the world than the Permanent Court of International Justice or any other world tribunal. In the past such proposals have been made chiefly in connection with the International Conferences of American States. More recently a regional international court for the Pacific area has been

suggested. Some of the advocates of a European or West European "federation" have adumbrated the establishment of a regional international court in Europe. The future of international judicial organization is clearly among the questions which will require thorough reconsideration on the morrow of the war, and a brief discussion of some of the problems which the creation of regional international courts would present may therefore be of interest.

The coexistence of the Permanent Court of International Justice and of entirely independent regional international courts would involve at least two dangers. There would be a danger of conflicts regarding jurisdiction, and a danger that regional courts might be inspired by regional legal conceptions to such an extent that their decisions might prejudice the future unity of the law of nations in respect of matters regarding which uniform rules of worldwide validity are desirable.

Assume that the Permanent Court of International Justice and an entirely independent regional international court were both to enjoy, in greater or lesser degree, compulsory jurisdiction in respect of the same subject-matter and between the same parties. There would then, unless adequate arrangements for coördination existed, be a danger of conflicts regarding jurisdiction which would tend to discredit both courts. One party to a case might apply to the Permanent Court and the other party to the regional court. Each court might decline to regard its jurisdiction as excluded under the rules governing its competence and procedure by the fact that the other party had applied to the other court. Such a conflict might arise at an early stage of the proceedings. The Permanent Court, acting under Article 41 of its Statute at the request of one party, might indicate one set of measures of interim protection; the regional court, acting in exercise of similar powers at the request of the other party, might indicate measures of interim protection incompatible with those indicated by the Permanent Court. Even more delicate would be the situation if both courts gave judgment by default and did so in opposite senses. Adequate arrangements for resolving any conflicts regarding jurisdiction which might arise would therefore be essential in the event of the creation of any regional courts.

There are, of course, numerous cases in which jurisdiction has been attributed to the Permanent Court conditionally upon the parties not having agreed, in respect of the particular dispute or class of dispute in question, upon reference to some other body. A statute conferring jurisdiction upon a regional court in general terms was not the type of agreement for another jurisdiction contemplated when the clauses and reservations embodying this condition were drafted. Such a statute would, however, probably be regarded by the Permanent Court as effectually excluding its jurisdiction under instruments and between parties as regards which there are in force clauses or reservations excluding cases in which the parties have agreed to accept some other jurisdiction. But in other cases the Permanent Court would seem to have been

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Recovering Culture: The Berlin National Gallery and the U.S. Occupation, 1945-1949

Marion Deshmukh

Beauty is a basic requirement for civilized life.

—Walter Gropius, Speech at the College Art Association, 30 January 1948

Buildings have been wrecked and looted, offices and refugees have crowded into cultural monuments; collections are still dispersed, materials are still scarce. Above all, the activities suggested here are a potent force for democracy, in ways which the Germans, even those with the best will, have no notion.

—Monuments Fine Arts & Archives OMGUS
Draft Report, 24 August 1948

One day we will have brought together that which the tragic development of our history has temporarily divided.

—Berlin Mayor Ernst Reuter, Speech at the opening of the first exhibition in West Berlin of paintings and sculpture in the Dahlem Museum, 2 October 1950

I.

WHAT was to be salvaged of Germany's artistic legacy after her surrender to the Allied forces in 1945?¹ With Germany's unification in 1990, the question has assumed a new resonance.

Thanks to Vernon Lidtke and Peter Paret for their constructive suggestions and to my colleague, Jack Censer, for editorial improvement. Appreciated are the comments from the late John Gimbel, before his untimely death in the summer of 1992. His work pioneered the study of *Nachkriegsgeschichte* in the United States.

1. See Wieland Schmied's detailed discussion of twentieth-century German art,

Currently, Germany's intellectual community is pondering the country's aesthetic future after forty years of political, social, economic, and cultural division. Critics have condemned the former German Democratic Republic for its pernicious cultural role in mandating aesthetic styles, such as socialist realism, and for its policy of punishing those who chose not to conform. Similarly, after the Nazi surrender, the wartime Allies and the defeated Germans debated the direction culture should take in Germany after the collapse. National Socialist rule and the incredible material devastation of the war had destroyed museums and dispersed or damaged much of the nation's artistic legacy.² Within months after the end of World War II, tensions mounted between the Russian and Western Allies over occupation policies, leading to the subsequent division of Germany and of Berlin.

This essay will describe the postwar cultural policies of American occupation forces as well as those of the vanquished Germans that forged occupied Germany's cultural identity. By focusing on the National Gallery's fate in postwar Berlin, critical reconstructions and deliberate aesthetic omissions served to fashion both a new artistic vision and to revive the older modernist tradition. I will concentrate on two aspects of postwar cultural policy based largely on the OMGUS (Office of the Military Government, United States) record holdings in the U.S. National Archives. First, after briefly describing Nazi museum and arts policies in the 1930s, the essay will examine how Berlin's postwar military and political division physically divided prewar Germany's premier museum of modern art, the National Gallery. The National Gallery's fate in particular is essential to an understanding of modernism's political role throughout twentieth-century Germany.

particularly the post-1945 period, in his "Ausgangspunkt und Verwandlung, Gedanken über Vision, Expression und Konstruktion in der deutschen Kunst, 1905-1985," in *Deutsche Kunst im 20. Jahrhundert*, ed. Christos M. Joachimides, Norman Rosenthal, Wieland Schmied (London 1985-1986), [exhibition catalog], esp. 54-59.

Almost thirty years ago, the poet and critic Hans Magnus Enzensberger caustically wrote: "Our two trump cards are our so-called *unbewältigte Vergangenheit* and the 'German question.' These slogans refer to fascism and to partition; around each a set of complicated, precisely regulated rituals has evolved, to none of which can I quite reconcile myself. Self-hatred and self-praise—self-pity and arrogance—look all too much alike." "Bin ich ein Deutscher?" *Die Zeit*, 12 June 1964, reprinted in *Postwar German Culture*, ed. Charles McClelland and Steven Sher (New York, 1974), 192. For a historiographical overview of divided Germany's legacy, see Mary Fulbrook, *The Two Germanies, 1945-1990. Problems of Interpretation* (Atlantic Highlands, 1992).

2. See the recent volume detailing Nazi plundering of art objects: Lynn H. Nicholas, *The Rape of Europa, The Fate of Europe's Treasures in the Third Reich and the Second World War* (New York, 1994). See also Michael Kurtz, *Nazi Contraband* (New York, 1985). The end of the Cold War has witnessed a reexamination of the location of artworks purported to be lost or stolen. In January 1995 a special symposium was held on the

Secondly, I will discuss how the larger East-West conflict, already apparent before the war's end, played itself out in the cultural politics of museum administration, acquisition, reconstruction, and exhibition policies during the occupation period. Wartime damages and dispersals precluded major museum initiatives for several years. The 1948 division of Berlin began the long Cold War rivalry that ended only with German reunification in 1990. Nevertheless, a revealing picture emerges by reviewing US policies toward the arts and museum reorganization in Berlin after 1945 and by comparing these with the policies of the other occupying forces as well as with those of the Germans themselves. And the Berliners' own initiatives in museum reconstruction and exhibition policies after the war highlight debates about the role of visual culture that continued during the forty years of a divided Germany.

The National Gallery's destiny is instructive for two key reasons. Until the Nazi seizure of power in 1933, the museum's leadership consistently espoused German and international modernism in the arts and vigorously promoted the latter's acquisition and display. The gallery's collection and exhibition policies were continually affected by political pressures, beginning with Kaiser Wilhelm II and ending with Adolf Hitler. Imperial and Republican cultural conservatives, a substantial number being anti-Semitic, had desired a museum housing German art exclusively, while cultural liberals saw its mission as representing the best of all schools of contemporary Western art. The National Gallery's acquisitions policies from the imperial period at the end of the nineteenth century through the 1930s reflected the museum's ambiguous and often conflicting programmatic tasks.³ Several progressive museum directors came under fire for their controversial acquisition policies, especially over purchases and gifts of French and German impressionist, post-impressionist, expressionist, and abstract art. But the National Gallery could boast that its range of modernism, with early purchases or donations of paintings by Manet, Renoir, Liebermann, Corinth, and Slevogt, among others, set imposing standards for galleries throughout Europe and the United States.⁴ The National Gallery was the

complicated subject: "The Spoils of War. World War II and its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property," 19-21 January 1995, Bard Graduate Center for Studies in the Decorative Arts.

3. On the National Gallery's acquisitions policies before World War I, see the detailed study by Christopher With, *The Prussian Landeskunstkommission, 1862-1911* (Berlin, 1986), esp. 47-49, 93ff.

4. "In 1931 Alfred Barr, Jr. traveled in Germany to prepare his *Modern German Painting and Sculpture* for the fledging Museum of Modern Art in New York. He was so impressed by what he saw in the museums that he made a point in his catalogue of citing the contemporary collecting policies of German public institutions." Stephanie Barron, "1937: Modern Art and Politics in Prewar Germany," in idem, "Degenerate Art," *The Fate of the*

first German museum to acquire a Cezanne, for example, in 1897.⁵ Despite the strongly-held belief in modernism's aesthetic importance by both Hugo von Tschudi (from 1896 until 1909) and Ludwig Justi (from 1909 until 1933) during their combined tenure that spanned three decades as the National Gallery's directors, the acquisition of modern art for the museum tended to be a risky and politically dangerous enterprise.⁶

The gallery's troubles mounted dramatically after the Nazis came to power in 1933. They proceeded to remove both museum personnel as well as a large number of works in the middle 1930s as a result of their well-known aversion to avant-garde art. The National Socialist *Kunstammer*, under the direction of Joseph Goebbels, summarily fired museum curators perceived to be promoting modernism. In late June 1933, only six months after Hitler's appointment as chancellor, the new government forced Justi to take an "indefinite leave, effective immediately." He was replaced by his supportive assistant, Alois Schardt, whose position was equally tenuous. By November 1933, Schardt received a day's notice informing him that the National Socialist government no longer required his services.⁷ The Nazis then gave the directorship to Eberhard Hanfstaengl, head of Munich's State Collections and cousin of Hitler's longtime supporter, Ernst Hanfstaengl. Nonetheless, the government dismissed him in 1937. Paul Ortwin Rave, Justi's former curatorial assistant, assumed the post as de facto director, though the Nazis awarded no one the coveted title after Hanfstaengl's forced departure. Rave, cleared by the Allies after the war

Avant-Garde in Nazi Germany. [Exh. Cat., Los Angeles County Museum of Art] (Los Angeles, 1991), 13.

5. With, *The Prussian Landeskunstkommission*, 99–100, 166n.

6. For a compact summary of the museum's history, see Paul Ortwin Rave, *Die Geschichte der National Galerie Berlin* (Berlin, 1968). Rave presided over the museum during the late 1930s and early 1940s as provisional director. For a fascinating account of controversial episodes in acquisition and exhibition policies before 1933, see Peter Paret, "The Tschudi Affair," *Journal of Modern History* 53 (December, 1981): 589–618. Kaiser Wilhelm II forced Tschudi's resignation, in part because the monarch vehemently objected to the museum's perceived promotion of aesthetic modernism. Rave's predecessors at the Nationalgalerie have also written about their experiences in the world of museum politics: cf. Hugo von Tschudi, *Gesammelte Schriften zur neueren Kunst* (Munich, 1912); Ludwig Justi, *Die National-Galerie und die moderne Kunst* (Leipzig, 1918), and idem, *Im Dienste der Kunst* (Breslau, 1936) (written following his dismissal by the Nazis). For a recent, brief overview of Justi's long career, see Eugen Blume, "Ludwig Justi—Im Dienste der Kunst," *Museums Journal* 1 (6 January 1992): 5–9. One of the National Gallery's (West Berlin) postwar directors, Dieter Honisch, has written an admirable history of the museum, *Die Nationalgalerie Berlin* (Recklinghausen, 1979), in which he also describes the efforts of Tschudi and Justi in fostering modernism and continually battling detractors. On the pervasive anti-Semitism in the art and museum world, see the recollections of the Jewish artist Max Liebermann, whose career spanned the Imperial, Republican, and first two years of the Nazi regimes: *Die Phantasie in der Malerei, Schriften und Reden* (Frankfurt am Main, 1978).

7. Annegret Janda, "The Fight for Modern Art, The Berlin Nationalgalerie after 1933,"

of possible pro-Nazi sympathies, became the National Gallery's first post-war director after 1945.⁸

Together with its directors, the National Gallery's collections faced continual uncertainties during the Third Reich.⁹ Because of the clouded ideological situation regarding the arts, no new exhibitions were mounted in the National Gallery after 1933. Following the 1936 International Olympic games held in Berlin, the museum closed the twentieth-century section which was located in the Kronprinzenpalais. In 1937, Hitler directed that thousands of what he termed "degenerate art" objects be confiscated from numerous German museums, including the National Gallery, either to be sold or destroyed after being displayed in a mammoth Munich exhibition as well as in cities throughout Germany.¹⁰ The regime removed approximately 16,000 pieces of German and foreign art from public collections within Germany. From the National Gallery's holdings, the Nazis seized 64 paintings, 26 sculptures, and 326 drawings.¹¹

in Barron, "Degenerate Art," 107–9. Her informative article poignantly catalogues the hardships faced by the National Gallery's staff over seemingly innocuous issues. For example, even publishing catalogs of the Gallery's holdings seemed "inopportune," since it was uncertain which of the museum's modern works would be condemned and possibly removed if listed, 110. She believes that the three National Gallery directors during the Nazi period, Justi, Schardt, and Hanfstaengl, bravely attempted to steer a worthy but ultimately fruitless path between traditional museum curatorial practice and radical fascist cultural policies, the latter finally claiming victory. There is a large literature on National Socialist arts policies. A few readily-available titles are listed here: Paul Ortwin Rave, *Kunstdiktatur im Dritten Reich* (Hamburg, 1949), one of the first accounts of Nazi arts policy; Hildegard Brenner, *Die Kunstpolitik des Nationalsozialismus* (Reinbek, 1963); Berthold Hinz, *Art in the Third Reich* (New York, 1979); Joseph Wulf, *Die bildenden Künste im Dritten Reich: Eine Dokumentation* (Frankfurt, 1983); Otto Thoma, *Die Propaganda-Maschinerie: Bildende Kunst und Öffentlichkeitsarbeit im Dritten Reich* (Berlin, 1978); Peter-Klaus Schuster, ed., "Kunststadt" München 1937: Nationalsozialismus und "Entartete Kunst" (Munich, 1987); Alan Steinweis, *Art Ideology, and Economics in Nazi Germany: the Reich Chambers of Music, Theater, and the Visual Arts* (North Carolina, 1993).

8. See below, p. 427.

9. The National Gallery's collections had been reorganized several times between the pre-World War I period and immediately before the Nazi takeover in early 1933. The main building of the National Gallery housed nineteenth-century art up to impressionism. The Kronprinzenpalais displayed twentieth-century modernism. Other buildings contained Schinkel drawings, the library holdings, and sculpture collections. Therefore even before National Socialist rule, the museum, partly because it had outgrown its original space, and partly because its director reconceptualized modernism based on the recent art historical literature, was structured differently from its original plan. Joan Weinstein, *The End of Expressionism, Art and the November Revolution in Germany, 1918–1919* (Chicago, 1990), 39–42, describes ideas for the museum's reorganization during the tumultuous years after the 1918 revolutionary political activities which were proposed by Justi and others.

10. For an extended discussion of these confiscations, see Rave, *Kunstdiktatur*; Alfred Hentzen, *Die Berliner National-Galerie im Bildersturm* (Cologne, 1972); Hinz, *Art in the Third Reich*; Ian Dunlop, *The Shock of the New* (New York, 1972), 224–59; Barron, "Degenerate Art."

11. Honisch, *Nationalgalerie Berlin*, 49–50. Janda's figures are more conservative. She

On the eve of the war, many paintings and drawings in the National Gallery's collections were on loan to other museums for various exhibitions or were hanging in government offices within Germany or abroad. Rave estimated that 1,560 works were thus dispersed to 151 different locations.¹² Paintings and sculpture not considered "degenerate" had to be removed for safekeeping once hostilities broke out in 1939. Officials closed the National Gallery to the public and most of the more valuable works were sequestered either in various Berlin locations or in the Merkers mines in Thuringia, the Kaiserroda mines east of Eisenach, at Grasleben, and in Bleicherode, southwest of Nordhausen. The bulk of the National Gallery holdings were stored at Kaiserroda.¹³ While Hitler occasionally believed that to evacuate works of art would demonstrate "weakness," he nevertheless authorized the removal of thousands of objects to various sites for safekeeping.¹⁴

states that a total of 141 work were removed from the National Gallery, specifically for the 1937 Munich Degenerate Art Show. By 1938, 237 works had been removed, exchanged, or sold. Janda, "The Fight," 113-14.

12. Rave, *Die Geschichte der National Galerie Berlin*, 123.

13. For a very full account of all the Berlin museums and the art library during this period, including the National Gallery, see Irene Kühnel-Kunze, *Bergung-Evakuierung-Rückführung: Die Berliner Museen in den Jahren 1939-1959* (Berlin, 1984), 17-30. Hereafter cited as Kunze, *BER*. Kühnel-Kunze was associated with the Berlin museums from 1925 to 1946. She served as an assistant to the famed General Director Wilhelm von Bode before 1929. From 1946 to 1949 she was a consultant for U.S. Military Headquarters in the art section of the MFA & A section in Berlin-Dahlem. She later served in various capacities as a consultant for the Berlin municipal Senate and head (1963-64) of the Painting Gallery in Dahlem. See also, Annegret Janda, ed., *National-Galerie, Wiederaufbau und Entwicklung seit 1945* [Exh. Cat. National-Galerie] (E. Berlin, 1974).

14. A number of publications have described the postwar location and restitution of art objects: Control Commission in Germany, *Works of Art in Germany* [British Zone]; *Losses and Survivals in the War*, MFA & A Branch, British Control Commission (London, HM Stationary Office, 1946); Thomas C. Howe, Jr., *Salt Mines and Castles, the Discovery and Restitution of Looted European Art* (Indianapolis, 1946); *Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas* (U.S. Government Printing Office, 1946); Michael Kurtz, *Nazi Contraband: American Policy on the Return of European Cultural Treasures* (New York & London, 1985). A recent work which is very critical of Allied restitution efforts is Cay Friemuth's *Die geraubte Kunst: der dramatische Wetlauf um die Rettung der Kulturschätze nach dem zweiten Weltkrieg: Entführung, Bergung, und Restitution europäischen Kulturgutes, 1939-1948* (Braunschweig, 1989). Germany's recent unification has reopened questions of cultural restitution. Cf. Friemuth, *Die geraubte Kunst*, 67-102. In an article based on Friemuth's research, Karl-Heinz Janssen writes: "By April 7, 1945, a total of 9000 crates from fifteen departments of Berlin's museums had been brought to the West. Not everything got back safely; some crates arrived considerably lighter than at the beginning of their journey." Klaus Goldmann, who kept a close watch on the transport operation, observed: "In many cases it was the most unusual, valuable, and irreplaceable pieces" that got lost. The British Military Government confirmed: "There is evidence of more or less serious losses from parts of the Berlin collections arriving in the British and American zones." "Kunstraub! The sacking of Germany," *The Art Newspaper* 5 (February, 1991): 10.

Between February 1943 and the end of April 1945, Allied planes bombed the Museum Island in Berlin at regular, sometimes monthly intervals.¹⁵ The damage ranged from total destruction (the Old Museum) to buildings partially burned and bombed (National Gallery, Kaiser Friedrich Museum). Despite the removal of artworks for safekeeping, the repeated Allied aerial attacks and the resulting fires destroyed an additional 300 works of art in the National Gallery's collection, though that number has not been conclusively verified.¹⁶ The British sequestered over two hundred damaged pictures to a castle in the city of Celle in Braunschweig.¹⁷ Almost four hundred works, the core of the museum's collection, ended up in the American zone.¹⁸ These works included paintings by the German romantics, such as Caspar David Friedrich, and works by Manet, Leibl, and the French impressionists. The Russian zone contained the largest number of works, 700 paintings and 400 pieces of sculpture, though many of these were considered to be of lesser aesthetic quality than those in the British and American zones.¹⁹ Thus, in the eight-year period between the opening of the "Degenerate Art" exhibition in 1937 and the closing months of the war in 1945, the National Gallery's collections were scattered, sequestered, partly destroyed and damaged due to Nazi politics, war, and bombings.

II.

While *Stunde Null* or "zero hour" has often characterized German political and cultural discontinuity in 1945, the title of Wols's (Wolfgang Schulze) 1946/47 abstract expressionist painting, "It's all over," better captures the

15. Kunze, *BER*, 49-51.

16. Christopher Norris, "The Disaster at Flakturm Friedrichshain: A Chronicle and List of Paintings," *Burlington Magazine* (1952), quoted in H. H. Pats, *Pictures in Peril* (London, 1957), 214-17; The exact number of works lost and destroyed has yet to be determined. See also, National Archives, RG 59, Department of State, 1945-1949, 862.403/4-947 "Return of German Agencies of Cultural Materials," 3 April 1947, and 862.4031/3-3048, 27 February 1948, Letter of Francis Henry Taylor to Department of State; and Friedrich Winkler, *Kriegschronik der Berliner Museen*, May 1946, reprinted in Kunze, *BER*, Appendix 2, 341-43; Nicholas, *The Rape of Europe*, 327-67.

17. The main U.S. depositories, called Central Collecting Points (CCP) were located in Wiesbaden, Marburg (eventually combined with Wiesbaden's), Frankfurt, and Munich. See Craig Hugh Smyth, *Repatriation of Art from the Collecting Point in Munich after World War II: Background and Beginnings* (Maarsse, The Hague, Montclair, NJ, 1988), 53. The bulk of the relocated artworks in the British zone were in Celle, Braunschweig. The Russians removed major artworks back to the Soviet Union before returning many of them in the mid-1950s. The Western allies also returned their collections at the same time.

18. See Walter Farmer's unpublished account, "The Safe Keepers: A Memoir of the Arts at the End of World War II." Farmer, an architect, was the first director of the Wiesbaden Collecting Point from 1945 to 1946 and an MFA & A Officer.

19. Kunze, *BER*, 345-50.

sense of both the bitter end and the expectation of an auspicious beginning.²⁰ Its title as well as its style announced a break with prewar convention. Yet artistic and institutional continuities predating 1933 almost immediately resurfaced after 1945 in both the Western and Soviet zones of occupation. In fact, as a Berlin museum employee recalled, having participated in the sequestering of museum art objects and having a real sense of the museums and their collections, the staff was willing to aid in their reconstruction immediately: "[For us] there was no 'zero-hour.'"²¹

Questions arose on how to recapture the best of Germany's artistic past? How to reconstruct the damaged museums? How to reconstitute and augment the museum holdings? How to reestablish a viable art community of painters, dealers, collectors, and museum officials after the war? After Germany's total collapse, Allied authorities understandably made museum reconstruction a low priority, especially in view of Berlin's divided zonal administration. Allied policy toward the arts is instructive in understanding subsequent German museum practices. During the tumultuous years between 1945 and 1948 several factors shaped political and aesthetic policies within the National Gallery. First of all, American officials regarded developing a coherent arts policy a minor issue compared to feeding and sheltering millions of war-weary Germans and displaced persons. They also saw to what extent the arts policy of the Nazis had severely circumscribed artistic freedom. Therefore, the U.S. military government saw little need to substitute one form of control for another, however benign. Additionally, Americans generally tended to view art and culture in recreational terms rather than as an integral part of one's spiritual and material life. Military governance reflected this attitude. As an arts officer critical of this policy noted:

20. See the informative discussion of the postwar art scene by Eduard Trier, "1945-1955, Fragmentarische Erinnerungen," in *1945-1985: Kunst in der Bundesrepublik Deutschland*, ed. Dominik Bartmann [Exh. Cat., Nationalgalerie] (W. Berlin, 1985), 10-16. Though a prisoner-of-war at war's end, Trier retrospectively saw the Janus-face aspect of 1945, a time of both incredible pessimism due to German society's collapse and destruction, as well as the optimistic hope for freer and better times for German culture after the Nazis' political and aesthetic barbarism, p. 10. See also *Der gekrümmte Horizont, Kunst in Berlin, 1945-1967* [Exh. Cat., Akademie der Künste] (W. Berlin, 1980), and Bernhard Schulz, ed., *Grauzonen und Farbwelten, 1945-1955* [Exh. Cat.] (Berlin, 1983). It is beyond the scope of this article to recount the raging debates among German artists and critics during the late 1940s and early 1950s over the merits of aesthetic realism versus abstraction. Some painters condemned realism as a totalitarian tool of the Nazis as well as of the Soviet occupation officials who governed the Eastern zone. Abstract painting favored by the Western allies and West German artists appeared to symbolize individualism and a non-politicized freedom. Carl Hofer personified the postwar figurative artist while Willi Baumeister vigorously supported abstract art. See Freya Mülhaupt's "Bildende Kunst, ... und was lebt, flieht die Norm," in Schulz, ed., *Grauzonen*, 183-223.

21. Kunze *BER*, 76. See also McClelland & Scher, eds., *Postwar German Culture*, particularly Albert Schulze-Vellinghausen, "The Situation in German Painting since 1945,"

A clearly defined and promptly enacted art program for occupied Germany would not by itself have been sufficient, of course, to bring about a genuine democratic reorientation of the German people. But the absence of a program in this one field is a good example of similar omissions in many other fields. We emphasized politics and economics. We neglected, in the beginning, the cultural matters.²²

British policy mirrored the passivity of the Americans, while both the French and the Russians took an active approach to the fine arts. At first, both the French and Russians wished to counteract more than a decade of Nazi nationalist xenophobia and aversion to modernism. The American MFA & A (Monuments, Fine Arts, and Archives) officer, Edith Standen, observed that:

The French have accomplished the most; they have circulated fine exhibitions of French art and helped and encouraged every type of cultural activity. . . . And what are the Americans doing? [There is] the indifference and even disapproval of [the MFA & A officers'] cultural activities by higher authority in Military Government, in striking contrast to the official policy in the fields of music, the theater, radio, the cinema, etc.²³

The French received high marks for their efforts. As a recent art curator has noted:

The most important event of those early months was the exhibition *Modern French Painting*, organized by the educational and cultural affairs division of the Groupe Français du Conseil de Contrôle and shown in 1946 in the National Palace (which has since been demolished). The Berliners, who had not seen modern art for a very long time, came in droves and formed lines kilometers long to admire the van Goghs, Gauguins, Matisse, Renoirs, and Picassos which had been denied them for so long.²⁴

The Russian position initially reflected the broader policy of political and cultural inclusion during the first few years of occupation. Once the

417-23; and Charles Burdick, Hans-Adolf Jacobsen, & Winfried Kudzus, eds., *Contemporary Germany, Politics and Culture* (Boulder, Colo., 1984); Karin Thomas, "Art in Germany, 1945-1982," in Burdick, et al., *Contemporary Germany*, 398-420.

22. Hellmut Lehmann-Haupt, *Art under a Dictatorship*, (New York, 1954), 197.

23. Edith Standen, "Report on Germany," *College Art Journal* 7, no. 3 (1948): 211-12. German artists later had similar recollections. "Only the French exhibited their great École-de-Paris show in Düsseldorf, as in Berlin, where we were able to see again Max Ernst as well as Matisse, Braque, and Picasso." Interview with Hann Trier, 1982, Barbara Straka and Marie-Theres Suermann, "... Die Kunst muss nämlich gar nichts!," in Schulz, ed., *Grauzonen*, 272.

24. Eberhard Roters, "Art in Berlin from 1945 to the Present," *Art in Berlin, 1815-1989* [Exh. Cat., High Museum of Art] (Atlanta, 1989), 99.

Communists clearly controlled the government, the pretense of cultural ecumenicalism was quickly dropped. But earlier, in October 1946, the Russians sponsored a large all-German art exhibit in Dresden which included Nazi-condemned modernists such as Klee, Kirchner, Beckmann, and Barlach.²⁵

German intellectuals, in contrast to the Americans and British, were very conscious of the importance of culture. For example in 1946, the historian Friedrich Meinecke saw culture as a positive and critical vehicle for moral rehabilitation:

... our spiritual culture, especially our art, poetry, and science, must be assigned a high place in the external apparatus of our civilization. Today in Germany this apparatus lies in ruins... some organizational assistance is needed in order to afford the first nourishment to those hungering and thirsting after beauty and the spirit.²⁶

During 1948, tensions heightened between the Russians and the Western Allies, reaching crisis proportions over currency and monetary differences and resulting in the Berlin blockade. These events created the impetus for a more activist U.S. arts policy. The passive policy had worried the MFA & A field officers who had, in 1946, called for "the immediate replenishment of our dwindling Fine Arts personnel in Germany."²⁷ By means of museum exhibitions and education, the field officers desired to implement an awareness among the Germans of National Socialism's nefarious impact on the arts. But even two years after the war, U.S. General Lucius Clay, writing to the curator of the Art Institute of Chicago, could still reflect that:

... Even art cannot thrive on an empty stomach, nor when a man has no roof over his head. Official concern must be primarily with these latter problems. As these are solved, responsible Germans certainly will be able to devote more attention to affairs of the mind and the spirit.²⁸

25. H. Trökes, "Moderne Kunst in Deutschland," *Das Kunstwerk*, 1, nos. 8/9, (1946-47): 73. Charges of aesthetic "formalism," meaning a communist critique of "socially irrelevant" art such as abstraction, surfaced as early as 1946. For parallel attitudes toward literature, see David Pike, *The Politics of Culture in Soviet-Occupied Germany, 1945-1949* (Stanford, 1992). On France's policies see Franz Knipping & Jacques Le Rider eds., *Frankreichs Kulturpolitik in Deutschland, 1945-1950* (Tübingen, 1987).

26. Friedrich Meinecke, *The German Catastrophe* (Boston, 1963), (first published in German in 1946), 116. Edith Standen likewise quoted a passage from the German press which poignantly observed: "We do not want to go without works of art in our ruins. They are our mainstay and foundation, here we can start again—they explain to us consolatory space, temporal existence, age and peacefulness. Even more: They make us happy in a philosophical sense." Standen, "Report on Germany," 213.

27. Howe, *Salt Mines and Castles*, 293. The military were anxious to return as many nonessential personnel back to the U.S. as quickly as possible.

28. Letter to Frederick Sweet from Lucius Clay, 18 June 1947, OMGUS, RG 260,

Unlike the French occupation forces who separated the functions of restitution and cultural rehabilitation, the U.S. Military Government placed the ~~MFA & A Section under the Economics Division of the Restitution Branch. Its primary objective was the return of lost art objects to their rightful owners. Aesthetic re-education therefore took a back seat to the~~ branch's primary task of restitution. The military government actively discouraged a policy of cultural intervention by field officers. As Edith Standen, an arts officer critical of such a policy observed:

MFA & A officers work... under two severe handicaps. One is the indifference and even disapproval of their cultural activities by higher authorities. The second is the presence in Washington of 202 German museum-owned paintings.²⁹

While the field officers attempted to preserve and protect the thousands of artworks that had landed in the American zone, some in Washington saw German art treasures as potential war booty, further exacerbating the tensions between the U.S. government and its arts officers in the field. Restitution of artifacts consumed the first two years of postwar occupation for the U.S. field officers. Thomas Howe, a field officer who later described his activities in Germany suggested:

So far as restitution is concerned, the record has been a success. [Preparations] included the establishment of Central Collecting Points at Munich, Marburg and Wiesbaden. The Central Collecting Points, organized and directed by Monuments officers with museum experience, were staffed with trained personnel from German museums... The Collecting Points at Wiesbaden and Marburg... housed German-owned collections brought from repositories in which storage conditions were unsatisfactory. The reestablishment of German museums and other cultural institutions—our second main objective, has been to a large extent, sacrificed in the interests of restitution.³⁰

ECR Div., Cultural Affairs, MFA & A, 345-1/5, Box 216, Folder 4. For a recent view of General Clay and U.S. occupation policies, see Wolfgang Krieger, *General Lucius D. Clay und die amerikanische Deutschlandpolitik, 1945-1949*, (Stuttgart, 1987); and Jean Edward Smith, *Lucius D. Clay: An American Life*, (New York, 1990).

29. Standen, "Report on Germany," 211. See also her diary entries in: Edith Standen Papers, National Gallery of Art Archives, Washington, DC. At the 1995 Bard Graduate Center conference on "The Spoils of War," Standen recalled that the highest priority the MFA & A officers had was to preserve and protect artworks under their custody. Walter Farmer, the first director of the Wiesbaden Collecting Point, and Standen, the second, were vociferous opponents of the transfer of paintings to Washington, DC., signing, along with 22 others, a document on 7 November 1946 known as the Wiesbaden Manifesto. It strongly condemned the paintings' transfer to the US. On the transfer, see Nicholas, *The Rape of Europe*. 384-405. Also author's interviews with Walter Farmer, 20 January 1995, and with Edith Standen, 19 January 1995.

30. Howe, *Salt Mines*, 292-93.

These two sentiments were echoed by other officers. As part of the Military Government's custodial duties as perceived by the MFA & A's, 202 paintings were shipped to the United States in November 1945. The pictures came primarily from the Kaiser-Friedrich Museum. Two of the paintings were from the National Gallery and all were shipped, ostensibly, for "safekeeping." The paintings included priceless old masters by artists such as Altdorfer, Baldung Grien, Botticelli, Caravaggio, Chardin, Cranach, van Eyck, Hals, Holbein, Mantegna, the Master of Flémalle, Memling, 15 Rembrandts (including his famed portrait of his wife Saskia), Rubens, Tiepolo, Tintoretto, Vermeer, and van der Weyden. The two National Gallery paintings shipped were Honoré Daumier's *Don Quixote and Sancho Panza* and Edouard Manet's *In the Winter Garden*.³¹ From the start, this shipment met with vociferous opposition from MFA & A officers stationed in Germany. As Edith Standen angrily stated: "... the original removal of these works for safekeeping, unnecessary, unwise, and unethical as it was, proved almost fatal to the whole program in Germany..."³² Some have seen this transfer as part of the U.S. Government's general policy of retribution toward the Germans immediately after the surrender when the "Morgenthau Plan" had considerable influence in the White House.³³ On 25 January 1946, the Chief for the Division of

31. The list is reproduced in Howe, *Salt Mines*, Appendix, 297-300 and in Kunze, *BER*, Appendix 7, 370-77. See also National Archives, Department of State, 1945-1949, RG 59, 862, 403/4-947, "Return to German Agencies of Cultural Materials," 3 April 1947; and 862.4031/33048, 27 February 1948, Letter of Francis Henry Taylor to Department of State. Regarding the paintings sent to the U.S., see OMGUS RG 260 AG No. 1, 007, 1945-46, Box 9, Folder 5, OMGUS RG 260, ECR Div., Cultural Affairs Branch, MFA & A 345/1/5, Box 218, Folders 3 & 5. Lucius D. Clay, *Decision in Germany* (Garden City, NY, 1950), 306-9; Jean Edward Smith, ed., *The Papers of General Lucius D. Clay, Germany, 1945-1949* (Bloomington & London, 1974), 1:68, 268; 2:551-52, 627-29, 634-37; "Protective Custody?" *Magazine of Art* 39 (February 1946): 42-80; "Berlin's Masters," *Newsweek* (29 March 1948): 82.

According to recent discussions of the 202 paintings: "The Director of New York's Metropolitan Museum, Francis Henry Taylor had already chosen the paintings from the Kaiser Friedrich Museum's catalogue [ostensibly for permanent retention]. He added two from the Nationalgalerie. This was to please General Eisenhower, who, on 12 April [1945] had stood transfixed before Manet's *Winter Garden*." Karl-Heinz Jansen, "Kunstraub!," 11; Friemuth, *Die geraubte Kunst*, 108.

32. Standen, "Report on Germany," 213. On 9 May 1946, a year after Germany's surrender and approximately six months after the transfer of the Berlin paintings to the United States, 100 prominent art historians and curators sent President Truman a signed resolution, condemning the art transfer and calling for "the immediate safe return to Germany of the aforesaid paintings..." Among the resolution's signers were: Alfred Barr, director of the Museum of Modern Art, the historian Jacques Barzun, the art historian H. W. Janson, Rensselaer W. Lee, Millard Meiss, Frederick Clapp, of the Frick Collections. Resolution reprinted in Howe, *Salt Mines*, 305-11, and Farmer, "The Safekeepers," 116-17.

33. For a succinct discussion of these plans, see Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932-1945* (New York, 1979), 472-75. In August 1944,

Central European Affairs, James W. Riddleberger, defended the government's decision to ship the paintings to the United States:

The coal situation in Germany is critical and has made it impossible to provide heat for the museums. General Clay cannot be expected to provide heat for the museums if that means taking it away from American forces, from hospitals, or from essential utility needs. After a careful review of the facts, it was decided that the most important aspect was to safeguard these priceless treasures by bringing them to this country where they could be properly cared for. It was hoped that the President's pledge that they would be returned to Germany would satisfy those who might be critical of this Government's motives.³⁴

Officials gingerly sidestepped the issue of ownership by insisting that the works were to be in temporary, not permanent custody. To those criticizing the shipment of the paintings to the United States, however, the government's position was disingenuous. They charged that U.S. governmental authorities considered the artworks to be war booty and, (citing the incredible American sacrifices) that the latter believed that the American people were entitled to some form of compensation. A senate bill introduced by William Fulbright of Arkansas called for the paintings' retention "until such time as the United States formally recognizes a national government for Germany... such paintings be in the custody of the Secretary of the Army."³⁵ In a secret portion of a cable sent to the chief

Roosevelt stated that "It is of the utmost importance that every person in Germany should realize that this time Germany is a defeated nation... We either have to castrate the German people or you have got to treat them in such a manner so they can't just go on reproducing people who want to continue the way they have in the past." *Ibid.*, 472. See also Dean Acheson's *The Struggle for a Free Europe* (New York, 1971), 34-35 in which the former Secretary of State described the U.S. Joint Chief of Staff's directive (JCS 1067) as "harsh" and "unworkable." The plan changed to a more conciliatory policy as outlined in July, 1947 (JCS 1779). This had been preceded by a speech in Stuttgart of the then-Secretary of State James F. Byrnes in September 1946, calling for economic unity and favoring German initiatives in responsible self-government. *Ibid.*, 35.

34. Letter from James W. Riddleberger to Mr. Rensselaer W. Lee, President of the College Art Association, 25 January 1946, reprinted in Howe, *Salt Mines*, 301-2. Cf. National Archives, State Department, 862.4031/11-848, Information Bulletin, USMG in Germany, Richard Howard, "US Returns German Art," 2 November 1948, 18. On the incredible controversy surrounding the paintings and their exhibition in the United States; see Howe, *Salt Mines*, 272ff., Hearings before a Subcommittee on Armed Services, U.S. Senate, 80th Congress, 2nd Session, S. 2439, "A Bill to provide for the temporary retention in the United States of certain German Paintings," 4 March-16 April, 1948; *The Berlin Masterpieces, Paintings from the Berlin Museums Exhibited in Cooperation with the Department of the Army of the United States of America*, (New York, 1948) (the paintings were exhibited in several US cities, including Washington, DC, New York, Boston, Philadelphia, Detroit, etc.) Kurtz, *Nazi Contraband; Smyth, Repatriation of Art*.

35. Senate Bill 2439, "A Bill to provide for the temporary retention in the United States of certain German Paintings," 1948, National Archives, 862.4031/4-348.

of the Army's Civil Affairs Division, Clay angrily opposed the Fulbright bill, suspecting that curators at Washington's National Gallery coveted the Berlin paintings:

Their [the National Gallery's] representatives on an early visit talked about the possibility of obtaining these pictures either in reparations or in payment of occupation costs, and I am afraid their desire to increase the prestige of the National Gallery lies behind the Fulbright measure. It is an attempt to hold the pictures now in the hope that events may so develop that they will never have to be returned.³⁶

The 1945 policy of possible retribution evolved into one stressing restitution by 1948. Two factors occasioned this shift: the sharp criticism by American curators, art historians, and U.S. field officers over the initial policy of temporarily housing the German paintings. Secondly, by 1948, with continual friction between the Western Allies and the Russians, the return of the paintings could serve a useful Cold War purpose, showing that the Americans respected Germany's cultural possessions. The Russians had removed numerous artworks from their zone of occupation and their actions had received continual negative publicity in the United States. As General Clay maintained in his secret memo to the head of the Army's Civil Affairs Division, "... the effect of such action [U.S. retention of the collection] on American reputation and prestige would be devastating indeed and would place us in the same position as the Red Army and other vandal hordes who have overrun Europe throughout the centuries.³⁷

Thus, during the first three years of U.S. occupation, the removal of valuable paintings to the U.S. together with the passive American fine arts policy within Germany met with continual criticism, especially by arts officers stationed in Germany. As late as 1949, when the military government brought over an outside consultant to Germany to review the entire U.S. arts policy, it appeared that there was little change from

36. Memo from Clay to David Nocco, 1 April 1948, CC-3719, Ref. W-98943, Smith, ed., *Papers of General Lucius Clay*, 2:616-17.

37. Clay to Nocco, *Ibid.*, 617. Over vigorous protests, the paintings in the United States traveled to various U.S. museums. The proceeds from admission raised money for food and milk for German children. Cf. Richard Howard, "US Returns German Art," 2 November 1948. US Military Government *Information Bulletin* (2 November 1948): 16. Howard criticized the "Soviet Trophy Committee for systematically remov[ing] between] 800,000 and 900,000 objects," *ibid.*, 15. The Russians had shipped treasures from the Dresden museums as well as the Berlin museums to the Soviet Union. While the USSR returned some of the artworks to the GDR in the 1950s, the issue has been revisited with the end of the Cold War. Russians are being accused of still holding many works secretly, not only German works, but works now belonging to the newly created republics of the Ukraine and Belarus. That tensions have escalated can be seen in the acrimonious debate between Russian, German, and East European government, museum, and archives officials at the January 1995 "Spoils of War" conference.

previous years: "[We have come] to be regarded in Germany as an honest broker interested in property rather than interested in the arts themselves."³⁸

Yet, American arts policies, however passive initially, functioned positively in several key areas. While it was true that the Military Government temporarily removed Berlin museum paintings to the U.S. for "safekeeping," the United States never seriously considered the permanent retention of valuable artworks. Secondly, the MFA & A officers were superbly qualified to handle the complex issues of restitution as well as those of cultural policy in general. Many were professional art historians, museum directors, restorers, and curators familiar with pre-Nazi art historical scholarship and museum curatorial practice. They were in contact with art historians and others exiled during the 1930s who had emigrated to the United States.³⁹ They wished to reinstate the liberal values which the Nazis had so vehemently rejected. Arts consultant William Constable suggested that the U.S. should actively "select and emphasize those elements in the German tradition which are most in consonance with Military Government aims," such as publishing examples of "even the Bauhaus."⁴⁰ The Germans who moved to Berlin's Western sectors after 1948 worked closely with US and British arts officers developing progressive museum policies in the areas of restoration, exhibition, public education and accessibility which were comparable to Western museum policies. Curators desired to rehabilitate modernism that had been so thoroughly discredited by the Nazis. The Russians and GDR officials increasingly condemned modernism. Thus, the lengthening shadow of the Cold War further sharpened both the rhetoric and the exhibition policies in divided Berlin.

III.

How did the Germans themselves go about reconstructing their visual culture after Nazi policies of antimodernism and anti-Semitism had forced

38. OMGUS RG 260, 333-3/5.4104, Box 202, Folder 2, Memo from William Constable to Alonzo Grace, 1 April 1949, 1.

39. See Colin Eisler, "Kunstgeschichte, American Style: A Study in Migration," in *The Intellectual Migration, Europe and America, 1930-1960*, ed. Donald Fleming & Bernard Bailyn (Cambridge, MA, 1969), 544-629. For example, of the MFA & A officers, Farmer was an architectural and interior design consultant and engineer. Edith Standen was head of the Textile Study Room of the Metropolitan Museum of Art from 1949 to 1970. Craig Hugh Smyth, first director of the Central Collecting Point, Munich, 1945-46, was professor of art history at Harvard and at the Institute of Fine Arts, New York University. James Plaut was assistant curator of paintings, Boston Museum of Fine Arts and director of the Boston Institute of Contemporary Art. S. Lane Faison, Jr., the last director of Munich's Central Collecting Point, taught art history at Williams College for four decades. Thomas Howe was associated with the San Francisco Palace of the Legion of Honor.

40. Visiting Consultant's Report, William Constable, OMGUSRG 260, 333-3/5. Box 202, Folder 2, 3. See also, W. G. Constable Papers, Archives of American Art, Washington, DC.

hundreds of artists, museum curators, art dealers, and art historians into "inner immigration" or external exile? In May 1945, Berlin's National Gallery, located in the Soviet zone, fell under the governance of the "German Central Administration for Peoples' Culture in the Soviet Zone of Occupation." The departments of "Scientific Research and Education" and "Art and Literature" had jurisdiction over the museums.⁴¹ While both the Americans and the British held many of the Gallery's artworks in the two Western zones, the Russians controlled the damaged building as well as a core of the holdings, many of which they transferred to the Soviet Union. Several museum-related tasks confronted the Allies collectively after 1945, however. These tasks included: deciding the future status of the surviving Berlin museum personnel, beginning the process of cataloging and organizing the museums' contents, and finally, aiding in the National Gallery's future exhibition policy. All three areas merit discussion.

In late 1944, the British had created a secret list of museum personnel (entitled the "White List") which was added to and amended by American experts during the same period and later, in May 1945. During the war, the Allies had drawn up lists to aid in the selection of German personnel who would be politically acceptable to resume positions of authority after the conflict. These lists contained name of Nazis ("black"), anti-Nazis ("white"), and those whose politics were more ambiguous ("gray"). The British document recorded the top museum personnel throughout Germany, along with brief descriptions of their political reliability.⁴²

When the allies agreed in principle to the July 1945 Potsdam Agreements relating to German denazification as well as demilitarization, democratization, and decentralization, they dismissed several senior personnel from each of the Berlin museums who had enthusiastically joined the National Socialist party, quickly removing Otto Kümmel, the General Director of all the Berlin museums, including the National Gallery. Immediately after the surrender, the Russians authorized the appointment of

41. See Hans Joachim Reichardt et. al., *Berlin, Quellen und Dokumente, 1945-1951*, Halbbd. 1, Berlin Senate/Landesarchiv Berlin, 1964.

42. National Archives, RG 59, Box 729, 862 403/8-2849/44, OMGUS RG 260, ECR Div., MFA & A, 345-3/5, Box 221, Folder 2. In 1987, the U.S. National Archives declassified several lists of German museum, library, and university personnel. The lists ranged from "Confidential" to "Top Secret" in classification. The earliest list found by this author is: "Extracts on German Personnel for MFA & A from a U.S. individual [unnamed] familiar with them and 'optimistic' in his reactions." Date about 1937. US Group CC, Military Government Division "A" Property Section, MFA & A Sub-section, 25 October 1944. Cf. US National Archives, RG 239 P60010, Box 4, A/043E3, Eberhard Hanfstaengl, temporarily director of the Nationalgalerie during the mid-1930s was reinstated as Director General of the Bavarian Picture Galleries in 1945. Cf. OMGUS, 291-3/5 3988, Box 10, General Correspondence, VI B.

Carl Weickert as provisional head of the museums in mid-September 1945. According to one report, out of 58 persons on the museums' professional staff in 1943, ten belonged to the Nazi party. By 1946, 29 staff employees of varying ranks remained. Several museum officials, including the curator of the sculpture section, E. F. Bange, committed suicide following the Russian takeover of the Museum Island. Thirteen museum officials received appointments outside the Berlin museums.⁴³ Once a politically reliable staff was reinstalled, the U.S. military government maintained that further personnel decisions should be made by the Germans themselves. An 8 July 1945 memo sent to MFA & A headquarters stated:

The MFA & A Branch is not prepared at this time to make specific recommendations for posts at the Reich Ministerial Prussian State level, since it is not felt that the posts in the German ministries concerned with MFA & A are important enough to fill at once or that it will be necessary to recreate any MFA & A Administration at the top level before the local agencies have been reactivated.⁴⁴

The Allies agreed to restore and rehabilitate the National Gallery's progressive leadership, which, under the directorships of Hugo von Tschudi and Ludwig Justi established the museum's worldwide fame during the first three decades of the twentieth century. Fired by the Nazis in 1933, Justi had refused to request his retirement income; it was "characteristic of his strong and independent character that he did not, at that time, file an application to receive his pension; . . . he became the director of the Art Library instead."⁴⁵ Justi's dismissal by the Nazis in 1933, together with his distinguished service throughout most of the century, virtually guaranteed his appointment as General Director of the Berlin Museums. At the time of his selection, an observer noted that:

Justi is already 72 years old, but exceedingly active and energetic. Dr. Justi was introduced to the municipal council and briefly expressed his opinion about the past and future meaning of the museums. . . .⁴⁶

Justi assumed the directorship of all the museums on 17 August 1946. He resided in Sans Souci, Potsdam, which facilitated his commute to the Museum Island through only one Allied zone; both his residence and

43. Winkler, *Kriegschronik*, 343-44. These numbers included staff at other museums and cultural institutions in addition to the National Gallery, including: the Neues Museum, Pergamon Museum, Kaiser-Friedrich Museum, Zeughaus, National Gallery, Central Library, Art Library, Ethnological Museum.

44. Memo accompanying Confidential File, White List, from Lt. Col. Mason Hammond, AG, to Director, MFA & A Chief, 8 July 1945, National Archives, State Department, RG 59, 1945-1949, Box 729, 862.403/8-2845.

45. Kunze, *BER*, 87.

46. Proceedings of the Municipal Council, 1946, quoted in Kunze, *BER*, 79.

place of work were located in the Russian-controlled sector.⁴⁷

After interrogation by a special OSS section which cleared him of Nazi affiliations, Paul Ortwin Rave, Justi's curator, was appointed the National Gallery's new director.⁴⁸ The files list Rave as an "anti-Nazi and good scholar."⁴⁹ During his long tenure at the National Gallery he experienced discontinuities, disjunctures, and life-threatening situations, all of which he accepted in the name of preserving the gallery's collection, especially during the closing days of the war when he personally took charge of transporting the museum's holdings to safer locations.⁵⁰ It is noteworthy that, along with Justi and Rave, many of the names on British and American "favorable" lists were reinstated with French and Russian support and became the leading museum officials throughout postwar East and West Germany. Initially, unanimity existed among the allies regarding postwar museum personnel.⁵¹ Because the military governments considered museum restaffing a low priority immediately after the surrender, appointments met with little opposition. In some cases, valued professional expertise enabled otherwise ideologically suspect museum personnel to keep their posts. However, understaffing at the curatorial level remained the norm for a number of years. As one American museum official noted in 1948/49:

As a result of Nazi policy, of the war, and of emigration, Germany is now largely a country of the elderly and the ineffective, and of the young and the ignorant. The number of capable, vigorous and well-informed [museum] men of middle age is limited; and of these, many were sympathetic to the Nazis. As a result, any cultural policy that

47. Kunze, *BER*, 57. In 1947 Weickert took over the German Archeological Institute in the Western sector of Berlin.

48. OMGUS RG 260, ECR Div., MFA & A, 345-3/5, Box 221, Folder 2. Rave's associate at the Gallery, Alfred Hentzen, was described in the same document as "an able man, courageous and reliable." At war's end, Hentzen was a British POW in an Egyptian camp before rejoining the museum.

49. *Ibid.* See also, National Archives, RG 239, 60010, Drawer 1/5, Card Files of European Specialists in the Fine Arts.

50. Born in Elberfeld in 1893, Rave joined the National Gallery in 1922 as an assistant before being promoted to curator in 1934. His "political unreliability" prevented him from being named director after Hanfstaengl's forced dismissal in 1937. A later National Gallery director described Rave in the following manner: "One could say that the man stood completely in the tradition of a Lichtwark [Hamburg's *Kunsthalle's* director at the turn of the century] and a Justi, a liberal thinker, serving the national, better yet, the Prussian tradition . . ." Honisch, *Nationalgalerie Berlin*, 53.

51. See *A Report on German Museums*, prepared by members of *Prolog*, an informal group of American and German residents of Berlin, interested in the Fine Arts, Berlin, Fall, 1947, reproduced in Kunze, *BER*, appendix 6, 365-69. See also, Winkler, *Kriegschronik*, Section C, appendix 2, 343-44. Ironically, Friedrich Winkler himself was described as "weak" on the unfavorable personnel list. OMGUS RG 260, ECR Div., MFA & A, 345-3/5, Box 221, Folder 2.

looks for immediate results in the near future is likely to fail. Enough time must be allowed for the younger generation, who can be effectively influenced, to get into the saddle.⁵²

In the years prior to the Berlin blockade, the museum's personnel housed in the National Gallery's main building (in the Russian sector) were able to travel to the Western zones and view the collections stored in the U.S. Collecting Points in Wiesbaden, Marburg, Munich, Frankfurt, and in the British zone in Celle. There appeared to be few discernible differences over museum personnel among the Allies. The majority of the museum staff remained at their posts with little interruption.⁵³ But their titles as well as their official duties remained uncertain since most of Berlin's museums were in a shambles in both the Eastern and Western sectors of the city during the first two years of occupation.

IV.

The physical damage meant, however, that the museums could not function as tools for cultural reeducation for some time. The museum officials who stayed on "resembled construction workers more than art historians" according to a recent commentator.⁵⁴ The National Gallery lacked not only walls and windows, but an "essential piece of art history, an epoch of German and international art . . . between the turn of the century and the liberation of 1945."⁵⁵ Despite shortages of materials, physically reconstructing the damaged museum and cataloging its remaining inventory became the critical tasks of the day. Yet makeshift exhibitions in provisional surroundings did take place. Secondly, the acquisition of works of art, however meager, was resumed. Justi moved quickly to reinstate a sense of continuity with pre-1933 cultural conditions.

In March, 1946 a member of the British Monuments, Fine Arts, and Archives section of the British military government reported that:

The whole of the Rhineland is a mass of rubble; Berlin, too, is a gaunt gutted memory of its former self. Munich looks as if an earthquake or a tornado had swept over it; Hamburg, Kiel, Paderborn, and Münster are fantastic aggregations of twisted iron, crazy gables, and bad smells.⁵⁶

52. Visiting Consultant's Report, 3. Constable headed the Boston Museum of Fine Arts.

53. The Museum Island housed the core museums but Greater Berlin had collections in other sections of the city.

54. Thomas Deecke, "Die deutschen Museen sammeln und stellen aus," in: 1945-1985, *Kunst in der Bundesrepublik Deutschland*, ed. Bartmann, 641.

55. *Ibid.*

56. S. F. Markham, "Museums in Germany Today," *The Museums Journal* 45, no. 12 (March 1946): 206.

His compatriot, a Registrar at the Royal Entomological Society of London, wrote one year after the surrender that "the destruction of buildings must be seen to be believed and one may be excused for thinking that there is a good case for abandoning towns . . ." ⁵⁷ Two and a half years after war's end the National Gallery's physical condition remained very problematic: Its roof and all its windows had been destroyed and materials were not available for its repair. Even three years after the war, an observer noted that the Berlin

museum buildings have suffered a great deal. [Some] are a total loss. Schinkel's Altes Museum is "perhaps capable of repair," but reconstruction of the famous interior of the Schloss would be "more difficult." Pergamon-Museum, National Galerie, Kaiser-Friedrich Museum are "repairable," when material can be supplied. ⁵⁸

Hellmut Lehmann-Haupt, a German-born American arts officer close to the Berlin arts scene, recalled:

The former Berlin state museums, once in possession of some of the most valuable and extensive collections . . . found themselves crippled by the wartime destruction of their buildings, by the evacuation of their treasures to other zones, and last though not least, by extensive confiscations of their remaining treasures on the part of the soviet raiding parties after the fall of the city. But even so, the museum administration was struggling hard to keep a few selected masterpieces, highlighted by skilled and experienced showmanship. ⁵⁹

The National Gallery's collection remained dispersed throughout the occupation period, largely due to the museum's disrepair. In a May 1946 inventory, 400 National Gallery paintings were stored in the Central Collecting Point, Wiesbaden. These included the most prized works in the Gallery's possession, works by the early nineteenth-century romantic painter, Caspar David Friedrich, the late nineteenth-century Swiss-born neo-idealist, Arnold Böcklin, the late nineteenth-century realist, Wilhelm Leibl, and famed nineteenth-century French painters such as Edouard Manet. The British zone held 200 additional National Gallery works, while the Russians possessed approximately 700 paintings and 400 pieces of sculpture. The Russian zone also retained 5000 nineteenth-century German

57. Francis J. Griffin, "Present State of Some German Museums," *Nature*, no. 3993, (11 May 1946): 631.

58. "Report on German Museums," digested from the *Prolog* report by Otto J. Brendel, in Standen, "Report on Germany," 214. Also reproduced in Kunze, *BER*, Appendix 6, 365-69. The MFA & A officer Walter Farmer recalled that all of the National Gallery's windows had been damaged as had its roof.

59. Lehmann-Haupt, *Art under a Dictatorship*, 188.

graphics together with 5000 drawings by nineteenth-century Germany's premier realist, Adolf von Menzel. ⁶⁰

After the formal establishment of the Federal Republic and the German Democratic Republic in 1949, the reunion of the collection seemed even more distant than it had been in 1946. An inventory conducted three years later by the Berlin Senate Section for Popular Education listed the paintings housed in the American and British zones of occupation in Wiesbaden and Celle respectively: 392 German paintings of the nineteenth century together with French impressionist paintings (U.S. Zone), and 226 paintings, including 16 works by the early nineteenth century artist Karl Blechen, two Böcklins, four works by Friedrich, ten by the mid-nineteenth century Berlin equestrian painter, Franz Krüger, 17 Menzel paintings, five works by the early nineteenth-century neo-classic architect and artist Karl Friedrich Schinkel, four works by the Biedermeier artist Moritz Schwind, and five paintings by Hans Thoma. ⁶¹

William Constable, the head of the Boston Museum of Fine Arts and arts consultant to General Clay in 1949, noted that "the Prussian State collections have always been regarded by the outside world as the National German collections . . . To break up the collections would break this tradition. It is doubtful whether the *Länder* or the City of Berlin could adequately provide for the maintenance and display of the collections and for an adequate learned staff to handle them." ⁶² In October 1950 the German nineteenth-century paintings from Celle went on loan exhibition to the Charlottenburg Palace.

If the core of the National Gallery's collection was thus physically dispersed, what would be its function during the immediate postwar period? How could the museum serve as the premier repository for modern art? How, in such circumstances, could it provide the primary exhibition venue for temporary shows from its own collection together with visiting exhibits? While the museum staff struggled to resume its earlier functions, the zonal allied military governments directed most of their efforts at organizing shows. For example, between February 1946 and December 1949, OMGUS mounted nine major art exhibitions displaying German-owned old master and nineteenth-century works in the main Wiesbaden depository in Hesse. ⁶³ During the same period, the U.S. Military Government

60. Winkler, *Kriegschronik*, Appendix 2, 345-49.

61. "Übersicht über die aus den Depots in Wiesbaden und Celle zurückerwarteten Bestände der Staatlichen Museen (Senats-Abteilung für Volksbildung, 1952), reproduced in Kunze, *BER*, Appendix 39, 478-80.

62. Visiting Consultant's Report, Constable, 17.

63. The 202 paintings brought to the U.S. went on exhibition in Germany following their return in May 1948. After arriving in Bremerhaven, they were shown at the Bavarian State Galleries in Munich during the summer months, followed by a show in Wiesbaden,

restored damaged paintings and returned many collections to their original locations in various German cities in its zone. The Berlin collections however, were "for practical purposes . . . considered as homeless," according to the Director of the Hesse office of the Military Government in 1949.⁶⁴ The Berlin paintings remained in legal and political limbo for almost a decade because of the political uncertainties present in the divided former capital.⁶⁵ Furthermore, with the Allied dissolution of the Prussian State on 25 February 1947, the museums' fate was further clouded because the collections had been the property of Prussia as well as the Prussian monarchy.⁶⁶ A State Department official noted in 1949:

one of three U.S. Military Government Central Collecting Points. Cf. Ardelia Hall, "The Returned Masterpieces of the Berlin Museums," *Department of State Bulletin*, 20 (May 1949): 1:513, 543-45. The Wiesbaden Collecting Point (housed in the Landesmuseum) contained the largest number of works: 4,450 paintings and 197,200 art objects from the entire American zone. *Ibid.*, 543. General Clay was reluctant to return the paintings directly to Berlin because of worsening tensions between the Western allies and the Russians. In a February 1948 secret memo, Clay wrote: ". . . I recommended against return of pictures because return other than to Berlin would offend Soviet[s]. We had not reached present position in which far more important actions have been taken against Soviet protest." Memo to Draper from Clay, 6 February 1948, CC 3111, Ref. W-95402, Smith, *Papers of Lucius D. Clay*, 2:555.

64. James Newman, "Foreword" to the catalog of the 1949 exhibition on "The Returned Masterpieces of the Berlin Museum," in the Central Art Collecting Point, Landesmuseum, Wiesbaden, in Hall, "The Returned Masterpieces," 545.

65. The Russians took paintings found on the Museum Island, the Mint, and the Friedrichshain anti-aircraft tower (where numerous old masters mysteriously burned shortly after the war's end) to the Soviet Union, returning the art, professionally restored, to the East German government in 1958. Cf. the special issue of *Museums Journal*, dedicated to the museums in the GDR and Berlin, March 1990, particularly the articles by Günter Schade, "Zur Geschichte der Berliner Museumsinsel von 1945 bis heute," 6, in which he states that only in 1949 ten rooms were usable for exhibition purposes at the National Gallery. See also, *ibid.*, Peter Betthausen, "Nationalgalerie-Stammhaus," 33-35, and Fritz Jacobi, "Sammlung Kunst der DDR der Nationalgalerie im Alten Museum," 36-38 for an overview of GDR art collected for the museum since East Germany's establishment in 1949. Both GDR art and international art donated by the West German candy baron and his wife, Peter and Irene Ludwig, were housed in the Altes Museum, which was only rehabilitated in the 1960s due to its extensive wartime damage. Schade, "Zur Geschichte," 9. Recently, Germans have been questioning how much art taken by the Soviets at war's end has been retained. Cf. the various articles by two Russians documenting this issue: Konstantin Akinsha and Grigori Kozlov, "Spoils of War: The Soviet's Hidden Art Treasures," *ARTnews* (September 1991): 134-41; "To Return or Not to Return," *ARTnews* (October 1994): 155-59; and the Pushkin Museum director's rationalization for Russia retaining the art: Irina Antonova, "We Don't Owe Anybody Anything," *The Art Newspaper* (July-September 1994).

66. Control Council, Law no. 46, "Abolition of the State of Prussia," 25 February 1947, and signed by P. Koenig (France), V. Sokolovsky (USSR), Lucius Clay (USA), B.H. Robertson (Great Britain). Article III ambiguously stated: "The State and administrative functions as well as the assets and liabilities of the former Prussian State will be transferred to appropriate Länder, subject to such agreements as may be necessary and made by the Allied Control Authority." Reprinted in Kunze, *BER*, Appendix 9, 379.

The final chapter of the long hegira of the "returned masterpieces" will not be written before they are restored once more to their rightful owners, the people of Berlin . . . Although it may be some time before these homeless collections can be returned, it may confidently be expected that the integrity and unity of the great Berlin collections will always be recognized.⁶⁷

During the 1950s several exhibits loaned from the US and British depositories were held in Dahlem and Charlottenburg.⁶⁸ By the late 1950s the occupying Allied governments returned many of the collections held in their custody back to East and West Germany. But the Cold War division of Germany prevented the reconstitution of the National Gallery's collection and that of other Berlin museums' for forty-five years. Even by the late 1950s and early 1960s, the original National Gallery in East Berlin was a mere shadow of its former self: "Justi and his staff worked hard to install thoroughly professional exhibitions, but an air of sadness clung to [the Berlin museums]" in the words of a recent account.⁶⁹

V.

Despite these incredible difficulties, the Germans nevertheless mounted two significant exhibitions in Berlin. The first, entitled *Wiedersehen mit Museumsgut*, opened on 21 December 1946 and displayed 98 works, ten of which belonged to the National Gallery and had been placed in the category of "degenerate art" by the Nazis. "This event will remain unforgettable to all those who witnessed it. It was, in the truest sense of the word, a 'first flowering out of the ruins.'"⁷⁰ A second exhibition followed in 1947 with a display of "Masterpieces by German Sculptors and Painters."⁷¹

In addition to exhibiting from the existing collections, Justi and Rave, together with the advisor to the Cultural Section of the Municipal Council, Dr. Adolf Jannasch, agreed on two priorities for the National Gallery. The first was to fill the art historical gaps created by twelve years of Nazi cultural policy. This meant the acquisition of paintings, graphics, and sculpture that had been so systematically and ruthlessly removed by the National Socialists; especially those of expressionism, dada, New Objectivity (*Neue Sachlichkeit*), and surrealism. The second priority was to patronize

67. Hall, "The Returned Masterpieces of the Berlin Museums," 544.

68. Kunze, *BER*, Appendix 30, 433-38.

69. Edward P. Alexander, "Wilhelm Bode and Berlin's Museum Island," in *idem*, *Museum Masters, Their Museums and Their Influence* (Nashville, TN., 1983), 230.

70. Kunze, *BER*, 88.

71. Berlin, Schlüterbau, 1947, *Meisterwerke deutscher Bildhauer und Maler*, [Exh. Cat.], 1947. Foreword by L. Justi, Berlin. P. Metz.

living artists whom the Nazis had condemned. These artists had faced extreme privations due to their isolation and inability to paint or exhibit. The lack of even the most basic art supplies, such as pencils and paper in the immediate postwar period, created additional hardships.⁷² Prospective patrons were few in number, particularly in the four-power division of Berlin where the political and economic uncertainties created enormous difficulties.

The National Gallery suffered during the postwar years because of its financial inability to purchase significant numbers of artworks. For the year 1946/47 RM80,000 (Reichmarks) (currency reforms and the subsequent hardened zonal divisions lay in the future) were allocated for purchases of the new "Gallery of the 20th Century," formally established in 1948, though conceived earlier. In April 1947 a Purchasing Commission was established which included Justi, Jannasch, the painters Karl Schmidt-Rottluff, (one of the early members of the *Die Brücke* expressionists), Karl Hofer, (a figural painter forbidden to paint by the Nazis), and SED, SPD, and CDU members of the city parliament. As Jannasch recalled, "We visited art exhibitions in the half-destroyed Charlottenburg Palace and in the flourishing private galleries of Gerd Rosen . . . A systematic purchasing plan was sought in which one could find generally-authentic examples of Berlin's cultural development through the abundance of styles."⁷³ By 1948, the funding for purchases increased to RM200,000. In that year the commission purchased three paintings by Max Pechstein, a major figure of German expressionism, as well as works by Karl Hofer, and sculptures by Joachim Karsch and Bernhard Heiliger. By 1 June 1948, the Gallery of the 20th Century had purchased between 50 and 60 paintings, more than 15 sculptures, and approximately 100 drawings. Included among the purchased works were paintings by both expressionists and contemporary German artists, such as Werner Helde.⁷⁴

But shortly after these purchases, the Soviets launched a total blockade of Berlin. As a result of Russian and Western divisions over currency reform, the Soviets attempted to restrict access to Berlin and blockaded the city for over a year. Beginning in mid-1948, the Western Allies suc-

72. Richard Howard, U.S. MFA & A Branch Chief, noted that: "Among other things, several of us have purchased artists' supplies from the States out of our own pockets and distribute them to artists who need them." OMGUS RG 260, MFA & A, 345-1/5, Box 216, Folder 4. Letter from Richard Howard to Frederick Sweet, 16 June 1947.

73. Adolf Jannasch, *Die Galerie des 20. Jahrhunderts, Berlin 1945-1968* (Berlin: Staatliches Museum Preussischer Kulturbesitz, 1968), 10. See also Jutta Held, *Kunst und Kunstpolitik in Deutschland* (Berlin 1981), 362 on the difficulties of museum acquisition during the first few years. The commission's majority wished to concentrate on purchases of living artists while Justi and Jannasch wished to acquire the classic modernists removed by the Nazis.

74. Jannasch, *Die Galerie des 20. Jahrhunderts*, 14.

ceeded in supplying the beleaguered Western sectors with food and fuel supplies. The Berlin Blockade created two separate municipal councils and two mayors for the city by the end of the year.⁷⁵ Several key personnel from all of the museums decided to leave for the Western sectors. Because the British and French military governments held the most valuable parts of the collections in their zones, some museum personnel believed they could continue their professional careers more profitably in the West. Others increasingly feared the growing communist aesthetic control in the Eastern sector and decided to depart.⁷⁶ The recent "Gallery of the 20th Century" acquisitions were located and remained in the Soviet sector but the key personnel migrated west and with them went their philosophy.

After the Berlin blockade, Rave technically no longer directed the National Gallery, though he remained its de facto head until 1950.⁷⁷ In 1955 he became the director of the art library while Jannasch headed efforts to continue the work of creating a museum of twentieth-century art. Supported by Berlin officials, particularly the Mayor Ernst Reuter and City Councillor-Walter May, Jannasch proceeded to plan for future purchases, primarily of the early twentieth-century German expressionist painters of *Die Brücke* (the Bridge) and *Blaue Reiter* (Blue Riders) groups. But given the problematic economic conditions, Jannasch could hope for no more from city officials than DM30,000 (in the new Western currency) to acquire works of living artists.⁷⁸ Not only was money scarce, but prices for modern art steadily rose after the war, preventing both the East and West Germans from making major purchases until the mid-1950s. Additionally, Berlin housed only two major private collections of modernism, in contrast to earlier times. Repeated political crises in Berlin during the late 1940s and 1950s, together with its divided status ultimately saw the collections land in Munich and other West German cities.⁷⁹ According to the recollections of a student-artist living in the rubble-strewn city:

The state institutions in Berlin did not, at that time come into the

75. Friedrich Ebert, son of the Weimar Republic's president, served as first mayor of East Berlin while Ernst Reuter became West Berlin's first mayor. See Jean Edward Smith, *The Defense of Berlin* (Baltimore, MD., 1963).

76. Kunze, *BER*, 131-33, Pike, *The Politics of Culture*, 235-45.

77. Interestingly, in a GDR publication accompanying a National Gallery exhibition on its reconstruction and development since 1945, Rave is listed as the National Gallery's director until 1950. Only after the 1958 return of paintings and drawings by the Soviets was the East Berlin's National Gallery's function as the traditional repository for nineteenth and twentieth-century art restored. It did, however house exhibitions continuously, beginning in 1951. For a listing of exhibitions through the 1950s to the mid-1970s, cf. Janda, *Die National-Galerie*, n.p.

78. Jannasch, *Die Galerie des 20. Jahrhunderts*, 16.

79. *Ibid.*, 25; Honisch, *Die Nationalgalerie Berlins*, 73-76.

picture at all despite the fact that the district officials already employed art officials . . . But the museums were not there, one did not think of them. The collection on Jebenstrasse, the Gallery of the 20th Century with Jannasch, was only conceived as a project in '48/49, but that was all very preliminary.⁸⁰

Meanwhile in the Soviet Zone—while the Russians later showed little tolerance for modernism—Justi was able to promote modernism during the first three years of Soviet military occupation. Ironically, however, the creation of the "Gallery of the 20th Century" occurred during Berlin's formal division into Eastern and Western sections in 1948. Justi's long-standing reputation spanning German cultural history from the Imperial period through National Socialism, enabled him to command enormous respect among the Western authorities as well as among the Russians. Likewise he maintained cordial relations with the newly-installed German communist and socialist leadership, including Prime Minister Otto Grotewohl. Nonetheless, he fought a losing battle to continue augmenting the "Gallery of the 20th Century," which, shortly after its founding in 1948, was divided like Berlin itself.

Beginning in 1949, after both Rave and Jannasch left for the Western sector, Justi, with resignation, concentrated more on museum reconstruction than on the acquisition of modernist art, the former a safer task since the Soviet occupation and the SED government pointedly pressured artists and intellectuals to favor socialist realism over abstract and surrealist painting, which the leadership increasingly criticized as "formalistic."⁸¹

In 1949, a former military officers' mess near the Zoo train station on Jebenstrasse in the British sector was designated as the new location for the 20th Century Gallery. Yet it took five years before exhibitions could be arranged at the Jebenstrasse site. In 1968, almost two decades after Berlin's division, the Gallery was renamed the New National Gallery in West Berlin, following the construction of a building designed by the German-born American architect, Mies van der Rohe, to house the partly reconstituted collection. The museum was partly conceived as an architectural and visual critique, not only of discredited Nazi arts policies, but those of the Stalinist German Democratic Republic, whose condemnation of contemporary abstract, minimalist, and Pop Art appeared to continue the totalitarian legacy. The new National Gallery's postwar beginnings

80. Interview with Manfred Bluth, in Straka and Suermann, ". . . Die Kunst muss nämlich gar nichts!," 269.

81. Jannasch, *Die Galerie des 20. Jahrhunderts*, 14, 17. See also "German Artists Resist Controls," *New York Times*, 15 December 1946, p. 21. The article recounted a meeting held in Berlin's Soviet sector "to discuss the thesis there was no more possibility of developing art and that 'Volksnahe Kunst' should be the sole preoccupation of artists today . . . This is social realism, according to its proponents."

occurred with its formal founding on 7 April 1948, almost three years after the German surrender and weeks before the Berlin blockade. Even though the new building's dedication was celebrated in 1968, twenty years after the establishment of the "Gallery of the 20th Century," its mission became one of both rehabilitating classic modernism and of challenging the GDR's apparent continuity of conservative exhibition and acquisition practices. Western allied attitudes toward modernism, Western curatorial practice, and the antimodernist ideological stance taken by the Communists, all affected the Gallery's postwar exhibition and acquisition policies.⁸²

VI.

Cold war politics and German economic growth fostered the twin goals of enlarging the Berlin collection and museum construction, though the East German National Gallery building suffered in comparison to West Berlin's New National Gallery. From the shattered beginnings on the ruins of the Third Reich, today's National Gallery is embarking, despite financial constraints, on a program of renovation and expansion.⁸³ The current director of the museum's contemporary branch, to be housed in the Hamburger *Bahnhof*, optimistically suggests: "There is still [in Berlin] a pioneering spirit, a sense of curiosity, enthusiasm, willingness to take risks."⁸⁴ Berlin's museums are now, as in 1945, reexamining their exhibition and acquisition policies for practical as well as for ideological reasons. In May 1990, East Berlin's general director of museums, Günter Schade, posed the question: Does a "Berlin without borders" require duplicate museums which emerged from the Cold War's cultural competition?⁸⁵ Today those responsible for Berlin's (and Germany's) art community are contemplating how best to utilize the numerous existing cultural edifices: the Museum Island, the new Nationalgalerie, the Dahlem museums, and the two museums devoted to local Berlin history and culture.⁸⁶ One is perversely

82. Jannasch, *Die Galerie des 20. Jahrhunderts*, 14.

83. See the special issues of *Museums Journal*, 2 no. 5 (April, 1991), particularly the articles by Günther Schauerte, "Jetzt oder nie, Berlins Chancen, die Ausbildung des Museumsmittelbaus neu zu ordnen," 13-15, and Wolf-Dieter Dube's "Die Zusammenführung der Staatlichen Museen," 34-37. Schauerte is an advisor to the Prussian State Cultural Foundation, now in charge of all Berlin Museums and some archives, (*Staatliche Museen Preussischer Kulturbesitz*), while Dube is its General Director.

84. Wulf Herzogenrath, quoted in David Galloway, "The New Berlin, 'I Want My Wall Back,'" *Art in America* 79 (September 1991): 103. On the reorganization efforts, see also, "Sammlungen, Beschlüsse des Stiftungsrats der Stiftung Preussischer Kulturbesitz für die Zusammenführung der ehemals Staatlich Preussischen Sammlungen," in *Kunstchronik* 44, no. 3, (March, 1991): 135-37.

85. Quoted in Petra Kippstoff, "Die Chance," *Die Zeit* 20, no. 18 (May, 1990): 13.

86. Given the economic demands in restructuring Eastern Germany, funding for museum

reminded of a French philosopher's purported remark: The Frenchman loved Germany so much he desired two of them. Postwar East and West Berliners relentlessly constructed fraternal twin museums and theaters to showcase their respective cultural achievements. Two years before the fall of the Berlin Wall, each half of the city attempted to reconstruct alternative views of their history and culture through exhibition and theatrical extravaganzas showcasing the city's 750th anniversary.⁸⁷ During the postwar decades, the Federal Republic poured generous state subsidies into West Berlin's art community and institutions, particularly since West Germany's commercial and industrial art patrons lived elsewhere. The artists and museums of the Rhineland, Bavaria, or southwest Germany had direct links with local art sponsors. The absence of a strong commercial or industrial base in Berlin forced officials in Bonn to underwrite the former capital's cultural offerings, including exhibitions, museum reconstruction, and acquisitions.⁸⁸

After 1949, the East Germans regarded Berlin as their capital, carrying on the twin tasks of cultural transformation and cultural reconstruction. As befitting a major metropolis and governmental headquarters, East Berlin received special financial treatment in cultural matters. The regime's officially recognized artists were also subsidized and rarely had to concern themselves with such grubby matters as art sales. A secretary of the former German Democratic Republic's 6,000 member Association of Visual Artists recently fretted over the fate of painters in a new market system: "We had no starving artists. Every painter and sculptor could live off his or her art. Not all of them lavishly, of course, but comfortably."⁸⁹

Mounting expenses will force the current German government to make difficult cultural decisions. Questions of aesthetic worth of existing museums' collections have also been raised. What happens, for example, to forty years of GDR painting represented in East Berlin's National Gallery? Western

construction throughout the Federal Republic is being squeezed. See "The Golden Age of Museum Building is Ending," *The Art Newspaper* 2, no. 13 (December, 1991), in which the author, Giulia Ajmone Marsan, wryly noted: "It could be argued that the former West Germany with one museum [for] every 22,000 inhabitants . . . is at [a] saturation point. One curator exclaimed: 'What else do you want to build? There is a museum for everything,' and the remark is not entirely flippant. Apart from the more usual kinds of museums and galleries, there are ones for the office, photocopying, sewing machines, and irons, cookbooks, sugar, bread—not to mention the German community from Bessarabia," 6.

87. Cf. Anke Middelmann, "Berlin Celebrates its 750th Anniversary," *Europe* (July/August, 1987): 37, 46 and Gerhard Weiss, "Panem et Circenses: Berlin's Anniversaries as Political Happenings," in *Berlin, Culture and Metropolis*, ed. Charles W. Haxthausen & Heidrun Suhr (Minneapolis, 1990), 243–52.

88. Cf. Dieter Honisch's critical piece, "What is admired in Cologne may not be accepted in Munich," *ARTnews* (October, 1978): 62–67, particularly 66.

89. John Dornberg, "After the Wall," *ARTnews* (May 1990): 160.

critics and art historians had repeatedly dismissed these paintings as simply state-supported propaganda, though Peter Bethausen, the National Gallery's former director, maintained one cannot "consign the art and artists of the GDR to the dustbin of history."⁹⁰ East Berlin's National Gallery and West Berlin's New National Gallery will once again focus attention on the multiple political meanings of art. In the postwar period, both museums attempted to represent the best of German and international painting for the East and the West respectively. In a sense, it is ironic that postwar capitalism and communism chose the same strategy to showcase their countries' national worth: generously subsidizing culture as a barometer of political efficacy.⁹¹ As a result of cultural chauvinism, Berlin became the home to 29 museums, though that number is being reduced by almost half. Budget cuts of 11 percent and restructuring will result in approximately 17 museums remaining and the elimination of over 150 museum personnel in Berlin's eastern half.⁹²

Thus the questions raised about the fate of the two Berlin National Galleries are not simply budgetary nor merely organizational. The queries represent recurring issues of aesthetic and historical self-representation.⁹³ After World War II, the National Gallery's directions in personnel, exhibition, and acquisition was heavily influenced by the military occupation forces, reflecting larger cultural questions, particularly those of aesthetic national identity. Material and social conditions are completely different in today's Berlin from the unimaginable devastation of 1945. Yet, once again the museum's role is relevant to a united German republic. Once again, cultural continuities and aesthetic disjunctures are epitomized in the National Gallery's reorganization, acquisition, and exhibition policies. Fortunately, its aesthetic future appears far brighter now than it did in the dismal aftermath of 1945.

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90. *Ibid.*, 162. See also David Galloway, "Report from East Berlin," *Art in America* 77 (July, 1989): 45–47.

91. Galloway, "The New Berlin," *Art in America* (September 1991): 98ff., 101–2.

92. *Ibid.*, 102. Galloway noted the over-employment of state personnel, reflecting the former GDR's "no unemployment" policy: ". . . admitting visitors [to the museums] normally required three full-time employees: one to sell a ticket, one to tear it in half and a third to throw away the scrap that resulted." See also, "A Counter-Reformation," *Economist* 325, no. 7789 (12 December 1992): 97, on museum reorganization.

93. Several articles published after unification have presented somewhat conflicting opinions regarding the future of Berlin as a regenerated art capital, wondering if a new united Berlin will recall the German capital's cultural apogee during the Weimar Republic. Contrast, for example, the optimistic assessment by Gail Schares and Judith Dobrzynski, "Can Berlin paint itself back into the art world?," *Business Week* (15 July 1991): 137 with Richard Morais's pessimistic piece, "Berlin's Fading Euphoria," *Forbes* 148 (14 October 1991): 127–29.

cretionary or mandatory. If we follow Justice Holmes' view that assumption of jurisdiction is discretionary, there must be a valid excuse for not assuming jurisdiction. It has been shown that there is none. If the view that the statute is mandatory is adhered to, the problem of validity of excuses is not pertinent. Under either view, the application of the Supremacy Clause of the Constitution would be the same.

Article VI of the Constitution provides:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the Contrary notwithstanding. (Emphasis supplied.)

The meaning of this is clear. If there is state law contrary to federal law, state law must bow to the paramount federal authority. Applied here, if the state does have objections to the federal law based on conflicting principles, it cannot be heard to so object, for the paramount law orders them to take jurisdiction.³⁹ This clause in the Constitution was meant to insure paramountcy to the laws of the federal government when acting in its sphere. Our system was not to break down as it did under the Articles of Confederation, because of lack of power in the federal government.

The Emergency Price Control Act was passed in order to prevent inflation. It is national in scope and in purpose. State courts cannot and must not obstruct this national objective. If state courts are not open to the enforcement of these rights, the efficacy of the Act will be restricted and curtailed.⁴⁰ There is no dispute but that state courts

³⁹ See *State v. Wells*, 2 Hill 687, 692, (S. C. 1835): "I cannot understand the argument that Congress may confer the jurisdiction, and yet the state courts may refuse to exercise it. If the act of Congress may constitutionally and lawfully confer the jurisdiction, the State courts may be compelled to entertain and exercise it. Such seems to have been the view of the framers of the act, and of the Congress that enacted it. . . ."

See also, Barnett, *The Delegation of Federal Jurisdiction to State Courts by Congress* (1909) 43 AM. L. REV. 852, at 859-860: "Further, this application of the Constitution [Art. VI] proves too much. Logically, it would make the jurisdiction of the State courts not only lawful, but also compulsory." (emphasis supplied); *McKnett v. St. Louis Ry.*, 292 U. S. 23, 54 Sup. Ct. 690, 78 L. ed. 1227 (1934).

⁴⁰ *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451, 455 (D. Neb. 1942) "This court is satisfied that the legislative purpose [of the FLSA] . . . was to grant a broad jurisdiction for the enforcement of the obligations imposed under the act, and specifically to vest the plaintiff employee with the election between available courts. The reasons for that course are manifest. It was and is obvious that, except in very rare group or class actions, the amount of potential recovery under the act will be so small that the aggrieved employee will be tempted to abandon the vindication of his right unless he may institute his suit and prosecute it to effect in a court of his own choice, within his im-

mediate neighborhood, and without burdensome and disproportionate expense both in money and in time. To that end, the court considers that the congress employed apt language, in providing that the suits arising under the law might be 'maintained in any court of competent jurisdiction.'"

are the most accessible to the consumer and in most instances the same would apply to the Administrator. And if Section 205(e) is to achieve the purpose for which it was conceived, it must be utilized fully.

Because Congress has required the state court to take jurisdiction, and because the federal government is supreme in its sphere, it follows that the state court must assume jurisdiction in cases arising under Section 205(e) of the Act.

HILDA A. ASIA.

FOREIGN FUNDS AND PROPERTY CONTROL—THE POWERS AND DUTIES OF THE ALIEN PROPERTY CUSTODIAN *

Control of Foreign Funds and Alien Property

The administrative machinery to wage economic war which has gone into operation since April 10, 1940, when Germany invaded Norway and Denmark, is part of the general scheme of total war. The machinery is made up of various agencies of the government, including the United States Treasury Department, the Alien Property Custodian, and the Board of Economic Warfare. Of these agencies the Treasury Department and the Alien Property Custodian are very closely related, their combined work constituting the entire field of foreign funds and property control.

Some discussion of the general scheme of freezing control is necessary to show the position of the Custodian in the scheme. Freezing control was instituted on April 10, 1940, by an Executive Order¹ which froze the assets in the United States of nationals of Denmark and Norway. This Executive Order was issued pursuant to section 5 (b) of the Trading with the enemy Act of 1917.² The Order was amended from time to time to include countries invaded by the Axis powers,³ and on December 18, 1941, the First War Powers Act⁴ was passed, amending section 5 (b) of the Trading with the enemy

* Grateful acknowledgement is made to Professor Frederick K. Beutel, of the School of Jurisprudence, College of William and Mary, for his helpful suggestions to the author in preparing this note.

¹ Ex. O. No. 8389, April 10, 1940, 5 FED. REG. 1400 (1940).

² 40 Stat. 415 (1917), 50 U. S. C. § 5 (1940).

³ See (1943) 11 GEO. WASH. L. REV. 240 for a discussion of the amendments to the Order and a full treatment of the workings of freezing control under the Treasury Department.

⁴ 55 Stat. 838 (1941), 50 U. S. C. App. Supp. 1, § 601 et seq. (1941).

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Act. This Act broadened the powers of the President over foreign-owned property, and included the power to vest such property. Under this Act any individual within the United States is subject to the blocking provisions of the Freezing Control Order if he is within the definition of "national," that is, if he has been domiciled in or was a subject, citizen, or resident of a blocked country at any time on or since the effective date of the Order, or is acting for the benefit of or on behalf of any blocked country or national thereof. The Secretary of the Treasury has broad power to determine when an individual is deemed to be a "national" within the meaning of the Order. The devices used by the Axis powers to gain control of industry in this country by using American citizens as nominal owners ("cloaks") made the power given to the Secretary necessary. The Order includes any business enterprise within the United States controlled directly or indirectly by blocked nationals of any blocked country. The system is in effect a freezing and licensing by the Secretary. The residents in this country, by definition subject to the blocking provisions of the Order, who are considered loyal and not engaged in any attempt to harm the interests of this country are allowed to operate under license from the Secretary. Such persons are regarded as though they were not "nationals" of a foreign country.⁵

If the continuation of a business enterprise whose activities are contrary to the security of the Western Hemisphere appears to the Alien Property Custodian to be in the national interest, he is given the authority by Executive Order 9193,⁶ issued pursuant to the First War Powers Act,⁷ to vest such enterprise and continue to operate it. The broad powers delegated by the President to the Custodian under Executive Order 9193 will be discussed hereafter in detail.

Source of Power in the President to Control and Regulate Foreign Funds and Property

The source of the Presidential power to exercise control and regulation of enemy property is found in section 5 (b) of the Trading with the enemy Act of 1917, as amended by the First War Powers Act of 1941.⁸ This section greatly expands the power which was vested in the President during World War I and delegated by him to the Custodian. The original Act was based on the principle of sequestration of enemy property to prevent the enemy from gaining aid and

⁵ *Administration of the Wartime Financial and Property Controls of the United States Government*, U. S. Treasury Dept., Foreign Funds Control, June, 1942.

⁶ Ex. O. 9193, July 6, 1942, 7 FED. REG. 5205 (1942).

⁷ *Supra* note 4.

⁸ *Id.*

comfort from property in the United States which was enemy owned. Congress was to determine the disposition of the property at the end of the war. The Custodian had no power of final disposition of the property except where a sale was necessary to its preservation. An amendment to the Act⁹ made the Custodian the common law trustee of all property held by him (other than money), and vested him with absolute ownership and management of the property, which could be sold to American citizens. However, all money received by the Custodian from such sales was turned over to the Treasury to be held there for final disposition by Congress. Another amendment to the Act¹⁰ gave the Custodian power to seize all copyrights and patents which he determined were enemy owned. This gave rise to the celebrated "Americanization" of valuable patents and copyrights by the Custodian.¹¹

But the idea of *use* of property taken over by the Custodian, of whatever nature, is a new one in American handling of enemy property during wartime. The wording of section 5 (b) of the Trading with the enemy Act, as amended by the First War Powers Act of 1941, and the legislative history of the amendment must be examined in order to obtain a clear picture of the actual powers of the Custodian. The amendment authorizes the vesting of property or interests in property owned by foreign countries and nationals of foreign countries, and states that "upon such terms and conditions as the President may prescribe such interest or property shall be *held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.*" (Emphasis supplied.) The discussions in the House and the Senate Reports at the time the First War Powers Act was passed are particularly illuminating:

Title III [of the First War Powers Act of 1941] deals with the Trading with the Enemy Act, the old Trading with the Enemy Act, with certain additional powers giving the President control over communications with foreign nations, also giving the President the power to use property of the enemy that we may con-

⁹ 40 Stat. 460 (1918), 50 U. S. C. App. § 12 (1940).

¹⁰ 40 Stat. 1021 (1918).

¹¹ *United States v. Chemical Foundation*, 272 U. S. 1, 47 Sup. Ct. 1, 71 L. ed. 131 (1926). This case involved a suit by the Government to set aside a transaction by which the Custodian sold patents seized by him, which were enemy-owned, to Chemical Foundation, which was organized in 1919 to purchase enemy-owned patents seized by the Custodian and to hold the same in a fiduciary capacity "for the Americanization of such industries as may be affected thereby, for the exclusion or elimination of alien interests hostile . . . to said industries, and for the advancement of chemical and allied science and industry in the United States." The Foundation granted licenses to American citizens to make use of and sell inventions covered by the patents. The Court held that the disposition of the patents was within the authority of the President and the Custodian and that the sale was valid and according to law.

fiscate. In the last war the President could confiscate enemy property but we were not able to use it to our own advantage. This bill gives him that additional power.¹²

There is another very important change in section 301 from the present Trading with the enemy Act. Under our former law I think we still have power to seize enemy alien property and under our present law of export control we have considerable additional power over alien property, but this goes much further and gives the agents appointed by the Government the power to seize any property . . . whether belonging to friend or enemy, and to put it into use. . . . It gives us the right to utilize the property we take over. . . . This is a power that was not granted in 1917, when a similar bill was passed.¹³

While existing law permits the Government to prevent transactions, it is now necessary for the Government to be able to affirmatively compel the use and application of foreign property in a manner consistent with the interests of the United States. . . .

Section 301 would remedy this situation. It gives the President flexible powers, operating through such agency as he might choose, to deal comprehensively with many problems that surround alien property or its ownership or control in the manner most effective in each particular case. In this respect, the bill avoids the rigidity and inflexibility which characterized the Alien Property Custodian law enacted during the last war.¹⁴

While the Custodian is authorized by this important amendment to use and expend money and property if his purpose is within the purview of section 5 (b) as amended, namely, in the interest of and for the benefit of the United States, this does not mean the general public interest and benefit, but the interest sought to be promoted by the statute in question. This seems to be a reasonable limitation upon the term "national interest."¹⁵

The constitutional source of the President's power to control, regulate and seize foreign funds and enemy property is found in Article I, section 8, clauses 3, 5 and 11 of the Constitution:

- The Congress shall have Power . . .
- To regulate Commerce with foreign Nations, . . .
- To coin Money, regulate the Value thereof, and of foreign Coin, . . .
- To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .

¹² 87 CONG. REC. 10115 (Dec. 16, 1941).

¹³ 87 CONG. REC. 10120 (Dec. 16, 1941).

¹⁴ S. REPT. 911, 77th Cong., p. 2 (1941).

¹⁵ Cf. *Texas v. United States*, 292 U. S. 522, 531, 54 Sup. Ct. 819, 78 L. ed. 1402 (1934), where the Supreme Court construed "public interest," as used in the Interstate Commerce Act, as meaning public interest relating to adequacy of transportation service as stated in the Act.

The cases uphold an exercise of the war powers by Congress in a manner sufficient to reach the economic purposes of total war.¹⁶ Some of the cases even state generally that the war powers are not restricted by the Fifth Amendment.¹⁷ The history of American activities in wartime seems to lead to the conclusion that our policy has been to confiscate enemy property, not to sequester it.¹⁸ The property of English citizens was confiscated during the Revolutionary War, and this was upheld by the Supreme Court as a justifiable act by a sovereign.¹⁹ The general rule of international law is contrary to this view. The authorities agree that enemy property may not be confiscated, though there is a division among them as to sequestration, the majority believing that alien property found in a country at the outbreak of war cannot be taken at all, and the minority standing for a policy of sequestration during the period of the war.²⁰

After the War of 1812 the Supreme Court held that while a court could not condemn private property of an alien in the absence of legislative authority (which was lacking in the particular case), war gives the sovereign a right to take persons and confiscate the property of enemies.²¹ Confiscation was practised during the Civil War and upheld by the courts.²² The policy of sequestration of enemy property was a new one introduced by the Trading with the enemy Act of 1917.²³ The Act gave the President power to take over property of enemies and their allies, and provided that citizens or friendly aliens

¹⁶ *Miller v. United States*, 11 Wall. 268 (U. S. 1870); *Kirk v. Lynd*, 106 U. S. 315, 1 Sup. Ct. 296, 27 L. ed. 193 (1882); *Cummings v. Deutsche Bank*, 300 U. S. 115, 57 Sup. Ct. 359, 81 L. ed. 545 (1937).

¹⁷ *Miller v. United States*, *supra* note 16 at 304, 305; *Cummings v. Deutsche Bank*, *supra* note 16 at 120. But see *Ex parte Milligan*, 4 Wall. 2, 120-127 (U. S. 1866); *United States v. Russell*, 13 Wall. 623, 627 (U. S. 1871); *United States v. Cohen Grocery Co.*, 255 U. S. 81, 88, 41 Sup. Ct. 298, 65 L. ed. 516 (1921); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 426, 54 Sup. Ct. 231, 78 L. ed. 413 (1934). It has been held that friendly aliens are entitled to the protection of the due process clause. *Wong v. United States*, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. ed. 140 (1896); *Russian Fleet v. United States*, 282 U. S. 481, 51 Sup. Ct. 229, 75 L. ed. 473 (1931); *United States v. Pink*, 315 U. S. 203, 228, 62 Sup. Ct. 552, 86 L. ed. 796 (1942). No discussion is attempted here as to the right of citizens to compensation under the Fifth Amendment if their property is taken by the Custodian. Though some cases have stated that where the Fifth Amendment and the war powers conflict, the war power should be paramount, *Deutsch-Australische v. United States*, 59 Ct. Cls. 450 (1924), app. dis. 277 U. S. 610, 48 Sup. Ct. 432, 72 L. ed. 1014 (1928), it would certainly seem that as to citizens and friendly aliens, the restrictions and requirements of the Fifth Amendment cannot be suspended.

¹⁸ GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940).

¹⁹ *Ware v. Hylton*, 3 Dall. 199, 226 (U. S. 1796).

²⁰ GATHINGS, *op. cit. supra*, at 14.

²¹ *Brown v. United States*, 8 Cranch 110, 122 (U. S. 1814).

²² *Miller v. United States*, *supra* note 16; *Young v. United States*, 97 U. S. 39, 24 L. ed. 992 (1877).

²³ 40 Stat. 411 (1917), 50 U. S. C. App. (1941).

whose property was taken could recover it in administrative or court proceedings. The Act was held constitutional.²⁴ A recent case²⁵ has held that Section 9 of the old Act, giving an independent judicial remedy to those wronged by any act of the Custodian, is still in effect, since if it were not the Act would not be constitutional. One writer has expressed the view that the old Act as amended was confiscatory, and that the sale of patents by the Custodian to the Chemical Foundation, upheld by the Supreme Court,²⁶ was really a species of confiscation.

The Delegation of Power by the President to the Custodian

The old Office of Alien Property Custodian was abolished by Executive Order 6694 of May 1, 1934, and its powers and duties transferred to the Office of the Attorney General. The Settlement of War Claims Act of 1928²⁷ had provided a machinery for claims growing out of World War I, but in 1934 Congress passed a joint resolution²⁸ to the effect that as long as Germany was in default of her war debt, all payments under this Act were suspended. This Act was upheld as constitutional.²⁹ The payments are still suspended, leaving a large fund in the Treasury. On February 12, 1942, all the powers of the President under sections 3 (a) and 5 (b) of the old Trading with the enemy Act and the new Act were delegated by the President to

²⁴ *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. ed. 403 (1920); *Stoehr v. Wallace*, 255 U. S. 239, 41 Sup. Ct. 293, 65 L. ed. 604 (1921).

²⁵ *Draeger Shipping Co. v. Crowley*, 11 U. S. Law Week 2626 (S. D. N. Y. 1943). Here the Custodian took stock of Draeger, an American citizen, and a domestic corporation, after making a finding that the property was held for the benefit of a German corporation, and that the stock represented ownership of a business enterprise which was a national of a designated enemy country. This was denied by Draeger, who filed a motion for an order directing the Custodian to hold the property in his custody until final judgment. The suit was filed under Section 9 (a) of the old Trading with the enemy Act, giving any person not an enemy or ally of enemy a right to file suit to establish his right to property seized by the Custodian. The Custodian contended that Section 9 (a) did not apply to action taken with respect to property of a foreign national under Section 5 (b) of the Act, as amended. The court held that the plaintiff was entitled to maintain the suit, despite the fact that Executive Order 9193 (*supra* note 6) provided that any determination by the Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof, is to be final and conclusive. The court stated that Section 9 (a) is applicable to action taken under Section 5 (b) as amended, and that if no right were given to a citizen to establish in court that property taken by the Custodian is not owned or controlled by a national of a foreign or enemy country, a serious doubt would arise as to the constitutionality of the Act.

²⁶ *Zollman, The Return of Property by The Alien Property Custodian* (1923) 121 MICH. L. REV. 277.

²⁷ 45 Stat. 254 (1928).

²⁸ 48 Stat. 1267 (1934).

²⁹ *Cummings v. Deutsche Bank*, *supra* note 16.

the Secretary of the Treasury.³⁰ On March 11, 1942, the President by Executive Order 9095 delegated to the Alien Property Custodian all powers under 3 (a) and 5 (b) except those delegated prior to February 12, 1942, and specifically revoked his delegation of February 12, 1942, to the Treasury. Executive Order 9193 of July 9, 1942, amended Executive Order 9095 and set forth the powers and duties of the Custodian in detail. This Order authorizes the Custodian to take "such action as he deems necessary in the national interest, including . . . the power to direct, manage, supervise, control or vest," with respect to business enterprises within the United States or property owned by a national of an enemy country, the cash or securities of such business enterprises where the same is necessary to the conduct of the business enterprise, patents, etc., of foreign countries or in which a national of a foreign country has an interest, ships or vessels of foreign countries or their nationals, and property or interest in judicial administration in favor of an enemy country or national thereof. The Order excludes cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities, which are within the province of the Secretary of the Treasury, except to the extent that any one of the aforementioned categories should be necessary for the "maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof." The real line of division between the duties of the Custodian and the Secretary is the practical one of whether the assets seized by the United States are passive assets—cash, moneys, etc.—or active business enterprises or patents which can be put to use in the service of the war effort of the United States.

The Operations of the Office of the Alien Property Custodian

The Office of Alien Property Custodian is divided into the following branches: Investigation and Research, General Counsel, Property Division, Business Operations, Division of Liquidation, and Division of Administration of Patents, Copyrights and Trademarks. The Division of Investigation and Research makes a study of the facts concerning property to be vested, based upon reports which were filed with the Secretary of the Treasury as to foreign holdings under regulations issued pursuant to Executive Order 8389 of April 10, 1940. A report is made to the Executive Committee, which decides whether the property should be vested. If the decision is to vest the property, a Vesting Order is drawn, describing the business or property and listing the names of the owners, the natures of the interests,

³⁰ 7 FED. REG. 1409 (1942).

etc. The Division which will administer the property is notified of the Order, which is then published in the Federal Register. Notice is then given to owners or persons having custody or control of the property. If the property involved is real property, the Order is filed with the recording offices set up in the particular state involved. The same procedure is followed in vesting patents or copyrights. The property under judicial administration or in litigation is handled in one of two ways. The Custodian can vest the interest of the alien, or can substitute for him in the court proceedings.³¹ If as a result of the action or proceedings, the alien obtains money or property, this is paid over to the frozen accounts held by the Treasury Department.

Administrative machinery has been set up for persons adversely affected by a Vesting Order. After the Order has issued, any such person has one year in which to file a claim, which is heard by the Vested Property Claims Committee. The Committee will order the return of the property if it has been vested by mistake. The First War Powers Act of 1941³² makes no provision for appeal from an adverse decision by the Committee. However, the recent case of *Draeger Shipping Co. v. Crowley*³³ holds that Section 9 (a) of the old Trading with the enemy Act, providing a remedy for a person not an enemy nor an ally of enemy claiming a right in property seized by the Custodian, is still in effect.

If the property vested by the Custodian is in the form of a business enterprise, the Business Operations Division takes over and operates it so as to expedite the war effort. If liquidation of the business appears advisable, the Liquidation Division disposes of it by public sale with a notice giving any American citizen the right to buy the business or equipment. However, the Custodian may accomplish this by private sale if it is in the best interests of the United States. Real estate may be held and administered by the Property Division. Unliquidated stocks, bonds and securities are deposited in the Federal Reserve Bank of New York to be held for the Custodian. Personal property can be stored under bond, and patents and copyrights have been licensed to Americans.

Persons Affected by Foreign Funds and Property Control

The original Trading with the enemy Act³⁴ gave power to the President, which was delegated to the Custodian, to take over the

³¹ See *Estate of Marie K. Renard*, 109 N. Y. Law Journal 552 (1943), where it was held that it was proper for the Custodian to appear in a representative capacity for a resident of France in spite of the fact that the property involved had not been vested by the Custodian.

³² *Supra* note 4.

³³ *Supra* note 25.

³⁴ *Supra* note 23.

property of *enemies and allies of enemies*. The First War Powers Act of 1941, amending section 5 (b) of the old Act, gives the power to take the property or interest of *any foreign country or national thereof*. This extends the power to all aliens. The original Act contained explicit definitions of "enemies" and "allies of enemies,"³⁵ and the courts defined the terms in a number of cases decided under that Act.³⁶ Executive Orders 8389 and 9193, of April 10, 1940, and July 9, 1942, respectively, set forth a definition of the term "national" which is extremely broad in effect.³⁷

The foregoing discussion of the powers and duties of the Custodian has emphasized the relevant executive orders and The First War Powers Act of 1941, but a full consideration of the Trading with the enemy Act of 1917 was not feasible because it is impossible to determine what parts of the statute are, or are not, still in effect. This confusion is a matter which should be of grave concern to the Legislature. Congress, by Joint Resolution of March 3, 1921,³⁸ expressly

³⁵ *Supra* note 23, sec. 2.

³⁶ *Behn, Mayer & Co. v. Miller*, 266 U. S. 457, 45 Sup. Ct. 165, 69 L. ed. 374 (1925); *Hamburg-American Co. v. United States*, 277 U. S. 138, 48 Sup. Ct. 470, 72 L. ed. 822 (1928) (status of domestic corporations whose stock is owned in whole or part by enemies); see (1942) 20 TEX. L. REV. 746 for an extensive comment on the meaning of "enemy" under the Trading with the enemy Act.

³⁷ Sec. 5 E. "The term 'national' shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national or such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a 'national' as herein defined." Ex. O. 8389, *supra* note 1, as amended.

6. . . . the term 'national' shall have the meaning prescribed in Section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. . . ." Ex. O. 9193, *supra* note 6. See also, *Draeger Shipping Co. v. Crowley*, *supra* note 25, for a discussion of "enemy," "ally of enemy" and "national."

³⁸ 41 Stat. 1359 (1921).

excepted the Trading with the enemy Act from the operation of the resolution, which stated that the provisions of acts which were contingent upon the duration of the war were to be construed as though the war had ended. However, many of the sections of the old Act³⁹ contain the clause "during the present war" (emphasis supplied), which seems to indicate that these sections cannot possibly be in effect at the present time. Since the beginning of World War II, the courts have construed various sections of the old Act, treating them as though still in effect.⁴⁰ No case has been found where the court has construed one of the "during the present war" clauses, and presumably the holding in such case would be that the provision could not be in effect during this war. It would be far better for Congress to clarify the situation by proper legislation, because of the importance of the property rights involved in the taking over of alien property.

MARY M. DEWEY.

HANDLING WARTIME STRIKES: NATIONAL LABOR RELATIONS BOARD AND WAR LABOR BOARD COMPARED

Two divergent trends in methods of handling strikes and strikers have developed since the War Labor Board was set up to handle labor disputes arising in vital war industries. The National Labor Relations Board applies its usual strike doctrines during the war period because in wartime as in peacetime, it is the duty of that Board to prevent unfair labor practices. The War Labor Board, on the other hand, applies such principles as will effectively settle the particular dispute in a specific case.¹ Perhaps it is because these two Boards are foreign in their purposes, the National Labor Relations Board admin-

³⁹ Sec. 3 (d), 40 Stat. 412 (1917), 50 U. S. C. App. § 3 (d) (1940); Sec. 11, 40 Stat. 422 (1917), 50 U. S. C. App. § 11 (1940); Sec. 13, 40 Stat. 424 (1917), 50 U. S. C. App. § 13 (1940); Sec. 14, 40 Stat. 424 (1917), 50 U. S. C. App. § 14 (1940).

⁴⁰ Ex parte Colonna, 314 U. S. 510, 62 Sup. Ct. 373, 86 L. ed. 357 (1942), Secs. 2 (b) and 7 (b); Ex parte Kawato, 63 Sup. Ct. 115, 87 L. ed. 94 (Adv. Op.) (1942), Secs. 2 and 7; Draeger Shipping Co. v. Crowley, *supra* note 25, Sec. 9 (a).

¹ A recent decision of the War Labor Board effectively illustrates this distinction. The union had called a strike in protest against the employer's alleged anti-union acts. The employer filled most of the strikers' places with new employees. The union asked that the strikers be reinstated with back pay. The War Labor Board pointed out to the parties that it has no authority to make findings of unfair labor practices or to prescribe remedies predicated thereon, but in order to preserve the status quo until the National Labor Relations Board determined the question, the War Labor Board ruled that the company should offer reinstatement to the strikers with back pay. The War Labor Board will settle the dispute at hand but cannot determine questions of law arising under the Wagner Act. In re Montag Bros., Inc., W. L. B. Case No. 799, 11 LRR 780, Feb. 5, 1943.

istering the Wagner Act and the War Labor Board carrying out an Executive Order in time of emergency, that there respective decisions disclose broad distinctions in policies and principles.

A comparison of those decisions of the National Labor Relations Board, which hold the employer guilty of unfair labor practices, with those of the War Labor Board, which rule against the employer, demonstrates that the doctrines applied by the two Boards to strike situations differ in many respects.

The National Labor Relations Board, carrying out the policies of the National Labor Relations Act, has continued to uphold the right of the worker to self-organization and collective bargaining at a time when organized labor, in the national interest, has voluntarily given up the right to strike.² Under Section 8 (3) of the Wagner Act, any discrimination in regard to hire or tenure of employment or terms or conditions of employment, for the purpose of encouraging or discouraging membership in a labor organization, is an unfair labor practice, except in the case of valid closed-shop contracts. Among the circumstances which have supported charges of discrimination are:

Strikers may not be discriminated against in regard to reinstatement because of their union activity. Delegation to a company-dominated union of authority to determine who should be recalled after a strike has been held to reveal an intention to discriminate,³ and in the absence of a valid closed-shop contract, the employer is not protected from a finding of unfair labor practices by a plea that the discrimination resulted from the threat of a strike or other economic pressure by a rival union.⁴

Where a strike is caused by unfair labor practices of an employer, the employer has been ordered to reinstate the strikers, dismissing, if necessary, persons hired since the strike to replace strikers. Striking employees, upon making an unconditional offer to return to work, acquire a right to available jobs which, for the purpose of eligibility to vote in National Relations Labor Board elections, is superior to the right of new employees hired after the strikers' offer. This rule

² The declaration in the Wagner Act (49 Stat. 449, 29 U. S. C. § 151 *et seq.* (1940)) that "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike" amounts to an "express" prohibition against discharge of employees for participating in "strikes," even if the "strikes" are conducted on an employer's property during working hours. In re Cudahy Packing Co., 29 N. L. R. B. 837, 8 LRR MAN. 10, (1941).

The President "accepted" a pledge of no strikes or lockouts and an agreement that a War Labor Board should be set up by the President to handle all disputes (9 LRR 393).

³ In re Shenandoah-Dives Mining Co., 36 N. L. R. B. 1153, 9 LRR MAN. 127 (1941).

⁴ In re Greer Steel Co., 38 N. L. R. B. 65, 9 LRR MAN. 268 (1942). Also In re Borg-Wagner Corp., 38 N. L. R. B. 866, 9 LRR MAN. 305 (1942).

Foreign Exchange and Gold Policies

By JOHN DONALDSON

Written June 27, 1940

THE foreign trade of the United States during the last two decades, and particularly since 1931, has been carried on in the midst of unprecedented alterations in the international monetary situation and even in concepts concerning it. These changes cannot be recited, much less explored, here,¹ but a few of the high lights may be briefly recalled.

According to classical theory, gold was "the" balancing agent in maintaining international economic equilibrium, and this theory provided the fundamental justification of the international gold standard. Later writers suggested that the equilibrium would be maintained in the absence of gold flows, through the impact of commodity flows upon price structures, or even through shifts in international demand. Other students of money have gone further, and have looked upon the rigid gold standard as at best providing international stability at the expense of national economic autonomy. They have therefore condemned it as one which permits international transmission of economic shock, and have argued for flexible exchanges, managed by means of stabilization operations.² Meanwhile, observers have spoken of the progressive demonetization of gold in recent monetary history, and while this process is

¹ Many of the fundamental changes are objectively analyzed, and references to primary and secondary sources are given, in John Donaldson, *The Dollar: A Study of the "New" National and International Monetary System*, New York: Oxford University Press, 1937.

² See, e.g.: Gustav Cassel, *The Downfall of the Gold Standard*, Oxford Press, 1936; J. M. Keynes, *The General Theory of Employment, Interest and Money*, New York, 1936; Charles R. Whittlesey, *International Monetary Issues*,

far from complete, the phrase is significant. Also to be noted is the recently widespread belief that external currency depreciation stimulates goods exports. This notion has important limitations in both theory and practice,³ but it has undoubtedly accounted for a certain amount of so-called "competitive depreciation," or "currency warfare." An important point in this connection, as I have pointed out elsewhere, was for some time almost completely overlooked, namely, that external depreciation may affect nonmerchandise items, such as capital flows, in the balance of international payments.

WORLD MONETARY CHANGES

International monetary experience since the first World War has been almost kaleidoscopic. In the major monetary disturbances of the 1920's, only our own currency remained as before. Gradually other principal countries stabilized theirs, some at old par, most of them at devalued levels. In this partial re-establishment of the old system a new feature was added, namely, the gold-exchange standard, by which a country could count among its reserves foreign-exchange holdings and balances on gold countries. This later proved to be an element of weakness in time of emergency; for example, it facilitated the rapid run on London in 1931. In that year the world financial crisis forced England "off gold," and certain other countries followed.⁴ England then

³ This question is critically and inductively examined in S. E. Harris, *Exchange Depreciation*, Harvard Press, 1936, and in John Donaldson, *op. cit.*

⁴ "Off gold" and "on gold" are arbitrary terms, as the gold standard has several essential features, some of which may be discarded

AMERICAN EXCHANGE AND GOLD POLICY

In the modern period, until 1933, American monetary policy underwent no major change. While other currencies tumbled through a variety of post-war and postdepression experiences, the dollar remained fully on gold at old par. But the bank crisis here in March 1933 led to a series of proclamations and laws the essential features of which were: (1) internal banking and other measures looking toward liberalization of credit and general "reflation," with the 1926 price level as, roughly, the objective; (2) cessation of redeemability and free coinage; (3) temporary exchange control; (4) ultimate devaluation; (5) taking over of gold and control of international gold movements, and heavy subsequent gold purchases from abroad by the Government; (6) refusal to join in any rigid international stabilization (at the London conference in the summer of 1933); (7) setting up of the (flexible) stabilization fund; and (8) ultimate international co-operation in such stabilization.

De facto devaluation was attempted, beginning in the fall of 1933, on the theory that by increasing the price paid for gold the internal depreciation of the dollar (general commodity price rise) could be effected. The price of gold was progressively increased from the old \$20.67 per ounce to \$34.45 on January 16, 1934, and to \$35.00 per ounce on January 31, 1934, on which date *de jure* devaluation was decreed by reducing the nominal gold content of the dollar (at a corresponding figure) to 59.06 per cent of its former amount, a devaluation of approximately 40 per cent. Measures were also taken regarding silver, but, though significant, they have not formed a major part of the new monetary policy as such.

established her exchange equalization account to provide for flexibly managed, rather than rigid, stabilization.

It was essentially this system of *exchange stabilization* that we adopted after our devaluation of 1933, and that became the basis, along co-operative lines, for the Tripartite Accord of 1936, among the United States, Great Britain, and France, joined also by the several other members of the erstwhile gold bloc. In contrast with this stabilization type of exchange intervention, the direct, rationing type of *exchange control* was adopted by many countries, with significant variations in Germany and Russia. From these in turn arose all manner of special exchange agreements, some of them creating essentially a barter regime. Meanwhile the two last-named systems have tended to merge, especially since the beginning of the present war; for example, Great Britain had entered into exchange deals with exchange-control countries, and since the war began has maintained an "official" rate for certain transactions.⁵ Under the impetus of war, exchange control marches on, and in the end may become almost everywhere complete.

It goes without saying that these shifting concepts and these rapid transformations in the international monetary structure have greatly affected America's foreign trade and other international transactions and have helped to condition our own foreign-exchange and gold policy.

while others are retained. For example, England abandoned redeemability and also a fixed gold content. In 1933 the United States abandoned the former but not the latter.

⁵ See Paul Einzig, *Exchange Control*, London: Macmillan Co., 1934.

⁶ *Federal Reserve Bulletin*, April 1940, pp. 277-78; T. Balogh, in "Foreign Exchange and Export Trade Policy," *The Economic Journal*, Vol. L, No. 197, March 1940, pp. 1-26, proposes a still more elaborate system of exchange restrictions for Great Britain.

Subsequent high lights may be summed up as follows: (1) internal central banking policies generally in keeping with the new monetary and gold policy; (2) a fear for a while that the new policies would not sufficiently expand credit and prices; (3) a fear, later, that the large inflows of gold might produce such inflationary effects excessively, and a consequent "gold sterilization" measure adopted in December 1936 but abandoned in April 1938 (after the 1937 depression);⁷ (4) possible informal co-operation with the British Exchange Equalization Account; (5) official entry, in September 1936, into the Tripartite Accord for co-operation with Great Britain and France and shortly thereafter with the other former gold-bloc countries (Belgium, Switzerland, and the Netherlands) which joined in; this arrangement, however, being on a day-to-day basis.

To the outbreak of the present European war and even to this writing (June 1940), no other major, formal change has been made in our money and gold policy. Other foreign economic policies, such as the trade-agreements program, the no-credits-to-belligerents aspect of the neutrality legislation, and the control of funds of governments and nationals of invaded countries to prevent their expropriation by the invader (spring 1940),⁸ have a bearing upon the problem at hand, but are beyond the scope of this article.

⁷ The experiment had proved somewhat costly. But the desterilized gold was shifted to the Federal Reserve System, and increased the deposits of the Federal Government and later the reserves of member banks.

⁸ Note, June 7, 1940: It is reported that beginning today no securities can be imported from any country unless examined by a Federal Reserve bank, but that if they are found not to be from invaded countries, they will be released; otherwise they will be frozen, as

EFFECTS OF OUR POLICY

The phenomena which may be looked to for possible effects of our policy are both internal and external. Internally, even with the aid of vast public spending and other measures, the new monetary policy did not bring expected results, although the credit base expanded to such a point that it has provided a constant danger of enormous inflation "if the dam should ever break."

Externally, the dollar, after January 1933, fluctuated differently in terms of different foreign currencies, in some cases to the extent of the devaluation or more; in some cases less. With regard to our foreign trade, to make a long story short, our goods exports increased substantially (if irregularly) but so did our goods imports and our net balance of trade, while rising in 1933 and 1934, fell in 1935, and was exceedingly small in 1936, after which it rose greatly. Altogether the figures are far from proving the assumption of relation of currency depreciation to export stimulation.

However, the most striking changes occurred in two other items. Omitting yearly details, there was an unprecedented inflow of both gold and capital from 1934 to 1939 inclusive.⁹ Space does not permit analysis of the nature of the capital inflow. One point, however, must be made. While every item in the balance of payments may influence every other, and one must use caution in seeking causal relationships among them, there is no doubt that these gold and capital movements have been closely associated, and that they in

⁹ For figures on all the items, see U. S. Dept. of Commerce, *The Balance of International Payments of the United States*, by Amos E. Taylor, yearly, and "The Balance of International Payments in 1939," by August Maffry and Paul D. Dickens in *Survey of Current Business*, Feb. 1940; also Amos E. Taylor's

turn have a relationship to our monetary and gold policy.

THE GOLD PROBLEM

Obviously, not the whole of the problem here discussed is simply a gold problem; but much of it turns on gold, and to this we may give attention.

The central facts regarding gold may be recapitulated. Estimated world gold production¹⁰ rose rapidly from \$672,000,000 in 1929 to \$1,390,000,000 in 1939, one of the areas of greatest increase (especially to 1936) being the Soviet Union, with other very substantial increases in the United States, Canada, Australia, and Latin America. The increase in South Africa and Rhodesia was proportionately somewhat less great. American and British ownership of mines in some of these countries is to be noted in passing. Widespread currency devaluations have strongly influenced the rise in output. It is also estimated that such production increase, together with Asiatic and other dishoardings, and the automatic rise in monetary value resulting directly from the currency devaluations, brought the total value of the world monetary gold stock from about twelve billion dollars in 1929 to about twenty-nine billions at the end of 1939. Net United States gold imports aggregated about ten billion dollars in 1934-39, which was greater than the increase in non-United States production during that period and therefore represented also absorption of some of the reserves of other countries and probably of some of the dishoardings. This puts us in the position (May, 1940) of holding approximately eighteen billion dollars' worth, or about 60 per cent of the world total.¹¹

¹⁰ Figures based partly on those given in *Federal Reserve Bulletin*, March 1940, p. 253.

¹¹ Some estimates in June 1940, using a somewhat smaller world total, indicate a United States stock of more than nineteen

Some main proposals

The problem thus created has been almost endlessly discussed and alternative solutions debated in recent years and months.¹² A few high lights of the greatly varying views and proposals may be sketched here. Some of the main proposals, not all mutually exclusive, are these: (1) that the present policy be continued; (2) that the present linkage of gold and the dollar be continued but that we return to a full gold standard, by denationalizing gold and restoring redeemability, thus putting gold back into circulation, and by permitting free private imports and exports of gold; (3) that we (i.e. the Government) completely discontinue buying gold; (4) that we substantially reduce the price we pay for gold, from \$35.00 per ounce to some lower figure, perhaps the original \$20.67; (5) that we increase the dollar price of gold, say to \$41.34; (6) that we impose tariff duties on gold imports, perhaps on a graduated scale, and grant compensatory bounties on gold exports, thus establishing a dual gold price, domestic and foreign; (7) that we hold our gold and after the war use it for foreign loans to rehabilitate the world; (8) that we hold it and (blending economic and other purposes) after the war buy up all remaining armaments in other countries, with a view to preventing future wars.

On the internal side, argument for existing policy either denies the danger of an unprecedented inflation or affirms the sufficiency of existing devices (especially that of further increasing member bank reserve requirements in order to reduce

billion dollars, or 70 per cent of world stock. There are also some important quantities of gold here earmarked for foreign account, but these are not imports unless and until they are released.

present excess reserves). Adverse critics regard the danger as real, and assert that not only the older devices (of discount control and open market operations) but also the new reserve requirement authority is inadequate to stop the inflation if it begins. But the external aspect, the chief concern of this discussion, is more complicated.

DEFENSE OF EXISTING GOLD POLICY

The official defense of the external policy contends that the gold inflow has occurred largely because of the capital inflow and partly because of an active trade balance (as in 1938), and cites the well-known flight from unfavorable conditions abroad as the chief reason for the capital flow. It also, however, emphasizes the belief that recovery and stability here also count, and that these alleged conditions are proved by that inflow. In supporting the \$35 price per ounce it asserts that within narrow limits (and translated of course into foreign currencies at current exchange rates), substantially this same price prevails in other countries, and that slight variations in the price of gold would still occur if our official price were reduced to \$10 or increased to \$60. Getting to the heart of the matter, it further deals with the question whether "gold comes to the United States in large amounts because we give more goods and services for a dollar (or its monetary equivalent in foreign currencies) than does any other country." With some qualification it asserts that this is not the case, and endeavors to prove the point by claiming:

Were it true that an ounce of gold had a significantly higher purchasing power over American internationally traded goods than over foreign goods, indirect but definite evidence would be revealed in our trade figures. Our export excess would have so increased since 1933 that either we would

have drained the outside world of all its monetary gold, or we would have forced other countries to adopt strict exchange or import controls or much higher tariff schedules. No such developments have occurred. (?!)

Capital flows had just been mentioned, but immediately the matter is explained in the outdated and inadequate terms of goods and gold alone, as if they were the only items in the balance of payments. And exchange and import controls have been the order of the day abroad. And the draining process continues!

Against stoppage of our official gold buying, at least unilaterally (i.e. without co-operative support from others), it is argued that this would cause the dollar to appreciate indefinitely on the exchanges, with consequent shrinkage of our exports, would disrupt all foreign exchange and bullion markets, and would in general lessen public confidence in gold as a medium—which would be particularly unfortunate for us since we possess so much gold. This last point is somewhat like admitting, in the vernacular, that the United States has a golden bear by the tail and cannot let go.

The arguments against a reduction in our buying price are, with some modifications, of a similar order. If the change were small the effects might not be great, but capital imports might continue or increase anyway; if there were foreign anticipation of further reduction, more foreign gold might be "dumped" here. If the reduction were sharp and substantial, say to \$25, there might be a drop in gold inflow or even an outflow. But the external appreciation of the dollar would greatly hamper exports and induce a large inflow of competitive imports, and the internal deflation would greatly retard recovery—so runs the argument. And the possible outflow of gold would probably go

to countries which already have a good deal, and not to the countries which most need it. Incidentally, it is added, gold production is important to a number of countries, and a stoppage or price reduction in our buying would greatly lessen their prosperity and indirectly ours; because they could then buy less of our merchandise exports. It is admitted that the gold drain from other countries is unfortunate for them and thus indirectly for us, but, it is said, this cannot be helped. The official arguments seldom mention the fact that a reduction in our gold price to its former level would wipe out the large "bookkeeping" profit our Government made when it devalued the dollar.¹⁸

As for the position in which we are placed by possessing great amounts of gold, it is admitted that these quantities are far more than enough for internal purposes, but the assertion has been noted that this can be controlled; these stocks are probably more than enough for settling international balances, which is the more important function, but this excess, it is said, need not cause much concern. At a time of great international disturbances, the excess of gold provides protection against any "run on the United States." (A significant point.) Nor are we in danger of getting "stuck" with our gold, because, whatever may be the future internal monetary policies of the various countries, it is argued that gold will always be needed and desired for settling international balances. Moreover, while our Government controls our gold flow, it always allows whatever imports or ex-

¹⁸ It has been estimated recently that every dollar of reduction in gold price would cost the Treasury \$550,000,000, and that if the price were cut to \$25 this would wipe out the \$1,800,000,000 in the stabilization fund, and the Treasury would have to borrow \$3,700,000,000 of the gold certificates now held by the Federal Reserve banks as reserve for their

ports of the metal are needed for such commercial and financial transactions.

CRITICISMS OF EXISTING GOLD POLICY

If the contentions in favor of the external aspects of the present policy which are advanced by officials and by economists of the same view are somewhat qualified but nevertheless comprehensive, the attacks upon the policy are rather more sweeping. They usually begin and often end with two familiar pieces of ironic humor: (1) it is stupid to go to the trouble and expense of digging gold in the Transvaal and burying it again at Fort Knox; (2) after "Uncle Sam" has drained the world of its monetary gold stock, the other nations will completely demonetize gold and "leave Uncle Sam holding the bag." Beneath these grim jests, of course, lie serious analyses. Some of the facts and arguments on this side of the problem have been noted at various points above. Nor do the critics necessarily deny all the claims of the advocates.

A representative line of reasoning may be traced. Our inflow of gold cannot be attributed to our devaluation of 1934, especially since other countries were devaluing also. Nor is a difference in national price levels to be given as the cause; the proof of this is given more logically than by the advocates, by pointing out that at least prior to 1938 our net credit on merchandise trade and on interest and dividends was declining and our net debit on account of services was rising; this would tend to cause an outflow of gold. The explanation lies in the net inflow of capital. Moreover, the gold did not flow in because the capital was flowing in; *the inflow of gold caused the inflow of capital!*

This is a highly significant point, and undoubtedly true in large part; but it rests on the assumption that "gold is

can claims on the outside world, but to establish foreign claims against this country. . . ." Re-examination of the nature of the capital movements shows that this has not been completely the case, but it has been partly so.

It is then argued that foreign monetary authorities have discretionary authority over gold movements, and, unhampered by a commitment to buy (and sell) gold at a predetermined price, can cause it to be exported to the United States (or not) as they wish. This of course hinges upon the balance of payments, i.e., upon the willingness of the foreigners to buy something from us; but they have in fact been very willing to buy securities and short-term dollar claims, and to buy, very recently, rather more goods, especially war goods.

Some significant arguments

The familiar reasoning is presented that under the old gold standard these inflows would have been self-corrective, since they would have tended to depress commodity prices in the countries from which they came and to increase such prices here, thus stimulating imports of goods into, and inducing counterbalancing exports of gold out of, this country (which was always at least good *theory*); but under present conditions gold is not used as money or a regulator of money in the other countries concerned (since they have no fixed content), and in this country it is so controlled as to have had, as yet, no very great tendency in fact to push the dollar upward on the exchanges and thus to reverse the old-time process.¹⁴

This is a significant point. Even more significant is the contention that the flight of "hot" money to this country could not have attained the pro-

¹⁴ In recent months (i.e. during the present war) many other leading currencies have fallen greatly in terms of dollars, but this

portions it has, had the United States not maintained its \$35-an-ounce purchase policy. Perhaps at least as important as the \$35 price, one may add, possibly more so; in fact, has been the unlimited market which our Government has thus maintained by buying gold freely. Looking ahead, the countries which have sold us the gold are not likely to want soon to take it back, since that would be inflationary and expensive for them; although a motive for holding at least some of it might be a desire to keep the dollar high on the exchanges so that American goods exports would be at a competitive disadvantage.

Also significant is the argument, not only that almost nowhere else does gold any longer serve its old function as an internal regulator of monetary supply and therefore of commodity prices, but also that its function of adjusting international balances is now "perverted" and "in process of atrophy," while at the same time the United States, having abandoned redeemability, nevertheless has effected a sort of compromise whereby we still have a modified gold standard, i.e., a fixed gold content for our currency and a fixed gold-purchase policy. As a consequence, foreigners mostly prefer to have dollar claims instead of gold, and are likely to continue to do so, so that our gold dilemma increases. The benefit goes to gold producers (who are gaining from low gold production costs and the high price for gold made available by the United States), and in another and important sense to those who obtain dollar claims, and the burden is borne by the United States. So runs the criticism of the American gold policy.

THE OUTLOOK

But the critics, conservative and otherwise, have frank difficulties in offering an acceptable solution. Our return to

the co-operation of other countries, under present conditions is practically inconceivable; one of the many difficulties would be the return to the necessary international lending. The proposal to *increase* further our buying price for gold is occasionally urged on the ground that this would depress the dollar on the exchanges, stimulate our commodity exports, and thus restore equilibrium. But with gold divorced from money and prices in most other important countries this is chimerical, and might even have the opposite effects because of foreign anticipation of further gold-price increases on our part. If we undertook to *lower* our gold purchase price, we would be in danger of suffering at least some of the consequences pointed out by the Treasury.

If we made a serious mistake in setting up the original purchase plan, strict logic would indicate that we correct it now, by lowering the official price, or "turning it [gold] loose" to find its own level, which would probably be far below \$35; but the very practical factors already mentioned prevent this from being feasible. Again, to permit inflation here to run its course, in proportion to our gold holdings, would be equally impractical and most unfortunate. The scheme to impose graduated tariffs upon gold imports and to grant subsidies on gold exports, and thus to create a two-price system in which gold imports would be checked, gold exports stimulated, and our gold holdings preserved at present value—this scheme is ingenious, but scarcely workable. The very arguments of its advocates regarding foreign preference for dollars tell against it; the subsidy on gold exports might have to be very large in order to change this preference.

In short, whatever elements of folly may, by fairly general admission, exist in the present policy and persistence in

however important it may be for us and doubtless for world economy in general to get gold back into greater use and better distribution, no panacea presents itself under present conditions.

The outlook is clouded by unprecedented economic uncertainties and by the highly unpredictable outcome of the present lightning war. During the last war some nations turned from prohibition of gold exports to prohibition of gold imports; one cannot fight with gold, nor eat it. Moreover, if after the present struggle large economic blocs emerge, inter-national trade may diminish, and, also, the trend toward barter may continue or increase. Even ignoring these further possible world economic transformations, the United States can dispose of its gold in a "normal way" only by attaining very great net imports of goods and services or by making huge loans. Precisely the opposite of the former is likely, and as for the latter, exhausted nations calling for rehabilitation will need goods, not gold.

For the future, only some frankly political solution can be imagined, such as distributing our gold by gift among the American nations in order to establish a hemisphere currency bloc—and any such schemes are of course highly visionary. Economically we made a mistake, and apparently we are "stuck"; but in the absence of a panacea, for the present the only common-sense expedient is to be prepared to pocket our golden loss and profit by the experience in a rapidly changing world economic order.

BIBLIOGRAPHICAL NOTE ON THE GOLD PROBLEM

A few of the more significant writings, in addition to ones previously cited, may be indicated here: (1) U. S. Treasury Press Release No. 16-83, consisting of a letter of March 14, 1939 from Senator Robert F. Wagner, chairman of the Banking and Currency Committee of the Senate, and a letter of reply dated

ury Henry Morgenthau, Jr., the latter extensively defending the existing governmental policy. (2) Fritz Lehmann, "The Gold Problem," *Social Research*, Vol. 7, No. 2 (May 1940), pp. 125-50, largely supporting and elaborating the Treasury's arguments. (3) Frank D. Graham and Charles R. Whittlesey, "Has Gold a Future?" *Foreign Affairs*, Vol. 17, No. 3 (April 1939), pp. 578-98. (4) The same authors, *Golden Avalanche* (Princeton, 1939), substantially along the lines of their article just cited, viewing the problem as serious and condemning the current policy. (5) E. A. Goldenweiser, "The Gold Problem Today," *Federal Reserve Bulletin*, Jan. 1940, pp. 11 *et seq.*, a concise and objective statement of the problem. (6) S. E. Harris, "Gold and the American Economy," *Review of Economic Statistics*, Vol. 22 (Feb. 1940), pp. 1-12. (7) R. H. Brand, "Gold: A World Economic Problem," *International Conciliation*, No. 333 (Oct. 1937), pp. 663 *et seq.* For a treatment of the problem as it stood earlier, (8) John Donaldson, "Gold and International Trade," *Gold: A World Problem*, Academy of World

Economics, 1932. Further reference may also be made to (9) John Donaldson, *The Dollar: A Study of the "New" National and International Monetary System* (New York: Oxford University Press, 1937), especially Chaps. V, VI, and VII; and (10) Paul Einzig, *The Future of Gold*, New York: The Macmillan Co., 1935. In the present article above, considerable emphasis has been given to the Morgenthau letter on the one side, and to the Graham and Whittlesey arguments on the other. A few further current references may be given: (11) Discussions of the problem in current issues of bank bulletins, e.g., that of The National City Bank of New York for May 1940 and June 1940. (12) Address of Secretary Morgenthau before the National Institute of Government, Washington, D. C., Friday, May 3, 1940, a more popular and unqualified and less objective defense of present policy than that in his well-known letter to Senator Wagner cited above. (13) A letter of October 24, 1939, from Secretary Morgenthau, replying to a letter of October 17, 1939, from Senator A. H. Vandenberg.

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The American Farmer Looks Abroad

By L. A. WHEELER

Written June 22, 1940

TO A large extent the agricultural programs and policies of the United States since the end of the World War have been directed toward the correction of maladjustments caused by the war. Basically, these maladjustments consisted, on the one hand, of expanded producing capacity and, on the other, of reduced effective demand resulting from the loss of foreign markets. The significance of agricultural policies in relation to foreign trade cannot be understood except in the light of the basic relationship of American agriculture itself to foreign trade.

RISE AND DECLINE OF AGRICULTURAL EXPORTS

Beginning with Colonial days, the agriculture of the United States has been dependent upon foreign markets. Tobacco from Maryland, Virginia, and the Carolinas was the outstanding export product in Colonial times. Cotton exports started to develop in the early years of the nineteenth century, and soon cotton became the leading export product of the United States, a position it has retained practically up to the present time. With the opening up of virgin land in the Middle West and the development of rail and water transportation around the middle of the nineteenth century, other agricultural products became important in our export trade. Among these may be mentioned such cereals as wheat, corn, and barley, and such livestock products as beef, pork, lard, cheese, and butter.

These vast agricultural exports of the nineteenth century were made possible by a combination of factors. Of these the most important were the opening un

of new and fertile land and the introduction of cheap transportation in the West. However, the large exports were made possible by prices which often yielded the producer little, if any, return. At the same time the growing industrialization and the expanding population of Western Europe called for quantities of foodstuffs and agricultural raw materials far beyond the ability of European agriculture to supply. Of all the surplus-producing countries, the United States was in the best position to satisfy this growing European demand, and the liberalization of European commercial policy cleared the way for the flow of American agricultural exports.

Another important fact should be noted. In the early years of our national life it was necessary to obtain capital to develop the potentially vast resources of industry, mining, and agriculture. This capital could be obtained only by borrowing abroad, and this borrowing was possible largely because of the potential producing capacity of American agriculture. The large active (export) balance of trade which developed in the last quarter of the nineteenth century and paid the interest and principal on the accumulated debt, consisted mainly of huge exports of agricultural products.

Around 1900, agricultural exports from the United States tended downward. This downward trend was due primarily to the fact that the requirements of our increasing population for certain agricultural products, notably livestock products, was expanding more rapidly than production; and, second, to the emergence of greatly increased

Captured Enemy Property: Booty of War and Seized Enemy Property



William Gerald Downey, Jr.

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CAPTURED ENEMY PROPERTY: BOOTY OF WAR AND SEIZED ENEMY PROPERTY

BY WILLIAM GERALD DOWNEY, JR.*

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In an address before the 1949 annual meeting of the American Society of International Law this writer remarked that the laws governing captured enemy property have never been codified or collected in one place and are very difficult to find and apply.¹ The lack of a handy tool in the field of captured property has been noted at times by others, including Professor H. A. Smith, formerly a colonel with the British 21st Army Group, who observed that the "law of booty is almost unwritten"² and Judge Manley O. Hudson, who wrote some years ago in an editorial in this JOURNAL that the "literature on captured property and war booty seemed inadequate."³

In the fall of 1947 the now famous case of the captured Hungarian horses focused the attention of the Congress as well as that of the various interested executive departments of this Government on the difficulties arising in the application of the legal principles governing captured property when faced with the political concept of restitution, and the various considerations inherent therein.⁴

I—DEFINITIONS

The first question to be determined is: What is captured enemy property?

Generally speaking, any property which is useful in war or is taken or seized on the ground of military necessity for the purpose of depriving the enemy of its use or of turning it to the captor's advantage is considered

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¹ Proceedings, 1949, p. 104.

² Col. H. A. Smith, "Booty of War," XXIII British Yearbook of International Law (1946), p. 227.

³ Manley O. Hudson, "A Soldier's Property in War," this JOURNAL, Vol. 26 (1932), pp. 340, 342.

⁴ See 80th Cong., 2d Sess., Report of a Subcommittee of the Committee on Armed Services, United States Senate, Questions of Ownership of Captured Horses (Washington, D. C.: Government Printing Office, 1948).

captured enemy property.⁵ However, international law restricts the taking or seizing of enemy property to that property having the nature of personal as distinguished from real property. Enemy public property and enemy private property are the two classes of enemy personal property, *i.e.*, enemy chattels, susceptible of becoming captured enemy property.⁶

Enemy *public* property is defined as chattels, the title to which is vested in a state or in any agency of such state. Enemy *private* property is defined as chattels, the title to which is vested in an individual, a private corporation or a public corporation not owned by the state or by an agency of the state.

Each of the three words in the term "captured enemy property," has a special significance of its own. John Bassett Moore has ably stated that "The word 'capture' is in law a technical term, denoting the hostile seizure of persons, places and things. . . ." ⁷ The Supreme Court of the United States has defined the word "enemy" as meaning a "State which is at war with another State."⁸ The word "property" as herein used is restricted to personal property or chattels, and has been defined "in the strict legal sense as the aggregate of rights which are guaranteed and protected by law; more specifically . . . ownership, the unrestricted and exclusive right to a thing."⁹

It would appear therefore that the term "captured enemy property" may be legally defined as "*Chattels, the aggregate of unrestricted and exclusive rights in which has been acquired through hostile seizure on land, in conformity with the international law of war, by a belligerent state from an enemy state or from the inhabitants thereof.*"

Captured enemy property is a fairly modern term which has often been used synonymously with the older term "war booty," recently discussed in this JOURNAL as follows:

"War booty," strictly defined, is limited to movable articles on the battlefield and in besieged towns. Private property which may be taken as booty is restricted to arms, munitions, pieces of equipment, horses, military papers, and the like. Public enemy property which may be seized as war booty is limited to movables on the battlefield, and these need not be for military operations or necessity.¹⁰

It will be readily understood, then, that the term "captured enemy property" defined above embraces much more than the term "war booty,"

⁵ See Oppenheim, *International Law*, Vol. II, §§ 133-145; Feilchenfeld, *The International Economic Law of Belligerent Occupation*, pp. 51-61, 93-107; Spaight, *War Rights on Land*, pp. 410-418.

⁶ *Ibid.*

⁷ John Bassett Moore, *International Law and Some Current Illusions*, p. 21.

⁸ *Swiss National Insurance Co. v. Miller*, 267 U. S. 42 (1924).

⁹ *Black's Law Dictionary* (3d ed.), p. 1447.

¹⁰ Daniel H. Lew, "Manchurian Booty and International Law," this JOURNAL, Vol. 40 (1946), p. 584, at 586.

in that the former includes not only personal property captured on the field of battle, but also personal property seized or requisitioned by an army of occupation.

The concept of war booty is as old as recorded history. It has developed over a period of many centuries from the ancient practice by which the individual soldier was considered to be entitled to take whatever he could find and carry away, to the modern rule under which only the state is entitled to seize property as war booty. The ancient writers, Belli, Grotius and Vattel, were in agreement that the taking of war booty by individual soldiers for their own use was within the legal rights of such soldiers.¹¹ Recently and concurrently with the development of the theory of the inviolability of private property, the practice of warring nations has tended to restrict the taking of war booty by individual soldiers for their own use. Nearly all of the modern writers, particularly Calvo, Fiore, Davis, Hyde and Oppenheim, have condemned the ancient practice and have thrown the weight of their authority behind the idea that the taking of war booty is a right belonging only to a belligerent state.¹² Heffter, however, standing alone among the moderns, believes that international law permits individual soldiers to take war booty for their own use in exceptional cases as a special reward for their efforts.¹³

Opposed to the concept of war booty is the concept of requisitions which, according to Oppenheim, is the outgrowth of the eternal principle that war must support war. Around the beginning of the eighteenth century the armies of civilized nations began to requisition from the inhabitants of the invaded country such property as was needed by the army in lieu of the former practice of appropriating all public or private property obtainable.¹⁴ For centuries the generals of invading armies never gave any thought to paying for requisitioned property, but during the nineteenth century a practice of paying cash for requisitioned property grew up.¹⁵ With the coming into force of the Hague Regulations it became a legal requirement that payments for requisitions must be made in cash, or if payment in cash is impossible, acknowledged by receipt.¹⁶

¹¹ Belli, *De Re Militari et Bello Tractatus* (Translation, Vol. II, Carnegie Endowment for International Peace, 1936), p. 106; Grotius, *On the Law of War and Peace* (Translation, Vol. III, Carnegie Endowment for International Peace, 1925), p. 672; Vattel, *The Law of Nations* (Translation, Vol. III, Carnegie Endowment for International Peace, 1916), p. 292.

¹² Calvo, *Le Droit International Théorique et Pratique*, Vol. IV, p. 240; Fiore, *Nouveau Droit International Public*, Vol. III, pp. 1381-1382; Davis, *The Elements of International Law*, p. 310; Hyde, *International Law*, Vol. III, pp. 806-809; Oppenheim's *International Law* (Lauterpacht, 6th ed.), Vol. II, p. 310.

¹³ Heffter, *Das Europäische Völkerrecht der Gegenwart* (8th ed.), § 135.

¹⁴ Oppenheim, *op. cit.*, p. 316.

¹⁵ Keller, *Requisition und Kontribution*, pp. 5-26.

¹⁶ Art. 52, Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention IV of Oct. 18, 1907, 36 Stat. 2277; Department of State, *Treaty Series*, No. 539; 2 Malloy's *Treaties* 2269.

II—BOOTY OF WAR

It has long been a basic principle of the international law of war that enemy *public* property captured on a battlefield becomes the property of the capturing Power.¹⁷

A recent example of the application of this principle is contained in the case of one X, who during the fighting in France in 1944 investigated a hastily evacuated enemy regimental headquarters and found therein a box of French francs. He kept the box of francs and later used them to buy U. S. money orders which he sent to his wife. X was tried and convicted by court martial for violation of Article of War 80.¹⁸ In its holding the Board of Review stated that Article of War 80 was in accordance with the principle of the international law of war that enemy public property captured in war becomes the property of the government or Power by whose force it is taken, and does not become the property of the individual who takes it.¹⁹

A similar case involving currency, reported by Colonel H. A. Smith,²⁰ concerned three Belgians who on September 3, 1944, were walking along a country road and found in an abandoned German truck two boxes of currency containing 269,940 Belgian and 309,165 French francs. This money, less a certain amount alleged to have been spent by or on their respective wives, was subsequently discovered by the Belgian police in the men's homes. The men were tried and sentenced by the Belgian courts. In this case the physical identity of the currency which had been stolen was clearly established, so there was no difficulty in treating it as booty of war. The crime against Belgian law which had been committed consisted in the unlawful possession of Allied property.

Another case involving currency arose from a claim submitted by an American soldier who was wounded in action against the Germans during the summer of 1944 and took cover in a shell hole where he found a wounded German officer. The German is reported to have said: "Here's something for you, there's plenty more where I got that," and to have given the soldier French currency in the value of \$4,942.87. At the time that he was evacuated to a hospital, the soldier turned over the currency to an American finance officer. Later he submitted a claim for the amount of the money. His claim was denied on the grounds that the circumstances

¹⁷ *Oakes v. U. S.* (1898), 174 U. S. 778, 786; *Brown v. U. S.* (1814), 8 Cranch 110; Oppenheim, *op. cit.*, Vol. II, p. 307; Spaight, *War Rights on Land*, p. 198; Wheaton's *International Law* (7th ed.), p. 307; *Ware v. Hylton* (1814), 3 Dall. 199, 226; *Field Manual* 27-10, par. 327; *Davis, op. cit.*, p. 310; *Hague Convention IV*, 36 Stat. 2277; *Geneva (Prisoners of War) Convention*, 47 Stat. 202; *Geneva (Red Cross) Convention*, 47 Stat. 2074.

¹⁸ For text of Article of War 80, see below, p. 499.

¹⁹ 4 *Bulletin of the Judge Advocate General of the Army* (hereafter referred to as *Bull. JAG*) (1945) 338.

²⁰ *Smith, loc. cit.*, p. 235.

of the gift indicated that the money did not belong to the German officer and that unexplained possession by soldiers in the field of unusually large sums of money would justify the conclusion that the money belonged to the enemy government. If so, upon capture it became the property, not of the individual captor, but of the nation in whose army he served.²¹

It is generally held that title to captured enemy public property susceptible of becoming war booty passes from the losing Power to the capturing Power immediately upon the effective seizure, that is, as soon as the property is placed under substantial guard and is in the "firm possession" of the captor, or at the latest, within 24 hours after the seizure,²² without the necessity of an adjudication by a court as is required in the case of prizes captured at sea.²³

It is further generally held that when such a capture becomes perfect, *i.e.*, when title to the property is vested, a subsequent sale is good even against the former owner. The principle is thus established that whatever divests the possession of the original owner and substitutes the military in his place is good capture.²⁴

An interesting and enlightening illustration of these principles is the case of the captured Iranian pistol. During the war certain pistols of American manufacture were shipped to the Soviet Union under Lend-Lease authority. Among these pistols was No. 943481. The history of this pistol from the time of its arrival in Russia until the day it was captured by the Iranian Army in operations against the Iranian rebels in Azerbaidjan is unknown. However, the facts are clear that this pistol was part of a caché of arms which was captured by the Iranian forces during the Iranian civil war. Later the Chief of Staff of the Iranian Army presented the pistol as a trophy of war to a United States Army officer serving as an observer with the Iranian forces. The question of title to the pistol was raised and it was held that legal title had been vested in the Iranian Government by reason of capture. Assuming that the Iranian Government authorized the gift to the United States observer, it would appear that title to Pistol No. 943481 was vested in the United States observer. However, the attention of the interested officer was called to the clause of the United States Constitution which provides that no person holding an office of trust under the United States, shall, without the consent of Congress, accept any present from a foreign state.²⁵

²¹ 4 Bull. JAG (1945) 390.

²² *Oakes v. U. S.*, *supra*; *Porte v. U. S.*, *Devereaus' Reports* (Ct. Cls., 1856), p. 109, § 433; *Wheaton's International Law*, p. 307; Halleck, *International Law*, p. 366; *Lawrence, Principles of International Law* (6th ed.), p. 430.

²³ *Lamar v. Browne* (1875), 92 U. S. 187, 195; *Young v. U. S.* (1877), 97 U. S. 39, 60; *Wheaton, supra*; *Davis, supra*, p. 211; 3 *Phillimore, International Law*, p. 213.

²⁴ *Hannis Taylor, A Treatise on International Public Law*, p. 540.

²⁵ CSJAGA 1949/1355, March 2, 1949. *Mss. opinion.*

An examination of the origin of the rule of reduction to firm possession indicates that it was during the 16th century that the rule of "possession for 24 hours" was first applied. Later the rule was established that in respect of movable property title went with the seizing and that the mere act of seizing determined the right of property therein, provided that no property was seized the very nature of which had placed it beyond capture.²⁶

C. H. Calvo, writing in 1896, stated the general proposition that:

In order that the belligerent who comes into possession of movable property of the enemy may be able to acquire the serious and real title to these goods, it is absolutely necessary that he retain them in his power for more than 24 hours, the time generally considered as sufficient to place this booty in safety.

Such is the theory, but grave difficulties present themselves when we examine the basis on which rest the rights which war confers concerning private property and the exact moment at which it can be admitted that there is a legitimate transfer of property.²⁷

In our day, Calvo stated, the transfer of title is considered as taking place instantaneously from the moment of capture and the principle of 24 hours is no longer used except in maritime war.²⁸

The Legal Adviser of the Office of Military Government for Germany (OMGUS), in an opinion dated August 5, 1947, considered the question of the applicability of the term "reduction to firm possession" to certain items of captured enemy property which had not been seized but were located in the area of operations. He stated that:

... a belligerent does not acquire title to enemy public movable property until he has reduced it to firm possession. It appears that "firm possession" requires some manifestation of intention to seize and retain the property involved and some affirmative act or declaration of a possessory or custodial nature with respect to the property. The circumstances which will satisfy these two elements of firm possession will, of course, vary in each case. It is, however, our conclusion that the general occupation of an area by a belligerent is not of itself sufficient to satisfy either of the two elements of the doctrine of firm possession.²⁹

An interesting case involving the necessity for reduction to firm possession arose in connection with certain Confederate cannon which were found during World War II lying on the bottom of a certain river in Arkansas where they had been placed by the Confederate forces during the Civil War. It was held in 1947 that such cannon "became the property of the United States when the area where the cannon was located

²⁶ Calvo, *op. cit.*, Vol. IV, § 2210, translation supplied.

²⁷ *Ibid.*, § 2208.

²⁸ *Ibid.*, § 2210.

²⁹ IX Selected Opinions, OMGUS, 57, 60.

was captured by the Federal forces and continued to remain the property of the United States to this time."³⁰

It is necessary to note that these two cases are not in agreement as to what is needed in order to achieve reduction to firm possession. In the Confederate cannon case it was held that mere seizure and occupation of the territory by the Federal forces was sufficient to reduce the property to firm possession and thus to transfer title to the United States Government. In the OMGUS case, on the other hand, it was held that some indication of an intention to seize and reduce to firm possession must be shown in order to transfer title. It is the opinion of this writer that the OMGUS view is preferable and that some manifestation of intention is necessary. It would furthermore appear that the case of the Confederate cannon could have been decided on much stronger ground, such as that of abandoned property, rather than on the ground of captured enemy property.

There are several classes of property exempted from the rule that captured enemy *public* property becomes the property of the captor state.³¹ The Geneva (Sick and Wounded) Convention of 1929³² provides that the *matériel* and means of transportation of mobile sanitary formations are not generally subject to seizure, but that in case of urgent necessity, after the wounded and sick have been provided for, such material and transportation may be requisitioned. The same convention provides that aircraft used as sanitary transportation, provided it meets the other requirements of the convention, is not generally subject to seizure. The Hague Regulations³³ provide that works of art and science and historical monuments may not be seized, and the Geneva (Prisoners of War) Convention of 1929³⁴ provides that all effects and objects of personal use, except arms, horses, military equipment and military papers, shall remain in the possession of prisoners of war, as well as metal helmets and gas masks.

It is now generally recognized that *private* enemy property is immune from capture on the battlefield.³⁵ There are, however, several exceptions to this rule. Military papers, arms, horses and the like can be seized as

³⁰ 6 Bull. JAG (1947) 238-239.

³¹ See Field Manual 27-10, para. 188-190.

³² See Arts. 14-18, Arts. 33-37 of the Geneva (Sick and Wounded) Convention of August 12, 1949, have similar provisions pertaining to mobile and fixed sanitary installations as well as aircraft used as hospital transports.

³³ See Art. 56. In respect of the present immunity from capture of works of art and science and historical monuments, it is interesting to note that Richard R. Baxter in General Orders 100, The Code and its Origin (still in MSS), has pointed out that Francis Lieber was of the belief that works of art and science should be seized "for the sake of chastisement." Fortunately such views did not prevail.

³⁴ See Art. 6. Art. 18 of the Geneva (Prisoners of War) Convention of August 12, 1949, contains similar provisions. None of the Geneva Conventions of 1949 have been ratified by the United States.

³⁵ See note 5 above and sources cited therein.

war booty whether they can be used for military operations or not, and the mere fact that enemy private property has been found on a battlefield entitles a belligerent to seize it. Thus, in two cases involving the diaries of former high-ranking German officers, it was held in one case that if the diary was so related to the official duties of the writer that it might be considered as properly a part of the official papers pertaining to the German war effort, it may properly be considered to be "military papers," but in the second case it was held that if a similar diary reflected merely the personal observation of the writer, it would not constitute "military papers" and therefore must be considered as private property protected by the Convention.³⁶

It has been held in a recent case involving private property that if enemy private property was unlawfully taken by an individual member of the occupying forces from the original enemy owner or possessor, such misappropriation or taking would constitute a compensable claim, provided the seizure did not occur as an act of any of the armed forces engaged in combat, and further provided that the claim were asserted within four months or sufficient cause for delay in presenting the claim were shown.³⁷

The general rule, as expressed in Field Manual 27-10, *Rules of Land Warfare*, is that private property cannot be confiscated.³⁸ Here too, however, there is an exception which provides that private property can be seized only by way of military necessity for the support of the army.³⁹

The rule concerning property of unknown ownership is that if the ownership of property is unknown, or if, as frequently happens, there is any doubt as to whether it is public or private, it should be treated as public property until such time as the ownership is definitely settled.⁴⁰ Thus, in a case involving French currency of unknown origin captured by an American soldier, it was held that as it was possible that the money had been taken from the French Government, and because the ownership of the money was not known with certainty, it should be treated as public property in accordance with paragraph 322 of Field Manual 27-10. Therefore, in the absence of further proof of the origin and ownership of the money, the soldier concerned had no valid legal claim thereto.⁴¹

Joint captors are those who have assisted the actual captors to make the capture. In order that title to the captured property may vest in each of the joint captors it is necessary that there be a union of both forces and that both forces be under the command of the same officer at the

³⁶ CSJAGA 1949/2472, March 25, 1949. Mas. opinion.

³⁷ X Selected Opinions, OMGUS, 50.

³⁸ Field Manual 27-10, par. 326.

³⁹ *Ibid.*, par. 330.

⁴⁰ *Ibid.*, par. 322.

⁴¹ 4 Bull. JAG (1945) 390.

time of the capture. Community enterprise does not constitute a sufficient bond of association to justify joint sharing.⁴² Therefore it is the opinion of this writer that German property captured by the United States Fifth Army in Italy would not be considered as a joint capture even though the British and United States forces were fighting in Italy under a supreme commander. However, German property captured by a United States infantry regiment, aided in such capture by a British infantry brigade on the right flank, both units being part of a task force under the command of a United States officer, should be considered a joint capture and title to such captured property should be considered as equally vested in the United States and United Kingdom as joint captors.

III—SEIZED OR REQUISITIONED ENEMY PROPERTY

The laws governing enemy property seized or requisitioned by an army of occupation are more complete than those concerning property captured on the battlefield. The rules governing the seizing or requisitioning of such property are well fixed.

It has long been a general principle of the law of war that enemy *public* property may be seized by an army of occupation.⁴³ In addition, Article 53 of the Hague Regulations⁴⁴ provides that:

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Paragraph 332 of Field Manual 27-10, *Rules of Land Warfare*, in discussing what items are included in the second paragraph of Article 53, states:

The foregoing rule includes everything susceptible of direct military use, such as cables, telephone and telegraph plants, horses and other draft and riding animals, motors, bicycles, motorcycles, carts, wagons, carriages, railways, railway plants, tramways, ships in port, all manner of craft in canals and rivers, balloons, airships, airplanes, depots of arms, whether military or sporting, and in general all kinds of war material.

⁴² Wheaton, *op. cit.*, pp. 313-314; Risley, *Law of War*, pp. 141-142.

⁴³ See authorities cited in notes 17, 22, 23, *supra*.

⁴⁴ 36 Stat. 2277.

Thus it has been recently held that horses, raised by the German Army and seized by the United States Army on a German Army breeding farm, became the property of the United States;⁴⁵ that a German commercial cable owned by a private corporation and seized by the United States forces, need not be restored to its private owners prior to the making of a treaty of peace, at which time the question of compensation therefor would also be determined;⁴⁶ and that certain wine vats originally owned by the French Government and used in the supply of the French Army, which were seized by the occupying German forces under Article 53 of the Hague Regulations and sold to defendant, had become the property of the German Reich and, through sale, the property of the defendant.⁴⁷

It is a generally recognized principle of the international law of war that enemy private property may not be seized unless it is susceptible of direct military use, but that it may be requisitioned.⁴⁸ In addition to the general rule, Articles 46 and 47 of the Hague Regulations enacted that private property cannot be confiscated and that pillage is formally forbidden. Article 52 of the Hague Regulations provides that requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the "needs of the Army of occupation" and that such requisitioning shall be in proportion to the resources of the country. They shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall be paid for as far as possible in cash. If not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.⁴⁹

Field Manual 27-10, *Rules of Land Warfare*, states that under Article 52, practically everything necessary for the maintenance of the Army may be requisitioned, *e.g.*, fuel, food, forage, clothing, tobacco, printing presses, type, leather, cloth, etc. It also authorizes the billeting of troops for quarters and subsistence.

Oppenheim wrote in a similar view that: "Requisition is the name for the demand for the supply of all kinds of articles necessary for an army, such as provisions for men and horses, clothing, or means of transport. . . ."; and that "all requisitions must be paid for in cash, and if this is impossible they must be acknowledged by receipt, and the payment of the amount must be made as soon as possible."⁵⁰

Field Manual 27-10 states the rules concerning requisitions to be applied by United States forces. It provides that requisitions must be made under

⁴⁵ JAGA 1947/4808, May 23, 1947. *Mss. opinion.*

⁴⁶ JAGE 1946/3392, Aug. 30, 1946. *Mss. opinion.*

⁴⁷ *Etat Franais c. Etablissements Monmousseau*, Cour d'Appel d'Orlans, this JOURNAL, Vol. 43 (1949), p. 819.

⁴⁸ See authorities cited in note 5, *supra*.

⁴⁹ 36 Stat. 2277, Department of State, Treaty Series, No. 539.

⁵⁰ 2 Oppenheim 317-318.

the authority of the commander in the locality. It fixes no prescribed method of requisitioning but states that, if practicable, requisitions should be accomplished through the local authorities by systematic collection in bulk. If, for any reason, local authorities fail to make the required collections, they may be made by military detachments. Explaining the meaning of the expression "needs of the army" it states that such expression was adopted rather than "necessities of the war" as being more favorable to the inhabitants, but that the commander is not thereby limited to the absolute needs of the troops actually present. The prices of articles requisitioned will be fixed by agreement if possible, otherwise by military authority. It provides that cash will be paid, if possible, and receipts will be taken up as soon as possible. If cash is paid, coercion will seldom be necessary. The coercive measures adopted will be limited to the amount and kind necessary to secure the articles requisitioned.⁵¹

In the case of *Karmatzucas v. Germany*, the Germano-Greek Mixed Arbitral Tribunal held that only those requisitions were lawful that complied with the provisions of Article 52 of the Hague Regulations, namely, that payment of the amount due should be made as soon as possible after the requisition. As nearly nine years had elapsed since the requisition was made and as full payment therefor had not been made, such requisition was contrary to international law and afforded a good ground for the recognition of the competence of the Tribunal and for an award of compensation.⁵²

There appears to be considerable doubt about the reasoning of the Tribunal concerning the invalidity of the requisition in the *Karmatzucas* pronouncement. As Sir Arnold McNair and H. Lauterpacht, the editors of the *Annual Digest of Public International Law Cases*, have stated, "it is difficult to see how subsequent failure to pay rendered the requisition unlawful *ab initio*. It would have sufficed to hold that the subsequent failure to pay was illegal."⁵³

Oppenheim remarked that "There is little room for doubt that acts of deprivation of property in disregard of international law are incapable of creating or transferring title."⁵⁴ The Belgian Court of Cassation held that a requisition unaccompanied by a receipt or payment was no more capable of transferring property than theft,⁵⁵ and this view was also that of the Hungarian Supreme Court.⁵⁶ It would follow, therefore, that acts of deprivation of property, *i.e.*, requisitions, properly made and for which receipts have been issued or payment made, are valid and transfer title to the requisitioner upon issuance of such receipt. This view was upheld by

⁵¹ Field Manual 27-10, pars. 337, 338, 339, 340.

⁵² Annual Digest of Public International Law Cases, 1925-1926, Case No. 365.

⁵³ *Ibid.*, p. 479.

⁵⁴ 2 Oppenheim, note, p. 319.

⁵⁵ *Laurent v. Le Jeune*, Annual Digest, 1919-1922, Case No. 343.

⁵⁶ *Ibid.*, p. 482.

the Anglo-German Mixed Arbitral Tribunal which declared that although some coffee requisitioned in Belgium was, contrary to the provisions of Article 52, sent to Germany for the use of the army there, the requisition was not void in international law and that it therefore deprived the plaintiffs of their property there and then.⁵⁷

An illustrative recent case involving the application of the above rules arose as a result of a claim by *B*, a national and resident of Strasbourg, France, for restitution of a motor vehicle in the possession of one *C*, a United States national employed by the Army in Germany. The record indicated that *B*'s motor vehicle had been requisitioned by the German Army from *B* in January, 1944. The notice of requisition stated that the owner would receive payment for the vehicle upon presentation of the receipt which would be given for the property. The vehicle was turned over to the German military authorities, as directed, in June, 1944. *B* was given a receipt therefor by the proper German Army authorities but did not attempt to secure payment from the German Army, although he had ample time (five months) in which to do so before the German forces were driven out of Strasbourg. In April, 1945, the vehicle was captured by the United States forces in a German Army motor pool at Stuttgart, Germany. It was later transferred on a quantitative receipt as captured enemy property to the German traffic authorities, from whom *C* claimed to have derived his title thereto. It was held that title to the motor vehicle was vested in *C* and *B*'s claim for restitution thereof should be denied. Title to the vehicle passed from *B* to the Government of Germany upon requisition and issuance of the receipt, although *B*, who had sufficient time to do so, did not present the receipt for payment. Upon capture by the United States forces title to the vehicle passed from the Government of Germany to the Government of the United States. The transfer of the vehicle by the United States Army to the German traffic authorities passed title to them. Thereafter, through valid sales effected under the pertinent provisions of the German Civil Code, title passed to *C*.⁵⁸

IV—DISPOSITION OF CAPTURED ENEMY PROPERTY

The ultimate disposition of captured enemy property is not a question for international but for domestic law. The United States Constitution provides that the Congress shall make rules concerning captures on land and water.⁵⁹ Under this authority the Congress enacted Articles of War 79 and 80⁶⁰ which provide in pertinent part:

All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States. . . .

⁵⁷ Tesdorpf v. German State, Annual Digest, 1923-1924, Case No. 340.

⁵⁸ 8 Bull. JAG (1949) 109.

⁵⁹ Article I, sec. 8, cl. 11.

⁶⁰ Public Law 759, 80th Cong.; 10 U.S.C. 1551.

Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

The English rule is that "all booty captured from a hostile nation, whether on sea or land, belongs to the Crown. . . ." ⁶¹ Whenever booty is still admissible and therefore taken, it becomes the property of the state and not of the individual who captures it. The former practice by which booty was sold and the proceeds divided amongst the captors has vanished. ⁶²

Thus in an older case the Judge Advocate General held that the captor government, after capture, had "as full and complete title to captured property as to any of its property otherwise acquired. . . ." ⁶³

In a recent case where a Division Memorial Commission requested that certain enemy property captured by the Division be transferred to the Commission for permanent display in a museum to be built upon the termination of the war, it was held that there was no existing authority under which the War Department could comply with the request, as property captured from the enemy became the property of the United States and could only be disposed of in accordance with Congressional direction. It was further held that the Act of June 7, 1924, ⁶⁴ which authorized and directed the Secretary of War to apportion and distribute pro rata "among the several States and Territories and possessions of the United States and the District of Columbia" certain war trophies captured from the armed forces of Germany, was applicable only to property captured during the period of the first World War, April 7, 1917, to November 11, 1918, and furnished no authority for the distribution of property captured in World War II. ⁶⁵

By virtue of the authority of the war powers of the President and in order to improve the morale of United States forces in theaters of operations, the War Department published Circular 353 on August 31, 1944, which authorized:

. . . the retention of war trophies by military personnel and merchant seamen and other civilians serving with the United States

⁶¹ 6 Halsbury's Laws of England (2d ed.), p. 528.

⁶² War Office, Manual of Military Law, 1929, p. 333.

⁶³ Digest of Opinions of the Judge Advocate General, 1912, p. 1060.

⁶⁴ 43 Stat. 597.

⁶⁵ 3 Bull. JAG (1944) 381.

Army overseas . . . under the conditions set forth in the following instructions. Retention by individuals of captured equipment as war trophies in accordance with the instructions contained herein is considered to be for the service of the United States and not in violation of the 79th Article of War.

2. War trophies will be taken only in a manner strictly consistent with the following principles of international law:

a. Article 6 of the Geneva (Prisoners of War) Convention of 1929 (par. 79, FM 27-10; Ch. 6, TM 27-251 (p. 69)) provides:

All effects and objects of personal use—except arms, horses, military equipment, and military papers—shall remain in the possession of prisoners of war, as well as metal helmets and gas masks.

Money in the possession of prisoners may not be taken away from them except by order of an officer and after the amount is determined. A receipt shall be given. Money thus taken away shall be entered to the account of each prisoner.

Identification documents, insignia of rank, decorations, and objects of value may not be taken from prisoners.

b. Metal helmets and gas masks may be taken from prisoners by the proper authorities when prisoners have reached a place where they are no longer needed for protection.

c. Article 3 of the Geneva (Red Cross) Convention of 1929 (par. 176, FM 27-10; Ch. 7, TM 27-251 (p. 131)) provides:

After every engagement, the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and the dead and to protect them from robbery and ill treatment.

d. The taking of decorations, insignia of rank, or objects of value either from prisoners of war or from the wounded or dead (otherwise than officially for examination and safe keeping) is a violation of international law. There is nothing unlawful, however, in a soldier of our Army picking up and retaining small objects found on the battlefield, or buying articles from prisoners of war, of the sort, which, under the articles quoted, it is unlawful for him to take from a prisoner, the wounded, or the dead. In view of the practical difficulty of determining in a particular case whether an object has been acquired from a prisoner by coercion or otherwise obtained in a manner contrary to international law, commanding officers will take appropriate measures to prevent violation or evasion of either the letter or spirit of the conventions. Under no circumstances may war trophies include any item which in itself is evidence of disrespectful treatment of enemy dead.

3. a. With the exceptions noted in *b* below, military personnel returning to the United States from theaters of operations may be permitted to bring back small items of enemy equipment which have not been obtained in violation of the articles of the Geneva Convention as quoted in paragraph 2.

b. The following items are prohibited:

- (1) Nameplates. (These will not be removed from captured equipment except by authorized military personnel.)
- (2) Items which contain any explosives.

- (3) Items of which the value as trophies, as determined by the theater commander, is outweighed by their usefulness in the service or for research or training purposes in the theaters of operations or elsewhere, or by their value as critical scrap material.

In connection with the above-authorized retention of captured enemy property as war trophies it is sufficient to point out that such retention was authorized under the pertinent provisions of domestic law, not international law, and that such authorization was in no way a reversion to the older practice approved by Heffter⁶⁶ which looked upon the taking of booty as a right of the individual soldier under international law.

In any attempt to solve the many knotty problems relating to the disposition of captured enemy property, the London Declaration of 1943 cannot be overlooked, for it added substantial difficulties to legal solutions by bringing into the picture the political concept of restitution. By the London Declaration the United States and certain others of the United Nations issued

. . . formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.⁶⁷

The concept of restitution as contained in the Declaration of London would appear to imply that the capture, seizure or requisition of property by an invading army is illegal, that after the fact of such capture, seizure or requisition, title to such property remains vested in the original owner, and that the laws of war by which title to such property is transferred by capture, seizure or requisition are inoperative. While the language of the Declaration would appear to render it easy to make such an inference and while such inferences were made by nations whose property was seized, it is obvious that such inferences had no basis in law. Certainly it would not be maintained on any legal ground that the Declaration of London invalidated or rendered inoperative the unwritten rules

⁶⁶ See note 13, *supra*.

⁶⁷ Department of State Bulletin, Vol. 8, No. 184 (January 2, 1943), p. 21.

of the international law of war or the written rules contained in the Hague and Geneva Conventions.

Based upon the Declaration of London, claims against the United States for the restitution of items of military equipment were made by several foreign governments, including Hungary, Poland, Yugoslavia, Belgium and Norway. Each of these governments assumed that whatever property was seized by the German armed forces was to be considered as "looted" under the terms of the Declaration of London. As much of this equipment was later captured or seized by the United States, it was necessary, in attempting to determine the United States' interest in such equipment, to investigate as fully as possible the facts surrounding the German acquisition of such equipment, and to distinguish between property which could be legally captured or seized or requisitioned under the Hague Regulations by the German armed forces, and property which appeared in fact to have been "looted." As stated above, property captured on the battlefield or legally seized and requisitioned by an army of occupation became the property of the captor government. Under appropriate restitution directives property which was *illegally* seized was considered as "loot" and, if recovered, was restitutable.

Great difficulties, however, arose in the application of these apparently simple principles. In cases wherein it was found that Germany acquired such property as a result of capture on the battlefield or through seizure or requisition under the general rules of international law, applicable as well to Germany and its allies as to the United States and its allies, the determination was made that Germany's title thereto was valid. Under the ordinary rules governing captured property, *supra*, it is usually not necessary for the capturing Power to go behind the fact of seizure or capture by its own forces in order to determine the validity of its own title. However, in these and similar cases, because of the Declaration of London, it was necessary to establish that such captured enemy property had not been "looted" by the German forces.

The case of the captured Hungarian horses is a fair illustration of the difficulties encountered. Certain Hungarian horses, belonging to private and public owners, were taken from Hungary by the retreating German Army early in 1945. Later they were captured in combat by the United States Army on German army farms and were reduced to firm possession. The best of them were brought to the United States for use at the United States Army breeding farms. In 1947 the Hungarian Government requested their return under the provisions of the Declaration of London. The United States Army, believing the horses to be captured enemy property, desired to retain them, while the Department of State, anxious to prove the international good faith of the United States, desired to return the horses to Hungary. After extended hearings before a subcommittee of the Armed Services Committee of the United States Senate,

where all the relevant facts were brought to light, it was finally decided by the Departments of State and Army that the horses were captured enemy property, title to which was vested in the United States, and that such horses could not be sent to Hungary, or otherwise disposed of, without the specific authorization of an Act of Congress.

In conclusion, it is hoped that the material here presented will contribute to an understanding of the legal principles and problems inherent in the expression "captured enemy property." Colonel H. A. Smith stated that it would be for the jurists of tomorrow to determine how successfully we of today have solved in our small part such problems as have been presented for decision.⁶⁸ If this writer, by setting forth the general principles which have been illustrated by recently decided cases, has rendered this subject more understandable and the sources more available, he will have achieved his purpose and will have given the jurists of tomorrow some material upon which their judgment concerning the success of our efforts can be based.

⁶⁸ See note 2, *supra*.

COMMENTS

THE REPRESENTATIONAL FUNCTION OF THE ALIEN PROPERTY CUSTODIAN*

JAMES L. DUNCANSON†

Introduction

The Office of the Alien Property Custodian during World War II has performed an important function which was not exercised by the Custodian during the first World War; namely, the representation of persons who, because of their presence in enemy countries, or enemy-occupied territory, were unable to defend themselves or to appoint someone to represent them in court or administrative actions or proceedings in the United States.

The declaration of war between the United States and the Axis powers in 1941¹ focused attention on the Trading With the Enemy Act of 1917, as amended,² with respect to property situated within the United States belonging to persons within enemy-occupied territory and enemy countries.

In order to implement the existing legislation to meet the problems created by our entry into World War II, the First War Powers Act of 1941 was enacted by Congress and approved by the President on December 18, 1941. Title III of this Act³ amended the first sentence of subdivision (b) of Section (5) of the Trading With the Enemy Act of 1917, as amended. This legislation conferred broad powers upon the President or any agency he might select to deal with the property or interests therein of nationals of a foreign country during time of war.⁴

* This article in the main relates to cases arising in the New York Field Office of the Alien Property Custodian.

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1. Japan, 55 STAT. 795 (1941), 50 U. S. C. A. APP. (Supp. 1945); Germany, 55 STAT. 796 (1941), 50 U. S. C. A. APP. (Supp. 1945); Italy, 55 STAT. 797 (1941), 50 U. S. C. A. APP. (Supp. 1945); Bulgaria, 56 STAT. 307 (1942), 50 U. S. C. A. APP. (Supp. 1945); Hungary, 56 STAT. 307 (1942), 50 U. S. C. A. APP. (Supp. 1945); Rumania, 56 STAT. 307 (1942), 50 U. S. C. A. APP. (Supp. 1945).

2. 55 STAT. 839 (1941), 50 U. S. C. A. APP. § 5 (Supp. 1945).

3. *Ibid.*

4. "Title III contains three provisions: (1) Section 5 (b) p. 2305 of the Trading with the Enemy Act has been continued down to the present time. The existing system of foreign property control (commonly known as freezing control) is based on that subdivision as last amended on May 7, 1940. That subdivision of Section 5 as it is now in effect, however, does not give the broad powers to take, administer, control, use, liquidate, etc., such foreign-owned property that would be given by Section 301 of the bill. At present the Government exercises supervision over transactions in foreign property, either by prohibiting such transactions or by permitting them on condition and under license. It is, therefore, a system which can prevent transactions in foreign property prejudicial to the best interests of the United States, but it is not a system which can affirmatively compel the use and application of foreign property in those interests.

On March 11, 1942, the President of the United States by Executive Order No. 9095⁵ established the Office of Alien Property Custodian of the United States and on July 6, 1942, this Executive Order was amended by Executive Order No. 9193.⁶ Section "5" of this Executive Order⁷ authorized the Alien Property Custodian to issue regulations covering the service of process or notice upon any person within any designated enemy country or any occupied territory in connection with any court or administrative action or proceeding within the United States. The Custodian was further authorized by this Section to take measures in connection with representing any such person which, in his discretion, might be in the interest of the United States.

Procedure Set Up By the Alien Property Custodian

The Alien Property Custodian, acting pursuant to the authority of the Trading With the Enemy Act, as amended, and Executive Order No. 9193, thereafter issued General Orders 5,⁸ 6,⁹ and 20.¹⁰

"Section 301 remedies that situation by adding to the existing freezing control, in substance, the powers contained in the Trading with the Enemy Act with respect to alien property, extending those powers, and adding a flexibility of control which experience under the original act and the recent experience under freezing control have demonstrated to be advisable. The provisions of Section 301 would permit the establishment of a complete system of alien property treatment. It vests flexible powers in the President, operating through such agency or agencies as he might choose, to deal with the problems that surround alien property or its ownership or control in the manner deemed most effective in each particular case. In this respect the bill avoids the rigidity and inflexibility which characterized the Alien Property Custodian Law enacted during the last war." H. R. Com. Rep. No. 1507, 77th Cong., (1941) 6233.

5. 7 FED. REG. 1971 (1942).

6. 7 FED. REG. 5205 (1942).

7. "The Alien Property Custodian is authorized to issue appropriate regulations governing the service of process or notice upon any person within any designated enemy country or any enemy-occupied territory in connection with any court or administrative action or proceeding within the United States. The Alien Property Custodian also is authorized to take such other and further measures in connection with representing any such person in any such action or proceeding as in his judgment and discretion is or may be in the interest of the United States. If, as a result of any such action or proceeding, any such person obtains, or is determined to have, an interest in any property (including money judgments), such property, less an amount equal to the costs and expenses incurred by the Alien Property Custodian in such action or proceeding, shall be subject to the provisions of Executive Order No. 8389, as amended, *provided, however*, that this shall not be deemed to limit the powers of the Alien Property Custodian under section 2 of this Order; and *provided further*, that the Alien Property Custodian may vest an amount of such property equal to the costs and expenses incurred by the Alien Property Custodian in such action or proceeding."

8. 7 FED. REG. 6199 (1942).

9. *Ibid.*

10. 8 FED. REG. 1780 (1943).

General Order 5 requires all persons, acting under judicial supervision or in any court or administrative action or proceeding, to file a report relating to property or interest wherein it is reasonably believed that a person within an enemy country or enemy-occupied territory has an interest. The report relating thereto was required to be executed on a form known as APC-3.¹¹

General Order 6 relates to the service of process or notice upon persons within designated enemy countries and enemy-occupied territory. Certain states¹² amended their laws to provide for service of process or notice to conform with the provision of General Order 6. In New York, Rule 50 of the Rules of Civil Practice was also amended to provide for service upon the Custodian. It should be noted here that the issuance of General Order 6 was designed to aid the courts in meeting the various problems brought about by the declaration of war; however, its provisions are permissive and not mandatory. The Custodian through this order has provided for constructive service of process upon persons who, because of war-time conditions, are helpless to protect their interests in property under the jurisdiction of the various courts or administrative bodies in the United States. It has been said that where the Alien Property Custodian does not accept service of process on behalf of a person within an enemy country or in enemy-occupied territory or does not enter an appearance through a designated attorney on his behalf, the court has no jurisdiction of the proceeding and the interests of persons in the *res* cannot be adjudicated.¹³ The Custodian has not accepted service of process nor appeared in proceedings which do not involve the property rights of foreign nationals since these matters are entirely outside the sphere of his jurisdiction.¹⁴

General Order 10 states that certain designated persons such as an Executor, Administrator, etc. shall not pay, transfer or distribute any property for the benefit of any person within an enemy country, or enemy-occupied territory, unless the Alien Property Custodian has issued a written consent to the payment, transfer or distribution of said property. The courts have uniformly upheld this General Order of the Alien Property Custodian; even in the case of a payment to the City Treasurer pursuant to the provisions of Section 269 of the Surrogate's Court Act,¹⁵ such a consent has been held

11. See note 8 *supra*.

12. Indiana Acts 1943, C. 165; Maryland Laws 1943, C. 31; New Jersey Laws 1943, C. 32; New York Laws 1943, C. 407; Washington Laws 1943, C. 62.

13. Farmers and Merchants National Bank of Los Angeles v. Superior Court of Los Angeles County, 25 Cal. (2d) 842, 155 P. (2d) 823 (1945); *Cf.* Dean v. Nelson, 10 Wall. 158 (U. S. 1869).

14. With reference to the jurisdictional problems involved in such personal actions see, *Rosenblum v. Rosenblum*, 181 Misc. 78, 42 N. Y. S. (2d) 626 (Sup. Ct. 1943); *Fengler v. Fengler*, 181 Misc. 85, 43 N. Y. S. (2d) 885 (Sup. Ct. 1943).

15. This section provides in part as follows: "Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of

to be necessary.¹⁶

Designation of Attorney by the Alien Property Custodian

The Alien Property Custodian, upon the receipt of process or notice relating to property wherein it appears that a person within enemy-occupied territory, or a designated enemy country, has or may have an interest, designates¹⁷ an attorney on his staff to appear on behalf of such person in the pending action or proceeding in accordance with Section "5" of Executive Order No. 9193.

In some cases where the Custodian has designated attorneys to appear on behalf of persons within an enemy country or in enemy-occupied territory, the courts have misconstrued the effect of such an appearance and in some of the reported decisions the courts have incorrectly stated that the Alien Property Custodian had appeared in the proceedings. A careful examination of the appearances filed of record will disclose, as Surrogate Henderson correctly stated in *Flaum's Estate*,¹⁸ that a designation of attorney by the Alien Property Custodian to appear for a person within an enemy country or enemy-occupied territory did not constitute an appearance by the Alien Property Custodian as an Executive Officer of the United States. The designated attorney files his designation and Notice of Appearance on behalf of the person within an enemy country or enemy-occupied territory and his appearance continues until the Alien Property Custodian determines that the designated attorney's services are no longer essential. It has been held, however, that the exercise of this representational function does not preclude an attorney's acting under a valid pre-war power of attorney from continuing to represent his client who is in enemy-occupied territory during the time of war unless such representation conflicts with the best interests of the United

the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction."

16. *Miller's Estate*, 181 Misc. 88, 45 N. Y. S. (2d) 485 (Surr. Ct. 1943); *Estate of Hans Gunnerson*, N. Y. L. J., Oct. 26, 1944, p. 1406, col. 2.

17. The usual form of such designation is: "Pursuant to the authority vested in the Alien Property Custodian by the Trading with the Enemy Act, as amended, and Executive Order No. 9095, as amended, you are hereby designated, appointed and empowered to appear for and represent persons (a Person) within enemy-occupied territory (within a designated enemy country), in the matter of the estate of _____, deceased, a case now pending in the _____ Court, County of _____ State of _____ and to take such measures in connection with representing such persons (person) as may from time to time be determined by me or by my duly authorized representative."

18. 180 Misc. 1025, 42 N. Y. S. (2d) 539 (Surr. Ct. 1943).

States.¹⁹ It has also been held that the designation of an attorney by the Alien Property Custodian cannot be questioned.²⁰

This right to designate an attorney to represent persons within a designated enemy country was upheld by Surrogate Delehanty in *Matter of Cassola*,²¹ when attorneys representing the Swiss Consul General (as protecting power acting for the Government of Italy) sought to stay the settlement of an estate until the conclusion of war and until the distributees of the decedent might have counsel of their own choice. Surrogate Delehanty denied the motion of the attorneys for the Swiss Consul and upheld the representation by the designated attorney of the Alien Property Custodian. The attorneys designated by the Alien Property Custodian, wherever it was determined that communication with the defendant who was in an enemy-occupied territory, or a designated enemy-country, was necessary, have applied for and obtained stays of the actions until a reasonable time after the termination of hostilities.²² These decisions have been in conformity with the leading case of *Watts, Watts & Co. v. Unione Adriatica di Navigazione*.²³

The designating of attorneys by the Alien Property Custodian has aided the courts in jurisdictional matters and their active participation in the proceedings have permitted a proper adjudication of the rights of all interested parties. Mention of a few cases will serve to indicate how the attorney designated by the Alien Property Custodian has actively assisted in protecting the property rights of persons, in enemy or enemy-occupied countries, who have been unable to protect their interests. In *Cassola's Estate*,²⁴ the designated attorney on behalf of the distributees in Italy, opposed a claim by the Columbus Hospital of a gift *causa mortis*. It was claimed that currency, bonds, a commercial bank book and a statement of a brokerage account had been the subject of a gift by the decedent through the medium of the delivery of the keys to a box in his home. Surrogate Delehanty, while ruling

19. In the *Matter of Renard*, 179 Misc. 885, 39 N. Y. S. (2d) 968 (Surr. Ct. 1943); *In re Chapal's Estate*, 182 Misc. 402, 45 N. Y. S. (2d) 237 (Surr. Ct. 1943).

20. *In re Schultz's Estate*, 180 Misc. 1023, 1024, 42 N. Y. S. (2d) 537, 538 (Surr. Ct. 1943), the court said: "Perforce the Trading with the Enemy Act . . . and the Executive Orders the court and the parties must permit the appearance of the attorney designated to appear in the proceeding by the Alien Property Custodian. The rights which may enure to the benefit of the nation must be protected and the authority of the agency established by the Congress to intervene for the protection of the national rights is indubitable. In no event could the appearance of the attorney for the Alien Property Custodian be stricken out since on the face of the record there may be an interest in the assets of deceased on the part of persons residing in enemy-occupied territory." Also see *Petscheck v. American Enka Corp.*, 182 Misc. 503, 49 N. Y. S. (2d) 49 (Sup. Ct. 1944).

21. 183 Misc. 66, 47 N. Y. S. (2d) 90 (Surr. Ct. 1944).

22. *Metzger v. Credit Indus. d'Alsace et de Lorraine*, N. Y. L. J. Aug. 4, 1943, p. 239, col. 1; *Geismar v. Bellamy*, 180 Misc. 1018, 44 N. Y. S. (2d) 576 (Sup. Ct. 1943).

23. 248 U. S. 9 (1918).

24. 183 Misc. 366, 47 N. Y. S. (2d) 90 (Surr. Ct. 1944).

in favor of the Columbus Hospital on the currency and the bonds, upheld the contention by the designated attorney that a commercial bank book and a statement of a brokerage account could not be the subject of delivery by the mere transfer of the keys to the box containing these items. In *Graud's Estate*,²⁵ a claim was made by a guardian for an infant that an instrument executed by the absentee constituted a gift under the Laws of Latvia but the Surrogate decided in favor of the designated attorney of the Alien Property Custodian and the Special Guardian for the absentee and held that the instrument did not constitute any evidence of a gift by the absentee to the infant. In *Matter of Lachat*,²⁶ the late Surrogate Foley upheld the contention of the designated attorney who opposed the probate of the will upon the ground that the testatrix did not have testamentary capacity and that the instrument produced was executed as a result of undue influence. A similar contention by the designated attorney in the *Estate of Bertha May*²⁷ resulted in the denial of probate to a proposed last will and testament because of undue influence. In the *Matter of Andrevitch*,²⁸ Surrogate Howell upheld the contention of the designated attorney that the Socialist Labor Party, being an unincorporated association, was not the proper beneficiary of a bequest. In *Matter of Berkel*,²⁹ it was contended that a certain paragraph of the will constituted a trust. The attorney designated by the Alien Property Custodian opposed such interpretation and contended that the testatrix intended an outright legacy. The position of the designated attorney was upheld by Surrogate Savarese of Queens County. Surrogate Griffiths of Westchester County, in *Matter of George Antoni*,³⁰ ruled that a trust for the benefit of the widows and orphans of Neupfalz, Phinpfalz, Germany, was a valid charitable trust. This interpretation was advocated by the designated attorney and the New York Attorney General.

There are, of course, a great many cases which have been unreported in the State of New York in which the designated attorneys have performed services of inestimable value to persons in enemy-occupied territory and in enemy countries.³¹ The activities of the designated attorneys reflected in the New York decisions cited above have been carried out extensively throughout the forty-eight states.³²

25. — Misc. —, 43 N. Y. S. (2d) 803 (Surr. Ct. 1943).

26. 184 Misc. 486, 492, 52 N. Y. S. (2d) 445, 450 (Surr. Ct. 1944).

27. 184 Misc. 336, 55 N. Y. S. (2d) 402 (Surr. Ct. 1944).

28. — Misc. —, 57 N. Y. S. (2d) 86 (Surr. Ct. 1945).

29. 184 Misc. 711, 55 N. Y. S. (2d) 279 (Surr. Ct. 1944).

30. N. Y. L. J., March 4, 1946, p. 869, col. 3.

31. Additional cases involving the representational functions of the Alien Property Custodian's Office in this State will be found in the *Estate of Anna Downer*, N. Y. L. J., February 16, 1945, p. 637, col. 1; *Estate of Louis Ravasi*, N. Y. L. J., April 20, 1945, p. 1503, col. 2; *In re Morland's Estate*, 184 Misc. 439, 55 N. Y. S. (2d) 914 (Surr. Ct. 1944).

32. A few representative cases outside this jurisdiction in which the designated at-

Vesting Property

The Alien Property Custodian, in World War I, seized property by serving a demand upon the person holding property owned by the enemy. During World War II a different procedure has been followed by reason of Paragraph "2" of Executive Order No. 9193.³³ This provision gives to the Alien Property Custodian the power to vest property which is under judicial supervision.³⁴ This power is not limited but is all inclusive. This has recently been settled by the Supreme Court of the United States in *Markham v. Cabell*³⁵ in which the Court said: "... these authorizations carried power to issue regulations particularly in connection with the vesting of property as was done by the vesting orders in this case. The Alien Property Custodian in taking over the administration of the Trading with the Enemy Act is entitled to the full scope of its permanent provisions whether found in Section 5 (b) or Section 9 (a) or elsewhere."³⁶

If the Custodian deems it necessary in the national interest, he is authorized and empowered to take any action including the vesting of property. The Custodian, however, has not (under Section 2 (f) of Executive Order 9193) vested property of persons within enemy-occupied territory except in certain isolated cases where vesting was necessary in order to protect the property interests of such persons.³⁰

There are two types of vesting orders executed by the Alien Property Custodian:

1. an "all right, title and interest" vesting, and
2. a *res* vesting.

The first type, or an "all right, title and interest" vesting, transfers to the United States of America whatever title the designated national had in the property, while by the second type, or *res* vesting, the Custodian vests the

torneys' activities resulted in the ultimate award of property to the foreign national which, but for these services, would not have been distributed to him, are: *Allen v. Mazurowski*, 317 Mass. 218, 57 N. E. (2d) 544 (1944); *Estate of Christina Louise Petersen* (Sup. Ct. South Dakota 1946); *Estate of Nielsen*, — Mont. —, 165 P. (2d) 792 (1946).

33. 7 FED. REG. 5205 (1942).

34. "The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to: "... (f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings, and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof."

35. 325 U. S. 847 (1945).

36. Under a bill which became public law on March 8, 1946 (Public Law 322, 70th Congress) a new Section 32 was added to the Trading with the Enemy Act. This new Section authorizes the President for such officer or agency as he may designate to restore seized property to persons who were not citizens of enemy countries and who were not hostile to the United States.

property itself. Justice Pecora, in *Stern v. Newton*,³⁷ wrote a very comprehensive opinion and analyzed the difference between an "all right, title and interest" vesting and a *res* vesting. The learned Justice upheld the right of the Alien Property Custodian to immediate possession of the property by reason of his *res* vesting order.

The Alien Property Custodian has set up an administrative process whereby a person, who is not a national of a designated enemy country, may file a claim with the Alien Property Custodian. Such a person by filing a form known as APC-1 with the Alien Property Custodian has an opportunity to have his claim determined administratively at a hearing before the Vested Property Claims Committee. The Committee, after such a hearing, may determine that the claim should be allowed. Its determinations are subject, however, to the ultimate decision of the Custodian and appeals can be taken to the Custodian from the Committee's decisions. Procedure before the Vested Property Claims Committee is governed by regulation.³⁸ The divesting of vested property is an act performed solely by the Custodian. A claimant may, in the first instance, without a hearing before the Vested Property Claims Committee or after a claim is rejected, bring an action in the District Court of the United States under Section 9 (a) of the Trading with the Enemy Act as amended,³⁹ demanding that the Alien Property Custodian return his property. In *Markham v. Cabell*,⁴⁰ the United States Supreme Court has upheld this right of the claimant to bring such an action.

Vesting Orders by the Alien Property Custodian have also been upheld by the state courts. The late Surrogate Foley, in *Matter of Reiner*,⁴¹ wrote:

"The gift to each of these legatees vested indefeasibly in her upon the death of the decedent, with payment only postponed under certain stated conditions. The Alien Property Custodian has succeeded to all the rights in the property to which the legatee was entitled as completely as if by conveyance, transfer or assignment."⁴²

The same great jurist again gave full recognition to the Alien Property Custodian's vesting order in *Matter of Dieudonné*⁴³ where the court held that "the Alien Property Custodian acquired by virtue of the vesting order all the right, title and interest of the life tenant and the other alien beneficiaries in the trust."⁴⁴

37. — Misc. —, 39 N. Y. S. (2d) 593 (Sup. Ct. 1943).

38. 8 FED. REG. 16709 (1943).

39. 55 STAT. 839 (1941), 50 U. S. C. A. (Supp. 1945).

40. 325 U. S. 847 (1945).

41. — Misc. —, 44 N. Y. S. (2d) 282 (Surr. Ct. 1943).

42. *Citing Commercial Trust Co. of N. J. v. Miller*, 262 U. S. 51, 56 (1923).

43. — Misc. —, 53 N. Y. S. (2d) 56 (Surr. Ct. 1945).

44. *Citing the Trading With the Enemy Act, §§ 5 and 7; First War Powers Act of 1941, § 616; Executive Order 9095, as amended; Woodson v. Deutsche G. & S. S. V. Roessler*, 292 U. S. 449 (1934); *Central Union Trust Co. v. Garvan*, 254 U. S. 554 (1921); *Miller v. Lautenberg*, 239 N. Y. 132, 145 N. E. 907 (1924); *Matter of Bendit*,

In those cases where it is established that a person within enemy-occupied territory has an interest in property under judicial supervision and the Custodian has determined not to vest such property, attorneys and fiduciaries have been requested to provide in their decrees, judgments and orders that the property be placed in the City or County Treasurer's Office pursuant to Section 269 of the Surrogate's Court Act⁴⁵ until the further order of the court, or in a blocked account pursuant to Executive Order No. 8389, as amended. Section 269 of the Surrogate's Court Act has been very helpful in this respect and the late Surrogate Foley, in *Matter of Alexandroff*,⁴⁶ analyzes the reasons for its enactment by the New York legislature.

Discontinuance of Representation by the Alien Property Custodian of Persons Within Liberated Areas.

It has always been the aim of the Office of the Alien Property Custodian to restore the normal procedure of the courts wherever possible and to this end the Alien Property Custodian has issued three press releases with respect to his determination as to persons who were no longer "designated nationals" within the meaning of General Orders 5 and 6. The first release was issued on October 20, 1944 and the Alien Property Custodian determined that persons within the territory of the Union of Soviet Socialist Republics, as recognized by the United States on September 1, 1939, were no longer to be considered "designated nationals" because the territory described had been liberated from enemy forces, and because postal and other communications with persons within such territory had been restored. In this release it was emphasized that the attorneys designated by the Alien Property Custodian to represent such persons would continue to do so until the court recognized a duly authorized representative to appear for such persons.

The second press release was issued on March 1, 1945 and to the same effect as the October 20, 1944 release, the Custodian determined that persons within Belgium, Estonia, Finland, France, Latvia, Lithuania and Poland, not including the provinces of Pomorze and Katowice, were no longer to be considered as "designated nationals." The third press release was issued on June 7, 1945 and the Custodian determined that, effective on July 1, 1945, persons within Albania, Czechoslovakia, Denmark, Greece, Luxembourg, The Netherlands, Norway, Yugoslavia and the Provinces of Pomorze and Katowice of Poland, were no longer to be considered "designated nationals."

The Alien Property Custodian is presently accepting service on behalf of persons within Austria, Germany and Japan and citizens and subjects of Germany and Japan who are within Bulgaria, Hungary, Italy or Rumania. General Orders 5, 6 and 20 no longer apply to persons who are not citizens or subjects of Germany or Japan within Bulgaria, Hungary, Italy or Ru-

214 App. Div. 446, 212 N. Y. Supp. 526 (1st Dep't 1925); *Matter of Sielcken*, 167 Misc. 327, 3 N. Y. S. (2d) 793 (Surr. Ct. 1938); *Matter of Littman*, 176 Misc. 679, 28 N. Y. S. (2d) 458 (Surr. Ct. 1941).

45. See note 15 *supra*.

46. 183 Misc. 95, 47 N. Y. S. (2d) 334 (Surr. Ct. 1944).

mania in any court or administrative action or proceeding within the United States originally initiated or commenced after April 15, 1946.⁴⁷

Vesting of Costs and Expenses.

The Alien Property Custodian has established a procedure whereby he may be reimbursed for his actual costs and expenses for representing persons within enemy-occupied territory where as a result of such representation these persons are determined to have an interest in property under judicial supervision. The Custodian's authority for this procedure is Paragraph "5" of Executive Order No. 9193.⁴⁸ The courts, as a whole, have recognized this authority and have signed decrees and orders directing the fiduciaries to pay to the Alien Property Custodian his costs and expenses upon the issuance and filing of his vesting order. The designated attorneys have filed affidavits with the various courts setting forth what costs and expenses the Alien Property Custodian has incurred in the action or proceeding in those matters where a vesting order has not issued. It must be realized that some delay is encountered because of the administrative procedure involved and it is not possible to have all vesting orders issued in time to have the number and the amount inserted in the decree or order.

Conclusion

The Office of the Alien Property Custodian has been a distinct aid to all the courts during World War II because of the procedure set up whereby designated attorneys represent persons within designated enemy countries and enemy-occupied territory. Jurisdictional defects have been remedied, the courts have functioned without too much delay, the interests of persons rendered helpless by war have been protected, excessive fees and costs have been held to a minimum and the cost to the United States taxpayer has been almost nil. And how has this been accomplished? There is a simple answer. The Office of the Alien Property Custodian from its beginning has sought and given cooperation to both court and attorney. The Bench and Bar, in turn, have given to the Alien Property Custodian's Office their fullest co-operation and understanding.

The statement⁴⁹ by the Deputy Alien Property Custodian, Francis J. McNamara, expresses this aim:

"It is the desire of the Alien Property Custodian to so administer his office as to aid in the orderly disposition of all pending court or administrative actions or proceedings involving the property or interests of persons in an enemy country, or enemy-occupied territory. If he has succeeded in this phase of his functions, it has been due to the patience and willingness of the bench and bar to aid and assist him."

47. 67 FED. REG. 3579-3581 (1946).

48. This paragraph provides in part as follows: ". . . and provided further, that the Alien Property Custodian may vest an amount of such property equal to the costs and expenses incurred by the Alien Property Custodian in such action or proceeding."

7 FED. REG. 5205, 5206 (1942).

49. Address to Amer. Bar Ass'n. Chicago, Ill. 1943.

Freezing Control as a Weapon of Economic Defense

by

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Address delivered before the Committee on Insurance Law

AMERICAN BAR ASSOCIATION — SIXTY-FOURTH ANNUAL MEETING

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INCREASING public attention is being focused on problems of economic defense as a part of the total program of our national defense effort. Although less dramatic and stirring than military action, a sound and far-reaching policy in the economic and financial area will play a vital role in the weakening and ultimate defeat of the aggressor nations.

It may take us many months to whip into shape an effective army and to increase our production of war materials enough to become the real arsenal of democracy. On the economic defense front, however, there need be no period of preparation preliminary to major action. We are prepared now. We are equipped today with the most powerful economic weapons in the world.

Foreign funds control, or freezing control as it is more popularly called, is one of the most important instruments which this country can employ in its economic defense. This control in effect subjects to regulation and scrutiny all transactions in which blocked countries or their nationals have any type of interest. The control also has those elements of speed and flexibility that make possible the immediate execution of economic programs in the furtherance of this Government's foreign policy.

History

Freezing control was first instituted a year and a half ago when the Germans invaded Norway and Den-

mark. On that day the President, by Executive Order, prohibited transactions involving Norwegian and Danish property except as authorized by the Secretary of the Treasury. Thereafter, as other countries were invaded or subjected to the domination of aggressor powers, freezing control was made applicable to them.

On June 14, 1941, a most important extension of freezing control took place. The remaining countries of continental Europe including Germany and Italy were brought under the control. This step changed the emphasis of freezing control from a defensive weapon primarily intended to protect the property of invaded countries, to a frankly aggressive weapon against the Axis.

On July 26, 1941, when Japan over-ran Indo-China, the control was invoked against Japan. The public is becoming increasingly aware that the impact of freezing control on Japan has proved to be the most powerful and decisive action which this country has

¹ Executive Order No. 8389 of April 10, 1940, as amended, and the freezing control regulations, as amended, as well as The Proclaimed List Proclamation, together with General Rulings, General Licenses, and Public Circulars issued in the administration of freezing control are published in a pamphlet issued by the Treasury Department entitled "Documents Pertaining to Foreign Funds Control", which pamphlet may be obtained from any Federal Reserve Bank or from the Treasury Department in Washington. All public documents are not only filed with the Federal Register, but are distributed through the Treasury Department and the Federal Reserve Banks to all persons and institutions desiring copies.

as yet taken to curb Japanese aggression. At the same time, freezing control was extended to China at the specific request of Generalissimo Chiang Kai-shek in order to assist China in the control of its economy and in order to prevent Japan from using the occupied areas in China as a loop-hole for evading our freezing control.

On July 17, 1941, a step of a somewhat different order was taken. The President authorized the issuance of The Proclaimed List of Certain Blocked Nationals. This List, better known as the black list, contains the names of about two thousand persons and firms in the American republics whose activities this Government believes are unfriendly to the interests of the United States and hemispheric defense. From time to time names have been added to and deleted from the list. The black list has the effect of extending the freezing control to the listed persons and firms and treating them for all purposes as though they were nationals of Germany or Italy.

Legal Aspects

The freezing control order is based on a section of the 1917 Trading with the Enemy Act.² This section has been held constitutional by the Supreme Court of the United States.³ Apart from the statutory provisions, the President possesses powers conferred upon him directly by the Constitution. Some aspects of these Presidential powers, including his power to control foreign relations, I expect to discuss tomorrow before the Municipal Law Section.

I want to point out that the legality of freezing control has not been challenged in any court or, for that matter, by anyone appearing before the Department. I believe that this is due not merely to the comprehensiveness of the underlying authority, but to the widespread sympathetic understanding by the public of the purposes and aims of freezing control and the methods employed in its administration.

The freezing control order does not exhaust the powers vested in the President by the statute. In view

² Sec. 5(b) of the Trading with the Enemy Act of October 6, 1917, as amended; 40 Stat. 415, 966; 48 Stat. 1; 54 Stat. 179; U. S. C. title 12, sec. 95a.

³ *Norman v. B. & O. R. Co.*, (1935) 294 U. S. 240; *Norris v. United States*, (1935) 294 U. S. 317; *Perry v. United States*, (1935) 294 U. S. 330; *Campbell v. United States*, (D. C. S. D. N. Y., 1936) 5 F. Supp. 156, 167-170, 172-174; *Uebersee Finanz-Korporation, A. G. v. Rosen*, (C. C. A. 2, 1936) 83 F. (2d) 225, 228; *certiorari denied*, 298 U. S. 679; *British-American Tobacco Co. v. Federal Reserve Bank* (C. C. A. 2, 1939) 104 F. (2d) 652, 105 F. (2d) 935; *certiorari denied*, 308 U. S. 600.

of the interrelationships which have long existed between certain persons and concerns in this country and foreign interests and in view of the changing nature of the economic problems to be met from time to time, it is indeed fortunate that the authority vested in the President is sufficiently broad to permit him to apply the freezing control as the situation currently requires.

Purposes

The application of freezing control to an increasingly larger area of the world has greatly increased the effectiveness of the control.

When the control was first invoked it was regarded as a means of insuring that the Danish and Norwegian-owned property in this country would not fall into the hands of Germany. The Government also regarded itself as owing a responsibility to those persons who placed their assets here out of confidence in our strength and fairness. Freezing control also minimized the liabilities of American banks and others against the assertion of conflicting claims to property arising out of invasion and other revolutionary changes in the over-run countries of Europe.

Not only was it necessary to protect property in this country belonging to the invaded areas; it was also necessary to prevent the Axis powers from realizing the full benefits of large amounts of securities and other assets which they had looted in the invaded countries. To this end controls were established over the importation into the United States of securities, diamonds, paintings, and other valuable assets which had fallen into Axis hands.

Had we not imposed freezing control, we would not only have failed in our responsibilities to owners of seven billion dollars of funds in this country, but we would have permitted the Axis countries to have used these billions of dollars to their own very considerable advantage. With such funds the Axis could have drawn on our resources and the resources of the Western Hemisphere to maintain their war effort, to strengthen their economic and financial position, and to acquire those vital and strategic materials both here and abroad which are urgently needed by our country and other friendly countries.

Loss of these dollar assets and the inability of the Axis to acquire other dollar assets have greatly impaired the ability of the Axis powers to finance propaganda, sabotage, and other subversive activities in the United States and in other areas of strategic importance to this country.

Freezing control has prevented the Axis countries and their satellites from using the American dollar, and American banking and financial facilities, for commercial and other activities in the United States and other parts of the world. The American dollar today is the strongest medium of international exchange. It is the most sought after medium in the world for payment for goods and services. The subjection to licensing of all dollar transactions in which the Axis countries are directly or indirectly interested has effectively curtailed Axis use throughout the world of our dollar as a medium of payment.

In considering the effectiveness of freezing control, do not be misled by the fact that the aggressor nations have sought to retaliate against American-owned property abroad. American-owned property in the Axis countries, as well as in other European countries, in most cases was largely given up as lost before freezing control was instituted. Germany, through a gradual system of confiscation and control, left American owners of property with little more than a shell of title, seizing for German purposes the operating use of the American-owned property abroad. Moreover, Germany by seizing American-owned assets abroad can not compensate itself for the dollars which Germany hoped to acquire as a fruit of her conquest. These American-owned assets in Europe will not help Germany buy goods and services throughout the world as Germany would have been able to do had we allowed her to acquire title to any substantial part of the \$7 billion of European-owned assets in this country.

Freezing control has not been confined to the regulation of banking and financial transactions. It also is an instrument for controlling all imports and exports between the United States and the blocked countries.

The most striking and effective application of freezing control occurred in its extension to Japan. The application of the controls effectively stopped all trade with Japan. Freezing control was the instrument employed by the British, Dutch, and ourselves in taking parallel action against Japanese aggression. As a result of this coordinated and concentrated action, the economy of Japan has suffered a profound shock.

We have also eliminated import and export trade between this country and black-listed persons in Latin America. This action which our Government has already taken, as well as the action it is currently initiating, will contribute greatly to the elimination of the black-listed persons from such influence and activities as are hostile to the United States and hemispheric defense.

Paralleling the lease-lend aid which we are extending to those countries whose defense is vital to the defense of the United States, our Government, through the medium of freezing control, is taking effective action in the economic field to bolster the allied economic and financial blockade and to eliminate many of the leaks which have existed in that blockade. Moreover, our strong action has very substantially encouraged many Latin American countries to take measures along comparable lines, thus seriously curbing not only the financial and economic activities of the Axis, but also their propaganda and subversive activities in an area in which this nation has a fundamental concern.

Freezing control has been employed to deal with those neutral European countries which, by reason of their proximity to the Axis powers, have been frequently compelled against their will to serve as "fronts" for operations in the economic and financial field. By the extension of freezing control to such neutral countries, it has been possible both to permit the neutral countries to engage in legitimate transactions for their own need and to reduce the possibility of such countries acting as a screen for the Axis powers behind which Axis activities may be continued. The general licenses that were issued to such neutral countries are conditioned on the effective carrying out of the guaranty of the neutral governments that they will not be used as a disguise for Axis or other undesired transactions.

It is well known that there are certain business institutions in this country which are owned or dominated by the Axis and whose activities are contrary to American interests. Through the medium of foreign funds control, the Government can take and is taking appropriate steps to nullify or eliminate such vicious and undesirable influences and to assure the devotion of all American enterprises to the promotion of national interests.

Espionage, sabotage, and propaganda are spectacular forms of Axis subversive activities. Less spectacular, but probably more dangerous and pernicious in its effect, is that form of subversive activity addressed to limiting and curtailing the American productive capacity. Through the medium of patent pooling arrangements, licensing agreements and similar contracts, Germany has been able to put a drag on our national defense production. Through the same medium Germany has been able to secure information which would ordinarily be deemed military secrets. Germany and German interests have also sought to restrict American firms from competing with Axis firms in neutral markets. Needless to say such business

relationships must be dealt with in a manner which will not destroy legitimate American interests. Action will continue to be taken to solve this problem.

The freezing order and regulations provide ample facilities for requiring reports and making investigations to assure the effective functioning of the program. We are now engaged in taking a complete and comprehensive census of every conceivable type of foreign-owned property within the United States, irrespective of whether the owner of such property has been blocked under the freezing order. This census requires precise data as to the identity of the foreign interests and the nature and location of the property. We anticipate that the census will be an invaluable aid in effectively carrying out the many aspects of the program which I have discussed and in assuring the complete protection of American interests as well as of friendly foreign interests.

One aspect of freezing control that I should not omit is its usefulness as a mechanism through which we may provide assistance to friendly countries in their own regulation of finance and trade. As I indicated, freezing control was applied to China at the specific request of Generalissimo Chiang Kai-shek. This action by our Government in conjunction with the British and Dutch is immeasurably strengthening China's ability to acquire and retain much needed foreign exchange and to control China's foreign trade. Our coordination of freezing control with exchange and trade regulation by China reduces evasions of the Chinese control and strengthens China's authority over trade and finance in occupied China and in the international settlements where China would otherwise be largely impotent.

Foreign funds control is so flexible and dynamic an instrument of economic defense that we may reasonably assume its growing usefulness as new situations arise. We may likewise reasonably assume that freezing control will be a most useful instrument in dealing with several of the inevitable post-war economic and financial problems.

Operation

In view of the wide range of functions dealt with by freezing control, it is not surprising that the ad-

ministration of freezing control presents difficulties. The Treasury has constantly sought and adopted methods for simplifying the licensing procedure and the issuance of rulings and other information on questions of public interest.

Policy questions arising under freezing control are considered by an interdepartmental committee consisting of representatives of State, Treasury, and Justice Departments. Liaison is maintained with the recently created Economic Defense Board on which the State, Treasury, and Justice Departments are represented. Activities of freezing control are also coordinated with the functions of other departments and agencies of the Government.

The Treasury has sought to give applicants and their counsel full opportunity to present their case to the Department, both orally and in writing, and to insure the disposition of applications on the basis of equality and defined principles of policy. We have always been prepared to reconsider any denial of an application. In many instances, the Department has granted a previously denied license, upon presentation of additional information or upon further consideration of the case.

It is the desire of the Department to do everything possible to facilitate public understanding of freezing control problems. The Treasury and the Federal Reserve Banks are always available to discuss problems that may arise.

The legal profession can and should play an important role in the administration of freezing control and the Department would welcome suggestions from lawyers and all other groups as to how we can do a better job. You can help the Department by telling us what loopholes we are missing and how we can deal with them, as well as by telling us the areas in which we are unnecessarily strict.

All Americans are anxious to play an active part in this country's defense program. Lawyers, bankers, brokers, and other business and professional groups can make a real contribution to national defense by assisting and cooperating with the Government in the administration of freezing control.

1947

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COMPENSATION FOR WAR DAMAGE TO AMERICAN PROPERTY IN ALLIED COUNTRIES

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I. THE PROBLEM

The American national who suffered war damage to property on territory of an enemy country during World War II is encouraged by the progress already made on the peace treaties to believe that the duty to provide compensation for his damage will be imposed directly upon the government of the enemy country. Upon the coming into force of the peace treaties with Italy, Bulgaria, Hungary, Roumania, and Finland, each of those countries will be obliged to provide for damage to property of United Nations nationals, in its territory compensation equal to two-thirds of the sum necessary to purchase similar property or to make good the loss suffered.¹ If a similar pattern is followed when the treaties with Germany, Austria, and Japan are written each of those countries will also be obliged to provide compensation for damage to property of United Nations nationals on its territory.

The American national who suffered war damage to property on territory under the sovereignty of the United States during the war knows that compensation is provided by his own government. If he suffered damage to property in Hawaii, he has probably already obtained compensation from the War Damage Corporation.² If he suffered damage to property aboard a United States ship on the high seas, he has at least had the opportunity to obtain insurance at reasonable rates against the risk of such damage.³ If he suffered damage to property in the Philippines, he knows that the United States Government has authorized the appropriation of \$400,000,000 for distribution by the Philippine War Damage Commission as compensation for war damage to property in the Philippines.⁴ The extent to which the United States will obtain reimbursement from enemy governments for the compensation it grants as a gratuity has not yet been determined.

* The opinions expressed in this article are those of the writer and are not necessarily those of the Legal Adviser or the Department.
¹ Treaties of Peace with Italy, Bulgaria, Hungary, Roumania and Finland, Department of State Publication 2743.
² The War Damage Insurance Act, 15 USCA 606b-2, 56 Stat. 175.
³ The Marine War Risk Insurance Act, 46 USCA 1128 and 1128a, 54 Stat. 689-690.
⁴ The Philippine Rehabilitation Act, 50 USCA 1751-1763, 60 Stat. 128.

In contrast, the American national who suffered war damage to property on territory of Allied countries other than the United States can only be told that he may receive compensation from the United States Government, from the government of the Allied country in which his property was situated at the time of damage, from both of these governments, or from neither of them. There has been no indication that enemy governments will be obliged to provide compensation for war damage to property on Allied territory directly to the property owners. Whatever compensation is supplied by enemy governments for such damage will be supplied to the property owners indirectly through the appropriate Allied government. The problem is to determine the appropriate Allied government.

Under the United States war damage legislation already described compensation is provided in the form of outright cash payments, benefits payable for the reconstruction or replacement of property, and sums payable on policies of governmental insurance against war risks. Other Allied countries have also employed these three forms of compensation in their war damage legislation.⁵ Furthermore, the United States, the United Kingdom, and other Allied countries may regard their readiness during the war to provide insurance against war risks at reasonable cost as, in effect, a provision of compensation for damage even if the property owner failed to take out insurance. The United States, for example, has specifically excluded from compensation under the Philippine Rehabilitation Act certain types of losses for which insurance was available.⁶

War damage is defined very broadly in the legislation of the United States and the other Allied countries. Benefits under the Philippine Rehabilitation Act are payable for damage from any of the following causes: enemy attack, action taken by United States forces to prevent property from coming into the possession of the enemy, action taken by the enemy occupation authorities, action taken by the United States forces in opposing, resisting or expelling the enemy, or looting, pillage or other lawlessness or disorder accompanying the collapse of civil authority.⁷ Included in the French Government's definition of war damage is damage resulting from the enemy occupation such as dispossession or damage caused in dwellings used by the enemy, from requisitioning without full compensation, from mine and shell-clearing operations, and from the explosion, combustion, or dispersion of dangerous substances which have been abandoned or which are in the custody of the State, or of Allied armies, or of an enterprise working on their behalf.⁸ The Netherlands Government

⁵ United Kingdom: See R. M. Montgomery, *War Damage Act 1941*, and supplements. France: Law No. 46-2389 of October 28, 1946, published in the *Journal Officiel* of October 29, 1946. Netherlands: Staatsblad F255 of November 9, 1945.
⁶ 50 USCA 1760(5).
⁷ 50 USCA 1752(a).
⁸ Law No. 46-2389 of October 28, 1946, Article 6.

defines as war damage "any damage as a direct result of acts of war, of actions or measures of the enemy and of wartime conditions."⁹

Compensation is payable, under legislation of the United States and Allied countries, for war damage to real property, merchandise, commodities, household furniture, and clothing. The American, British, French, and Dutch Governments have not undertaken to provide compensation for the loss of currency or intangible property. And they either exclude completely from compensation, or provide only limited compensation for, articles of luxury such as jewelry and works of art.

Recognition of Responsibility to Provide Compensation on a Territorial Basis

There has been some recognition that an Allied nation should provide compensation for nationals of other Allied countries, or even for nationals of neutral countries, who sustained property damage on its territory to the same extent as it provides compensation for its own nationals, that is, that a nation should provide compensation on a territorial basis.

The eighteen Allied Governments which participated in the Paris Conference on Reparation unanimously resolved that:

... in the administration of reconstruction or compensation benefits for war damage to property, the treatment accorded by each Signatory Government to physical persons who are nationals and to legal persons who are nationals of or are owned by nationals of any other Signatory Government, so far as they have not been compensated after the war for the same property under any other form or on any other occasion, shall be in principle not less favourable than that which the Signatory Government accords to its own nationals.¹⁰

The participating Governments stated, however, as the concluding sentence of the resolution, that there are "many special problems of reciprocity related to this principle" and recognized that "in certain cases the actual implementation of the principle cannot be achieved except through special agreements between Signatory Governments."

Independently of reciprocity agreements, several countries have made their systems of compensation for property damage sustained on their territory applicable to their own nationals and other Allied nationals on equal terms. In all the legislation of the United Kingdom, whether compensation is paid as a gratuity, or in return for insurance premiums or compulsory contributions, no distinction has been made between the rights of British and other Allied nationals to obtain compensation. Similar

⁹ Staatsblad F255, November 9, 1945, Article 1.

¹⁰ Resolution 3 of the Final Act of the Conference, State Department Publication 584, *The Distribution of Reparation from Germany*, p. 19.

discriminatory systems of compensation were adopted in Australia,¹¹ India,¹² and New Zealand.¹³ Insurance schemes were also put into effect in such British colonies as Singapore and Malaya sufficiently in advance of the Japanese occupation to enable American property owners to take advantage of them.¹⁴ The United States, which combined a system of voluntary war risk insurance to cover property damage sustained on United States territory other than the Philippines with a system of gratuitous payments for damage occurring prior to the adoption of the insurance system, made policy payments and gratuitous payments to American and non-enemy nationals on equal terms.

Some countries have extended the benefits of their compensation laws to nationals of another Allied country in return for a pledge by the Allied country that their own nationals will receive reciprocal treatment under the laws of the Allied country. The French Government has extended the benefits of its legislation providing gratuitous compensation for war damage to property in France to American and British nationals.¹⁵ The Netherlands Government has recently announced that it grants equal treatment to American nationals in the administration of gratuitous compensation which it provides for its own nationals for war damage to property in the Netherlands.¹⁶

A few countries have indicated that the benefits of their war damage legislation may be extended to foreigners, but do not disclose on what basis the extension will be granted. Shortly after the invasion of Norway a series of laws were enacted of which the law on war risk insurance for buildings may be taken as an example.¹⁷ Every building which was insured against fire on or after April 8, 1940 (the day before the invasion) was automatically covered by war risk insurance. Although this legisla-

¹¹ Australia: See the recital of laws appearing in Part I, National Security (War Damage to Property) Regulations, Statutory Rules 1946 No. 176, published in the *Commonwealth Gazette* on December 5, 1946.

¹² India: The War Risks (Goods) Insurance Ordinance (No. IX of 1940), War Risks (Factories) Insurance Ordinance (No. XII of 1942), and War Risks (Inland Vessels) Insurance Ordinance (No. XXV of 1943).

¹³ New Zealand: War Damage Act, 1941, No. 17, as amended, and Earthquake and War Damage Act, 1944, No. 15.

¹⁴ See reference to Malayan War Risks (Goods) Insurance legislation in paragraph 4 of the Terms of Reference of the Malayan War Damage Commission.

¹⁵ Declaration by United States and French Governments on Commercial Policy and Related Matters, May 28, 1946, Article VII; *Department of State Bulletin*, June 9, 1946, p. 107.

¹⁶ Exchange of Notes between British and French Governments on December 3, 1946, *British Treaty Series* No. 60 (1946). See with reference to filing of claims by American nationals under French law, *Department of State Bulletin*, January 26, 1947, p. 146 and July 20, 1947, p. 143.

¹⁷ *Department of State Bulletin*, August 17, 1947, p. 332.

¹⁸ Order of April 4, 1941 on the War Damage Insurance Corporation for Buildings, published in *Norsk Lovtidend* for 1941, Nr. 15, pp. 200-211.

tion of the Quisling Government has been continued in effect by the present Norwegian Government, the insurance coverage is limited to buildings owned by Norwegian citizens.¹⁸ It is, however, stipulated in the law that "war damage to buildings in this country belonging to foreign citizens may be compensated for, if the King or his authorized representative makes provision therefor."¹⁹ A similar stipulation appears in a more recent Norwegian law which provides compensation for certain types of war losses sustained by Norwegian nationals on Norwegian territory, and not covered by war damage insurance legislation.²⁰ War damage legislation in Denmark has taken a parallel course.²¹

The United States Government in its legislation providing compensation for war damage to property in the Philippines grants compensation benefits to nationals of any non-enemy nation which "grants reciprocal war damage payments to American citizens resident in such countries [country]."²² The Swiss Government is the first government which the Philippine War Damage Commission has determined to have fulfilled the condition of reciprocity.²³ Switzerland had presented to the Commission evidence of its non-discriminatory legislation providing compensation for damage inflicted upon Swiss territory in violation of neutral rights.

Some nations may be obliged to grant equal treatment to nationals of other Allied countries, or even to nationals of neutral countries, by the terms of treaties negotiated prior to World War II. An example of such a treaty is the commercial treaty between the United States and Switzerland of 1850. By the terms of that treaty both Governments agree that:

In case of war, . . . the citizens of one of the two countries, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside with respect to indemnities for damages they may have sustained.²⁴

The decision of the Philippine War Damage Commission that Swiss citizens are eligible for benefits under the Philippine Rehabilitation Act was not based on the treaty, although reference is made to the treaty in the opinion of the Commission.²⁵

Finally, several countries have encouraged the nationals of the United

¹⁸ Provisional Law of July 19, 1946 on War Damage Insurance for Buildings.

¹⁹ Same, Section 9, para. 2.

²⁰ Provisional Law on Compensation for Certain Damages and Losses as a Result of the War, 1940-1945, effective April 25, 1947, published in *Norsk Lovtidend*, Nr. 14, 1947, pp. 247-251, Section 17.

²¹ See, for example, Danish Law No. 218 of 1940 concerning War Risk Insurance of Household Goods, effective April 30, 1940.

²² 50 USCA 1752(b)(1).

²³ Philippine War Damage Commission, Opinion L-7 of July 8, 1947.

²⁴ Malloy, *Treaties*, Vol. II, p. 1765, Article II.

²⁵ Philippine War Damage Commission, Opinion L-7 of July 8, 1947.

States, if not of other Allied countries, to register with them war damage to property sustained on their territory. Poland, in 1946, encouraged registration of such damage by American nationals, with the assurance that any compensation benefits to be provided would be available to Polish and American nationals without discrimination.²⁶ Belgium has accepted registration of war damage to American property in Belgium.²⁷ The Malayan War Damage Claims Commission accepts registrations of war damage to American property in Singapore and the Malayan Union.²⁸

Recognition of Responsibility to Provide Compensation on a Nationality Basis

In contrast to the trend already described, there has been some recognition that an Allied nation should provide compensation to its own nationals for property damage sustained by them on territory of other allied countries, that is, that compensation should be provided on a nationality basis.

The peace treaties with Italy, Bulgaria, Hungary, and Roumania authorize each of the Allied nations to apply assets within its territory of the enemy country or of nationals of the enemy country to the satisfaction of the claims of the Allied nation or of nationals of the Allied nation against the enemy country. Substantially, if not totally, excluded from the claims to be satisfied from this source are claims of nationals of the Allied country for damage to property in the enemy country for which the enemy country is under a direct obligation to pay two-thirds compensation. The United States has already agreed to release Italian assets in this country, and Italy has agreed to pay to the United States Government before December 31, 1947, \$5,000,000 "to be utilized, in such manner as the Government of the United States of America may deem appropriate, in application to the claims of United States nationals arising out of the war with Italy and not otherwise provided for."²⁹

The United Kingdom has not as yet undertaken to provide compensation for losses of its nationals abroad. Netherlands legislation authorizes the Minister of Finance either to assimilate the rights of Netherlands nationals abroad to those of Netherlands nationals at home, or to assimilate the rights of foreign nationals to the rights of Netherlands nationals with respect to damage sustained on Netherlands territory.³⁰ French legislation leaves the door open to the provision of compensation by the French Government for its nationals abroad by the following sentence inserted in Article 10:-

²⁶ Department of State Bulletin, June 23, 1946, p. 1083.

²⁷ Same, August 18, 1946, p. 336.

²⁸ Same, August 24, 1947, p. 398.

²⁹ Same, August 24, 1947, p. 376.

³⁰ *Statblad* F255 of November 9, 1945, Article 1(3).

... A subsequent law shall determine under what conditions and to what extent French natural and juridical persons who own damaged property abroad and who would not benefit by reciprocal agreements may be compensated.³¹

Several countries accept registration by their nationals of war losses sustained in other Allied countries. The nationals of China, Czechoslovakia, and Yugoslavia are required to register war losses, regardless of the country in which the damage was suffered with the government of the country of which they are nationals.³² The Department of State accepts for possible future consideration, in the event of Congressional action, claims submitted by American nationals for losses suffered in other Allied countries.

Numerous bills were introduced in the first session of the Eightieth Congress with the object of providing compensation for war losses. The only bill reported out of committee was the bill introduced in the House on June 30, 1947 for the purpose, among other things, of creating "a commission to make an inquiry and report with respect to war claims; . . ." The bill directs the commission not only to estimate the number and amount of war claims, but also to report "the extent to which such claims have been or may be satisfied under international agreements or domestic or foreign laws."

The House Committee on Interstate and Foreign Commerce reported the bill favorably on July 17, 1947.³⁴ The report contains the following statement:

War claims of individual American citizens who have suffered as a result of enemy action are a part of the sum total of claims for reparations against the respective enemy governments. If sufficient assets cannot be secured from such enemy governments to take care of the claims of the American people as a whole and the claims of individual citizens, the Congress of the United States will have to determine, after considering the report and recommendations of the War Claims Commission created by title II of this bill, whether and to what extent individual claims should be paid out of the Treasury in view of the fact that if this bill becomes law, the United States will have been the recipient of the net proceeds resulting from the liquidation of the enemy assets which are available in this country.

Congress adjourned before the bill was put to a vote.

³¹ French Law No. 46-2389 of October 28, 1946.

³² China: See note of January 27, 1947 from Chinese Ministry of Foreign Affairs to American Embassy at Nanking, reported in despatch 541 of March 5, 1947 from Embassy to the Department. Czechoslovakia: Decree No. 54 of August 31, 1945, and Order of the Minister of the Interior of September 3, 1945. Yugoslavia: Decree of Council of Ministers of April 2, 1945 (Official Gazette No. 20 of April 10, 1945) and Rules issued by Premier on June 10, 1945 (Official Gazette No. 44 of June 26, 1945).

³³ H. R. 4044, 80th Congress, 1st Session.

³⁴ House Report No. 976, 80th Congress, 1st Session.

II. THE PRINCIPLES

The reason for the development of two inconsistent bases for providing compensation for war damage to property of a national of one Allied country in territory of another Allied country lies in the fact that different principles are applicable to the distribution of compensation funds depending on whether the funds are derived from external or internal sources. External sources are reparations from enemy countries, which may consist of equipment, ships, or assets of enemy nationals. Internal sources are either voluntary payments for governmental insurance against war damage, compulsory contributions exacted from the owners of property subjected to the risk of war damage, special taxes for rehabilitation purposes, or revenues from general taxation.

Once it is recognized that funds for the compensation of war damage are derived from two sources, the reason for the growth of two different bases for providing compensation becomes apparent. Nationality is the basis usually employed in distributing funds derived from intergovernmental claims. The territorial basis is usually employed in distributing funds derived from taxation or other internal sources.

The Distribution of Compensation Funds Derived from Reparations

The question of which government should distribute reparations received from an enemy country for war damage to private property, the government of the country of which the property owner is a national or the government of the territory on which the property was situated at the time of damage, cannot be answered without asking another question. On what basis should claims be presented against enemy governments for war damage to private property, the nationality basis or the territorial basis? The basis used in distributing the proceeds of the claim should, of course, be the same as the basis used in presenting the claim.

The rule customarily followed in international law is that a government may present only the claims of its own nationals against another government.

The first essential of an international claim is a showing that the claimant is entitled to the protection of the state whose assistance is invoked. Aside from the special situation of alien seamen and aliens serving in the armed forces, concerning which considerable confusion exists, it is well settled that the right to protect is confined to nationals of the protecting state.³⁵

When the claim is for a wrong committed by one state to property on the territory of a second state owned by a national of a third state, which is the protecting state, the state of which the property owner is a national of the state within which his property is situated?

³⁵ H. H. Blackworth, *Digest of International Law*, 1943, Vol. V, p. 802.

When a Frenchman sought compensation for damage inflicted by a British cruiser during the Civil War upon property aboard an American ship out of the fund paid by Great Britain to the United States pursuant to the Geneva award, his claim was allowed, and so were the claims of numerous other persons not citizens of the United States.³⁶ The reason for allowing the claims of foreigners was stated by the Claims Court as follows:

A foreigner may be entitled to protection either as to his person or as to his property, or both. If he is within this country, or on the deck of one of our vessels, his person and his property with him are under our protection. And if his property alone is within this country it is entitled to and everywhere receives the same protection as the property of citizens; and so of the property of an alien nonresident upon the seas in an American vessel, this government has always extended to it the same protection as to that of citizens.³⁷

When the French Government espoused claims of French citizens whose property was damaged during the bombardment of Greytown, Nicaragua, in 1854 by United States forces, Secretary of State Marcy rejected the claims not only because the United States considered the bombardment to have been justified, but also because claims for such damage should only be presented by the government of Greytown. It was not certain who was wielding sovereign power in Greytown, but, said Secretary Marcy,

... it was for them to complain of the proceedings of the United States towards the people at that place, and to make reclamation, if any was due, for injuries to foreigners whom they had received within their jurisdiction, and whom they were consequently under obligation to protect.

The strength of the positions herein taken are not impaired by the fact that in some cases the claimants might be turned over for redress to a feeble power. It should be recollected that in this instance it was to such a power, without anything in its character or composition to justify confidence, that the applicants committed their property, and they can not reasonably ask to have a well-settled principle of international law changed in order to meet the exigency of their case.³⁸

During the negotiation of the peace treaties with Italy, Bulgaria, Hungary, Roumania, and Finland it was apparently recognized that each Allied country was responsible for presenting the claims of its nationals for war damage caused by those enemy countries. In each treaty the Allied Governments declare that certain rights attributed to them "cover all their claims and those of their nationals for loss or damage due to acts of war."³⁹ Each Allied Government is authorized to apply the proceeds

³⁶ Moore, *International Arbitrations*, 1898, Vol. III, pp. 2350-2360.

³⁷ Same, p. 2353.

³⁸ Moore, *Digest of International Law*, 1906, Vol. VI, p. 934.

³⁹ See, for example, Article 80 of the Italian treaty.

obtained from the liquidation of enemy assets in its territory to the satisfaction of its claims "and those of its nationals."⁴⁰ In the understandings concluded in August, 1947 between Italy and the United States, Italy agreed, in return for the release of Italian assets in the United States, to pay \$5,000,000 to the United States to be applied to the "claims of United States nationals arising out of the war with Italy."⁴¹

The agreement reached at the Paris Conference on Reparation in November and December, 1945, also provides that each Signatory Government shall regard the share of reparation allocated to it under the agreement, "as covering all its claims and those of its nationals against the former German Government. . . ." ⁴² But when the Conference unanimously resolved that equal treatment should be granted by each Allied government to its own nationals and the nationals of any other Signatory Government in the administration of compensation for war damage to property on its territory, the Conference adopted a principle inconsistent with the theory that a nation presents the claims of its nationals only. A nation cannot be expected simultaneously (1) to grant equal treatment to foreigners in the administration of compensation for war damage to property on its territory, and (2) to present against enemy governments only the claims of its nationals.

The report of the United States representative at the Paris Conference discloses that it was the United States delegation which initiated the resolution on equal treatment. The report continues:

The question of whether foreign investors should look to their own Government or to the nations in which their properties were located for compensation was complicated by the fact that different nations used different bases in the computation of war damages for reparation purposes. Both the United Kingdom and French claims data included all war damage incurred on British and French soil, respectively, without regard to the nationality of owners of damaged property, but nothing for damage to British and French properties abroad. On the other hand, the United States claims data included war damage suffered by United States property holders wherever located. In Tripartite discussion between the United States, British and French delegates it was agreed that the United States data on claims representing war damages would only be for that part of such damages as was not satisfied by compensation benefits from other countries.⁴³

No issue was made of the basis for presenting claims for war damage to private property at the Paris Conference because such claims were only

⁴⁰ See, for example, Article 79 of the Italian treaty.

⁴¹ *Department of State Bulletin*, August 24, 1947, p. 376.

⁴² Final Act of Paris Conference on Reparation, Part I, Article 2A, Department of State Publication No. 2584, *The Distribution of Reparation from Germany*, p. 12.

⁴³ Unclassified portion of *Final Report on the Paris Conference on Reparation*, submitted to the Secretary of State by James W. Angell on February 13, 1946, p. 123.

a small fraction of the total monetary losses claimed, and monetary losses were only one of the factors considered in allocating reparations.⁴⁴ It is doubtful that any country's share of reparations would have been substantially affected by a shift from the territorial basis to the nationality basis, or *vice versa*, in the presentation of claims. No allocation has yet been made of reparations from Japan, but it is unlikely, in view of the announced policy of the Far Eastern Commission to determine shares on a "broad political basis," that an issue will be made of the question whether a government should put in its claims on a territorial or nationality basis.

The fact that a country provided compensation for war damage on a territorial basis while the war was in progress is, of course, a strong reason for that country to insist that any reparations payable for damage on its territory be paid to it. Great Britain has provided compensation on a territorial basis and has insisted on the right to receive compensation on a territorial basis. The United States may be expected to insist that any reparations payable by Japan for war damage to property in the Philippines be paid to it since the United States has undertaken to provide compensation on a territorial basis in the Philippines.

The decision as to which of two governments may present a claim may have a substantial effect upon the amount a claimant recovers. Whatever system is used to calculate how much reparations a government has received for war damage to property, it may be expected that each government will receive a different percentage of the total amount of its claim. Governments may adopt different conclusions as to the classes of property owners who are entitled to share in reparations funds. Governments differ in their ability to administer compensation. And, in days of exchange control, the currency in which compensation is payable will make a difference.

It is doubtful that claims for damage to property caused by one state to property in a second state which is owned by a national of a third state should be presented on a nationality basis. But it is because such claims are, and have been, so presented, that there is a tendency to provide compensation for war damage on a nationality basis.

The Distribution of Compensation Funds Derived from Taxation

Distribution of compensation funds which a country derives from internal sources through insurance premiums, special assessments, or general taxation, is generally made to all property owners who can be included in the insurance scheme or the taxation system, that is, to all owners of property situated within the territory of the country.

⁴⁴ See article by John B. Howard, *The Paris Agreement on Reparation from Germany*, Department of State Publication No. 2584.

⁴⁵ *Department of State Bulletin*, June 1, 1947, p. 1069.

There is a strong moral, if not a legally enforceable, obligation upon a government not to levy taxes upon property owners of all nationalities to provide benefits for property owners of its own nationality. When the French Government in 1945 levied a "solidarity tax" upon all property in France in order to raise funds for the reconstruction of war damaged property, American owners of property in France protested against the exclusion of foreign-owned property from a share in the reconstruction benefits. The injustice of the threatened discrimination by France was cited in the discussion of the equality of treatment resolution at the Paris Conference on Reparation.⁴⁶

Commercial treaties between the United States and a large number of countries contain a provision substantially similar to the following:

The nationals of either High Contracting Party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals.⁴⁷

The type of discrimination against which such a provision is aimed is that in which a government levies higher taxes on foreign-owned than on domestic-owned property in order to provide the same governmental benefits for both types of property.

Discrimination also exists, however, if a government taxes both types of property at the same rate in order to provide greater governmental benefits for domestic-owned than for foreign-owned property. An effort to strike at this type of discrimination appears in the commercial treaty between the United States and Belgium of 1875, which is still in force. The treaty adds to the sentence which forbids the levying of higher taxes on citizens of one of the two States than are levied on citizens of the country in which they may be, the following clause:

and the privileges, immunities and other favors, with regard to commerce or industry, enjoyed by the citizens or subjects of one of the two States, shall be common to those of the other.⁴⁸

Discrimination is easy to recognize if a government raises funds for war damage compensation by special taxation on all property and pays benefits only for domestic-owned property. It exists, though the demonstration of its existence is difficult, if compensation funds are taken out of revenue from general taxation levied without distinction as to the nationality of the property owner, and benefits are paid only to property owners who are nationals.

⁴⁶ Unclassified portion of *Final Report on the Paris Conference on Reparation*, submitted to the Secretary of State by James W. Angell on February 18, 1946, p. 124.

⁴⁷ Hackworth, *Digest*, Vol. III, p. 577.

⁴⁸ Article I; Malloy, *Treaties*, Vol. I, p. 91.

The existence of discrimination is still more difficult to demonstrate when a government raises funds by taxation derived from one part of its territory to pay benefits for damage sustained in another part of its territory. Out of funds which the United States Government has raised by levying taxes in the United States, irrespective of the nationality of the taxpayer, there is authorized to be appropriated \$400,000,000 to provide compensation for war damage to property in the Philippines. The restriction of this compensation to American and Philippine nationals would appear to be discriminatory. It may be argued that the United States is under no duty to provide benefits for property in a territory which has become independent. But it may also be argued that, if the United States undertakes to provide such compensation out of taxes levied on American-owned and foreign-owned property alike, it should distribute compensation benefits to American-owned and foreign-owned property alike.

The obligation not to discriminate in taxation on grounds of nationality is not the only reason why nations adopt the territorial basis in distributing compensation for war damage derived from internal sources. Compensation so derived is not distributed on a nationality basis because a nation is reluctant to assume responsibility to provide benefits for its own nationals who are beyond the reach of its taxing power and its administrative control. It is readily understandable why the United States Government has not provided war risk insurance for American-owned property in China. It is also understandable why the United States has not undertaken to raise funds by taxation to provide benefits for Americans who suffered war damage to property in China. Since the United States Government cannot tax American owners of property in China, it hesitates to assume an obligation to provide benefits for them by levying taxes on property owners in the United States.

The fact that a property owner must look to the government which has the power to tax his property for compensation derived from funds raised by taxation has, of course, a substantial effect upon the amount of compensation he may recover. But an American owner of property in China has no more grounds for complaint that he is not receiving as much compensation from tax sources as a Chinese owner of property in the United States, than he has for complaint that the Chinese Government does not provide as good police protection or sanitation for him in China as does the United States Government for a Chinese national in the United States.

It is because the provision of compensation for war damage to property from internal sources so closely resembles other governmental functions with respect to which the rights of aliens have been assimilated to those of nationals that there has been a tendency to provide compensation on a territorial basis.

III. THE SOLUTIONS OF THE PROBLEM

If determination of the basis for providing compensation for war damage to the property of a national of one Allied country on territory of another Allied country is left to the independent action of each Allied government, it is possible that some governments will provide compensation on both nationality and territorial bases, some on the nationality basis only, and some on the territorial basis only.

There are obvious drawbacks to unilateral efforts to fix responsibility to provide compensation. Suppose the United States decides to use the territorial basis, but other countries adopt the nationality basis. American nationals will receive no compensation for losses abroad; foreign nationals may be overcompensated for losses on American territory. Suppose the United States decides to use the nationality basis, but other countries adopt the territorial basis. Foreign nationals will receive no compensation for losses on American soil; American nationals may be overcompensated for losses on Allied territory. Suppose the United States decides to use both bases to provide compensation. Some American nationals and some foreign nationals may then be overcompensated.

The danger of over-compensation is not imaginary. The French and Netherlands Governments now undertake to provide full compensation to American nationals for war damage to certain types of property on their territory. If the United States provides compensation for war damage to American property abroad, American nationals with losses to certain types of property in France and the Netherlands will be overcompensated.

A nation cannot avoid the pitfall of overcompensation solely by stipulating in its compensation legislation, that the amount of benefits payable to any claimant shall be reduced by the amount of compensation he has received or may receive, from a foreign government. Every government has the natural desire to pay its own nationals only to the extent they do not receive compensation abroad, and to pay foreign nationals only to the extent they do not receive compensation from their own governments. If every government acts upon that desire, the only consolation a war damage sufferer will receive will be a direction from each of two governments to seek his compensation from the other.

There is need for intergovernmental agreement on responsibility to provide compensation. There are only three possible forms which such an agreement may take: agreement to a system of dual responsibility with partial recognition of both the nationality and the territorial bases, agreement to use the nationality basis as the sole basis, or agreement to use the territorial basis as the sole basis.

Provision of Compensation on Both Nationality and Territorial Bases

Under a system of dual responsibility both the government of the country of which the property owner is a national and the government of the territory in which his property was damaged assume responsibility to provide some compensation for war damage.

Any system of dual responsibility to provide compensation for the same damage has serious disadvantages. There is duplication of effort in the assessment of the same damage by two governments. Instead of facing the jurisdictional problems presented by either the nationality or the territorial basis, governments must face the jurisdictional problems of both bases.

The necessity of eliminating the possibility of overcompensation when two governments provide compensation for the same damage obliges the two governments to agree that either the nationality, or the territorial, basis is the primary basis for providing compensation, and that the alternate basis is to be used only as a supplementary source of compensation. For example, China and the United States might agree that the nationality basis is the primary basis, that is, that either government could deduct from any compensation which might become payable on a territorial basis whatever amounts the nationals of the other were entitled to receive from their own government. France and the United States might agree that the territorial basis is the primary basis and that either government could deduct from any compensation which might become payable on a nationality basis whatever amounts its nationals were entitled to receive from the foreign government.⁴⁰

If, however, the United States stands ready to agree with some countries that the nationality basis should be used as the primary basis, and with other countries that the territorial basis should be used as the primary basis, the United States will not be able to determine the size of the fund needed to provide full compensation, nor the percentage of compensation afforded by a given fund, either for Americans in other Allied countries or for nationals of other Allied countries in the United States, until the United States knows the primary basis adopted by each Allied country and the amount of compensation provided on that basis.

Suppose, on the one hand, that the United States wants to provide compensation for American nationals abroad. No estimate can be made of the aggregate of damage for which compensation will have to be provided until the United States knows every one of the other Allied countries which will, pursuant to agreement with the United States, use the territorial basis as the primary basis, and also the amount of compensation provided by each of those Allied countries to American nationals on the territorial basis.

⁴⁰ At present, however, the French Government excludes from compensation damage for which compensation is payable under the laws of any Allied government. Law No. 46-2389 of October 28, 1946, Articles 8 and 17.

Suppose, on the other hand, the United States wants to provide compensation for foreign nationals on American soil. No estimate can be made of the aggregate of damage for which compensation will have to be provided until the United States knows every one of the other Allied countries which will, pursuant to agreement with the United States, use the nationality basis as the primary basis, and also the amount of compensation provided by each of those countries to their own nationals.⁴⁰

If each Allied government pursues a policy of waiting to see what basis of compensation is adopted as primary, and how much compensation is provided by foreign governments, there will be a stalemate. Each government will postpone the establishment of its system of compensation until the other governments have established their systems.

Allied governments would be able to go forward with the provision of compensation on a primary basis if they were able to agree that either one or the other of the two bases would be accepted by all as the primary basis. If all countries agreed that the nationality basis would be primary, each country would merely have to estimate the total losses of its nationals at home and abroad, and provide compensation accordingly. If all countries agreed that the territorial basis would be primary, each country would merely have to estimate the total losses suffered by its own and Allied nationals on its territory, and provide compensation accordingly. But even if provision of compensation on a primary basis might be made without delay, there will be delay in providing compensation on a supplementary basis.

If the United States undertakes to consider the amount of compensation provided by foreign governments it might conceivably eliminate delay in establishing a system of compensation by arranging for the recovery of benefits already paid, in the event that foreign governments subsequently provide compensation. But delay is only one of the difficulties inherent in attempting to supplement the amount of compensation provided by a foreign government.

Let us assume that the United States, wishing to compensate its nationals overseas abroad to the extent that foreign governments do not provide compensation for such losses on a territorial basis, has determined all those countries which provide no compensation for losses to American property in their territory. The United States cannot, then, simply provide compensation for all losses of American nationals in such countries. Even countries which do provide compensation for damage to American property

under the Philippine Rehabilitation Act says nothing about whether the Philippine War Damage Commission may deduct from the benefits payable to an eligible foreign national the compensation the foreign national receives from his own government. Should such a deduction be required, the Commission will not be able to divide the compensation fund among Philippine, American, and Allied claimants until it determines how much eligible nationals will receive from their own governments.

limit the compensation to certain types of property. Articles of luxury, for example, are generally excluded from compensation. On certain types of property some countries pay varying proportions of the amount of the damage. Each country has its own list of the types of property damage for which compensation is payable, and its own standards of compensation.

The United States Government cannot justify the provision of compensation for war damage to an automobile owned by an American national in China, if an American national in France whose automobile was damaged has no way of obtaining compensation for such damage. The United States must, therefore, if it is to establish a supplementary system of compensation on a nationality basis, define the types of property damage compensable and undertake to pay a certain standard of compensation to all American nationals for such damage, with the provision that there shall be deducted from this standard in each case whatever compensation the American national may be able to receive from a foreign government.

The mechanics of deducting the amount of compensation payable by a foreign government from the amount payable by the United States Government is not a simple matter. If the foreign government has not actually paid out compensation to the American national, the United States must decide how much compensation it may be expected to pay out. And then it must determine the difference between two sums, payable in different currencies, at different times, and with different restrictions upon use. The United States must also decide, if it attempts to provide supplementary compensation on a nationality basis, whether American nationals who suffered losses in countries like the United Kingdom where insurance against war damage was available, are entitled to receive compensation from the United States Government if they failed to take out insurance policies.

The Nationality Basis as the Sole Basis for Providing Compensation

Use of the nationality basis as the sole basis means that each Allied government agrees to provide compensation for war damage to property situated on its territory or on territory of any Allied country only if the property is owned by its nationals. To the extent that the United States undertakes to raise funds for compensation purposes by taxation, it will be faced with two objections to the use of the nationality basis. Foreign nationals will object to being forced to share the burdens of taxation without sharing the benefits. American nationals will object to being taxed to provide compensation for American owners of property in foreign countries who will be sharing the benefits of taxation without being subject to its burdens.

To the extent that other Allied countries raise funds for compensation purposes by taxation, they will be faced with similar objections. American nationals will object to being taxed in foreign countries without receiving

any benefits; nationals of the foreign countries will object to being taxed to provide compensation for fellow-nationals who are not subject to tax.

It is, of course, difficult to demonstrate to what extent a given compensation fund is derived from internal, and to what extent it is derived from external, sources. But there can be little doubt that external sources will be inadequate to supply the measure of compensation which the United States and other Allied countries have already assumed responsibility to provide.

Since reparations are not allocated solely on the basis of monetary losses, there can be no exact formula for determining the amount a nation recovers on its claim against an enemy country for war damage to private property. It might be assumed that the amount recovered for such damage is, roughly, in the same ratio to the total of reparations received as the claim for such damage is to the total of monetary losses claimed. If such an assumption is made, reparations as a source of compensation will be grossly inadequate. The House Committee on Interstate and Foreign Commerce in its report of July 17, 1947 on the bill to create a commission to study the matter of war claims stated:

The position of Germany and Japan (with respect to war claims against these countries) is somewhat analogous to that of a bankrupt against whom claims are apt to be filed in an amount greatly in excess of the bankrupt's assets. The legitimate claims of the United States alone, on account of the expense incurred in fighting World War II, will most likely exceed many times the assets available for payment even over a considerable period of years. . . .²¹

It might be assumed that all reparations, or reparations of a particular type such as enemy assets, are received for private war losses. Such an assumption appears to have been made when it was stipulated in the agreement for the release of Italian assets that Italy's payment of 5 million dollars should be used to satisfy private war claims of United States nationals. However, the 5 million dollar fund has been made available for private claimants as a consequence of the waiver of claims of the United States Government. It is difficult to say, therefore, whether the fund should be regarded as derived from external, or from internal, sources.

Even if the application of all reparations to claims for private war losses be regarded as justified, reparations may still be insufficient to provide substantial compensation. Claims for private war losses include claims not only for damage to property but also claims for damage to the person, such as personal injuries and death due to mistreatment of prisoners-of-war and civilian internees. The United States has already committed itself to provide \$400,000,000 worth of compensation for war damage caused by Japan to property, largely of American or Philippine nationals, in only one part

²¹ House Report No. 976 on H. R. 4044, 80th Congress, 1st Session, pp. 2-3.

of the area damaged as a consequence of the war with Japan. It is not known whether Japan will be obliged to match that figure with reparations.

It is, of course, not merely a question whether reparations received by the United States will be adequate to compensate all American nationals for their war losses. Adoption of the nationality basis assumes that each Allied country is willing to limit the compensation it provides to the amount of reparations it receives. In view of the much heavier damage sustained by nationals of most of the Allied countries, than was sustained by American nationals, it is not to be expected that other Allied countries will find reparations an adequate source of compensation.

The nationality basis is predicated on the theory that a government should present only the claims of its nationals against an enemy government. If this theory is rejected, there is no theoretical justification for the use of the nationality basis.

Finally, it is already difficult to secure agreement to the nationality basis because so much progress has already been made toward payment of compensation on a territorial basis. Great Britain, the United States, and other Allied countries have for years been collecting premiums from foreign owners of property within their territory for war risk insurance. Gratuitous payments have already been made to foreigners for war damage. A number of countries have entered into agreements to guarantee equal treatment in the administration of compensation benefits. These arrangements cannot easily be undone.

The Territorial Basis as the Sole Basis for Providing Compensation

If the territorial basis were adopted as the sole basis for providing compensation, each Allied country would provide compensation for war damage sustained to property of Allied, as well as its own, nationals situated on its own territory, but would provide no compensation for property of its nationals on territory of other Allied countries.

The objection to this solution of the compensation problem, as already indicated, is that, if reparations are received by a country for damage to property of its nationals in other Allied countries, the government of the country should not refuse to provide compensation for such damage. It has been disclosed, however, that some governments did not put in claims for reparations on a nationality basis. It is also doubtful that the governments which did present claims on a nationality basis thereby secured a significant increase over the share of reparations they would have received if their claims had been presented on a territorial basis.

The question is merely one of the right of a property owner to look to the government of the country of which he is a national to present his claim, rather than to the government of the territory in which his property was situated at the time of damage. Even if governments receive the same

shares of reparations whether they espouse claims on a nationality or on a territorial basis, the individual property owner may have strong reasons for preferring to have his claim presented, and compensation administered, by one government rather than the other. The brief reference to authority on the point which has already been made indicates that it is doubtful that a property owner has the right to insist that the government of the country of which he is a national present his claim for damage caused by a second government on territory of a third government.

There are important advantages to be derived from placing sole responsibility to provide compensation for war damage upon the government of the territory in which the damage occurred. The chief advantage is that the territorial basis permits governments to tie compensation programs to rehabilitation programs. The burden of providing compensation is so heavy that most countries have not been willing to pay compensation outright. They have insisted that the compensation be used to rebuild or replace the damaged property. To make such insistence effective they have stipulated that compensation will be paid in fractional parts as the work of reconstruction progresses.

By the terms of the Philippine Rehabilitation Act, the Philippine War Damage Commission, to the fullest extent practicable, is to require that lost or damaged property be rebuilt, replaced, or repaired before payments of money are actually made to claimants. If the Commission determines that rebuilding, replacement, or repair is impossible or impractical, the Commission may waive the requirement, but is then to insist that compensation benefits be reinvested in such manner as will further the rehabilitation or economic development of the Philippines.⁵² It would be impossible, however, for a government which pays compensation for war damage to property of its nationals in a foreign country to enforce any requirement that the compensation be used either to repair, replace or rebuild the damaged property, or be invested in such a way as would further the economic rehabilitation of the country in which the damage occurred.

Another advantage of the adoption of the territorial basis is that programs to provide compensation for war damage can be brought into proper relationship with programs for the recovery of property which has been confiscated or looted during the war. Most governments include in their definitions of compensable war damage, damage resulting from confiscatory measures of the enemy or from looting. A determination cannot be made that such a loss has been suffered until there has been a prior determination that the confiscated or looted property is not recoverable. This preliminary determination can be effectively made only by the government of the territory in which the property was situated at the time of loss.

When the Allied countries of Europe were liberated, property taken over from the retreating enemy was placed under the administration of the gov-

⁵² 50 USCA 1754(e).

ernment of the Allied country in which it was found. These governments are now endeavoring to restore such property, if it can be identified, to the rightful owners. In cases where confiscated property cannot be restored but assets have been recovered of the enemy agency which confiscated the property, some Allied governments, the Netherlands for example, are endeavoring to distribute among the owners a pro rata share of the proceeds from the liquidation of the enemy agency.⁵³ It has also been recognized that property which has been removed from Allied countries by the enemy and which is subsequently found in enemy territory will be returned by the Allied authorities in control of the enemy territory to the government of the Allied country from which the property was taken, regardless of the nationality of the owner of the property.⁵⁴

Since the responsibility for restoring confiscated or looted property has been placed upon the government of the country in which the property was situated at the time of loss, an advantage would be gained by placing responsibility to provide compensation for property which cannot be restored upon the same government. It is not desirable to have the United States assume responsibility to provide compensation for property of American nationals lost or confiscated in the Netherlands when it cannot determine whether the property has been lost or confiscated without consulting the Netherlands Government.

Adoption of the territorial basis, by emphasizing that compensation for war damage to property is derived largely from internal sources, makes it easier for governments to provide the same amount of compensation for damage to property no matter which enemy country caused the damage. When the nationality basis is used, and the emphasis is upon reparations as a source of compensation, there is a tendency, if not an obligation, to pay different proportions of compensation for damage caused by different enemy countries corresponding to the different percentages of recovery on reparations claims against the enemy countries. If it be recognized that compensation should be provided, if not from external, then from internal, sources, no point is perceived in introducing into compensation systems the vexing question of determining which enemy country was responsible for a particular item of damage.

Adoption of the territorial basis places the responsibility to provide compensation upon the government in the best position to assess the damages. It is much easier for the French Government, than for the United States Government, to evaluate damage sustained to property in France.

Administrative difficulties will arise in any attempt to use the territorial basis as the sole basis for providing compensation. There will be the problem of determining the situs of property for purposes of select-

⁵³ See with reference to the Netherlands, *Department of State Bulletin*, August 12, 1947, p. 299.

⁵⁴ Same, June 15, 1947, p. 1161.

ing the responsible government. Should a government provide compensation for movable property which was damaged while in transit through its territory? Should a government provide compensation for diplomatic and consular property of another government, or for property of foreign service officers or members of the armed forces of another government? It is believed the solution of these questions might properly be found by fixing the situs of property for compensation purposes in the same country in which its situs is fixed for taxation purposes. At any rate no administrative difficulties come to mind which would be insuperable.

It is not intended in this article to minimize the problems which must be faced in providing compensation on a territorial basis. It is contended, however, that the problems are easier to solve than those which must be faced if compensation is provided on a nationality basis or on a combination of the two bases.

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CURRENT NOTES

REGIONAL MEETINGS AUTHORIZED BY EXECUTIVE COUNCIL

The Executive Council of the Society voted at a meeting held in Washington, September 28 to authorize regional meetings to be held in New York, Chicago, San Francisco, and in any other localities where members of the Society might wish to hold such meetings, and President Hyde was authorized to invite particular members of the Society to organize such meetings. It was indicated that, in order to serve the purpose of contributing to the program of the annual meeting in April, such meetings should be held as early as possible, and preferably within the next three months. This action was taken as the result of a proposal made by President Hyde for a meeting held in New York on November 9, on the basis of the heavy vote in favor of regional meetings in the replies to the third item on the questionnaire distributed in July. The purpose of the meetings should be to discuss the program of activities of the Society as well as current problems of international law and relations, as touched upon in items one and two of the questionnaire. The question of the formation of local chapters of the Society, a step recently taken by the Federal Bar Association, might also be discussed. The regional meetings should draw upon the territories surrounding the place of the meeting although the Washington area should probably not be involved in other regional meetings.

P. B. P.

GENERAL NOTE ON THE LAW OF WAR BOOTY

Partly as a consequence of action taken under the Potsdam Declaration,¹ and partly due to misapprehensions relative to property seizures in the occupied zones of occupation in Germany, confusion has arisen in thought and language on the subject of war booty to an extent indicating that many have lost sight of the principles which define rather sharply the orbit of the concept of this concept.

The concept of war booty as understood in that part of the law of nations relating to the conduct of warfare on land, embodies three basic postulates which must be kept constantly in mind in determining the validity of a seizure of property. These postulates or criteria are: (1) The private property of enemy subjects in territory under belligerent occupation may be confiscated; a similar protection is accorded private property found in the field of battle with certain special exceptions to be indicated later. (2) Moveable state, or public, property which can be used for military operations may be appropriated by the occupying state; if found on the battlefield it is subject to seizure as booty even though not usable in military

¹ For text see this JOURNAL, Vol. 39 (1945), Supplement, p. 245.

operations. (3) Immoveable state, or public, property is subject to use and administration but may not be appropriated by the occupant; this specific limitation upon confiscation is a corollary of the recognized prohibition against premature annexation.

Such restrictions upon the conduct of a belligerent in occupied territory as are involved in these general criteria presuppose, however, a condition of military occupation within the meaning of international law. They do not operate where, after *debellatio* (that is, annihilation of the enemy's armed forces together with destruction of its government resulting in disappearance of the enemy state as an international person), sovereignty over the territory in question is assumed and exercised by the victor.² In the second situation, which involves considerations of state succession (whether with or without formal annexation), the new sovereign may take such measures as he sees fit with respect to property within his new domains, untrammelled by the Hague Regulations, which deal only with his authority over the territory of a hostile state.³ Here, however, a different set of principles may operate to curb his freedom of action relative to property seizures, namely the established principle of general international law (which operates even in time of peace) that the private property of aliens may not be confiscated without adequate and effective compensation.⁴ In this respect a foreign subject may enjoy better treatment than is accorded to a state's own citizens, for while the property of citizens may be confiscated in the public interest without any restriction under international law, alien owners must be given compensation.⁵

It is not within the compass of this note to examine whether the authority exercised by the victorious governments in Germany, or by the Allied Control Council, necessarily implies the assumption of sovereignty (through creation of a condominium or several independent sovereignties) with the consequent vesting of full sovereign powers in the Allies,⁶ or whether, if such a construction of the present situation be disputed, the legality of measures taken relative to property rights and reparations while a state of war exists may be challenged as premature in the absence of a peace settlement. Suffice it to observe that international law knows only two categories of occupation by a conquering state: belligerent occupation properly so-called

² See Oppenheim, *International Law*, 6th ed., Vol. II, pp. 466-467; Hall, *International Law*, 8th ed., pp. 680-681.

³ See Articles 42 and ff. of the Regulations annexed to Hague Convention No. IV of 1907, *U. S. Treaty Series*, No. 539; Malloy, *Treaties*, Vol. II, p. 2269; TM 27-251, *Treaties Governing Land Warfare*, p. 31 and ff.

⁴ A. V. Freeman, *The International Responsibility of States for Denial of Justice*, p. 515 and ff., and authorities cited.

⁵ Exchange of Notes between Mexico and the United States, August 22, 1938, this *JOURNAL*, Vol. 32 (1938), p. 198.

⁶ See Kelsen, in this *JOURNAL*, Vol. 35 (1944), p. 692, and his later discussion in same, Vol. 39 (1945), p. 518 and ff.

and assumption of sovereignty over the conquered areas. There is no in-between status. Consequently, the validity of acts performed by a victorious belligerent can only be tested, as already noted, either by the rules applicable to military occupation or by the principles which determine the prerogatives inherent in a sovereign nation. In any event, as between the victorious states themselves and the defeated nation, disposition of property rights not otherwise sanctioned by applicable principles may be legitimated by the provisions of the peace treaty.

* * * * *

War booty, properly so-called, is a concept which relates to the powers of a belligerent, first, over property found on the battlefield, and, second, over property in enemy territory under military occupation as generally understood in land warfare. To use this term to describe the removal of property as reparations which are imposed by a victorious nation upon a vanquished enemy is a complete misconception of its scope.⁷ Reparations are determined by the peace settlement and are subject to political pressure. Booty is limited by well-defined principles of international law. Furthermore, it is totally unrelated to the unquestioned right of a belligerent to seize or destroy property in the conduct of hostilities, if imperatively demanded by the necessities of war.⁸ These recognized categories are independent of any restrictions which a belligerent may choose to adopt for its own purposes in dealing with enemy property ordinarily subject to seizure. A belligerent may, of course, elect not to exercise fully its right to seize property as booty. Such a course may be pursued because arrangements have been entered into with co-belligerents relative to the disposition of enemy property in general,⁹ or to the restitution of certain special types of property seized by the enemy during the war. One example in point would be a government's determination to treat as "captured enemy material" in any zone only property which was owned or held for direct military use by enemy military authorities.¹⁰ The more limited concept

⁷ On March 1, 1946, the Department of State officially denied that the United States had any agreement with the Soviet Government in regard to "war booty" in Manchuria and repudiated any interpretation of that term to include industrial enterprises such as Japanese industries and equipment in Manchuria. *Department of State Bulletin*, Vol. XIV (1946), p. 364.

⁸ FM 27-10, *Rules of Land Warfare*, par. 313; and for an application of this principle in international jurisprudence, *Hardman's case*, American and British Claims Arbitration, *Nielsen's Report*, p. 495.

⁹ Such as under the "Liberated Areas Agreements" between the United States and various other governments, a typical example of which is the accord supplementing the agreement of May 16, 1944, between the United States and the Netherlands (official text unpublished).

¹⁰ A striking illustration of American policy is furnished by the American Government's return to the Hungarian National Bank of approximately \$32,000,000 worth of gold which had been removed from Hungary by the Germans and subsequently captured by the armed forces of the United States. See *Department of State Bulletin*, Vol. XV (1946), p. 335.

embraced in a policy of this kind would obviously not prejudice the larger rights granted by international law.

The general principles governing war booty are set forth in Articles 46, 47, 52, 53, 55 and 56 of the Regulations annexed to Hague Convention No. IV of 1907 concerning the laws and customs of war on land. A survey of these articles and of the precedents afforded by their application is the only accurate means of ascertaining what is embraced by the concept of booty, inasmuch as that term is not defined either in the Regulations or in any other international instrument. The articles referred to are found in Section III of the Regulations entitled "Military Authority over the Territory of the Hostile State." Article 46 of these Regulations formally prohibits confiscation of private property, which on the contrary, must be "respected."¹¹ Article 47 forbids pillage; this injunction applying to public as well as to private property.¹² Article 52 permits requisitions in kind (and in the form of services) from municipalities or inhabitants, but only for the needs of the army of occupation. Contributions in kind are required to be paid for as soon as possible. The powers of an occupant with respect to the public property of the State (both moveable and immoveable) as well as certain special categories of private property, are regulated in Articles 53 and 55:

Article 53. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the state which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Article 55. The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Property seized under Article 53 need not be directly usable for military operations, as in the case of ammunition, but it is sufficient if it serves that purpose indirectly.¹³ The United States *Rules of Land Warfare* states this rule more restrictively when it declares in Paragraph 321:

All movable property belonging to the state directly susceptible of military use may be taken possession of as booty and utilized for the benefit of the invader's government. Other movable property, not

¹¹ See *Neel's Executor v. Noland's Heirs*, 166 Ky. 455, 467.

¹² C. C. Hyde, *International Law*, Boston, 1945 (2d ed.), Vol. II, § 694.

¹³ M. Huber, in *Revue Générale de Droit International Public*, 1913, p. 683; H. Rolin, *Le Droit Moderne de la Guerre*, § 547.

directly susceptible of military use, must be respected and cannot be appropriated.

It is clear that property which cannot be used for military operations, directly or indirectly (a shallow test, indeed, in the present era of "total" war) is not subject to appropriation.¹⁴ Such moveables as books, pictures, collections of various kinds, are exempt. Thus, to be lawful booty moveables must be (1) state owned and (2) usable in military operations.

Article 55 is incorporated word for word into the War Department *Rules of Land Warfare*, as paragraph 315, and is amplified by paragraph 316 thereof in the following terms:

The occupant does not have the absolute right of disposal or sale of enemy real property. As administrator or usufructuary, he should not exercise his rights in such wasteful and negligent manner as seriously to impair its value. He may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines. A lease or contract should not extend beyond the conclusion of the war.

The general exemption from seizure enjoyed by private property is extended by Article 56 to the property of municipalities, of institutions dedicated to religion, charity and education, the arts and sciences, even when such property is that of the state; and the seizure or destruction of, and wilful damage done to, these institutions, to historic monuments or to works of art and science are expressly forbidden.

It was formerly the rule that all enemy property, whether public or private, which a belligerent found on the battlefield, was lawful booty and could be appropriated. So far as private enemy property is concerned, this rule is now obsolete, except with respect to such items as military papers, arms, horses, and the like. But the rule is still valid with respect to public enemy property so found. As Oppenheim says:

Thus, not only weapons, munitions, and valuable pieces of equipment which are found upon the dead, wounded, and prisoners may be seized, but also the war-chest and state papers in possession of a captured commander, enemy horses, batteries, carts, and all other public property found on the field of battle that is of value * * * The restriction in Article 53 of the Hague Regulations that only such moveable property may be appropriated as can be used for the operations of war does not apply to property found on the battlefield, for Article 53 speaks of "an army of occupation" only. Such property may be appropriated whether it can be used for military operations or not; the mere fact that it was seized on the battlefield entitles a belligerent to appropriate it.¹⁵

Under this category of rights—rights of a belligerent engaged in actual hostilities, as distinguished from his rights with respect to property in oc-

¹⁴ J. De Loutet, *Le Droit International Positif*, Vol. II, p. 301.

¹⁵ *International Law*, as cited pp. 310-311; also Hyde, § 695 and Spaight, *Air Power and War Rights*, p. 329.

cupied territory—trains carrying ammunition or troops, or carts and the vehicles loaded with food or supplies can be seized as booty of war, whether privately owned or not.¹⁶ But the seizure of means of transportation which is permitted under Article 53, paragraph 2, is altogether different in character. In that case the occupant's authority is limited to use, and he may not appropriate title to himself. The duty to restore such property when peace is declared and to make compensation is recognized by the United States War Department Field Manual on *Rules of Land Warfare* (FM 27-10), paragraph 331 of which incorporates the rule of Article 53, paragraph 2, of the Hague Regulations. The use there contemplated clearly includes cables, telephone and telegraph plants, radio stations, automobiles, horses, wagons, railways, railway plants, tramways, ships in port, airplanes and aviation facilities, depots of arms whether military or sporting, and in general, all kinds of war material.¹⁷ While Article 53, paragraph 2, permits the seizure of privately owned arms and munitions factories and other establishments manufacturing war material, as well as the exploitation of private railroads and their equipment, the private character of this property requires that it be restored at the end of the war and excludes it from consideration as lawful booty.¹⁸ The same quality prevents an occupant from taking possession of funds or securities found in the treasury of the private railroad and belonging to it.¹⁹ Such was in fact the express holding of the Franco-German Mixed Arbitral Tribunal in the case of *Compagnie des Chemins de Fer du Nord v. Germany*²⁰ where seizure of the Company's railway as a means of transport was upheld as compatible with Article 53, paragraph 2, but not seizure of the Company's funds and cash. Even the German General Staff's *Kriegsbrauch im Landkriege*²¹ acknowledged that the seizure of cash, funds, and realizable securities permitted under Article 53, is limited to those not belonging to municipalities, communes, or private individuals.

Where the ownership of property is unknown or where there is any doubt as to whether it is public or private property for purposes of seizure as war booty, the *Rules of Land Warfare* (which, it should be observed, constitute the governing doctrine for armies of the United States in the field), categorically states that such property should be treated as public property until ownership is definitely settled (paragraph 322). With this doctrine should be considered the ruling of the Hungarian-Yugoslav Mixed Arbitral Tribunal in *Collac v. Yugoslavia* to the effect that pieces of machinery, left behind at the approach of the enemy, cannot automatically be considered as war booty, but that it has to be ascertained whether they belong to a private person who, having temporarily abandoned them, has not relinquished his

¹⁶ A. Latifi, *Effects of War on Property*, p. 30.

¹⁷ Rolin, §§ 523, 528, and 530.

¹⁸ See Ferrand, *Des Réquisitions en matière de Droit International Public*, p. 176; Mégninac, *Le Droit des gens, et la Guerre de 1914-1918*, Vol. III, p. 608.

¹⁹ Rolin, § 530.

²⁰ *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, p. 67, at p. 72.

²¹ Morgan, ed., p. 160.

rights of ownership; or whether they formed part of the equipment of the enemy army or were at least in its use.²²

Text-writers have generally condemned as a violation of Article 53 (and the customary principles of international law which that article codifies) Germany's action in World War I of seizing and transferring the funds of the *Banque Nationale* of Belgium, a private institution, to the German Imperial Bank.²³ Among other recognized German violations in that war were the seizure and carrying off to Germany of live stock, and particularly horses and cattle, in the occupied portions of France and Belgium;²⁴ the dismantling of factories and workshops in Belgium and Northern France, as well as the carrying away of machinery and tools to Germany²⁵ and the tearing up of tracks of various privately owned Belgian railroads, the rails of which were transported to Poland for construction of military railways.²⁶ Removal of the tracks of a public railroad would also violate international law, since this exceeds the mere right of usufructuary given over immoveable property.²⁷ More controversial is whether an occupant may appropriate the rolling stock of state-owned railroads. Some writers take the position that railroad rolling stock is an integral part of the land, and must therefore be treated as immoveable property;²⁸ others hold that there is no obligation to restore rolling stock of this category which an occupant may have removed. Thus Feilchenfeld states:

An obligation to restore is created in paragraph 2 of Article 53 for privately owned rolling stock, but it is deliberately omitted in paragraph 1, which deals with state property.²⁹

Such is also the viewpoint of the great Max Huber who concludes that state rolling stock may be disposed of by the enemy who seizes it, as he sees fit.³⁰ This position is corroborated by the fact that at the First Hague Conference a

²² *Recueil des Décisions des T.A.M.* (1930), p. 195. And see Schwarzenberger, *International Law*, Vol. I, p. 272. In *Mazzoni v. Finanze dello Stato*, the court rejected an argument that stocks and bonds which had been left behind by their owners in Italian territory occupied by Austro-Hungarian troops, were liable to seizure as *res nullius* or war booty: *Annual Digest of Public International Law Cases*, 1927-1928, Case No. 384; also G. H. Hackworth, *Digest*, Vol. VI, p. 403.

²³ J. W. Garner, *International Law and the World War*, Vol. II, pp. 130-131; E. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, p. 38.

²⁴ Oppenheim, § 143a; and Garner, § 395.

²⁵ Garner, § 396, who points out that although Article 53 "allows, subject to restoration and indemnity for its use, the seizure of war material belonging to private persons, it does not authorize the seizure and exportation by the occupying belligerent of machinery and implements used in the industrial arts." See also note 7 above.

²⁶ Work cited, § 397.

²⁷ Rolin, § 555; Holland, *Law of War on Land*, par. 115.

²⁸ Rivier, *Principes de Droit des gens*, Vol. II, p. 311; Mégninac, Vol. III, p. 612.

²⁹ Work cited, p. 54.

³⁰ *Revue Général de Droit International Public*, 1913, p. 669. Accord: Von Stein, *Le droit international des chemins de fer en temps de guerre* in *Revue de droit international et de législation comparée*, Vol. 17, 1885, pp. 543 and ff.

proposal by Switzerland that state railway material should be returned at the end of hostilities, was rejected.³¹

One other vexatious problem that has arisen under Article 53 relates to the extent of the occupant's authority to appropriate "realizable securities" which are strictly the property of the state. Specie, paper money, and bullion belonging to the state can, of course, be appropriated, and the right to collect taxes, dues, and tolls is admitted. More complicated is the question of the occupant's right to collect debts owing to the legitimate sovereign when evidenced by written instruments such as bonds, negotiable instruments and similar securities, or ordinary debts not so evidenced. Bearer instruments belonging to the legitimate sovereign may be appropriated as booty by the occupant. He may not, however, sell securities payable to the legitimate government or its order since the occupant is not the legal successor to the legitimate government and is therefore incapable of passing title to such securities.³²

On the collection of debts, whether evidenced by instruments payable to the legitimate government or order, or arising from a contract, there is considerable controversy. It is generally agreed, however, that the phrase, "realizable" securities refers to matured debts and that an occupant may lawfully collect all debts due to the legitimate government which have matured during the period of occupation. But payment of a debt before maturity may not be required.³³

The general principles of the Hague Regulations summarily sketched above may seem in strange contrast to some of the practices followed by the belligerents during the course of the recent conflict and thereafter. When to the ordinary complexities of the booty problem are super-added the provisions of the Potsdam Declaration on reparations claims,³⁴ bewilderment is still further intensified. For example, Part IV of that Declaration specifies with respect to reparations from Germany that:

³¹ Scott, J. B., ed., *Proceedings of the Hague Peace Conference of 1899*, p. 67.

³² Westlake, *International Law*, Vol. II, p. 114; Huber, work cited, pp. 664, 665.

³³ Hershey, *The Essentials of Public International Law*, p. 620; Bordwell, *The Law of War*, p. 324; Huber, work cited, pp. 664, 669, 670.

³⁴ One of the primary difficulties with the Potsdam provisions on reparations is that no attempt was made to distinguish between external assets which were properly German, and those which had been seized wrongfully by the Germans from other nations during the war. For example, when the Nazis invaded Austria they appropriated most of the capital equipment of that country. At Potsdam it was provided that Soviet reparations claims were to be met by removals from the Soviet zone and "from appropriate German external assets" (IV, 1). Coupled with this was a renunciation by the United Kingdom and the United States of all claims "to German foreign assets in . . . Eastern Austria" (IV, 9). Under this language the Soviet Government has sought to justify its seizure—as German external assets—of property stolen from the Austrians by Germany. More meticulous draftsmanship might possibly have avoided both a serious source of friction and the resultant injustice to Austria. See this JOURNAL, Vol. 39 (1945), Supplement, p. 245, at pp. 251-253.

In addition to the reparations to be taken by the USSR from its own zone of occupation, the USSR shall receive additionally from the western zones:

(A) 15 per cent of such usable and complete industrial capital equipment, in the first place from the metallurgical, chemical, and machine manufacturing industries, as is unnecessary for the German peace economy and should be removed from the western zones of Germany, in exchange for an equivalent value of food, coal, potash, zinc, timber, clay products, petroleum products, and such other commodities as may be agreed upon.

(B) 10 per cent of such industrial capital equipment as is unnecessary for the German peace economy and should be removed from the western zones, to be transferred to the Soviet Government on reparations account without payment or exchange of any kind in return.³⁵

Clearly if property disposals under these provisions are to be regarded as lawful it must be either (a) because they fall within the category of reparations properly so-called (prior, it may be observed, to the existence of formal treaty clauses thereon) or (b) because they constitute a transfer of property over which the Allies have jointly or severally acquired the sovereign right of disposition. Under no view can they be justified as an application of the international law of booty.

These considerations must be kept in mind when final appraisal is made of the Potsdam approach. Without disregarding its full legal implications, the question of general principles nevertheless remains important, for issues continually arise not only concerning the validity of seizures as between the Allies themselves and third parties but also with respect to the propriety of booty seizures by the Axis forces during their regime of occupation in Europe. As has already been observed, whatever departures from the Hague Regulations may have appeared necessary to the Allies may be legitimated, as between themselves and the vanquished powers, by specific covering provisions in the peace treaties. Such provisions would, of course, be ineffectual to extinguish the rights of non-contracting third States whose subjects may have suffered damages due to violations of international law.

ALWYN V. FREEMAN *

AMERICAN MILITARY GOVERNMENT COURTS IN GERMANY

American Military Government Courts have been in operation in Germany since September, 1944. Little publicity has been given to their composition, jurisdiction, powers, and procedure. Their influence upon the democratization of Germany has probably been very great since the courts, above all German institutions prior to the Nazi regime felt the greatest impact of the National Socialist program. Particularly in the courts did the fullest

³⁵ Same, p. 252.

* Of the Michigan Bar. Nothing in the present note necessarily represents the views of any government agency.

5461
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Graham

EDITORIAL COMMENT

ARMISTICES—1944 STYLE

The armistice agreements¹ concluded between the Governments and high commands of Rumania, Finland, Bulgaria, and Hungary and their opposing belligerents on September 12, September 19, and October 28, 1944, and January 20, 1945, respectively, have furnished the first clear-cut indications of the general type of political and military treatment to be meted out to the remaining Axis partners at the conclusion of hostilities. While a number of capitulations were signed in the earlier stages of the war,² and two armistices, *eo nomine*, were concluded by the French Government and High Command with Germany and Italy respectively, no armistice agreements imposed by the United Nations have hitherto appeared in integral form, it being generally understood that published versions of the armistice concluded between the United Nations and Italy on September 3, 1943 were incomplete.³ The four armistice agreements and their annexes thus form the most interesting nexus of legal stipulations, military procedures, and politico-economic settlements which have appeared since the close of World War I. Because they are likely, under the prevailing climate of opinion which calls for a "long armistice," to serve for some time as yardsticks for the measurement of the political and social behavior of the defeated countries, they merit special attention and analysis. Finally, because what is sauce for the goshings may reasonably be assumed to savor of what is in store for the gander, they may have a certain value in forecasting the provisions of other armistices to come.

While Anglo-American practice in the past has been extremely flexible in referring to capitulations, truces, suspensions of arms, and other such acts, as armistices, and the reverse,⁴ Continental practice, particularly since the

¹ For the texts of the four armistices see below, supplement, pp. 85-103.

² Reference is made to the capitulation of the residual Polish forces in Warsaw late in September, 1939; that of the Netherlands High Command on May 16, 1940; that of the Belgian High Command and the King on May 27, 1940; to the surrender of representatives of the Yugoslav High Command at the end of April, 1941, and of the Greek High Command in mid-May, 1941, as examples. The terms of surrender of Axis forces in Syria in June, 1941 antedate the formation of the United Nations and therefore do not possess a character comparable to the agreements here discussed.

³ For the proclamation of the Italian armistice by General Eisenhower on September 8, 1943, see *The New York Times*, September 9, 1943. For an alleged statement of the terms see *Revue de Droit International (Sottile)*, XXII^e Année, No. 2 (April-June, 1944), p. 170.

⁴ See Percy Bordwell, *The Law of War between Belligerents: A History and Commentary*, Chicago, 1908, pp. 294-295, and W. E. Hall, *International Law*, Oxford, 1895 (4th ed.), pp. 564-565.

First and Second Hague Conferences, has steadily crystallized its conceptions.⁵ It tends to consider an armistice as an agreement for the general termination of hostilities, concluded by both military and civilian representatives of a defeated Power on wider than strictly military bases, to provide not merely for the end of open warfare, but for a transitional régime of indeterminate duration. The experience of the United States as a negotiator of the armistices with Austria, Hungary, and Germany in 1918⁶ committed it almost irretrievably to following Continental practice. It is not surprising, therefore, that the conception of a general armistice as largely equivalent to the "preliminary peace" of older usage, underlies the juridical thinking embodied, with its consent, in three of the four armistices under review. The non-participation of the Soviet Government in the practices of 1918 has not, however, operated to create any visible disharmony between the practice of the Allied and Associated Powers a quarter of a century ago and that of the Soviet Government and High Command now. If anything, the fact of Soviet participation in, and paramount influence on, the negotiations preceding the conclusion of these armistices tends to develop, in the present setting, precedents laid down by the Soviet Republic twenty-five years ago when it concluded armistice conventions with its limitrophe neighbors. The armistices of 1944 are thus, both ideologically and textually, new syntheses of hitherto unjuxtaposed practices.

GENERAL PROVISIONS

All four armistices were concluded at Moscow between mixed military and civilian delegations of the defeated⁷ and representatives of the Allied (Soviet) High Command, a British general participating in the negotiations with Bulgaria, because of the overlapping theaters involved, as "the representative of the Supreme Allied Commander in the Mediterranean." In keeping with the long established Continental practice of waiving ratification of armistice conventions if the negotiators possess special full powers, none of the armistices required further confirmation on either side, and thus expressly entered into effect immediately upon their signature.⁸ However, on the Allied side a new factor entered into consideration: in addition to the

⁵ See Paul Fauchille, *Traité de Droit international public*, Tome II, pp. 326-334 and 536-540 for an excellent statement of Continental practice.

⁶ See United States, Department of State, *Foreign Relations of the United States, 1918*, Supplement 1, Vol. I, pp. 1-498.

⁷ Thus the Rumanian Delegation consisted of a Minister of State, a General, a Prince and a civilian; the Finnish Delegation of the Minister of Foreign Affairs, the Minister of Defense (a General), the Chief of Staff and a general officer; the Bulgarian delegation of the Minister of Foreign Affairs, the Minister of Finance and two Ministers without portfolio—a wholly civilian delegation, which is an exception to the general rule. The Hungarian Delegation consisted of the Minister for Foreign Affairs, a General and the State Secretary of the Cabinet of Ministers.

⁸ Rumania, Art. 20; Finland, Art. 23; Bulgaria, Art. 19; Hungary, Art. XX.

explicit authorizations by specified national governments, the delegates acted not only for themselves but "in the interests of all the United Nations" in the Rumanian instrument and "on behalf of all the United Nations at war" with Finland, Bulgaria or Hungary respectively in the three other agreements.⁹ This stipulation thus laid claim for the United Nations to a new corporate and representative capacity¹⁰ which is reflected, from time to time, in other articles.

All the armistices were drafted in English and Russian as the official languages, with a vernacular version, which is expressly denied any claim to authenticity, for each of the defeated powers.¹¹ This marks a new advance for both Russian and English as diplomatic languages to the exclusion of French, and places English and Russian on a juridical parity. In the case of Finland a special interest attaches to the abandonment by Finland of any effort to negotiate in both Finnish and Swedish, this marking a new low

⁹ According to the *Department of State Bulletin*, Vol. X, No. 252 (April 22, 1944), pp. 374-376, Rumania was at war with the United States of America, Australia, Bolivia, Canada, Czechoslovakia, Haiti, Luxembourg, New Zealand, Nicaragua, the Union of South Africa, the Union of Soviet Socialist Republics and the United Kingdom, while relations with her had been severed by Argentina, Belgium, Brazil, Chile, Costa Rica, Egypt, Greece, Iran, Mexico, the Netherlands, Norway, Poland and Yugoslavia; Finland was at war with Australia, Canada, Czechoslovakia, New Zealand, the Union of South Africa, the Union of Soviet Socialist Republics and the United Kingdom, while relations had been severed by Belgium, Egypt, the Netherlands, Norway, Poland and Yugoslavia, and—a few months later, the United States of America; Bulgaria was at war with the United States of America, Australia, Bolivia, Czechoslovakia, Greece, Haiti, Luxembourg, New Zealand, Nicaragua, the Union of South Africa, the United Kingdom and Yugoslavia, joined at the last minute by the Union of Soviet Socialist Republics, while relations had been severed by Argentina, Belgium, Chile, Egypt, Iran, Mexico, the Netherlands and Poland. Hungary was at war with the United States of America, Australia, Bolivia, Canada, Czechoslovakia, Haiti, Luxembourg, New Zealand, Nicaragua, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom and Yugoslavia, while relations were severed by Argentina, Belgium, Brazil, Chile, Costa Rica, Egypt, Greece, Iran, Mexico, Netherlands, Poland and Uruguay.

It is apparent from the foregoing that Rumania was, with three relatively unimportant exceptions, chiefly involved in war with the United States, the British Commonwealth and Russia; Bulgaria with the United States, the British Commonwealth but not Russia—up to the last minute; Finland with Russia, the British Commonwealth, but not the United States, and with no severance of ties by any of the American Republics. Hungary was, accordingly, at war with Yugoslavia and all the states at war with Rumania, and so fell almost exactly into the pattern set by her European neighbor while additionally drawing the wrath—to the degree of severance of relations—of Uruguay. The status of Polish-Hungarian relations has never been satisfactorily cleared up, although the Polish Legation in Budapest ceased to function in January of 1941.

¹⁰ It will be recalled that in the peace settlement following World War I the preambles to the treaties of Versailles, Saint-Germain, Neuilly, Trianon, and Sevres indicated in each instance by name the "Principal Allied and Associated Powers" and also separately enumerated the states classified merely as "Allied and Associated Powers": nowhere was there a corporate capacity or designation.

¹¹ This is stated in the conclusion of each agreement.

point in the history of the status of Swedish as an official language.¹² The Finnish and Hungarian armistices also entrusted to the Soviet Government the duty of transmitting official copies of the maps to each of the other governments on whose behalf the armistice was concluded.

MILITARY PROVISIONS

The principal military objective of the armistices being to terminate hostilities, the initial article in each instance provides for this, the Rumanian armistice having the widest scope and forcing a complete military *volt-face*. Thus Rumania was compelled to discontinue military operations against the U.S.S.R., withdraw from the war against the United Nations, break off relations with Germany and her satellites,¹³ and enter into the war and promise to wage war on the United Nations side, placing her armies under the Allied (Soviet) High Command, with a view to recovering her independence and sovereignty. Finland, having given her pledge to break with Germany and evict German troops before the armistice was signed, merely pledged mutual cessation of hostilities and a break with Germany's satellite states, such rupture being defined as including all diplomatic and consular relations, and use of communications media with Germany and Hungary,¹⁴ and—what is decidedly new and important—the discontinuance of pouch and cypher and telephone communications with foreign countries by diplomatic missions and consulates located in Finland. This proviso, which is clearly intended to circumvent new forms of "unneutral service" by neutral diplomatic missions, will no doubt have its own precedent value, as hitting at neutrals through the vanquished. Certainly it marks an appreciable recession of neutral diplomatic rights. For Bulgaria, after her fleeting war with the U.S.S.R., there was only the obligation to cease war with all the other United Nations, break with Germany and Hungary, and pledge to make available such forces as might be required for service under Allied command—a stipulation possibly intended to impress Turkey, but hardly likely to be fully enforced.

Further to disable the enemy, the armed forces of Germany in Rumania, Finland, Bulgaria and Hungary were ordered disarmed,¹⁵ the Rumanian armistice providing for their internment, the other three for the surrender of

¹² In keeping with previous domestic practice, it is to be expected that Finland will publish an official version of the armistice in Swedish, but it will possess an "official" value only within the country and not internationally.

¹³ The phrase, as a legal description for the anti-Soviet coalition built up by Hitler, is new but occurs frequently in the three armistices. It appears not only as a convenient label for the classification of puppet régimes, but is apparently also intended to put in question—in terms of Rumania's own experience—the "sovereignty" and "independence of such areas in view of their previous manifest subordination to the Third Reich. No such designation is found in the Hungarian armistice, Hungary itself being obviously the last important satellite.

¹⁴ Article 5 and Annex; Hungary, Art. XVI and Annex.

¹⁵ Rumania, Art. 2; Finland, Art. 2; Bulgaria, Art. 1 (B); Hungary, Art. I (B).

all military, naval, and air personnel as prisoners of war; in any event, all nationals of Germany and Hungary in Rumania, Finland, and Bulgaria and of Germany in Hungary, were ordered interned. This procedure marks a rather high degree of severity toward the civilian population involved but appears to have been imposed by the circumstances of the war and the possibility of large scale subterfuge to permit military personnel to escape. It is a procedure more severe than was exacted by Russia of either Finland, Poland, or the Baltic States at the conclusion of World War I. A noteworthy feature is the exemption from internment under the Rumanian armistice of German and Hungarian citizens of Jewish origin.¹⁵ This is integrally connected with other measures of a politically remedial character discussed below, which endeavor to erect the framework of a new and humane legality following the collapse of the repressive Nazi-authoritarian régimes.

The common pattern of the armistices, which becomes continually clearer as their provisions are compared, is evidenced in the stipulations ensuring the Soviet and other Allied forces facilities for free movement in any direction, and access without cost to all installations, transport systems, air fields, etc., of the respective countries.¹⁶ The surrender of all Allied personnel in enemy hands is next demanded, entailing the repatriation of Allied prisoners of war as well as of interned Allied citizens on the territory of the defeated countries and Allied nationals transported to either Finland, Rumania, or Bulgaria.¹⁷ This is exacted of Rumania, Bulgaria and Hungary on a unilateral basis, whereas Finland receives an explicit pledge that Finnish prisoners of war and interned persons now located on the territory of Allied States will be transferred to Finland. This posits an equality and reciprocity of treatment for Finland which reveals itself elsewhere, chiefly through skilful drafting, in appreciably milder terms or more restricted demands than those imposed upon the former Balkan satellites. Special attention is given the needs of prisoners, internees and displaced persons, the agreements setting a formal standard of "adequate food, clothing, and medical services in accordance with hygienic requirements"—apparently an appeal to scientific standards of public health rather than to the provisions of international sanitary conventions.

MINORITY GUARANTEES

Correlative to the stipulations liberating Allied nationals are those releasing, irrespective of citizenship or nationality, all persons held in con-

¹⁵ German nationals of Jewish origin, temporarily domiciled in Hungary, were exempted from internment. Rumania, Art. 2, Annex; Hungary, Art. I, Annex.

¹⁶ Rumania, Art. 3 and Annex; Finland, Art. 3 and Annex; Bulgaria, Art. 3; Hungary, Art. III and Annex.

¹⁷ Rumania, Art. 5; Finland, Art. 10; Bulgaria, Art. 4 and Protocol. The Hungarian armistice speaks of providing "adequate food, clothing, medical services and sanitary and hygienic requirements"—another evidence of reference to objective rather than juridical, i.e., conventional, standards.

finement in the territory of the defeated nations on any one of three grounds.¹⁸ The first category embraces activities in favor of the United Nations—presumably applying to overt acts; the second covers persons incarcerated because of their sympathies with the cause of the United Nations—attitudes doubtless characterized by the enemy as subversive; the third category comprises offenses arising from status, covering persons condemned simply because of their racial origin—a term broadened in the Bulgarian armistice to cover "racial or religious reasons," quite understandable in areas where an *odium theologicum* has long prevailed. Taken together with the pledge to repeal or remove all discriminatory legislation and restrictions or disabilities of this character, these clauses enter a new field quite unconnected with military operations. They amount to an internationally imposed amnesty for offenses against an overthrown political régime. At the same time they set up a new form of minority guarantees for political, racial or religious groups bereft of any toleration under outgoing totalitarian régimes. A further promise of remedial action is given in the pledge exacted of each of the defeated to collaborate with the Allied Powers in the apprehension and trial of persons accused of war crimes.¹⁹

ECONOMIC CLAUSES

With persons in these various categories disposed of, the armistices turn to the material side, requiring first the restoration of previously existing state frontiers²⁰ between Rumania and Russia, Rumania and Hungary, Finland and Russia, Bulgaria and Greece and Yugoslavia, and between Hungary and Czechoslovakia, Rumania, and Yugoslavia. This is not merely a return to the *status quo ante*, but a basic decision regarding frontiers for the future. In that respect at least, the clauses are those of a preliminary peace.

In the wake of surrender of territory comes the surrender as "trophies" or "booty" of all German and Hungarian war matériel, including both war and merchant vessels of both countries found within Rumanian, Finnish or Bul-

¹⁸ Rumania, Art. 6; Finland, Art. 20; Bulgaria, Art. 5; Hungary, Art. V.

¹⁹ Because of the complicated and ill-defined position of a number of categories of persons found in Hungarian territory, the Hungarian armistice added to Article V a special paragraph obligating the Hungarian Government to take "all necessary measures to ensure that all displaced persons and refugees within the limits of Hungarian territory, including Jews and stateless persons, are accorded at least the same measure of protection and security as its own nationals."

²⁰ Rumania, Art. 14; Finland, Art. 13; Bulgaria, Art. 6; Hungary, Art. XIV. The Hungarian armistice additionally provides for "the surrender to the governments concerned of persons accused of war crimes". This is a stipulation obviously intended to forestall and override objections of a statutory or constitutional character, such as that laid down in Art. 112 of the Weimar Constitution of the German Reich against a nation's surrender of its own nationals. This may well forecast an analogous provision in the armistice terms for a defeated Germany.

²¹ Rumania, Arts. 4 and 19; Finland, Arts. 6, 7, 8, and Annex 9; Bulgaria, Art. 4 and Protocol; Hungary, Art. II.

garian jurisdiction.²¹ Other stipulations lay down guarantees against the removal or destruction or sabotage of enemy-owned or enemy-controlled property, movable or immovable,²² whether owned by the enemy state or by enemy nationals or by non-nationals domiciled in enemy or enemy-occupied territory. While comprehensive in its scope and phrased so as to apply to widely ramified conditions, this proviso is apparently directed primarily against the flight of privately owned capital from regions to be placed under occupation by the Red Army. All such property in Rumania and Finland is to be subject to the Allied (Soviet) High Command; in Bulgaria and Hungary to the dictates of the Allied Control Commission.

The treatment of merchant shipping under the armistice conditions is rather complex, and some of the thorniest questions as to title and possession are deliberately postponed, it being obviously impossible for the United Nations to reach agreement on all the points of law, including prize law before the armistices were concluded. In the main, merchant shipping of the United Nations found in the ports of the defeated countries is, without exception, to be turned over to the Allied (Soviet) High Command "in the interest of the Allies" and placed under its operational control "for the duration of the war against Germany and Hungary." Subsequently such ships are to be returned to their owners. That this opens up a number of interesting legal problems is obvious in the light of recent litigation over the ships of Estonia, Latvia, and Lithuania in foreign courts.²³

The fiscal and economic controls to be exercised by the Allied (Soviet) High Command in the territory of the defeated states are extensive, involving power to demand or requisition goods and currency to cover the needs of the control agencies, and a blanket right to utilize all the major forms of economic installations and enterprises, if necessary.²⁴

The problem of reparations²⁵ is differently faced in each armistice. Rumania's load is appreciably lightened by her participation in the war on the Allied side, yet a total of \$300,000,000 payable over a six year period chiefly in commodities such as grain and oil, is required of her. Finland is held to a similar amount, to be paid for in timber, paper, cellulose, sea-going craft, etc. Bulgaria is merely required to "make such reparation for loss and

²¹ Rumania, Art. 7; Finland, Art. 15; Bulgaria, Art. 12; Hungary, Art. VII, and Protocol Art. 2. Only German material and shipping are to be surrendered by Hungary.

²² Rumania, Arts. 8-9; Finland, Arts. 16-17; Bulgaria, Arts. 13-14; Hungary, Arts. VIII-X.

²³ Cf. Briggs, Herbert W., "Non-Recognition in the Courts: The Ships of the Baltic Republics," this JOURNAL, Vol. 37, No. 4 (October, 1943), pp. 585-596.

²⁴ Rumania, Art. 10; Bulgaria, Art. 15, and Protocol 4, Art. 17; Hungary, Art. XI and Annex. Oddly enough, only a general pledge to respond to requisitions was required of Finland in Art. 19.

²⁵ The phraseology involved is almost strained in its circumlocution (our italics): "Losses caused to the Soviet Union will be made good" by Rumania; "Losses caused by Finland will be indemnified," but Bulgaria will make such reparation . . . as may be determined. Rumania, Art. 11; Finland, Art. 11; Bulgaria, Art. 9; Hungary, Art. XII.

damage caused by the war to the United Nations, including Greece and Yugoslavia, as may be determined later." Since there was only a paper war between Bulgaria and the Soviet Union, no real reparation claims arise from that quarter; only the United Nations directly involved need expect reparations from Bulgaria. The Hungarian armistice explicitly sets aside \$100,000,000 of reparations payments on behalf of Czechoslovakia and Yugoslavia. Compensation²⁶ (not reparations) will be paid for losses caused to the property of other Allied States and their nationals, the amount to be fixed at a later date. These stipulations on behalf of the other United Nations and their nationals constitute a promissory note destined to be rather illusory if only because reparations carry their own priority and are of a nature to exhaust the ability of the defeated to pay them before compensation claims get a hearing.

Restoration, chiefly to the Soviet Union, of evacuated movable property which is comprehensively enumerated, is pledged in almost identical language in each instrument.²⁷ This is another of the remedial acts of the armistices in effecting a large scale undoing and reversal of the spoliations, the "national grand larceny" to which the Soviet Union was subjected by the acts of the Axis coalition. The logical corollary to such acts of material restoration is the juridical one of the restoration of all legal rights and interests of the United Nations and their nationals as they existed before the war, and the exaction of a pledge from the defeated to return such property in good order.²⁸ The armistices thus recognize the existence of two régimes of property and give legal status and support to each.

POLITICAL CONTROLS

The final group of stipulations is intended to assure the victors unchallenged and unchallengeable political control. Each armistice expressly requires the dissolution of all pro-Hitler or other fascist political, military, paramilitary or other organizations conducting propaganda hostile to the United Nations (especially to the Soviet Union) and binds each of the defeated not to tolerate in future the existence of such organizations on its territory.²⁹ A further article³⁰ in two instances places "the printing, im-

²⁶ Rumania, Art. 11; Hungary, Art. XII, Annex. Finland is held to similar "indemnification in the future, and the amount of the compensation is to be fixed separately."

²⁷ Rumania, Art. 12; Finland, Art. 14; Bulgaria, Art. 11. Greece and Yugoslavia are likewise to benefit by Bulgaria's acts of restoration; no analogous article is found in the Hungarian armistice.

²⁸ Rumania, Art. 13; Finland, Art. 12; Bulgaria, Art. 10; Hungary, Art. XIII.

²⁹ Rumania, Art. 15; Finland, Art. 21; Bulgaria, Art. 7; Hungary, Art. XV. This type of stipulation has been insisted upon by the Soviet Government as a part of nearly every basic settlement with foreign countries. Such anti-propaganda guarantees were inserted in the Baltic peace treaties of 1920, and in the various settlements with other countries such as China and Japan. They are found in the multiple exchange of notes constituting the settlement with the United States on November 17, 1933. The negotiation of the three armistices

portation and distribution of periodical and non-periodical literature, the presentation of theatrical performances and films, the work of wireless stations, post, telegraph and telephone services" under the control of the Allied (Soviet) High Command. While undoubtedly a paramount necessity in order to break Nazi domination of the public mind in Rumania and Bulgaria, this proviso goes appreciably beyond previous armistices and sets up a rigid and rigorous mechanism of opinion control which is, to say the least, capable of *ancipitis usus*. Only the existence of Allied Control Commissions, expressly provided for in each instrument,³¹ stands in the way of possible political abuse of the sweeping powers of control enumerated above.

The Allied Control Commission in Rumania, whose powers are only sketchily outlined in an annex to the armistice agreement, is to serve chiefly as a means of liaison between the Allied (Soviet) High Command and the Rumanian government. It is presumed expressly to act "on behalf of the Allied Powers" and apparently not for the United Nations. The details as to its exact composition and powers and procedures are left for further elaboration. The Allied Control Commission in Finland, whose powers were worked out in considerable detail, is left in substantially the same situation. The Allied Control Commissions in Bulgaria and Hungary, which are to be headed by a Soviet representative, expressly envisage participation in their labors by representatives of the United States and the United Kingdom.

Viewed in retrospect, the four armistices reveal the need for, and recognize the necessity of action on behalf of, a United Nations structure which is not presently in being; they endeavor to act corporately for the United Nations and actually succeed in representing only the much smaller grouping of "Allied Powers." The control bodies they create are only imperfectly delineated and their actual role is fixed with anything but juridical precision. The armistice with Rumania bears numerous evidences of having been very hastily drawn up; that with Finland reveals highly precise, expert, smooth drafting, while the Bulgarian and Hungarian instruments are decidedly more general in character. They tend to cover with broad strokes new situations hitherto ungoverned or only imperfectly reached by the law of nations. But they do focus with unflinching precision on the complete destruction of Germany's power, leaving to the future the more careful defining of the rules which will govern some personal and many property relations between régimes organized on different economic principles.

stices under review afforded the Soviet Government a special opportunity to extend the stipulations to cover the entire bloc of the United Nations, thus broadening and more nearly universalizing the anti-propaganda guarantees.

³⁰ Rumania, Art. 16; Bulgaria, Art. 8, Hungary, Art. XVI and Annex. The Finnish armistice contains no analogous provisions.

³¹ Rumania, Art. 18 and Annex; Finland, Art. 22 and Annex; Bulgaria, Art. 18; Hungary, Art. XVIII and Annex.

They also serve to indicate in considerable detail the juridical principles likely to be followed in dealing with Germany at the time of her ultimate capitulation:

MALBONE W. GRAHAM

POLAND AT YALTA AND DUMBARTON OAKS

The Atlantic Charter may no longer be regarded as a scrap of paper unsigned and uncertain in content and purpose, embodying merely the pious wishes of the heads of state. At the Crimea Conference the leaders of the three Great Powers again put their stamp of approval on and gave new life to the strained and faltering instrument. They declared in their announcement of February 11, 1945, under the heading "Declaration on Liberated Europe" that:

The establishment of order in Europe and the rebuilding of national economic life must be achieved by processes which will enable the liberated peoples to destroy the last vestiges of Nazism and Fascism and to create democratic institutions of their own choice. This is a principle of the Atlantic Charter—the right of all peoples to choose the form of government under which they will live—the restoration of sovereign rights and self-government to those peoples who have been forcibly deprived of them by the aggressor nations.

After stating that the three Governments will jointly assist the liberated states where necessary to establish internal peace, to carry out relief, to set up interim authorities representative of democratic elements and pledged to free elections, and to facilitate the holding of such elections, the Declaration continues:

By this declaration we reaffirm our faith in the principles of the Atlantic Charter, our pledge in the declaration by the United Nations, and our determination to build in cooperation with other peace-loving nations world order under law, dedicated to peace, security, freedom, and the general well being of all mankind.¹

These fresh affirmations of the Atlantic Charter are merely reiterations of prior pronouncements of a similar kind on the part of the Big Three and other nations. The principles of the Charter were agreed to by Russia, Poland, and other countries at the Inter-Allied Meeting in London on September 24, 1941, in the Declaration of the United Nations of January 1, 1942, to which 45 nations have now adhered, and in the series of Mutual Aid Agreements of 1942 and later. The British-Russian Alliance Treaty of May 26,

¹ The Atlantic Charter as promulgated by President Roosevelt and Prime Minister Churchill on August 14, 1941, declared that:

- (1) Their countries seek no aggrandizement, territorial or other.
- (2) They desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned.
- (3) They respect the right of all people to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them.

1951

Greenapple

LEGISLATION

Control of Alien Property in Time of War or National Emergency: Avoidance of Vesting Under the Trading With the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C.A. App. § 1 et seq. (Supp. 1951).—The recent declaration by the President of an existing state of national emergency¹ has made possible the reactivation of certain wartime and emergency legislation. Among the laws which may be called into operation by the President in the event of war or other period of national emergency is the Trading With the Enemy Act of 1917.² The Act, designed to deprive an enemy of access and/or ownership to assets subject to the jurisdiction of the United States,³ and to prevent all unlicensed intercourse with designated countries,⁴ directly affects

¹ Proclamation No. 2914, 15 FED. REG. 9029 (Dec. 19, 1950).

² 40 STAT. 411 (1917), as amended, 50 U.S.C.A. APP. § 1 et seq. (Supp. 1951). The 1947 statute does not come into operation automatically, but provides in § 5(b) that during time of war or during any other period of national emergency as declared by the President, the President may . . .

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation, or exportation of, or dealing in, or exercising any right, power or privilege with respect to or transaction involving, any property in which any foreign country, or a national thereof has any interest, by any person or with respect to any property subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest when, as and upon the terms directed by the President, in such agency as may be designated . . . and upon such terms as the President may prescribe, such . . . property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest and for the benefit of the United States.

See Reeves, *The Control of Foreign Funds by the U.S. Treasury*, 11 LAW & CONTEMP. PROB. 17, 32 (1945), where it is pointed out that § 5 as originally passed in 1917 was not intended as a property control, but that between World War I and World War II had been thrice amended [40 STAT. 435 (1918); 40 STAT. 966 (1918); 48 STAT. 1 (1933)] and twice called into use in domestic emergencies [in the Banking Holiday, Proclamation No. 2039, (1933), 31 CODE FED. REGS. § 120.1 (1939); and in support of the government's gold policy, Exec. Order No. 6102 (1933); Exec. Order No. 6111 (1933); Exec. Order No. 6260 (1933), 31 CODE FED. REGS. § 50.1 to 50.11 (1939)] before it evolved to its present form.

³ Generally principles of territoriality control the question of situs of property. 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 71 (1941); Borchard, *Extraterritorial Confiscations*, 36 AM. J. INT'L. L. 275 (1942); Gilligan, *Extraterritorial Effect of Foreign Decrees and Seizures*, 88 U. OF PA. L. REV. 983 (1940); Jessup, *The Litvinov Assignment and the Pink Case*, 36 AM. J. INT'L. L. 382 (1942). Problems arise particularly as to the situs of debts and corporate stock. See Rabel, *Situs Problems in Enemy Property Measures*, 11 LAW & CONTEMP. PROB. 118 (1945). In *McGrath v. Cities Service*, 189 F.2d 744 (2d Cir. 1951), cert. granted, — U.S. — (1951), an order of the Custodian vesting the debt represented by bonds held in Germany was contested on grounds of lack of jurisdiction and it was held by the court, per Hand, J., that power over the person of the debtor confers jurisdiction over the debt. It was further stated that if at a future time the debtor is required to pay a bona fide claim on the bonds, it would then have a valid claim for recovery from the United States. This case was cited as authority in *In re Central States Power & Light Corp.*, 99 F. Supp. 157 (D. Del. 1951).

⁴ H. R. REP. NO. 1507, 77th Cong., 1st Sess. 3 (1941); ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT 29 (U.S. Treas. Dep't 1942) where it is stated:

In the twenty year period between 1919 and 1939 German interests succeeded in

property of a foreign country or national designated by the President to be within the proscription of the statute, and subject to the jurisdiction of the United States. The range of persons potentially affected is broad;⁵ the amount of property interests concerned may be staggering.⁶

The Act is extraordinarily flexible, giving the President or those whom he shall designate to act in his behalf⁷ wide powers in administering and enforcing its provisions, thereby making available as many pragmatic means as there are

organizing within the United States another industrial and commercial network. . . . It is necessary to point out that these business enterprises constituted a base of operations to carry out Axis plans to control production, to hold markets in this Hemisphere, to support fifth column movements and to mold our post war economy according to Axis plans.

Freezing and vesting were some of the methods employed by the United States government in an effort to purge all business enterprises within the United States of their Axis influence.

⁵ Exec. Order No. 8389, 5 FED. REG. 1400 (1940), as amended, Exec. Order No. 8785, 6 FED. REG. 2897 (1941), Exec. Order No. 8982, 6 FED. REG. 6530 (1941), Exec. Order No. 8985, 6 FED. REG. 6625 (1941), Exec. Order No. 8998, 6 FED. REG. 6785 (Dec. 26, 1941) which in § 5, E. defines the term "national" as

(i) Any person who has been domiciled in or a subject, citizen or resident of a foreign country at any time on or since the effective date of this order.

(ii) Any partnership, association, corporation or other organization organized under the laws of, . . . or has had its principle place of business in such foreign country, or which on or since the effective date of this order has been controlled by, or a substantial part of its stocks, shares, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof.

(iii) Any person . . . acting or purporting to act directly or indirectly for the benefit of any national of such foreign country.

(iv) Any person, who there is reasonable cause to believe is a national as herein defined.

[The "foreign country" referred to is one designated by the President.]

⁶ During World War I, the United States seized about \$600,000,000 of enemy owned property. REPORT OF THE OFFICE OF THE ALIEN PROPERTY CUSTODIAN 94 (1943). In World War II there were about 8½ billions subjected to control, although the amount of property actually vested by the Custodian was only \$450,000,000. *Hearings before the Sub-Committee of the House Judiciary Committee on H.R. 4840, 78th Cong., 2d Sess. 14 (1944).*

⁷ On Feb. 12, 1942, the President delegated his authority under §§ 3(a) and 5(b) of the Trading With the Enemy Act to the Secretary of the Treasury. Memorandum to the Secretary of the Treasury from the President, 7 FED. REG. 1409 (1942). When the Office of Alien Property was established on March 12, 1942, Exec. Order No. 9095, 7 FED. REG. 1971 (1942), all powers under §§ 3(a) and 5(b), except such as were granted to the Secretary of the Treasury by Executive Orders prior to Feb. 12, 1942, were thereby granted to the Alien Property Custodian. Certain purely domestic powers were reserved to the Federal Reserve Board. The Custodian then temporarily redelegated all his authority to the Secretary of the Treasury. Memorandum to the Secretary of the Treasury, March 12, 1942, 7 FED. REG. 2115 (1942). Executive Order No. 9193 settled the situation by giving the Custodian the power to vest property and control business enterprises, and leaving all other authority under §§ 3(a) and 5(b) in the Secretary of the Treasury. Exec. Order No. 9193, 7 FED. REG. 5205 (1942). By Exec. Order No. 9788, 11 FED. REG. 11981 (1946), the Office of Alien Property was terminated and its functions transferred to the Attorney General. Exec. Order No. 9989, 13 FED. REG. 4891 (1948) then transferred the powers granted to the Secretary of Treasury under §§ 3(a) and 5(b) to the Attorney General.

situations requiring control of the use and disposition of alien property.⁸ The most important means available for these purposes are the powers to freeze and vest interests in alien property.⁹ Freezing, unlike vesting, does not of itself alter the ownership of property affected, but prohibits or declares void transfers of the property or interest without license by the President.¹⁰ Vesting orders operate to transfer title in affected property to the Alien Property Custodian, who having gained title may deal with it "in the interest and for the benefit of the United States."¹¹ Freezing is therefore not of itself disastrous

⁸ ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT 36 (U.S. Treas. Dep't 1942). See Myron, *The Work of the Alien Property Custodian*, 11 LAW & CONTEMP. PROB. 76 (1945) for a discussion of the details of management of alien property.

⁹ See, generally, Bishop, *Judicial Construction of the Trading With The Enemy Act*, 62 HARV. L. REV. 721 (1949).

¹⁰ Exec. Order No. 8389, 6 FED. REG. 1400 (1940); Exec. Order No. 8785, 6 FED. REG. 2897 (1941). For analysis of the administrative and legal problems arising out of freezing regulations, see Reeves, *The Control of Foreign Funds by the U. S. Treasury*, 11 LAW & CONTEMP. PROB. 17; Note, 41 COL. L. REV. 1039 (1941). For a comparative study of systems of foreign funds control, see DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II*, cc. 19, 20 (1943, Supp. 1946). The authority of the Treasury in determining what licenses should be issued was final. Exec. Order No. 8389, § 7 note 5, *supra*. General licenses were issued granting freedom to engage in certain harmless transactions in blocked property, e.g., Gen. License No. 1, 5 FED. REG. 1695, 2309 (1940), as amended, 6 FED. REG. 2907 (1941); Gen. License No. 2, 5 FED. REG. 1695, 2309 (1940), as amended, 6 FED. REG. 3214, 5180, 6415 (1941), 9 FED. REG. 2083 (1944), permitting transactions with persons in the United States unless specifically excluded, e.g., Gen. License No. 42, 6 FED. REG. 2907 (1941), as amended, 7 FED. REG. 1492 (1942); Gen. License No. 42 A, 6 FED. REG. 6104 (1941), as amended 7 FED. REG. 468 (1942); [In 1942 the Treasury Department declared that "persons dealing with residents of the United States may now assume that such residents are not blocked unless they are affirmatively on notice to the contrary." Press Release No. 30-44 Feb. 23, 1942, DOCUMENTS PERTAINING TO FOREIGN FUNDS CONTROL, (U.S. Treas. Dep't 1945)] permitting trade with certain geographic areas, e.g., Gen. License No. 43, 6 FED. REG. 3556, 3946, 5180 (1941), as amended, 8 FED. REG. 4876, 6595 (1943), 9 FED. REG. 2084 (1944). (Among these were the American Republics, the British Commonwealth, Greenland, Iceland, etc.). Special licenses were also issued to a particular individual to engage in a particular transaction. See DOCUMENTS, *supra*. Gen. License No. 11, 5 FED. REG. 1804, (1940), as amended, 9 FED. REG. 12995 (1944), gave permission to certain national groups to withdraw up to \$500 per month from blocked bank accounts for living expenses. William H. Reeves, in his article, *supra*, at 46 points out that no legal proceeding could give any interest whatsoever in blocked property in the absence of a treasury license. *Propper v. Clark*, 337 U.S. 472, *rehearing denied*, 338 U.S. 841 (1948). *But cf.* *Zittman v. McGrath*, 341 U.S. 466 (1951) where it was held that an attachment on frozen property made in accordance with New York State law, although without a Treasury license, would place a lien on the property contingent upon the issuance of a license, and that such lien is not destroyed by a right, title and interest vesting order, vesting the property in the Custodian. A companion case, *McCarthy v. McGrath*, 341 U.S. 471 (1951) held that a res-vesting order would destroy the lien. See note 11 *infra*.

¹¹ 40 STAT. 415 (1917), as amended, 50 U.S.C.A. APP. § 5(b) (Supp. 1951). A distinction has been made between so-called "res-vesting orders" and "right, title and interest vesting orders." See Bishop, *Judicial Construction of the Trading With The Enemy Act*, 62 HARV. L. REV. 721, 735 (1949). The res-vesting order gives the Custodian a right to immediate possession of the vested property. The order may not be contested, the only

from the point of view of the property owner, and indeed may prove a boon in the event of wartime expropriatory measures by the alien's home or occupation government. A vesting order completely divests the enemy alien of any interests in the property, and except to the extent that Congress may in its discretion decide to reinstate certain property owners, the enemy alien has no right to recover the property or compensation therefor.¹²

The fact that nations engaged in "struggles for survival" have found it necessary to appropriate to their own use the reachable property of hostile countries and their nationals has, if anything, quickened the urge among civilized peoples not only to acquire but also to retain that measure of ownership, use or enjoyment which they regard as an essential attribute of the concept of property. The vitality of this desire has been marked by a continuous and formidable migration of short term capital to the United States,¹³ one of the few countries, and the sole remaining world power where property rights as such have remained relatively stable and intact. Once again, however, many aliens holding property subject to the jurisdiction of the United States feel prompted to provide for the protection of that property in the event that an international conflict should provoke the use of the powers of vesting granted to the President in the Trading With the Enemy Act.¹⁴

remedy available (aside from the administrative remedy) being that provided in § 9(a) of the Act—a suit in equity brought by a non-enemy to recover the property. 40 STAT. 419 (1917), as amended, 50 U.S.C.A. APP. § 9(a), (Supp. 1951); Application of the Alien Property Custodian, 270 App. Div. 732, 60 N.Y.S.2d 897 (4th Dep't 1946); see also Dulles, *The Vesting Power of the Alien Property Custodian*, 28 CORNELL L.Q. 245, 254 (1943).

The right, title and interest vesting order will vest property in the Custodian only upon proof by him of the existence of an interest of a named alien in the property, and only to the extent that there is such an interest. *In re Knutzen's Estate*, 31 Cal.2d 253, 191 P.2d 747 (1948). A reading of the cases reveals that more extensive use is made of the right, title and interest vesting order than of the *res*-vesting order. The reason may be to avoid extensive litigation at a later date.

¹² The friendly alien has a constitutional right to just compensation. *Russian Volunteer Fleet v. United States*, 282 U.S. 489 (1931); *Silesian-American Corp. v. Clark*, 332 U.S. 469, 479 (1947). See Sommerich, *A Brief Against Confiscation*, 11 LAW & CONTEMP. PROB. 152 (1945) for a history of the disposition of alien property after the last war. About 80% of the property of German nationals was returned in 1928 by the SETTLEMENT OF WAR CLAIMS ACT, 45 STAT. 254 (1928). After World War II, provisions were made for the return of property to nationals of nations other than Germany, Japan, Bulgaria, Hungary and Rumania. 60 STAT. 50 (1946), as amended, 50 U.S.C.A. APP. § 32 (Supp. 1951). Cf. § 9 of the TRADING WITH THE ENEMY ACT, 40 STAT. 419 (1917), as amended, 50 U.S.C.A. APP. § 9 (Supp. 1951).

¹³ STATISTICAL SUPPLEMENT, SURVEY OF CURRENT BUSINESS 105 (U.S. Dep't of Commerce 1949).

¹⁴ The alien owner must protect himself not only against vesting and similar measures of the United States Government, but also against the foreign political events which may provoke such measures. Some of these events are as follows:

(1) War, declared or undeclared, between the country of the alien's present nationality, domicile or residence, and/or an ally thereof, and the United States, as such and/or acting in behalf of the United Nations.

(2) Occupation of the country of the alien's present or prospective nationality, domicile, or residence, by a country, and/or an ally thereof, at war, declared or undeclared, with the United States, as such and/or acting on behalf of the United Nations.

The Alien Property Custodian may vest property interests of any individual, partnership, association, corporation, or other organization that is a national of a foreign country against which the United States has declared the existence of a state of war,¹⁵ or a national of any other designated foreign country if he finds that such action is in the interests of the United States. The absence of an alien interest in property defeats vesting;¹⁶ should a non-alien interest be vested, the affected party may successfully contest the order of the Custodian, or recover the property or its value in a subsequent action.¹⁷ This possible "out" for alien holders of property interests subject to the jurisdiction of the United States nurtured a myriad of schemes for the concealment of these interests.¹⁸ The most common element of these schemes in World Wars I and II was a sham transfer of legal title and/or of possession to a party who in fact had no substantial interest. In most cases the courts pierced the fictional veil of record ownership, and the device of concealment was given no legal effect. Where the courts have found that a transfer of title is not *bona fide* or that an alien retains a beneficial interest, the transfer was not recognized and title vested in the Property Custodian upon proper order. Among the devices which have thus failed because of the absence of good faith were a sale,¹⁹ transfers of property to or by an agent,²⁰ a trust,²¹ and various corporate arrangements.²² It seems fruitless therefore to attempt concealment by legal cloaking. A complete and *bona fide* divestment of present or vested future interests in property subject to the Act is required.

For a time during and after World War I, it was held that property of a corporation, incorporated in the United States or in a friendly country, would

(3) *Coup d'etat* or political, social or economic upheaval in the country of alien's present or prospective nationality, domicile, or residence.

(4) Confiscatory decrees or their equivalent by the present or successor government, recognized or unrecognized, *de facto* or *de jure*, of the country of alien's present or prospective nationality, domicile or residence.

¹⁵ Exec. Order No. 8389 § 5C, as amended, note 5, *supra*. Exec. Order No. 9193 § 1(a), (c), 7 FED. REG. 5205 (1942).

¹⁶ Exec. Order No. 9193 § 1(b), 7 FED. REG. 5205.

¹⁷ See note 11 *supra*.

¹⁸ Reeves, *The Control of Foreign Funds by the United States*, 11 LAW & CONTEMP. PROB. 17, 52 (1945).

¹⁹ Beck v. Clark, 88 F. Supp. 565 (D. Conn. 1949), *aff'd*, 182 F.2d 315 (2d Cir. 1950) (a German corporation doing business in the United States transferred its assets to P and released a debt owing it by P for a consideration that was patently insufficient, in a transaction which left a vestige of control in the German corporation).

²⁰ Kaname Fujino v. Clark, 71 F. Supp. 1 (D. Hawaii 1947), *aff'd*, 172 F.2d 384 (9th Cir. 1947), *cert. denied*, 337 U.S. 937 (1948). Cf. Von Wendel v. McGrath, 180 F.2d 716 (3rd Cir. 1950), *cert. denied*, 340 U.S. 816 (1951), where the gift was apparently *bona fide* but the agent's power of attorney, as understood by the majority of the court, was insufficient for the purpose.

²¹ Stoehr v. Wallace, 255 U.S. 239 (1920) (14,900 shares of stock in Botany Mills owned by a German corporation transferred in trust to a dummy New York corporation for the purpose of concealing the true ownership of the stocks).

²² Draeger Shipping Co. v. Crowley, 55 F. Supp. 906 (S.D.N.Y. 1944) (Assets of a New York corporation formally separated from its German parent were vested because still actually controlled by the parent.). For devices concealing control of a corporation, see ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE U.S. GOVERNMENT 29 (U.S. Treas. Dep't 1942).

not be subjected to vesting although the owners of controlling stock were enemies,²³ so long as the corporation did no trading with the enemy.²⁴ This accorded with the then accepted doctrine of corporate nationality.²⁵ But in 1947, the Supreme Court, in the case of *Clark v. Ubersee-Finanz Corporation*²⁶ held that the amended § 5(b) of the Trading With the Enemy Act had so increased the scope of the Act as to abrogate this doctrine for the purposes of vesting. The court's statement of the scope of § 5(b) is instructive:

As we have observed, the scheme of the Act when *Behn-Meyer & Co. v. Miller* was decided was to respect the corporate form, even though the enemy held all the stock of the corporate claimant. *Hamburg-American Co. v. U. S.* . . . The 1941 amendment to § 5(b) reflected a complete reversal in that policy. The power of seizure and vesting was extended to all property of any foreign country or national so that no innocent appearing device could become a Trojan Horse.²⁷

This decision would seem to eliminate the possibility of protecting alien property through the utilization of a friendly or domestic corporation, whose corporateness is *bona fide* and whose affairs may be free of the control of hostile

²³ *Hamburg-American Line Terminal and Navigation Co. v. United States*, 277 U.S. 457 (1927) (held that a domestic corporation could recover the fair rental value of property seized by the United States during the war although its stock was entirely owned by an alien enemy corporation); *Behn, Meyer & Co. v. Miller*, 266 U.S. 457 (1925) (British Corporation permitted to recover its property in the United States seized by the Custodian during the war although a majority of its stock was owned by German nationals).

²⁴ *Swiss National Insurance Co. v. Miller*, 289 Fed. 571 (D.C. Cir. 1923), *aff'd* 267 U.S. 42 (1924). (Swiss corporation denied recovery of its assets seized by the Custodian during the war because at the time of the seizure it was doing business with the enemy).

²⁵ See notes 23 and 24 *supra*. In *Daimler Co. Ltd. v. Continental Tyre Co. Ltd.*, [1916] 2 A.C. 307, the House of Lords stated that a British corporation might be an enemy for the purposes of the British Trading With the Enemy Act, 4 & 5 GEO. 5, c. 87 (1914) if it were controlled by enemy nationals. The following year Lehman, J., later Chief Judge of the New York Court of Appeals, clearly rejected this doctrine, stating that in the United States the place of incorporation determines nationality. *Fritz Schultz Jr., Co. v. Raines & Co.*, 100 Misc. 697, 166 N.Y. Supp. 567 (Sup. Ct. N.Y. County 1917). The British position was once again rejected in the United States in 1943 in the case of *Drewry v. Onassis*, 179 Misc. 578, 39 N.Y.S.2d 688 (Sup. Ct. N.Y. County 1943), *rev'd on other grounds*, 266 App. Div. 292, 42 N.Y.S.2d 74. (1st Dep't 1943). See DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* 130 (1943).

²⁶ 332 U.S. 480 (1947).

²⁷ See also *Ubersee Finanz Corp. v. Clark*, 82 F. Supp. 602 (D.D.C. 1949), *aff'd*, 191 F.2d 327 (D.C. Cir. 1951), where it was held that the Ubersee corporation was in fact enemy owned.

Paul V. Myron, chief of the estates and trusts section of the office of the Alien Property Custodian in 1942 and 1943 points out in his article, *The Work of the Alien Property Custodian* 11 *LAW & CONTEMP. PROB.* 76 (1945) that the Custodian may vest either the enemy interest in the enterprise or the assets of the enterprise, the primary concern being to eliminate any actual or potential enemy control. At p. 89 he says:

If the Custodian has vested only the stock of a corporation and the corporation continues to exist as a legal entity, the Custodian is not the proper party to be sued for debts of the corporation. Such claims are filed against the corporation. . . . When, however, the assets of a corporation are vested, claims thereafter may be filed with the Custodian.

Cf. note 11, *supra*.

persons, but whose stock is nevertheless owned by nationals of designated foreign countries.

Trusts in which an alien has no present or vested future interest have been left unscathed. A series of decisions have developed the doctrine that neither the corpus nor income of a trust in which an alien person has but a contingent interest as determined by the governing law²⁸ may be vested by the Custodian, while a present or vested alien interest is subject to vesting. Where a trust was created by an alien who reserved an absolute power of revocation²⁹ or where the corpus was payable to an alien upon demand,³⁰ it was held that the Custodian could properly vest the property. A vested remainder in an alien may be vested by the Custodian.³¹ Where a trust instrument designated a non-resident German national as an income beneficiary, except in the event that it were impossible or illegal to make payment to her, in which event such income was to be accumulated in the trust for five years, and if at that time it were still impossible or illegal to make payment to her, then to be distributed to the other beneficiaries, it was held that she had a present interest subject to defeasance by a condition subsequent. Thus in the case of *Clark v. Continental National Bank of Lincoln*,³² the right of the Custodian to vest that interest was upheld.

But where the interest of the alien in the trust would arise only upon the happening of an event uncertain to occur, the Custodian was less successful. Thus where the trust instrument stated that the income would be payable to an alien only upon a determination by the trustee that the beneficiary was presently in a position to take, it has been held that there was no present or vested future interest subject to vesting.³³ It is implied that the result would be the same where trust income is payable to an alien upon the condition that it should not be illegal to transfer property to such a person.³⁴ Similar doctrines

²⁸ For a discussion of the principles of Conflicts of Laws as related to trusts, see 2 BEALE, *CONFLICTS OF LAWS* 954 *et seq.* (1935); GOODRICH ON *CONFLICTS OF LAWS*, §§ 151, 159 (1949); RESTATEMENT, *CONFLICT OF LAWS*, §§ 241, 294, 295 (1934); Carver, *Trusts Inter Vivos and the Conflict of Laws*, 44 HARV. L. REV. 161 (1930).

²⁹ *Commercial Trust Co. of N.J. v. Miller*, 262 U.S. 51 (1922).

³⁰ *In re Miller*, 281 Fed. 764 (2d Cir. 1922), *appeal dismissed sub nom.* Schaeffer v. Miller, 262 U.S. 760 (1922).

³¹ *In re Littman's Estate*, 175 Misc. 679, 28 N.Y.S.2d 458 (Surr. Ct. N.Y. County 1941) (vesting order of 1918 vested the interest of an alien remainderman; when the life tenant died in 1941, although the remainderman was then an American citizen, Custodian held to have the right to the remainder interest); *Cf.* *Central Hanover Bank & Trust Co. v. Markham*, 68 F. Supp. 829 (S.D. N.Y. 1947) (where an alien has a life interest and another the remainder, the Custodian may vest immediately).

³² 88 F. Supp. 324 (D. Neb. 1949). But *cf.* *In re Schiff* [1921] 1 Chanc. 149 (where a testator left property in trust, income payable to non-resident German nationals, unless there is legislation prohibiting the transfer, in which case the income is to be paid to testator's English nephews and neices until such time as legislation permitted payment to the German beneficiaries, at which time payment was to be made to them, *held*, upon petition by the Custodian for possession of the property interests of the German beneficiaries, (1) by the conditions of the will they had no interest, (2) the condition of the will is not against public policy, for this does not evade the statute, but rather brings about a state of affairs not within the scope of the statute). It may have been the accumulation featured which vitiated the otherwise similar trust in the *Continental National Bank case supra*.

³³ *McGrath v. Ward*, 91 F. Supp. 636 (D. Mass. 1950).

³⁴ *Clark v. Continental National Bank of Lincoln*, 88 F. Supp. 324 (D. Neb. 1949).

have been used regarding testamentary dispositions of property to aliens. It was held in the case of *Clark v. Edmunds*³⁶ that a testator's bequest to certain non-resident German nationals "should they survive the war" did not create such an interest in an alien that it might be vested, the bequest being on a contingency that had not yet occurred. However, the court clearly asserted that if by the terms of the instrument, the German distributees took a present interest (payment, possession or enjoyment alone being deferred), the interest would be subject to vesting by the Alien Property Custodian.³⁶

It has been suggested that these cases (holding that the Custodian may not vest a contingent interest of an alien) may be incorrect; that such trusts may be void for evading the policy of the statute.³⁷ Authority for this assertion is found only in two lower court cases, the New York case of *In re Reiner's Estate*³⁸ and the Pennsylvania case of *Thee's Estate*.³⁹ In the *Thee* case, the stronger of the two, the testator directed that property be distributed among certain non-resident German nationals, provided however that if the property could not be transferred, the executors were to hold it in trust until such time as it could be transferred. The court held that the Custodian could vest, saying:

Aside from the purely legal aspects of the case, it is my opinion that it would be against public policy for this court to sanction a testamentary direction which would deprive the Government of its sovereign right to seize and hold property, the title to which is vested in alien enemies.⁴⁰

With a similar testamentary provision, the result was the same in the *Reiner* case where the court remarked:

The testatrix intended that the executor was to defer payment and to hold the money in trust only if political conditions abroad would frustrate the transmission of the funds or deprive the legatees of the enjoyment of the funds. *The purpose of the testatrix was to assure the legatees of ultimate payment of the legacies.* (Italics added)⁴¹

The argument of the Custodian is that the purpose of the Trading with the Enemy Act is not only to control the use and disposition of property interests which may be employed in a manner inimical to the safety of the United States, but also to defray in some measure the expenses of conducting war.⁴² It is

³⁶ 73 F. Supp. 390 (W.D. Va. 1947).

³⁶ *Id.* at 393. See also, *In re Hayes Will*, 195 Misc. 1026, 91 N.Y.S.2d 1026 (Surr. Ct. Westchester County 1949).

³⁷ 91 N.Y.S.2d 266 (Surr. Ct. Westchester County 1949). Bishop, *Judicial Construction of the Trading With the Enemy Act*, 62 HARV. L. REV. 721, 739 (1949).

³⁸ 44 N.Y.S.2d 282 (Surr. Ct. N.Y. County 1943).

³⁹ 49 Pa. D. & C. 362 (Orphan's Ct. 1943). Both cases are cited by Mr. Bishop.

⁴⁰ *Id.* at 366.

⁴¹ 44 N.Y.S.2d 282, 283 (Surr. Ct. N.Y. County 1943).

⁴² Bishop, *supra* note 37, at 740-744. This has been thoroughly debated. For arguments against confiscations, see: GATHERINGS, *INTERNATIONAL LAW AND TREATMENT OF ALIEN PROPERTY* (1940), introduction by Borchard; 2 HYDE *INTERNATIONAL LAW* 232 *et seq.* (1922); Littauer, *Confiscation of Property of Technical Enemies*, 52 YALE L. J. 739 (1942); Sommerich, *A Brief Against Confiscation* 11 LAW & CONTEMP. PROB. 152 (1945). Cf. Josephberg v. Markham, 152 F.2d 644 (2d Cir. 1945). Some arguments have been put forth in favor of confiscation. See: Gearhart, *Postwar Prospects For Treatment of Enemy Property*, 11 LAW & CONTEMP. PROB. 152; Rubin, *Inviolability of Enemy Private Property*, 11 LAW & CONTEMP. PROB. 166 (1945). A very pragmatic argument is made by Mr. Rubin, who states at p. 181:

concluded, therefore, that interests which are to ripen in an alien on the contingency that it shall be legal for the alien to take should be vested by the Custodian as a vested interest in property; that the contingency, having its only purpose the frustration of the right of the sovereign to seize all property, should be disregarded. But it is doubtful that either the *The Reiner* cases may be cited for any broader proposition than that property which an alien has a vested interest, *payment alone being deferred*, may be seized by the Alien Property Custodian.⁴³

Furthermore, a series of more recent New York cases hold that, where property is given to a proscribed alien, contingent upon the legality of taking, and where it is further provided that upon failure of the condition, the property shall be paid over to a non-alien, or friendly alien, or person who may legally take, the Custodian may not properly vest the property.⁴⁴ The case *In re Reuss' Estate*⁴⁵ is particularly significant. There the testator left \$100,000 to his sister in Germany,

... to be hers absolutely and forever, upon the following conditions: That at the time of the settlement and distribution of my estate

1. That Adolf Hitler, or his form of Government, be not in power in Germany.
2. That there be no war between America and Germany.
3. That there be no prohibitive restrictions against the transmission of funds by reason of war between America and Germany.⁴⁶

It was then provided that upon failure of any one of these conditions

The important and compelling consideration is that no country at the present time considers the foreign investments of its nationals to have a purely private nature; that at least of all the governments of our present enemies; that each government exercises to some extent jurisdiction over these foreign assets for governmental purposes; that each directs the use of the foreign exchange represented by the foreign investments; that the allied governments have been forced to ask their nationals to liquidate foreign investments for wartime purposes; and that no reason exists why enemy countries should escape this equal obligation and should emerge from this war with substantial foreign holdings, while at the same time allied claims against these governments are scaled down to the extent necessary not only to recognize the impoverished condition of these enemy countries, but also to protect them from the necessity of utilizing their foreign investments.

So stated, the issue becomes one, not of whether enemy private property should be confiscated, but of whether enemy nationals are to be accorded more favorable treatment than allied nationals, and enemy nations than allied nations.

Congress was apparently persuaded by the argument of Mr. Rubin, and in 1948 passed the WAR CLAIMS ACT, 62 STAT. 1240 (1948); 50 U.S.C.A. APP. § 2001 *et seq.* (Supp. 1951) providing that no property of German or Japanese nationals shall be returned (§ 2001) and that a trust fund shall be set up, using this property to pay certain war claims (§ 2012). However, a recent amendment to § 32, — STAT. —, 50 U.S.C.A. APP. 32 (1950) gives the Alien Property Custodian authority to return up to an aggregate of \$5,000,000 to citizens of the United States who lost their citizenship solely by reason of marriage to an alien, and who reacquired their citizenship prior to the enactment of this amendment.

⁴³ See *Clark v. Edmunds*, 73 F. Supp. 390, 393 (W.D. Va. 1947).

⁴⁴ *In re Reuss' Estate*, 196 Misc. 2d, 91 N.Y.S.2d 479 (Surr. Ct. Queens County 1949); *In re Bantin's Estate*, 68 N.Y.S.2d 516 (Surr. Ct. N.Y. County 1947); *In re Hasdin's Will*, 65 N.Y.S.2d 226 (Surr. Ct. Queens County 1946); *In re Engelking's Will*, 116 Misc. 866, 57 N.Y.S.2d 745 (Surr. Ct. Kings County 1945).

⁴⁵ 196 Misc. 2d, 91 N.Y.S.2d 479 (Surr. Ct. Queens County 1949).

⁴⁶ *Id.* at 26, 91 N.Y.S.2d at 482.

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money was to be paid to the Franciscan Friars, "it being my intention" continued the testator, "to avoid confiscation of the bequest provided for my beloved sister and that it be paid her if at all possible." Upon petition by the Custodian to vest this property, arguing that such a bequest was against public policy, the court said:

The contention that such a condition is void as against public policy is untenable. There is no policy of the law which forbids the imposition of a condition to a bequest that if the legatee cannot presently enjoy the gift then another shall take it.

It would appear then that a trust which names an alien, even an alien enemy, as a contingent beneficiary cannot be subjected to vesting by the Custodian. However, unless an alternate non-alien beneficiary is named, or provision is made for his appointment as beneficiary, the condition may be interpreted as creating a vested interest in an alien beneficiary, payment alone being deferred. Furthermore, since the present tendency of administrative thinking seems to be to disregard legal technicalities wherever such disregard is not radically inconsistent with well-established principles of property rights, it may be prudent to add that the more remote the contingency, the less susceptible the contingent interest will be to being engulfed by any future extension of the Custodian's powers. The remotest of contingencies, it is submitted, is one dependent upon the unfettered discretion of a trustee from time to time to appoint one or more beneficiaries from among a number of persons designated by name or by class. It would seem that if these persons include non-alien as well as aliens, and if the trustee having the power of appointment is a citizen or friendly alien residing here, such a trust would withstand attack even under the most stringent application of the Trading With the Enemy Act.

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Charles Wesley Harris

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INTERNATIONAL RELATIONS AND THE DISPOSITION OF ALIEN ENEMY PROPERTY SEIZED BY THE UNITED STATES DURING WORLD WAR II: A CASE STUDY ON GERMAN PROPERTIES

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MORE THAN SIXTEEN YEARS have elapsed since the termination of hostilities of World War II and the United States Government still has the bulk of the enemy property seized during that war. Through 1958 and early 1959, the problem hung in balance as to whether the American Government would retain, permanently, these former enemy assets, as provided in the War Claims Act of 1948, or whether they would be returned. As of 1960, full return to the original German and Japanese owners seemed rather remote and the likelihood of partial return is becoming increasingly doubtful at the present time. But even with the alternative of full return to the former owners virtually ruled out, there are still many serious problems as to how to get rid of all of the properties still in the hands of the Government, or the assets derived therefrom. Heading the list of such properties is the giant General Aniline and Film Corporation (GAFK), the status of which will be discussed later on in the article.

The alien enemy property question has had a long and rather peculiar history in the United States. It has been fraught with numerous conflicting factors and influences which have made it infinitely complex. These entangling forces remain unresolved. Commencing long before the end of the War, almost every proposal thinkable has been offered with regard to disposing of the seized assets. Some were made in accordance with what was considered to be the international legal requirements regarding the disposition of enemy property, while others have been made with little or no respect for international legal rules, having been motivated by domestic and selfish factors of private interest.

Primary interest in the present article is centered on the German properties. The large majority of the seized assets were German and the interplay of international relations factors and the

other elements involved have been focused mainly upon these assets.

I

The entire question of seizing and disposing of enemy assets is a concomitant of war itself and, consequently, has been the concern of the law of nations throughout its history. The crucial question today as at various times in the past is what does international law require with regard to the seizure and disposition of private enemy property. The ancient period tends to support the right and practice of confiscation of any and all goods seized during the course of hostilities. However, the exercise of the right of confiscation declined in the early modern period. The writings of legal philosophers such as Grotius and of certain rationalist thinkers aided in the mitigation of the prevailing tradition and urged that no confiscation should take place.

The initial example of American practice came during the Revolutionary War. Although confiscation actually took place during the conflict, the final action, in which the central government sought to restore the value of the property taken, is considered to have supported the rule of nonconfiscation. Gradually, nations began to draw up treaties which afforded some form of protection to enemy property in time of war. During the nineteenth century it was generally accepted among the countries of the world that alien enemy property seized during the time of war was to be returned when the war was over.¹ The question of the treatment of alien enemy property took on increased significance during and after the First World War. This was due to several factors, such as the rise of socialistic theories and practices, the nature of modern warfare which was becoming increasingly "total war," the economic interdependence of States, et cetera.

Alien enemy property was sequestered during World War I with the idea that the property was to be in trust or preservation by the State which sequestered it until its disposition could be determined at the conclusion of hostilities. At the time the property was seized no State avowed an intention of confiscating it. When World War I was over the terms of the Treaty of Versailles

¹See James A. Gathings, *International Law and American Treatment of Alien Enemy Property* (Washington: American Council on Public Affairs, 1940) p. 34ff.

(Article 297 (b)) permitted the Allied Powers to retain the alien enemy property which they had sequestered. The plan called for a liquidation of the property by the respective countries to reimburse their own nationals who had claims against the enemy States. The United States did not ratify the Treaty of Versailles but the Treaty of Berlin, 1921, between the United States and Germany, gave the United States virtually the same privileges as those given to the Allied Powers in the former treaty. In the final analysis, however, the United States did return most of the German property seized during the First World War.²

The handling of enemy property during World War I could hardly be said to have set a pattern. American action with regard to the treatment of enemy property was highly ambiguous. Evidence can be found in the actions of the United States which could be used to develop a case either for or against confiscation. The view here, however, is that the stronger case can be made for the position that the overall policy and action of the United States during World War I was in opposition to the confiscation of private enemy property and thus supported only a policy of sequestration.

With the outbreak of World War II, alien enemy property was again sequestered by the belligerents, and by the United States,

²Some eighty per cent of the German properties was to have been returned through the initial plan. After intense wrangling in Congress and the passage of several measures, starting with the Knox-Porter Resolution, July, 1921 (U.S. *Statutes at Large* XLII, Part 1, 105) and including the Winslow Act, 1923 (U.S. *Statutes at Large*, XLII, Part 1, 1511), the Settlement of War Claims Act (U.S. *Statutes at Large*, XLV, Part 1, p. 254) and the Harrison Resolution, the United States agreed to return German assets and all interest earned thereon. It was a conditional type agreement predicated upon Germany's making certain payments to help satisfy awards of the Mixed Claims Commission to American citizens. In 1934, due to the default by Germany in its payments under the Dawes Plan, the return of German assets was interrupted, pending Germany's Compliance with its obligations under the Debt Refunding Agreement.

U.S. *Congressional Record*, 73d Cong., 2d Sess., 1934, LXXVII, Part 11, 12067. What was considered the last chapter in the problem of vested German properties of World War I was written in 1953 when the U.S. and West Germany entered into an agreement where Germany bound itself to pay a total of \$97,500,000 in installments to satisfy unpaid Mixed Claims Commission awards held by the United States' nationals. These installments are to run over a period of twenty-six years. "Agreement Between the United States of America and the Federal Republic of Germany on the Settlement of Indebtedness of Germany for Awards made by the Mixed Claims Commission." TIAS No. 2796, U.S., *Treaties and Other International Agreements*, IV, Part 1, p. 908.

upon its entry into the war. Assets belonging to Germany, Japan and other enemy countries and their nationals were vested and placed under the control of the Alien Property Custodian pursuant to Executive Order Number 9095, March 11, 1942, as amended.³ This Order was issued under the authority given the President in the First War Powers Act of 1941 and the Trading with the Enemy Act of 1917, as amended.⁴ At the end of the War the United States was faced with the problem of disposing of the seized assets as the Trading with the Enemy Act provided that such property should be disposed of "as Congress shall direct."

Before the end of the War the broad outlines of what was to become United States' policy with regard to reparations and external enemy assets had already begun to take shape. Consequently, it was formulated amidst extreme animosities, characteristic of wartime feelings. The Allied Powers were in agreement that Nazism and German militarism should be stamped out so completely that they would never again trouble the peace of the world. There was fear among the Allies, and especially in the United States, of a resurgence of German Nazism.⁵ The greatest apprehension along this line seemed to have been focused upon the net-work of German industries located within the United States, and also in other foreign countries. Evidence was uncovered in the United States to show that with the defeat of the German Army and the discrediting of the Nazi Party, the German cartelists would attempt to dissociate themselves from their co-conspirators in a concealed attempt to lead a new Nazi movement aimed at world conquest.⁶ It was of con-

³The Office was created by Executive Order No. 9095, which was issued pursuant to the authority granted to the President in the Trading with the Enemy Act, as amended. The functions and duties of the Office were further defined by Executive Order No. 9198, July 6, 1942, which amended Executive Order No. 9095, *Code of Federal Regulations of the U.S. of America, Cumulative Supplement*, 1938 to 1943, Title III, 1121, 1174.

⁴Japanese owned assets were estimated at \$54 million and German owned assets at \$541 million. U.S. Congress, Senate Committee on the Judiciary, Report No. 1390 of the Subcommittee on *Trading with the Enemy Act*, 86th Cong., 2d Sess., 1960.

⁵Senator Harley M. Kilgore declared that secret documents had revealed detailed plans by German industrialists to rearm the Reich for another attempt at world conquest and the intention to finance an underground Nazi movement. *New York Times*, June 22, 1945, p. 6.

The *Washington Post* carried a statement of Field Marshall Montgomery which said in effect that Germany was down, but not out. "The country is down on its knees and needs watching," June 22, 1945.

⁶A series of interviews held by the United States Government officials with

sequence in the establishment of policy with regard to external enemy assets that the United States and other Allied nations placed high emphasis upon dismantling the German war machine. Henry Morgenthau, Jr., Secretary of Treasury during the war, and author of the "Morgenthau Plan" on the treatment of Germany after defeat, made the following statement concerning German external assets:

Just how Germany's economic aggression against the people of the United States was carried on has been brought to light in this war. Much of it has been discovered by the Treasury Department through our taking over such German outfits in this country as General Aniline and Film and Bosch Magneto. We found that no matter where the heart of the cartel octopus was—in Germany or England or Holland or the United States—the result was the same.⁷

Although German assets in the United States included a lot of private and individual properties, they were thought of, largely, in terms of the cartels and combines such as I.G. Farben, Bosch Magneto, Krupp Works, *et cetera*. These concerns had been instrumental in waging two world wars. Elder Statesman Bernard Baruch, in testimony before the Senate Committee on Military Affairs,⁸ stated that one of the ways to bring about a "sure peace" was to root out German assets and business organizations all over the world. Mr. Baruch's statement was typical of the initial post-war thinking with regard to the handling of German assets. It was not in terms of legal considerations, international or domestic, but rather, in terms of deindustrializing Germany in the interest of a "sure peace." The action of the United States with regard to enemy assets was concurred in by the other Allied countries.⁹

German industrialists, scientists, attorneys, journalists, and former German Government officials in July, 1944, revealed in part how the German had concealed the true owners and purposes of several industries in the United States. Exhibit # 4, entered into the record of *Hearings on Elimination of German Resources for War*, U.S. Congress, Senate, Subcommittee of the Committee on Military Affairs, 79th Cong., 1st Sess., pp. 498-503.

⁷Henry Morgenthau, Jr., *Germany Is Our Problem* (New York: Harper & Brothers Publishers, 1945) pp. 37-38.

⁸Mr. Baruch had only recently returned from a tour in Europe where he studied first-hand the devastation wrought by the Nazis and met with Allied leaders concerning the very problem on which he was testifying. U.S. Senate, Subcommittee of the Committee on Military Affairs, *Hearings on Elimination of German Resources for War*, *op. cit.*, p. 2.

⁹Even the neutral governments were asked to subscribe to the principles of certain declarations and resolutions drawn up by the Allies. Statement of Hon. William L. Clayton, Assistant Secretary of State, before Senate Subcommittee of the Committee on Military Affairs, *ibid.*, p. 59.

Attempt was made by the United States and the major Allied Powers to develop international policy along the lines of their national policies. This was mainly accomplished at the Paris Conference on Reparation, 1945.¹⁰ This conference was primarily concerned with dividing up the reparations to be exacted from the Western German Zones, under the control of the United States, Great Britain, and France. The signatory powers agreed to hold or dispose of German enemy assets within its jurisdiction in a manner designed to preclude their return to German ownership or control. Further action was taken by the United States toward permanent retention of the vested assets at the Bonn Convention of 1952, as amended by the Paris Protocol, in which the German Government agreed to compensate its own nationals.

II

In 1948, Congress passed the War Claims Act¹¹ which was considered to have implemented the policy contained in the Paris Reparation Agreement of 1946. However, this act was hardly on the statute books before the international political factors, which had influenced the policy that it contained, had begun to change. The split between the wartime Allies with regard to Germany and other key areas, which began as soon as the War was over, widened steadily; and by 1947 and 1948, the cold war was well under way. As the international situation grew more complicated with regard to United States-Russian relations, increasing dissatisfaction was registered in the United States concerning the War Claims Act as a final settlement of the alien enemy property issue.

¹⁰The broad policies which were to be implemented at the Conference had been laid down at the Tripartite Conference of Berlin (Potsdam) which stipulated that the reparations claims of the United States and the other Allies were to be met in part from German external assets. "U.S., Great Britain, Soviet Union-Report of Tripartite Conference of Berlin," *Supplement, American Journal of International Law, Official Documents*, XXXIX (1945), 105.

¹¹Public Law 896, known as the War Claims Act, became Section 39 of the Trading With the Enemy Act of 1917. It specifically prohibited the return of German and Japanese property except as authorized by Section 32 of the latter act (Public Laws 322 and 671, 79th Cong., 2d Sess.). The Act also called for the establishment of the War Claims Fund which was to be on the books of the Treasury Department. U.S. *Congressional Record*, 80th Cong., 2d Sess., 1948, XCIV, Part 8, 10226; U.S. War Claims Commission, *First Semi-Annual Report*, 1950 (Washington: GPO, 1950) p. vff.

Due mainly to domestic involvements and to factors removed from the international legal and political aspects of the enemy property issue, the Office of Alien Property was subjected to a thorough investigation by a Subcommittee ("To Examine and Review the Administration of the Trading with the Enemy Act of 1917, as Amended") of the Senate Judiciary Committee. The investigation by this Subcommittee delved into the history of the enactment of the confiscatory legislation contained in the 1948 War Claims Act. It examined and reviewed the administration of the Act in the light of the foreign relations of the United States. The conclusion of the report, *inter alia*, was that the vesting policies of the United States and the subsequent confiscatory legislation had originated under "questionable guidance"¹² and had resulted in a bureaucratic agency engaged in the administration of an act which was now inimical to the overall foreign policy of the United States. It was recommended that vested enemy assets be returned. The report set off the active stage of the unending struggle of "to return or not to return," former enemy assets. The initial action in this regard was taken by Congress and, subsequently, by the executive branch.¹³

Congress soon began serious efforts to repeal Section 39 of the Trading with the Enemy Act. Starting in 1954, numerous measures were introduced calling for a return of private enemy property to the original owners. The Trading with the Enemy Act has been under almost constant review since the initial review was authorized in 1952.

The international political situation was given as a primary reason why the German properties should be returned. East-West relations had deteriorated continually over such thorny issues as the

¹²The Subcommittee had reason to believe that subversive influences had played a part in the drawing up of the War Claims Act. Although the ascertainment of communist influences behind the confiscatory policy was not one of the seven questions propounded in the originating Resolution, Senator Langer, who was Chairman of the Judiciary Committee and also a member of the Subcommittee, had stressed for a long time the need for this kind of investigation of the Alien Property Office (APO) and the administration of the Trading with the Enemy Act. U.S. *Congressional Record*, 82d Cong., 1st Sess., 1951, XCVII, Part 1, 1106, also Part 3, 3633ff.

¹³A series of reactions was precipitated in West Germany, Switzerland, and other European countries. The high interest in Switzerland stemmed from their concern about General Aniline and Film Corporation whose stock was being withheld from Interhandel, the parent Swiss business corporation. *New York Times*, February 8, 1954, p. 31.

breakdown in the operation of the Allied Control Council, the Berlin blockade, rearmament of Germany, and many others. As this situation worsened, the acceptance of Germany into the Western family of nations was accelerated. Germany became a trusted ally of the West and a vital part of the Western defense system. Eventually, it became an accepted member of the North Atlantic Treaty Organization.

The abrupt shift in allies and enemies following World War II had direct effect upon the enemy property situation. The West German Government joined actively in the fight for the return of vested assets. Chancellor Adenauer made public appeals for the assets which emphasized the fact that the enmity between the United States and Germany was in the past, and that the community of interests and ideals between the peoples of the two nations dictated a return of the confiscated property. The West Germans felt that if the United States were to release German property blocked in this country, other Governments would be under moral obligation to follow that example. The West German Government also stressed the importance of upholding the American principle of the "sanctity of private property." One of President Eisenhower's earlier statements concerning the matter was that he considered it a very difficult problem but that he favored a return of the assets.¹⁴

One of the first bills to be introduced aimed at amending the Trading with the Enemy Act so as to allow the return of former enemy property was Senate Bill 3423 (83d Cong., 2d Sess.), introduced by Senator Everett Dirksen of Illinois. This bill called for full return of former enemy property as a "matter of grace."¹⁵ As hearings were held on this and subsequent measures, the various groups and persons having interest in whether enemy property would be returned or not began to speak up. Intense pressures were brought to bear on Congress from various sources.¹⁶ Many congress-

¹⁴*New York Times*, March 11, 1954, p. 14.

¹⁵It would have added eight sections to the Trading with the Enemy Act (40-47), with Section 40, in effect, repealing Section 39 of that Act, and Section 12 of the War Claims Act of 1948. U.S., Congress, Senate Subcommittee of the Committee on the Judiciary, *Hearings, on S. 3423, Return of Confiscated Property*, 83d Cong., 2d Sess., 1954, pp. 1-4.

¹⁶Charles W. Harris, "International Legal and Political Factors in the United States' Disposition of Alien Enemy Assets Seized During World War II. . ." (unpublished Ph.D. dissertation, Dept. of Political Science, University of Wisconsin) p. 263ff.

men with large German and Japanese constituencies or who represented areas where certain business interests profited from vesting and confiscating enemy assets were under heavy pressure from those sources.¹⁷

The *Hearings* held on S. 3423 in mid-1954 indicated the major changes that had taken place with respect to the thinking on the question of the disposition of alien enemy property since 1948, when the War Claims Act was being considered. With the West German Government having taken an open position on the question, and in light of the "cold war" situation, the international political factor began to wield increasing influence. Senator Dirksen, in pointing out three basic premises upon which the pro-return policy was based, stated that: "The second premise on which we proceeded was that of the foreign policy objective of improving our relationships with former enemy countries—we have particularly in mind, of course, the West German Republic."¹⁸

Executive support for the Dirksen bill was not decisive. The Departments of State and Justice did not concur in their views on the measure,¹⁹ and the failure of the bill to receive the support of the President was considered to have killed its chances of passage.²⁰ The failure to take action by Congress in 1954, with

The pressure was brought largely, upon the two main subcommittees handling the bills,—the Subcommittees of the Senate Judiciary Committee and the House Interstate and Foreign Commerce Committee, respectively.

¹⁷A list of organizations, business concerns, groups and private individuals testifying on the measures "to return or not to return enemy assets" would be extremely long. The list would range all the way from the American Association of Former Yugoslav Military Prisoners of War to the American Bankers' Association and the AFL-CIO. See table of contents of *Hearings*, U.S. Congress, Senate Subcommittee of the Committee on the Judiciary, *Hearings on S. 105 and other bills, Trading With the Enemy Act*, 86th Cong., 1st Sess., 1959.

¹⁸U.S. Congress, Senate Subcommittee of the Committee on the Judiciary, *Hearings on S. 3423, Return of Confiscated Property*, 83d Cong., 2d Sess., 1954, pp. 1-4.

¹⁹The Department of Justice opposed the passage of S. 3423 for various reasons. It did not consider the assumption that the return of confiscated property would enhance our relations with Germany as being well-founded; attention was called to the fact that a very substantial portion of the property vested as German-owned was in the hands of "record owners" who were of non-enemy nationalities and would, thereby, be in a position to keep it. The State Department supported the bill; Secretary of State Dulles stated that he would like to see the property returned to the original owners. *Ibid.*, p. 160.

²⁰The President's position, given in a reply to a letter from Chancellor Adenauer, was that he did not support any of the pending legislation in

regard to the return of enemy assets or to accept as final the action already taken, was only the beginning of years of frustrated attempts to settle the issue.

The chief positive action during 1954 toward making final disposition of former enemy assets was in the area of "discretionary" returns, involving heirless property. Prior action with regard to fringe returns had been rather successful. Section 32 of the Trading with the Enemy Act authorized the Office of Alien Property to return vested property to limited categories of former owners having technical enemy status but who were not hostile to the United States. This category included, mainly, those persons who were persecuted by their own Government as members of victimized political, racial or religious groups. In many cases these persons had died, and returns of their property were made to successors-in-interest by intestacy or will, provided the designated recipients were eligible for return under Section 32 of the Trading with the Enemy Act. The legislation with regard to heirless property was aimed at those instances where the vested property of such decedents was unclaimed because there were no survivors. It authorized the return, in a total amount not exceeding \$3 million, of the vested property of such heirless individuals to American charitable organizations designated by the President as successors-in-interests to the decedents.²¹

Discretionary or fringe disposals had earlier been made to non-hostile persons and to victims of Nazi persecutions. Included in the former category were those persons whose property had been seized due to the fact that they were in territory occupied by the Axis Powers, and persons resident in enemy territory or citizens of enemy nations who had suffered under Axis oppression.²² Included in the category of victims of Nazi persecutions were those

Congress with regard to the return of vested property. White House Press Release, August 10, 1954, in *New York Times*, August 11, 1954.

²¹Enactment of this legislation had been repeatedly urged by the executive departments concerned. Several bills, starting with the 80th Congress, had been previously introduced which were geared toward this end. See written Statement of General Lucius Clay, U.S. Congress, Senate Subcommittee of the Committee on the Judiciary, *Hearings on S. 2420, Heirless Property*, 83d Cong., 2d Sess., 1954, p. 20.

²²Public Law 322, March 8, 1946, conferred authority upon the President to make returns to nonhostile persons. U.S. Congress, House Subcommittee No. 1 of the Committee on the Judiciary, *Hearings on H.R. 3750—A Bill to Amend the First War Powers Act*, 1941, 79th Cong., 1st Sess., 1945, pp. 1-2.

persons who had suffered religious or racial persecution in the countries of their origin or residence.

III

The most extensive discussion of the alien enemy property issue between the United States and the West German Governments took place in February, 1955.²³ Although these discussions were not considered to be formal negotiations but, rather, only of an exploratory nature, they helped to formulate the Administration's position on the question of what to do, if anything, about the vested property being held by the Office of Alien Property. President Eisenhower had not taken a definite stand on any of the proposed legislation but he expressed sympathy for the individuals left in straitened circumstances in West Germany as a result of the operation of the vesting program. At the same time he added that he hoped that there would be provided some measure of compensation to those Americans who incurred losses arising out of the War.²⁴ This made it fairly clear that he would not support a full return.

The course of the United States-West German discussions (February 10, 1955 to March 3, 1955) followed, largely, the broad guideline of policy indicated by the President's statements. The United States' delegation informed the German delegation of a proposal that would be submitted to Congress for legislative consideration. German assets vested in consequence of World War II, or the proceeds of their liquidation were to be returned as a "matter of grace" to "natural persons" up to a limit of \$10,000 per owner, less costs of administration. This would include those persons whose assets exceeded \$10,000. Copyrights and trademarks were to be returned irrespective of their value, subject to existing licenses; cultural property was to be returned. Arrangements would be made to make the program available to residents of East Germany upon the reunification of Germany. The stated aim of this proposal was, mainly, to relieve the hardship cases. It was estimated that ninety per cent of the owners whose property was vested would receive full return.²⁵

The United States delegation stated that proposals would be

²³*New York Times*, February 7, 1955.

²⁴*Ibid.*, p. 31.

²⁵See White House Press Release No. 122, March 3, 1955.

submitted to the Congress for the settlement of war claims of nationals of the United States against Germany, up to about \$10,000. This proposal was to be financed by the use of \$100 million from the payments to be made by the Federal Republic on its debt to the United States on account of postwar economic assistance.

The Germans were dissatisfied with the United States' proposals, mainly because they did not cover corporate assets, which they had appealed for. While acknowledging the German appeal for a broader plan, the United States delegation said it was not envisaged by the Administration.

The Administration finally presented a bill calling for partial return. The contest between full return and partial return, and to a lesser degree the existing policy of "no return," was waged during the succeeding years on the basis of bills presented by the Administration and those of a number of congressmen. The German Government made it known that while partial return was a step in the right direction, it would not be considered a satisfactory final settlement. This attitude on the part of the West German Government may prove to have been a costly error.²⁶ Support in the United States for return of the assets has not been as high since.²⁷

The plan to make partial return as a "matter of grace" has not been successful. The Administration lost many potentially strong arguments for making any return of assets by supporting a program of partial return. For almost any point which could be put forth for partial return, either the case for full return or for "no return" could make even greater use of it.²⁸ One of the main arguments used by the Administration in support of this plan centered around the factor of cost. It was maintained that a plan should be enacted which would take care of American claimants promptly and relieve the German hardship cases without placing too much of a burden on the

²⁶The *New York Times* reported that an unidentified Administration official explained that the reason the Adenauer Government had shown so little interest in the Administration's partial return proposal, which would benefit the individual property owners, was the fact that the large industrialists provided most of the campaign funds for Adenauer's Christian Democratic Party, May 30, 1957, p. 4.

²⁷*Ibid.*, March 17, 1960, p. 4.

²⁸The statements of Secretary of State Dulles were used conveniently by the supporters of full return to strengthen their case against that of the Administration. U.S. Congress, Senate, *Payment of War Damage Claims and Return of Vested Assets*, 84th Cong., 2d Sess., 1956, Report 2809, p. 7.

American taxpayer. Those who opposed the plan responded by pointing out that in comparing relative values or costs, no one could estimate what it might cost the United States not to return the seized assets. The fact also was stressed that the enemy property question was not an independent issue which could be dealt with as such; it was part and parcel of the broader questions of the safety of foreign investments and the promotion of our general international interest. These were questions of infinite importance to the United States as a major foreign investor and as leader of the free world. It was pointed out that the confiscation of private property of former enemy aliens is, in effect, the exaction of reparation for the action of the former German Government from a relatively few Germans, specifically, those who had sufficient faith and confidence in the institutions of the United States to make their investments here.

The proponents of full return, in stressing the foreign relations factor, could claim a measure of support from the courts. The American courts handled numerous cases involving vested enemy property. They were mainly concerned with legal matters such as "enemy or non-enemy" status under the Trading with the Enemy Act, validity of title to vested property, validity of debt claims, et cetera. However, in some instances an acute awareness of the relation of the international political situation to the enemy property issue was indicated. The opinion of presiding Justice P. J. Moore of the District Court of Appeals of California in the case, *In Re Schneider's Estate*, 1956, is illustrative of this point:

Research has exposed a strange and regrettable anomaly in the foreign relations of our Central Government. For 35 years the United States has expended billions of dollars in attempting to recapture and retain the friendship and loyal adherence of our enemies opposed in two world wars. It has verily poured out its wealth to accomplish that purpose within the German Republic. Now, after more than 10 years since fighting ceased, and over 4 years since World War II was declared terminated. . . , that same Government, actuated by generous impulses toward a fallen foe, in nurturing the German state and its subdued people, withholds from these individuals within Germany comparatively modest sums. . . . By confiscating such moneys, we forfeit more good will than might have been acquired by the payment of multiplied thousands to the Bonn Government. . . .

The remedy lies with the Congress.²⁹

Those who opposed making any return, stressed the fact that

²⁹*In Re Schneider's Estate*, 296 Pacific (2d), 45, 52 (1956).

international agreements drawn up with our Allies and with West Germany dictated permanent retention of the seized assets, and committed the latter country to reimburse its own nationals.

Again in 1957, Senators Johnston and Dirksen led the drive to return vested enemy assets.³⁰ Hearings started in April on a number of bills designed to amend the Trading with the Enemy Act along several lines. Although more than 700 pages of testimony was taken, very little was uncovered that was not already known. Congress was urged to take early action to resolve the problem of vested enemy assets.³¹ Major emphasis in the testimony seemed to focus upon the principle of the sanctity of private property. It was pointed out that the violation of the principle could not be avoided by the "ingenious use of language," which gave lip service to the contrary, but which in fact denied to the private property owner that which he owned without prompt and adequate compensation for the property taken. With regard to the Administration's plan which was still pending, it was explained that partial performance of a basic principle is inadequate. In the American tradition "the right to property is a necessary concomitant part of our right to be free. It is axiomatic that our Government can no more condone some confiscation than it could some slavery, to say nothing at all of being the perpetrator thereof."³²

For the first time, the Subcommittee, in its report, attempted to meet head-on the obstacle of the 1946 Paris Agreement which barred return. The Agreement was assailed as being in violation of a basic principle; the fact that it existed did not mean that "there is no violation of this principle, any more than that an agreement

³⁰The Johnston Bill (S.600) provided for complete return. Senator Dirksen had been a sponsor of previous bills toward this end, along with other members of the House and Senate. Most of the Senate full return bills had been approved by the full Judiciary Committee but had not been acted upon by the Senate. U.S., Congress, Senate Subcommittee of the Committee on the Judiciary, *Hearings on S. 600, S. 727, S. 1302, Return of Confiscated Property*, 85th Cong., 1st Sess., 1957.

³¹The Subcommittee termed it inconceivable that an office should be maintained at a cost averaging \$3 million a year for 11 years after the termination of hostilities and more than 15 years after the declaration of war, when the function and purpose of the Office was so diametrically contrary to the larger national policies, domestic and foreign, of our Government. U.S. Congress, Senate Subcommittee of the Judiciary to *Examine and Review the Administration of the Trading with the Enemy Act*, Report No. 120, 85th Cong., 1st Sess., 1957, p. iv.

³²*Ibid.*, p. 13.

not to return the loot of a crime can overcome the fact that there was a burglary."³³

There were numerous minor developments during 1957 and 1958, relevant to the enemy property issue. However, no real progress was made toward making final disposition of the vested assets. There was no let up from the Germans in their pressure to have all of the assets returned.³⁴ During Chancellor Adenauer's visit to the United States in 1957,³⁵ the question was raised again and he stressed the importance of the issue from a political point of view. Speaking in reply to a question raised in a news conference, the West German Chancellor said:

We are looking for a way which would make it possible to meet the claims and the demands which are made in Germany and which are very important from a political point of view without at the same time imposing any burdens on the American taxpayer.³⁶

At the time of the Chancellor's visit (May, 1957) an agreement was reached that the enemy assets problems should be further discussed in Washington, between the Secretary of State and the German Ambassador. Between those who favored full return and those who favored partial or no-return the enemy property issue was fought to a virtual standstill. This was true despite the fact that there was major legislation pending on the question. Neither the Administration nor the Dirksen-Johnston group appeared willing to compromise its respective position.

Following the Chancellor's visit, there was speculation that the Administration was preparing to modify its opposition to full return, proposed in legislation sponsored by Senators Dirksen and Johnston. With an election coming up in West Germany in the Fall of 1957, it was hard for the Administration to flatly refuse the

³³*Ibid.*

³⁴On the eve of the hearings in 1957, before the Senate Judiciary Subcommittee, the German industrialists sent urgent appeals to President Eisenhower and Secretary of State Dulles, for the return of vested property. The West German Chamber of Commerce, and the industrial element made pleas for return upon the grounds that 30,000 Germans who invested in the United States should not be held responsible for Germany's reparation burden. *New York Times*, April 4, 1957, p. 6.

³⁵The Chancellor had visited the United States for talks concerning disarmament, unification of Germany and the possibilities of a Big Four Conference to deal with these and other top level matters, *ibid.*, April 29, 1957, p. 1

³⁶*Ibid.*, May 30, 1957, p. 30

Chancellor's appeal for greater consideration on the question of return of former German assets.³⁷

During the discussion of the issue in 1957, the President had reminded the Bonn Government that Germany had not been "hampered by a large reparation burden" because the Western Allies had agreed in 1945 to meet their claims against Germany, and those of their injured citizens, out of the seized assets. In return for the waiver of reparations the West German Government, in the Bonn Convention of 1952 and the Paris Agreement of 1954, agreed to reimburse its own citizens for the seized assets. The West German Government had taken no steps to fulfill this pledge.

Gradually, the Bonn Government was adopting the argument being put forth by the full return group in the United States. It moved further and further away from an acceptance of the Bonn Convention, implementing the Paris Agreement. By 1957, it was contending that the latter agreement was unjust and violated the sanctity of private property. In most of the discussions and public statements by officials of the Bonn Government, and by private citizens, the issue was dealt with, largely, as though no international agreements existed.

IV

One of the influences which has helped to make the enemy property issue extremely complex is the *Interhandel Case*, and the developments connected therewith. Interhandel is a Swiss concern which claims to be the owner of the General Aniline and Film Corporation. The latter was seized during World War II by the Alien Property Custodian and is still being held by the Office of Alien Property. Between 1942 and 1946, approximately 98 per cent of the stock of the corporation was vested under the Trading with the Enemy Act, as beneficially owned or controlled by an enemy (German) corporation, I. G. Farben. The United States contended that General Aniline and Film Corporation was enemy owned, or enemy tainted under the provisions of the Trading with the Enemy Act in that through the years the firm had participated in a conspiracy with the *Sturzenegger* Swiss banking firm and I. G. Farben to conceal and cloak the ownership and control by the

³⁷*Ibid.*, p. 4.

latter of properties and interests in many countries, and to allow I. G. Farben to control such properties.

The case had been in the United States courts since 1948, when Interhandel brought suit in the United States' District Court of the District of Columbia for recovery of its American assets, under Section 9(a) of the Trading with the Enemy Act, alleging that it was not and never had been a holding of the enemy, or an ally of the enemy. The firm had been cleared in Swiss proceedings as a bona fide corporation of that country, and not of German ownership or control. These findings were not accepted by the United States as binding under the Swiss-Allied Accord (Washington Accord) of 1946. Article IV (1) of this Accord provides: "The Government of the United States will unblock Swiss assets in the United States. The necessary procedures will be determined without delay."²⁸ The Swiss Government maintained that the action of the United States in refusing to return the assets in question to Interhandel was contrary to the above stipulation of the Accord.

The position of the United States with regard to the Washington Accord was that it did not apply to assets in the category of General Aniline and Film Corporation. It maintained that the obligation to unblock, as stated in Article IV of the Accord, referred to the lifting of United States Treasury controls on admittedly Swiss assets and not to the divesting of property vested by the Alien Property Custodian as enemy property. The United States further maintained that the Accord could not possibly have been intended to cover the property in question in that vested property is the property of the United States and can be disposed of only by Congress. Such provisions as had been laid down in the Trading with the Enemy Act with regard to enemy property governed the negotiators of the Washington Accord.

The Swiss Government challenged the interpretation placed upon the Washington Accord and the Treaty of Arbitration and Conciliation of 1931 by the United States Government. Essentially, the United States has maintained that to the extent that the agreements of 1931 and 1946 deal with the question at all, they support the right of domestic jurisdiction on its part, with regard to the Inter-

²⁸For the text of the Washington Accord, see Department of State *Bulletin* XIV (1946) p. 112. The interpretation of the provisions of the Accord has represented a source of disagreement between the two Governments. *Ibid.*, XXXVI (1957) p. 352.

handel dispute. It maintains that no arbitrable question between Switzerland and the United States has arisen under the 1931 Treaty.

The disposition of title to property located within a country is manifestly within the domestic jurisdiction of that country unless the country involved has by sovereign act removed the matter from its exclusive domestic jurisdiction. The United States has not removed the matter of the ownership of these shares in General Aniline and Film Corporation from its domestic jurisdiction.³⁹

In taking this stand the United States in effect asserted its own right to decide when a matter is within its domestic jurisdiction.

In reference to the American court decisions in the case, the Swiss Government pointed out that they had been restricted to mere procedural grounds, that the American assets of *Interhandel* had not been returned to their rightful owners, and that all attempts of the Swiss owners to obtain the return of their property had not been successful. The Swiss Government maintained that the issue now turned on questions of customary international law and treaty law relative to the right of the United States to seized alien property within its jurisdiction in all circumstances. After extended communication between the two Governments over the submission of the case to arbitration or conciliation, the Swiss Government took the *Interhandel Case* to the International Court of Justice, and asked for a decision on the merits, alternately, for a decision that the dispute is of a nature to be submitted to judicial settlement, arbitration or conciliation, and for interim measures of protection pending the Court's decision. The United States, subsequently, appeared before the Court and interposed four preliminary objections. These objections were based, mainly, upon the compulsory jurisdiction provision (Article 36(2)) of the Statute of the International Court of Justice, and the respective reservations of the United States thereto.⁴⁰

Issues of international law relative to the validity of the "peremptory" domestic jurisdiction reservation of the United States, and questions as to the interpretation of the treaty engagements were some of the issues to be decided by the Court. The factors in the case were altered somewhat in mid-1958 with the ruling of the

³⁹U.S. "Memorandum" to Government of Switzerland, *ibid.*, p. 357.

⁴⁰For a Statement of these objections, the respective reply of the Court, and a discussion of the Connally Reservation, see "The United States and World Court Jurisdiction," *Congressional Digest* (January, 1959), 7ff.

United States Supreme Court, reinstating the case after it had been thrown out by a lower court back in 1956. In November, 1958, talks between the representatives of Interhandel and the United States' Justice Department in an attempt to negotiate a settlement out of court proved unsuccessful. The negotiations were based upon the hopes of arriving at a settlement for cash. This would have ended the matter without having the courts pass finally on whether the stock was originally Swiss or German owned.

The International Court of Justice finally heard the argument of the United States and Switzerland late in 1958. Early in 1959 (March 21), a decision was handed down in the *Interhandel Case*. The decision did not go to the merits of the controversy but was concerned solely with the preliminary objections, filed by the United States, to the Court's jurisdiction.

In recent months the United States Government has been primarily concerned with the compensation of American claimants of war damages against Germany and Japan. The issues of the return of seized assets and the settlement of war damage claims, generally, have been linked together. The Eisenhower Administration took the position that to establish with certainty the magnitude of valid war damage claims of American nationals against Germany, and to make specific provisions for the payment of such claims, would eliminate one of the principal factors "which up to now have [*sic*] made consideration of the vested assets problem so difficult and unsatisfactory."⁴¹

In line with this aim, and also due to the Government's desire to get out of business, the Administration in 1959 and 1960 pushed legislation to permit the sale of Government seized shares of General Aniline and Film Corporation, which represented the chief portion of the property still being held by the Government.⁴² Legislation to permit the sale of the corporation was considered by the Eisenhower Administration to be the best way out of the legal entanglement which had existed for more than a decade. Under present American law the Government is barred from selling any enemy

⁴¹Letter from William B. Macomber, Assistant Secretary of State, July 3, 1958, quoted in U.S., Congress, Senate, Committee on the Judiciary, *Payment of War Damage Claims*. . . , Rept. No. 2358, 85th Cong., 2d Sess., 1958, p. 16.

⁴²The Alien Property Office had items ranging from patents and copyrights to approximately thirty-five parcels of land; however, GAFC represented the bulk of the seized property still being held.

assets while litigation is pending.⁴³ The plan was to put the shares on the market and reserve some of the proceeds of the sale to cover any eventual winning claim by Interhandel. The sale of the shares would make clear how much money is at stake, a point long in controversy.⁴⁴

The Office of Alien Property is seeking to complete the liquidation of the properties still being held as soon as possible. The Director of that Office stated in 1959 that he anticipated that the Alien Property Office, as a division of the Department of Justice under an Assistant Attorney General, would expire in 1960.⁴⁵ The costs and expenses of administering the Trading with the Enemy Act by the Office of Alien Property have been paid out of the proceeds of vested assets. Congress makes the appropriation each fiscal year out of such funds. The annual authorization has averaged around \$30 million. The authorization was reduced to \$1,500,000 for the fiscal year of 1960 and only \$650,000 for fiscal year, 1961.⁴⁶

Chief emphasis in 1959 and in 1960 was on paying the damage claims of American citizens for wartime losses abroad. The plan was to use the remaining proceeds from the sales of vested property to satisfy these claims.

As of mid-1959 the West German Government was still pressing the United States for the return of the assets. It was suggested that the United States might use West German repayments on economic aid to reimburse German citizens for the seized property.⁴⁷ However, this idea was quickly rejected by the State Department as not having the slightest chance of acceptance by the Administration. During Chancellor Adenauer's visit to the United States in March of 1960, the plea was again entered to have the seized assets, or

⁴³Letter from Assistant Attorney General Dallas S. Townsend, Director, Office of Alien Property, April 1, 1959; also see Department of State *Bulletin* XXXVI (1957) p. 351ff.

⁴⁴This is due mainly to the relative appreciation in value of the corporation under Government administration. *New York Times*, January 16, 1959, p. 37. Exclusive of GAFC, less than \$28 million of vested property remains. U.S., Congress, Senate Committee on Judiciary, Subcommittee on *Trading with the Enemy Act*, Rept. No. 228, 86th Cong., 1st Sess., 1959, p. 4.

⁴⁵*Ibid.*, p. 6

⁴⁶*Ibid.*, Rept. No. 1390, 86th Cong., 2d Sess., 1960, p. 4.

⁴⁷The U.S. extended some \$3 billion in aid to West Germany after World War II; two-thirds of this amount was "forgiven;" West Germany has repaid about \$200,000,000 of the remaining \$1 billion. *New York Times*, June 19, 1959, p. 2

compensation therefor, returned.⁴⁸ The chances of compliance with this plea have tended to diminish, gradually. In that much of the compensation from the assets has already been used to pay off certain American claims, an outright Congressional appropriation would be necessary to compensate German and Japanese nationals. This seems very unlikely at the present time.

West Germany has been actively seeking the return of vested assets since around 1953. Until 1960, the Germans asked for "full return," meaning the original value plus the wartime and postwar increments. In 1960, they proposed a two-thirds return of the original \$400,000,000.⁴⁹

The turning point in the drive for the return of the assets seemed to have come with the German rejection of the Administration's plan to return up to \$10,000 to "natural persons" as an "act of grace." This would have cost about \$60,000,000 and would have repaid in full ninety per cent of the former owners of the seized property. The plan also included the proposal to use any money left after paying American war damage claims to reimburse pro rata owners of property of more than \$10,000 value.

In late 1960, some eight years after formally promising to do so, the West German Government took initial steps to compensate its citizens for losses caused by wartime Allied seizures of German property. This is viewed as tacit admission that the chances of getting back any of the millions of dollars in assets seized in the United States are poor indeed.⁵⁰ After Chancellor Adenauer's return from Washington in March, 1960, he was apparently convinced that the full return demand which had been pressed upon him by West German corporate interests was no longer realistic.

Negotiation with regard to the alien enemy property issue, since the Kennedy Administration took office, has been linked with the United States' balance of payments problem. Apparently, the West German Government decided to mark time during the final stages

⁴⁸*Ibid.*, March 16, 1960, p. 9.

⁴⁹The value of German assets at the time of seizures was estimated at \$400,000,000. Many of the industrial properties increased in value during the War. The total value of the assets as of 1960 was set at \$541,000,000. *New York Times*, March 17, 1960, p. 4.

⁵⁰Cash payments to "natural persons" only will be made indirectly and will be paid under highly restrictive conditions. By a rough estimate, no more than \$50,000,000 can be disbursed in nonrepayable "loans," authorized by an unpublicized May 20, 1960, administrative decision of the Federal Cabinet. *New York Times*, May 25, 1960, p. 63.

of the Eisenhower Administration, with hopes that a solution could be worked out with the new Administration. Early in the Kennedy Administration, as a result of some two months negotiation between the United States and West German representatives, and in response to a proposal made by the former, the Bonn Government was prepared to make an offer of \$1,200,000,000 in various financial undertakings as a contribution toward the solution of the United States' balance of payments problem.⁵¹

The offer was to be conditional upon an agreement by the United States to cancel \$187,000,000 of the \$787,000,000 which West Germany owes this country in settlement of postwar debts for German relief and rehabilitation. The West German Government maintained that this cancellation would represent a settlement of postwar debts for the seized German assets being held by the United States. Initially, it was expected that the Kennedy Administration would accept this condition and present the proposal to Congress for its approval.⁵² However, when the offer was made, it was not accepted. United States officials suggested a plan of their own which would afford about \$600,000,000 relief a year to the United States' balance of payments problem.⁵³ The United States officials indicated to West German representatives that they would be prepared to discuss prepayment on the postwar debt, including a deduction for the seized assets, only after Bonn had agreed to a continuing aid program along the lines suggested in the plan of the United States.

Little action of significance has taken place in the 87th Congress. However, numerous bills have been introduced affecting the disposition of the seized enemy assets. Senator Keating has

⁵¹The West German offer was to include prepayment of \$600,000,000 of the remaining \$787,000,000 of West Germany's postwar debts to the United States; purchase of \$450,000,000 worth of arms in the United States this year with advance payment on \$150,000,000 of arms already contracted for; agreement in principle for Bonn to assume part of the United States military aid to Greece and Turkey, and some economic aid projects in under-developed countries. *New York Times*, January 25, 1961, p. 1.

⁵²*Ibid.*, January 24, 1961, p. 1.

⁵³The plan of the United States included military procurement in this country for West German forces of at least \$400,000,000 a year; military procurement here for other NATO nations of about \$100,000,000 to \$200,000,000 a year; grant and loan aid to underdeveloped nations of \$100,000,000 a year; liberalization of restrictions on agricultural imports, which would increase the export earnings of the United States by about \$15,000,000 to \$20,000,000 a year, *ibid.*, January 25, 1961, p. 1.

introduced three bills (S. Bills 708, 760, 956), which are concerned with the payment of certain wartime claims of United States' nationals, the permission of the sale of vested property involved in litigation, et cetera. S. 708 and a companion bill (H.R. 5028) provided for certain payments to organizations newly designated thereunder, which are concerned with relief and rehabilitation of needy victims of Nazi persecution. Bills authorizing the sale of vested properties notwithstanding the pendency of litigation for their recovery, while not being bills for the return of seized assets, nevertheless, make a disposition of them. Such a proposal is embodied in S. 760, H.R. 1078, and H.R. 3460.⁵⁴

None of these bills was considered to be particularly meaningful in that it was not known to what extent any of them reflected the thinking of the Administration. In his appearance before the Senate Judiciary Committee, Mr. Edward D. Re, the new head of the Foreign Claims Settlement Commission indicated his intention of conducting a thorough review of the whole problem,⁵⁵ to the end that the Administration would be in a position to submit a new legislative proposal for the consideration of the Congress. It remains to be seen what action, if any, will be taken by the Kennedy Administration. The Administration has made it clear that it views the problem differently from the Eisenhower Administration. It did not feel that the offer made by the West Germans early in 1961, involving proposed relief for the balance of payments problems, could pass Congress, and preferred not to submit it.⁵⁶

Ostensibly, the West German Government has given up hope of settling the assets problem with the Kennedy Administration at this time. However, it is unlikely that this problem, which for so long has been a part of the financial negotiations of the two coun-

⁵⁴Most of the other bills introduced were concerned with "fringe" returns, —S. 291, to return former owners unliquidated interests in estates and interests in trusts not yet reduced to possession; S. 495, and its companion bill, H.R. 3866, to return to certain citizens of the United States property seized from them when they were enemies, in a sum not to exceed in the aggregate \$9,000,000; H.R. 1185 to return to former owners interests in certain trusts created by citizens of the United States prior to December 7, 1941. U.S. Congress, Senate, S. 62, S. 291, S. 495, S. 708, S. 760, S. 956; House, H.R. 1078, H.R. 1185, H.R. 3460, H.R. 3866, 87th Cong., 1st Sess., 1961.

⁵⁵Letter from Hon. Russell Long, with enclosure from Joseph A. Davis, Chief Clerk, U. S. Senate, Committee on the Judiciary, Washington, D. C., May 8, 1961.

⁵⁶*New York Times*, February 26, 1961, p. 1.

tries, will long remain dormant. As long as the money realized from the sale of the German assets remains unspent in Washington, the problem is certain to be reviewed sooner or later. Any German Government is committed to seeking a return of the assets, and it has the promise of the United States Government (1957) in support of its efforts.⁵⁷

V

There are many highly controversial rules concerning the treatment of alien enemy property; especially is this true with regard to its disposition once it has been seized. Neither the international legal principles on the question nor the maze of treaties and international agreements have served to give it sufficient clarification. Acceptance of the law regarding alien enemy property has been much greater at certain periods than at others. The political entanglements which have beset the question of the treatment of alien enemy property following World Wars I and II hardly existed during the nineteenth century. Specific rules of international law emerged during the century which defined limits of belligerent action with regard to confiscation, sequestration, or requisition of enemy or neutral property in the belligerent's own territory, occupied territory, or on the high seas. It was normal for individuals who had suffered personal injury, confiscation of credits, or the seizure of property during the war to demand restitution or compensation.⁵⁸

The practice of the United States and other nations of the world supported the inviolability of enemy private property within the jurisdiction at the outbreak of war. The United States was involved in three foreign wars during the nineteenth century—the War of 1812, the Mexican War, and the Spanish American War. No confiscatory action was taken against alien enemy property in any of these wars.⁵⁹ The non-confiscatory principle pervaded the treaties

⁵⁷*Ibid.*

⁵⁸Quincy Wright, "War Claims: What of the Future?" *Law and Contemporary Problems*, XVI (November, 1951) 543ff. Professor Wright pointed out four considerations upon which war claims were based during the nineteenth century; among these were (1) respect for property and other legal rights of individuals and (2) respect for international law.

⁵⁹The Civil War, which was in many ways unique when contrasted with the other wars of the century, provided the only instance of confiscation. Harris, *op. cit.*, p. 49ff.

of this period and characterized the executive policy followed at international conferences.

Current writings of publicists and scholars in international law are not in accord on the rules governing the treatment of alien enemy property. Writers have generally been divided into two camps. On one side are those who assert that the permanent retention of alien enemy property for any reason whatsoever is confiscation and is a violation of international law.⁶⁰ On the other side are those who feel that it is legitimate to retain, permanently, alien enemy property seized during the time of war. Some members of the latter group maintain that there is no law at present, nor has there been one in the past, barring the confiscation of alien enemy assets in the prosecution of war. Others of this group feel that it is legitimate to retain alien enemy assets under certain circumstances which tend to obviate the charge of confiscation against the seizing power. In summation, it may be said that considerable evidence can be found to support the case against the confiscation of alien enemy property.

The international political situation has been given as a primary reason why the German properties should be returned. The West German Government has used the full weight of its influence in urging a return of the properties. Chancellor Adenauer made public appeals for the assets, emphasizing the fact that the enmity between the United States and Germany was in the past, and that the community of interests and ideals between the peoples of the two nations dictated a return of the confiscated property. Germany also stressed the importance of upholding the "sanctity of private property."

Throughout the long years of indecision concerning the enemy property issue, the legal factors have not been given due consideration. The treatment of enemy property is a legal question. The rights of a belligerent State with regard to sequestration, confiscation, subrogation, et cetera are all questions of law. Even though the law is not entirely clear with regard to the existence or non-existence of a right to confiscate alien enemy property, if a legal

⁶⁰Included in this group are such legal scholars as Edwin Borchard, Otto Sommerich, Rudolph M. Littauer, William R. Reeves and others. Of those who support confiscation, or the permanent retention of alien enemy property under certain circumstances, are Seymour J. Rubin, Henry P. de Vries, Cecil Sims, B. W. Gearhart and others. *Ibid.*, pp. 97-123.

approach had been taken at the outset, rather than one which was largely political and characterized by domestic influences, the settlement of the issue would not have been beset by the various shifts in the international political situation. In other words, if the aim and effort had been the ascertainment of the current law on the question, even if it meant having a determination by an internationally authoritative judicial tribunal, as has been often suggested by Professor Philip Jessup, the basis of operation would have been much more stable.⁶¹

There has always been a close tie-up between law and policy in the establishment and acceptance of international rules of conduct; but when policy is made predominant in deciding a question which is essentially legal and has been accepted as such over the years, a result in serious complication should not be surprising. Whether the law had been found to support or deny confiscation is not the important point. A settlement on that basis would probably have meant that we would not be still trying to reach a final decision, as of 1961, on what to do with alien enemy property, or the proceeds therefrom, which was seized some two decades ago.

⁶¹See "Editorial Comment" *American Journal of International Law*, XLIX (1955) pp. 57, 58, 62.