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TREATMENT OF ALIEN ENEMY PROPERTY IN WAR TIME AND AFTER BY THE UNITED STATES

REX M. POTTERF*

I

INTERNATIONAL LAW AND PRACTICE RELATIVE TO PRIVATE ENEMY PROPERTY

In the early history of warfare the Alien enemy was accorded no rights.¹ The changed treatment of enemy aliens, therefore, is a matter of relatively recent date.² After the opening of the nineteenth century there is only one clear case of the confiscation of private enemy property in the annals of European wars. Here Lord Ellenboro decided that an ordinance of a belligerent power seeking to confiscate private enemy property was not conformable to the usage of the law of nations.³ At the Hague Conference of 1899 it was proved that "Private property can not be confiscated."⁴ At any rate, there would seem to be this customary rule based upon the practice of a century and a half which accords to aliens certain property rights.⁵

This was granted fully by Alien Property Custodian A. Mitchell Palmer shortly after he assumed his office.⁶ Certainly, as has been pointed out by Hyde, there is a question whether the

*See biographical note, p. 474.

¹ The Roman jurist Gains thought "all that is taken from the enemy becomes ours." Grotius regarded pillage and the taking of private enemy property as legal. See Huberich, Charles H.: *The Law Relating To Trading With the Enemy*.

² This idea gained prevalence during the eighteenth century. See Bentwich, Norman: *The Law of Private Property in War*, p. 9. Rousseau believed that war is a relation between states and not between the individuals of warring nations. See Haberich: *op. cit.* pp. 3-4. During the French Revolution the idea gained currency. See Borchard, E. M.: "Confiscation of Enemy Private Property" in 28 *Yale Law Journal* (1918) 478 et seq.

³ There was an attempt made by Denmark to confiscate by ordinance the debts owing to her national by British subjects. See Hinrichs, A. E.: "The Spread Eagle vs. Alien Private Rights" in 111 *Nation* (Nov. 10, 1920) 528; Oppenheim, L. 2 *International Law* 157.

⁴ See Borchard: *Op. Cit* 481 and *Diplomatic Protection to Citizens Abroad* 261.

⁵ See Hershey, Amos S.: *Essentials of Public International Law*, p. 362.

⁶ See Palmer, A. Mitchell: "Why We Seized German Property," in 62 *Forum* (December, 1919), 584.

legal duty not to retain property at the end of the war might imply that there is a legal duty not to confiscate such property.⁷ Borchard believes that due to the immunity of private property in conquered territory *a fortiori*, private property in one's own territory at the outbreak of war, should possess a similar status.⁸

When private enemy property is employed for a hostile purpose, of course its immunity is at an end, but there still remains the duty of the belligerent ultimately to reimburse the owner.⁹ Likewise real property and movable property do not have the same sanctity as debts and incorporeal property.¹⁰ To these practices should be added the numerous treaties which provide for the protection of aliens in time of war if such aliens continue to maintain a neutral position similar to that of neutral states.¹¹ In spite of custom and even treaties there is still a "margin of uncertainty" due to military necessity which International Law recognizes.¹²

With respect to commercial relations with the enemy, various practices have prevailed.¹³ Generally, however, it has been held that such commerce must cease.¹⁴ This is entirely a matter for municipal regulation, and International Law does not lay down any rules.¹⁵ Under English law, all subjects of the King are forbidden to contract to do anything which may be contrary to the national interest. So transactions with enemies have

⁷ See Hyde, Charles C.: *2 International Law Chiefly as Interpreted and Applied by the United States*, 239.

⁸ This immunity can be based on the implied assent of the nations and a conformity in the practice of modern times. See Borchard: "Confiscation of Enemy Private Property" in *28 Yale Law Journal*, 479.

⁹ See 2 Hyde *Op. Cit.* 239.

¹⁰ See Hall, William E.: *A Treatise On International Law* (Eighth Ed), pp. 507, 522.

¹¹ Borchard: *Diplomatic Protection of Citizens Abroad*, 109.

¹² *Ibid.* 253.

¹³ It will be remembered that trade between the English colonies and the French in Canada during the latter part of the Seven Years War resulted in the employment of the *Writs of Assistance* by the British Government to stop the practice. See Lecky, W. E. H.: *The American Revolution* (J. A. Woodburn Ed.), p. 46 et seq. But during the Chino-Japanese War of 1895-6, the Japanese Government winked at the exportation of coal from Japan to China. See Takanashi, Sakuye: *International Law Applied To The Russo-Japanese War*, p. 82.

¹⁴ When permitted, such commerce exists only for the sake of expediency and if officially recognized, it is by Government license. See Borchard *op cit.* 110.

¹⁵ Garner, James W.: *International Law and the World War*, 208-9.

been held void *ab initio*. The restoration of peace does not validate such contracts.¹⁶

Continental practice differs from the Anglo-American rule in respect to the criteria for enemy character. In the former, the criterion is nationality, while under the latter domicile is the test.¹⁷ The practice followed by the United States prior to 1917 was usually in accord with the principle in vogue elsewhere. During the Revolutionary War the property of the Loyalists was confiscated by the various states.¹⁸ But shortly thereafter Hamilton severely condemned such action.¹⁹ At any rate, this was a subject for negotiation in our first two treaties with Great Britain.²⁰ In the early case of *Ware v. Hylton*, the confiscation of private enemy property was denounced by Justice Patterson "as a relic of barbarism."²¹ Again, during the War of 1812 there was an attempt at confiscation, and in *Brown v. United States*, the Supreme Court held that there could be no such confiscation unless authorized by specific congressional enactment.²² In *U. S. v. Percheman*, C. J. Marshall said ". . . that sense of justice and of right which is acknowledged and felt by the whole world would be outraged, if private property should be generally confiscated and private rights annulled."²³

There was no question of confiscation during the Mexican War because there was very little enemy property to confiscate in either country.²⁴ In the Civil War, however, there was wholesale confiscations on both sides.²⁵ Some confiscations carried out under Congressional Acts of 1861 and 1862 (12st. at Large 319 and 518) sought in that manner to punish treason.²⁶ Indeed, the Act of 1861 made the nature of the use of the property the ground for forfeiture. Apparently these examples do not offer

¹⁶ Campbell, H.: *The Law of War and Contract*, 12; Borchard: *op cit.* 111 et seq.

¹⁷ *Ibid.* 253.

¹⁸ Fite, E. D.: "Germany's Losses in America" in 18 *Cur. Hist.* (Pt. 2), 267.

¹⁹ He contended that a Government which permitted foreigners to acquire property within its borders was under obligations to protect such property. See 19th "Camillus Letter," quoted in 117 *Nation* (August, 8, 1923), 131.

²⁰ The Treaty of Paris in 1783 and the Jay Treaty, 1794.

²¹ 3 *Dallas* (1796), 199.

²² 8 *Cranch* (1814), 114.

²³ 7 *Petuis* (1836), 51.

²⁴ Fite: *Op cit.* 267.

²⁵ *Ibid.* 267.

²⁶ Borchard in 28 *Yale Law Journal*, 481.

much support to confiscation of alien property in the United States.²⁷

In 1867 the Supreme Court declared in the case of *Hargar v. Abbott* that the practice of confiscation was "condemned by the enlightened judgment of modern times." The Court still averred that the state legally possessed such right should it care to call it into use.²⁸ Abstention from confiscation also marked the Spanish American War. In accordance with the Proclamation of President McKinley of April 26, 1898, the Spanish ships in American ports were given thirty days to depart.²⁹ This was in marked contrast to the Act of May, 1917, wherein the President was authorized to take over and operate enemy vessels in American ports.³⁰ This was in contravention of current practice and likewise violated The Hague Agreement of 1899.³¹

II

TREATMENT OF ENEMY PROPERTY BY THE ALLIES

Prior to 1914, European capital had become rather widely dispersed. When the war broke out the various belligerent powers found their hands tied with respect to drastic measures against the property of aliens for that was certain to invite reprisals in kind. Ships were confiscated at once without any days of grace, but it was some little time before further action was taken.³² Indeed, everything that was done in the early days of the war was done with a view to military aims.³³

British emergency legislation modified common law³⁴ and defined the various classes of alien enemies.³⁵ On the basis

²⁷ See 2 Hyde: *Op. cit.* 238.

²⁸ 6 Wallace 532 (1867).

²⁹ See Fite: *Op. cit.* 267.

³⁰ See Fenwick, Charles G.: *International Law*, 45.

³¹ *Ibid.* 45.

³² Fite: *Op. cit.* 267.

³³ Lists of contraband were extended and exports and imports were prohibited. Not until 1915 were the blockade orders issued with a view to economic pressure. See Huberich: *Op. cit.* 1.

³⁴ The English Common Law forbids any and all intercourse with persons who reside in the enemy territory, even though they be British subjects. Only by Parliamentary enactment can such traffic be legalized. Garner: *Op. cit.* II, 209.

³⁵ "Every individual or partnership firm residing in or carrying on business in an enemy country, or corporation there incorporated; every subject of an enemy state carrying on a prohibited trade in British territory, and for the purpose of the patent, designs and trademark acts, any subject of the enemy wherever resident, and any British corporation controlled by or carried on for the benefit of enemy subject." See Borchard:

of this legislation the Court held in the case of *Porter v. Freudenberg* in 1915 that an enemy "means any person resident or carrying on business in an enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country."³⁶ German holdings in England were estimated to be worth something less than a half billion dollars.³⁷ By additional legislation and orders, this property was either seized or placed within the reach of British custodians. Liquidation of much of it was carried out and the proceeds held in trust by the custodian.³⁸ In France German property totaled little more than half the amount of such property in England.³⁹ Here the Administrateurs—Sequestrateurs—were similar to the English Custodian.⁴⁰ Likewise the prohibitions were similar to those in force in England.⁴¹ For a time Italy accorded German property treatment based on a special agreement with Germany, but after June, 1916, she adopted the practice of France and England.⁴² Russia began her program of sequestration of enemy property early in 1915, although provision was made for the exemption of such property on payment of a special tax.⁴³ Not until April 23, 1917, did the Japanese prohibit trading with the enemy.⁴⁴

Diplomatic Protection of Citizens Abroad, 111, in other words enemy character is obtained by birth, participation in hostilities, naturalization, trading in a hostile country, domicile in a hostile country, commercial domicile in a hostile country, marriage to an enemy and by enemy control of the business management of one's firm. See Campbell, H.: *The Law of War and Contract*, 3-6.

³⁶ 1 K. B. 857, 1915.

³⁷ See Garner: *Op. cit.* 86.

³⁸ See Roxburgh, Ronald F.: "German Property in War and Peace," in *37 Law Quarterly Review* (1921), 56.

³⁹ See Garner: *Op. cit.* 86.

⁴⁰ These officials were frequently reminded by circulars from the Minister of Justice that their function was chiefly to conserve this property until the end of the war "as an economic hostage" with the dual purpose of preventing its use to the disadvantage of the French national interest and to safeguard the interests of the French creditors. *Ibid.* 1, 92.

⁴¹ "All contracts and transactions by any person resident in France or in the French possessions or protectorates or French citizens wherever resident with any subject of the German Empire or Austria-Hungary, wherever resident or with any person resident within the German Empire or Austria-Hungary" were prohibited. Penal sanctions were imposed and by decree of November 7, 1915, like treatment was extended to Bulgaria. See Huberich: *Op. cit.* 10-11.

⁴² See Huberich: *Op. cit.* 12-13.

⁴³ *Ibid.* 13.

⁴⁴ *Ibid.* 14.

III

GERMANY AND ENEMY PROPERTY

German law, until the war, prohibited only such trading with the enemy as might fall within the category of treason. As the war progressed, she changed her policy⁴⁵ more and more until it became similar to that of the Allies.⁴⁶ In the case of French and British property held in Germany, German methods tended to become identical with those of Britain and France toward German property.⁴⁷ Even then her action appears to have been delayed until some time after her opponents had acted.⁴⁸ In some cases the German property Custodian (*Zwangsverwalter*) was able to conduct the business of aliens with considerable profit.⁴⁹ In most instances the duty of this official was merely to administer the sequestered property.⁵⁰

German treatment of American property was possibly tempered somewhat by the small amount of such property in Germany in comparison with German holdings in the United States.⁵¹ Before our entrance into the war it was charged that American property in Germany suffered somewhat, but the Germans have always claimed that this was only in connection with legitimate needs and that equality of treatment was accorded to American property along with that of other neutrals.⁵² One

⁴⁵ See "American Property in Germany," in 112 *Nation* (February 16, 1921), 272; Garner: *Op. cit.* 87.

⁴⁶ See Huberich: *Op. cit.* 14-15.

⁴⁷ See Bemis, Samuel Flagg: "Shall We Forget the Lusitania," in 131 *Outlook* (August 30, 1922), 711.

⁴⁸ See Garner: *Op. cit.* 99. After adopting this program it was efficiently carried out. *Ibid.* 100.

⁴⁹ The American Vice-President of the American Harvester Company, for instance, thanked *Zwangsverwalter* for his efficient administration of the business of this American company. See "American Property in Germany" in 112 *Nation* 273.

⁵⁰ See Borchard, E. M.: *Hearings Before the Committee on Interstate and Foreign Commerce*. House of Representatives. Sixty-Seventh Congress, Fourth Session. On H. R. 134, 96. Supplemental to the Trading with the Enemy Act, 230.

⁵¹ This was possibly in the ratio of 100-1 in favor of the United States. See Garner: *Op. cit.* 106. For a larger estimate of the value of American property in Germany, see Fite: *Op. cit.* 271. According to the report of the German *Zwangsverwalter* about 11,000,000 marks were turned over to him while more than 200,000,000 marks value of property reported to him was left in American hands but recorded on his books. See "American Property in Germany," 112 *Nation* 274. See also "Our Confiscation of German Property," in 109 *Nation* (August 2, 1918), 139.

⁵² See "American Property in Germany," in 112 *Nation* 274.

of the charges brought against Germany by Mr. Palmer was that American property liquidated by the Germans in Roumania after they had conquered it, was paid for in "stage money."⁵³ Both in Germany⁵⁴ and in the United States,⁵⁵ the official defense of acts against enemy property alluded to similar but prior treatment in the ranks of the enemy. For instance, the German Act of November 10, 1917, was alleged to be a reprisal for the Act of the American Congress approved October 6, 1917.⁵⁶ Into this controversy we have no desire to enter, for there is a maze of contradictory statements. While Mr. Palmer contended that "she (Germany) has done just as we have done keeping a little ahead of us,"⁵⁷ the German Privy Counselor, Mr. Widenfeld, of the Department of Foreign Affairs in Germany, said, ". . . the German Government from time to time, as American proceedings became known, *procured authority* to take measures of reprisal."⁵⁸ The American Government officials likewise defended American sequestrations as a reprisal for the German practice of pillage and destruction of private property and private business in the war theatre.⁵⁹

There is also controversy relative to the treatment accorded by Germany to American Personal property. By German officials it was claimed that even greater consideration was accorded to personal property than to business enterprises.⁶⁰ On the other hand, Mr. Palmer charged that the German treatment of American personal property was unduly rigorous.⁶¹

In general it would seem that Germany was more lenient during the war than was the United States in the treatment of enemy property. So pronounced a critic of German policy as Professor James W. Garner, thinks that Germany stands well

⁵³ This sequestration may have been more rigorous due to the fact that it was carried out under direction of the Military Authority. See Palmer, A. Mitchell: "Why We Seized German Property," in 62 *Forum* (December, 1919), 586 *Passim*.

⁵⁴ See American Property in Germany," in 112 *Nation* 272-3.

⁵⁵ See Palmer, A. Mitchell: *United States Alien Property Custodian Report*, 1918-19, 268; "Why We Seized German Property," in 62 *Forum*, 585; and also an unsigned article: "Our Confiscation of German Private Property," in 109 *Nation*, 139.

⁵⁶ The so-called Trading with the Enemy Act under which authority was granted for the sequestration of enemy property in the United States.

⁵⁷ See *United States Alien Property Custodian Report*, 1918-19, 268.

⁵⁸ See "Peace By Confiscation" in 23 *New Republic* (August 11, 1920), 296.

⁵⁹ See Palmer: "Why We Seized German Property," in 62 *Forum*, 273.

⁶⁰ See "American Property in Germany" in 112 *Nation* 273.

⁶¹ See *United States Alien Property Custodian Report*, 1918-19, 268.

in contrast with France and Britain and it seems that American policy went somewhat further than that of her European allies.⁶² Throughout, it was the German contention that such seizures as were made had in view the supervision and protection of such property, rather than hostility toward it.⁶³ Since the Armistice, practically all American property sequestered in Germany has been returned to its owners.⁶⁴ War measures were abolished in 1919 and this included economic measures directed against the United States.⁶⁵

IV

THE TRADING WITH THE ENEMY ACT AND ITS AMENDMENTS

Such action as the American Government took in the early⁶⁶ days of the war was governed by the common law.⁶⁷ Consideration of special legislation began early, but the Trading With the Enemy Act was not finally approved until October 6, 1917.⁶⁸ Judging from the utterances of Mr. Warren,⁶⁹ Secretary Redfield⁷⁰ and others,⁷¹ the act was at first designed merely to interdict further intercourse with the enemy. Motives at first altruistic, later came to be more practical. A year or so later, Mr. Palmer defended his confiscations in that they were retaliations for German Acts of a similar kind, that enemy enterprises furnished nuclei for German propaganda; and that it was a good

⁶² See 2 Garner: *Op. cit.* 230.

⁶³ See "American Property in Germany," in 112 *Nation* 273.

⁶⁴ See Borchard in *Hearings op cit* 230; Fehr, Joseph Conrad: "Disposal of Enemy Property," in 216 *North American Review* (July, 1922), 19.

⁶⁵ See "American Property in Germany," in 112 *Nation* 273.

⁶⁶ Prior to the Declaration of War, the United States had assumed possession of sixty interned ships belonging to the Hamburg American and German Lloyd lines. Against this the Imperial German Government ineffectually protested. See Palmer: "Crushing the German Advance in American Industry," in 66 *Scribner's* (July, 1919), 22.

⁶⁷ See Huberich: *Op. cit.* 3.

⁶⁸ The bill was introduced in the House on May 25, 1917. House Committee hearings were held in May and June. It was debated in the House on July 9, 10, and 11, 1917. Finally passed by the House, the Bill went to the Senate where there were subcommittee hearings and further debate. *Ibid.* 33-34. During the progress of this legislation, Charles Warren, Assistant-Attorney General of the United States and author of the bill, represented the Government in the Committee hearings. See Cohen, Julius H.: "The Obligation of the United States to Return Enemy Property," in 21 *Columbia Law Review* (1921), 674.

⁶⁹ *Ibid.* 674.

⁷⁰ Henrichs: *Op. cit.* 528.

⁷¹ *Ibid.* 528.

thing for American business to eliminate German business from our markets.⁷²

It seems, however, that the Act did have two primary objects which are not particularly inconsistent with recent international usage, viz., (a) the prevention of giving aid and comfort to the enemy, and (b) the making available of funds for war financing.⁷³ The thought of confiscation was disclaimed more than once.⁷⁴ In this form the Act could hardly be regarded as contradictory with the Treaties of 1799 and 1828 with Prussia, which accorded to merchants of either Prussia or the United States in case of war between the two countries a limited time to leave the country.⁷⁵

Under the provisions of the Act a system of licenses could be employed for the control of enemy trade. This design, however, fell into abeyance before it was ever executed, as no licenses were issued.⁷⁶ It has been pointed out that in reserving to itself the ultimate disposal of the sequestered enemy property, Congress apparently had no thought of destroying German businesses.⁷⁷ On the other hand, the Alien Property Custodian adopted a vigorous policy and came to regard his work as an essential activity in combating the enemy.⁷⁸

In order to correct the deficiencies⁷⁹ in the act, detected by Mr. Palmer in administering it, Congress added three amend-

⁷² *Ibid.* 529.

⁷³ See *Bulletin of Information*, June 8, 1918, p. 5.

⁷⁴ *Ibid.* November 14, 1917, No. 159, 1; Henrichs: *Op. cit.* 529.

⁷⁵ See Veritas: "The Alien Property Custodian," in 28 *New Republic* (September 21, 1921), 96.

⁷⁶ Henrichs: *Op. cit.* 529.

⁷⁷ The Custodian has been severely criticised in some quarters in that rather than as a conservator he was alleged to have acted as a destroyer of enemy property. See Nagel, Charles: "Confiscation Pure and Simple," in 177 *Nation* (August 15, 1923), 165.

⁷⁸ Palmer: *Op. cit.* in 66 *Scribner's*, 17.

⁷⁹ "(The original Trading with the Enemy Act of October 6, 1917) was framed for the purpose of preventing commerce of every sort between the United States and persons living or doing business in enemy territory, and yet it was couched in such conservative, not to say benevolent terms, that when the Alien Property Custodian got fairly into the work which the law laid upon him, he wondered whether its real effect might not be to lend aid and comfort to the enemy. It made the Alien Property Custodian a mere conservator of enemy property; a sort of guardian to take care of, administer and account for the property in the United States owned by persons, who by reason of their enemy character or residence in enemy territory, were disabled from caring for it themselves." See Palmer: *Op. cit.* in 66 *Scribner's*, 17.

ments to it.⁸⁰ It was argued by some that these were designed to protect enemy property and to prevent its waste.⁸¹ In brief, these amendments accomplished the following results: (a) the removal of nearly all restrictions on the sale of property by the Alien Property Custodian,⁸² (b) the placing of patents in the same category as property which can be seized by the Alien Property Custodian,⁸³ and (c) permission to the Alien Property Custodian to acquire an interest in certain kinds of corporations.⁸⁴ Of these amendments the one relating to the sale of property proved to be the most potent weapon against German interests.⁸⁵ Under the amendment relative to patents as many as 4,500 German-owned patents in the chemical industry alone were seized.⁸⁶

V

THE OFFICE OF ALIEN PROPERTY CUSTODIAN

The Trading With the Enemy Act left many matters to be governed by Common Law and the law of the States,⁸⁹ but laid down a general procedure to be followed. In accord with the precedents established in other similar acts not nationality but residence became the test of enemy character.⁹⁰ Upon the Alien

⁸⁰ Mr. Palmer testified before a district court that when military affairs were rather dark for the Allies, he conceived the plan of using his office as a militant factor in the destruction of enemy morale. After convincing the President of the wisdom of his plan the Congress was induced to make the changes in the Act. See "Are We American Thieves," in 117 *Nation* (August 1, 1921), 103; Palmer: *Op. cit.* in 66 *Scribner's*, 18.

⁸¹ See Veritas: *Op. cit.* in 28 *New Republic*, 97.

⁸² With the restriction that sales should be at public auction to the highest bidder and to American citizens only.

⁸³ This was designed to destroy the German monopoly in certain lines of industry. See Palmer: *Op. cit.* in 66 *Scribner's*, 17-18.

⁸⁴ Corporations in which the Alien Property Custodian could not produce the stockholders' certificates of shares due to concealment of such by enemy stockholders. *Ibid.* 17-18.

⁸⁵ See Fite: *Op. cit.* 269.

⁸⁶ See Palmer: *Op. cit.* in 66 *Scribner's*, 18.

⁸⁹ Among the subjects thus left to Common law or to State law were "the effect of war on contracts, enemy litigants, the suspension of statutes of limitation, interest on debts due to enemies' subjects, of interned enemies, and of prisoners of war, devises and bequests by and to enemies, the right of enemy heirs and next of kin . . ." See Huberich, *op. cit.* 3.

⁹⁰ All persons of whatever nationality, including partnerships and corporations, residing or doing business in the territory of enemy nations, or in territory occupied by the armed forces of the enemy, are enemy persons. The Act also puts allies of enemies in the same class with enemies, so that the Alien Property Custodian was empowered to demand and take

Property Custodian fell the brunt of the administration of the law.⁹¹ He was endowed with practically unlimited powers before the end of the war,⁹² and to make his position more secure, the Federal Courts held this power to be validly exercised.⁹³

The President, by frequent executive orders, increased the power of the Alien Property Custodian from time to time.⁹⁴ With such power this office gradually began to get under way. Reinforced by the penal sanctions of the act it was not long before it had a great deal of business to transact.⁹⁵

When transfer of property was made to the Custodian, it was as a full acquittance on the part of the person making it. All moneys received were required to be deposited with the Secre-

over property located or having its *situs* within this country, which is owned by, held for or owing to persons, partnerships or corporations resident or doing business in Germany, Austria-Hungary, Bulgaria and Turkey and in those portions of Belgium, France, Russia and the Balkans which were occupied by the armed forces of the enemy at the time the property was reported to the Alien Property Custodian. See *United States Alien Property Custodian Report*, 1918-19, p. 7.

In the case of French and Belgian nationals resident within territory held by German military forces the right to hold them within the category of enemies was very little used. In the case of the interned Germans in the United States an executive order declared them alien enemies. Fite, *op. cit.* 269.

⁹¹ In a few instances authority was delegated to other agencies. For instance the President's power over enemy insurance companies was passed on to the Treasury Department for exercise. See Garner 1 *op. cit.* 102.

⁹² He was not amenable to the control of the Courts with whatever exceptions apply to any common law trustee. Since his power was delegated by the President, he was responsible to the President alone. *Ibid.* 102.

⁹³ In the chemical foundation suits it was held that the President's acts could not be judicially reviewed and that the Custodian, with the virtual powers of an owner could sell the property in trust at discretion. See "Legalizing Fraud," in 118 *Nation* (January 23, 1924), 80.

⁹⁴ For instance the Presidential Proclamation of May 31, 1918, in conformity with the original Act empowered the Alien Property Custodian to take over the property of (a) wives of officers, officials or agents of Germany or Austro-Hungary; wives of persons within the territory (including that occupied by military and naval forces) of Germany or Austro-Hungary; and wives of persons resident outside of the United States and doing business within enemy territory, (b) persons who are prisoners of war, or have been, or shall hereafter be interned by any ally of the United States. See Palmer: "Germany's Industrial Army on American Soil," in 87 *Central Law Journal* (1918), 63-64.

⁹⁵ "Failure to make report to the Alien Property Custodian where required by law or by regulation of the Alien Property Custodian made under such law, is punishable by imprisonment for not more than ten years or a fine of not more than \$10,000 or both." See *Circular of Information*, Alien Property Custodian, Revised to July 1, 1918, p. 2.

tary of the Treasury for investment in United States bonds or certificates of indebtedness.⁹⁶ Transfer of alien property was accomplished in the following five ways: (a) by order or decree of a court, (b) in response to a formal demand, (c) in pursuance of a petition by the holder of such property, to be permitted to turn it over, (d) in pursuance of a license by the War Trade Board in connection with liquidation, and (e) in pursuance of a license of the Treasury Department in connection with the supervision and liquidation of enemy insurance companies.⁹⁷

To administer the volume of business of this office, eventually a considerable force was created. The work was divided among the five bureaus of Administration, Investigation, Trusts, Audits and Law.⁹⁸ In the Washington office the number of employees was considerably above five hundred.⁹⁹ The payroll for this force was provided by Congressional appropriation, which at its peak totaled \$455,000,101.¹⁰⁰

In formulating the policy of his office the Custodian found it necessary to consider such factors as the nature of reprisals which might be employed in enemy countries. For instance, the likelihood of barbarous reprisals in Turkey is alleged to be responsible for the immunity from sequestration enjoyed by Turkish property. In very few cases was Bulgarian property sequestered, although Bulgaria belonged to the category of alien enemies.¹⁰¹ In conducting the business of companies in which a majority interest had been sequestered, the Custodian held control through a board of directors of his own naming. In case the Custodian held only a minority interest in a company he was usually, for obvious reasons, unrepresented on the board of directors.¹⁰² Very frequently the Custodian relied upon competent attorneys to serve the interest which he held in trust.¹⁰³

⁹⁶ See 2 Garner: *Op. cit.* 103.

⁹⁷ See *United States Alien Property Custodian Report*, 1918-19, p. 22.

⁹⁸ See *Bulletin of Information*, June 8, 1918, p. 6.

⁹⁹ See *Alien Property Custodian Report*, 1918-19, p. 11.

¹⁰⁰ After 1921 this appropriation became progressively less. In 1924 the amount requested by the office had dropped to \$280,000. See *Annual Report of Alien Property Custodian*, 1922, p. 6.

¹⁰¹ See *United States Alien Property Custodian Report*, 1918-19.

¹⁰² See *Annual Report of the Alien Property Custodian*, 1922, p. 5.

¹⁰³ In *Re Botany Worsted Mills, Passaic, New Jersey*, Mr. John Quinn, Attorney and Counsellor at Law, made a report of his services to the Alien Property Custodian on behalf of the company. He enumerated among the larger matters the following duties to which he and his associates gave attention:

"1. Consideration of the balance sheet for 1919.

VI

THE CONVERSION OF ALIEN PROPERTY IN THE UNITED STATES

The program of converting alien property has been criticized on the ground that it served little or no military purpose and was only a veiled form of confiscation.¹⁰⁴ The Custodian, on the other hand, was convinced that he was serving an essential military purpose.¹⁰⁵ The total amount of property seized amounted in round numbers to a value of \$600,000,000 to \$800,000,000.¹⁰⁶ This property was widely scattered; some of it was in the insular possessions of the United States, but the bulk of it was in Continental United States.¹⁰⁷ The complicated character of this business is best realized from the fact that it comprised 33,000 separate trusts.¹⁰⁸ For the first sixteen months the business was

"2. Compensation to executives for year 1918.

"3. Entire revision of the old complicated by-laws of the company.

"4. Reorganization of the company so far as its stock interests were concerned.

"5. The proposed sale of 24,410 out of a total of 36,000 shares of the company held by the Alien Property Custodian.

"6. All of the contracts and arrangements with the selling force of the company.

"7. Examination of facts, advice, opinions and supervision of reports regarding Federal, State and local taxes.

"8. Services of Counsel prior to the reorganization of the company.

"9. Conferences with and advice to the board and committees in regard to the employment of accountants to investigate the affairs of the company.

"10. Bonuses to employees.

"11. Daily consideration of a great number of current matters in connection with the business of the company. See *Administration of Alien Property* (Statement 919), p. 50.

¹⁰⁴ "It is hard to see how it can be reconciled with the established rule of International Law in respect to the immunity of private property in land warfare." See Garner *op. cit.* 2, 105.

¹⁰⁵ For expression of the Alien Property Custodian on this subject, see *United States Alien Property Custodian Report, 1918-19*, p. 15; Palmer *op. cit.* in 87 *Central Law Journal*, 63; "Peace By Confiscation," in 23 *New Republic* (Aug. 11, 1920), 296.

¹⁰⁶ There is some variation in the figures. Certainly the property fluctuated in value from time to time. See "Peace by Confiscation" in *New Republic*, 296; Palmer, "The Great Work of the Alien Property Custodian," in 53 *American Law Review*, 45; *United States Alien Property Custodian Report, 1918-19*, p. 9; Veritas *op. cit.* in 28 *New Republic*, 97.

¹⁰⁷ See *United States Alien Property Custodian Report, 1918-19*, p. 111.

¹⁰⁸ "On December 5, 1918, 32 684 reports of enemy property had been received. The property of each enemy person is treated in the office as a trust and is administered by an organization which is built up on the gen-

handled at a cost of about \$1,000,000 to the United States Government.¹⁰⁹ By December 20, 1917, somewhat less than 13,000 reports were made. In the next year the remainder of the reports were made, requiring in many cases somewhat coercive measures.¹¹⁰

One of the most interesting phases of the program of conversion was Mr. Palmer's attempt to destroy sinister alien power in the United States.¹¹¹ He believed that about 5,000 of the sequestrated German investments represented sinister attempts on the part of German policy to control American Industry.¹¹² To make an end to this became the great objective of Mr. Palmer.¹¹³ Many clever devices were employed by alien property owners in seeking to avoid the surrender of their property. Frequently false transfers were made and when these fell under official suspicion the burden of proof fell upon the enemy attempting to make the transfer.¹¹⁴ Often such transfers were

eral lines of a trust company. The number of separate trusts now being administered amounts to 29,753 and have an aggregate value of \$506,400,500.94. About 9,000 of these cases are covered by reports in which the administration has not yet reached the state of evaluation. And several thousand more have been entered upon the books at nominal value, awaiting appraisal which is proceeding as rapidly as the force of the office will permit. When the entire number of trusts shall have been finally opened on the books and the readjustment of values consequent upon appraisal shall have been completed, it is safe to say that the total value of the enemy property in the hands of the Alien Property Custodian will reach \$8,000,000,000." See Palmer, *op. cit.* in 53 *Am. Law Review*, 45.

¹⁰⁹ Con't. See *United States Alien Property Custodian Report*, 1918-19, p. 9.

¹¹⁰ See Palmer, *op. cit.* in 53 *American Law Review*, 46.

¹¹¹ See Veritas, *op. cit.* in 28 *New Republic*, 96-97.

¹¹² See Palmer, *op. cit.* in 66 *Scribner's*, 23.

¹¹³ "I have had this peculiar and I may say disquieting experience. I have sat in Washington and watched many great enemy corporations under my management earn enormous profits growing out of the very war conditions for which their owners and their owner's friends in Germany are directly responsible, and I face the possibility of piling up these inordinate profits for distribution to the very persons to whom under the circumstances it would be unmoral and unconscionable for them to go." See Palmer, *op. cit.* in 87 *Central Law Journal*, 63.

"Of course I cannot speak for anybody except myself. The feeling is, I think, that the time has come when the ownership of some of these great German properties should be permanently separated from German capital, and that the enemy might as well know now that the connection which she has been able to maintain with American industry and commerce is broken, not simply during the war, but broken never to be resumed." Palmer quoted in *New Republic* (August 11, 1920), 296; see also *United States Alien Property Custodian Report*, 1918-19, p. 15.

¹¹⁴ See Fite *op. cit.* 13 *Current History* (Part 2), 269.

made without valid consideration and some were payable from the business itself at some remote time in the future.¹¹⁵

In other cases evidence was found to substantiate the fears of the Custodian.¹¹⁶ Some noteworthy cases were the Bayer Company on whose premises twenty-three trunks of correspondence were found belonging to Dernburg and Bernstorff;¹¹⁷ and the Orenstein-Arthur-Koppel Company which had accepted allied contracts for military supplies and then had delayed their delivery on the advice of the German ambassador.¹¹⁸ Such enemy firms were often Cartel controlled or subsidarized by the Imperial German Government.¹¹⁹

Thus it appears that while Germany seems to have a record of handling enemy property more in keeping with the established rules of international law than the United States, this can not be said affirmatively to be more than an appearance. The fact is that comparatively very little property in Germany was held by Americans while the records show that our Alien Property Custodian at one time held alien property to the amount of about \$800,000,000. Moreover, there is no affirmative evidence that German property held by the Americans was used to interfere with their handling of the war or in any hostile way. As already set forth, however, there are a number of clear cases in which American industries controlled by German nationals were used as indirect fighting units against the United States. As already indicated there must be a considerable margin in the application of these principles of international law in order to fit the peculiarities of every case in practice. The United States had an undoubted right to hold property that was used indirectly in a hostile manner and it had a right to enforce all reasonable regulations to prevent injury from this source even though incidentally the interests of aliens were injured. The interests of citizens always are inevitably injured in war times;

¹¹⁵ When the war would probably be ended. See Palmer, *op. cit.* in 53 *American Law Review*, 47.

¹¹⁶ The plan of "dummy" ownership was utilized by the Hamburg-American Line in its holdings on the Isle of St. Thomas in the brigin group. See Palmer, *op. cit.* 66, *Scribners*, 21.

¹¹⁶ "Many of the German owned industrial concerns in the United States were mere spy centers before we entered the war, and would have been centers of sedition if we had not promptly taken them into our possession." See Palmer, *op. cit.* in 66 *Scribners*, 21.

¹¹⁷ *Ibid.* 19.

¹¹⁸ *Ibid.* 20.

¹¹⁹ See Fite, *op. cit.* 267-268; Palmer, *op. cit.* 66, *Scribners*, 19-20, 23; *United States Alien Property Custodian Report*, 1918-19; "Peace By Confiscation," in *New Republic* (August 11, 1920), 296.

international law does not prevent a country from defending itself when attacked from within by the hostile use of enemy-owned property.

The Dye Industry particularly felt the hand of the Alien Property Custodian. But here the object was rather to convert it into an American industry as a step toward greater self-sufficiency.¹²⁰ Forty-seven hundred patents of German ownership relating to the manufacture of dyes and to other chemical processes were sequestered and later sold for \$225,000 to an American company—The Chemical Foundation.¹²¹

These conversions have had rather profitable results for American industry. By 1921 there was an increase of about 900 per cent in the amount of American produced dyes over the 1914 figure.¹²² For the Federal Government it resulted in uncovering a large amount of unpaid taxes from their concealment. Payment of such taxes was speedily made by the Custodian.¹²³ Of no little importance, too, was the increased production of essential war commodities which these firms were made to subserve.¹²⁴ In the clinical field considerable satisfaction was derived from the utilization of the German patent on Salvarsan made possible for the state dispensaries wherever it was possible for the state to undertake its manufacture.¹²⁵

¹²⁰ "I think, gentlemen, that I have introduced enough to show you that even prior to 1916, the dye industries of Germany were utterly and absolutely under the central control of the Government, and that the central control of the Government was able to use these dye industries at will for such Governmental purposes as is desired." See "Statement of Mr. Garvan," December 13, 1919, p. 26.

¹²¹ "Under Government Fire the Chemical Foundation looms into Importance," in 73 *Current Opinion* (September, 1922), 401.

¹²² See "Are We Americans Thieves?" in 117 *Nation* 104.

¹²³ See *United States Alien Property Custodian Report*, 1918-19, p. 19.

¹²⁴ At the time of the Armistice the Alien Property Custodian was supplying the government with "magnetos, motors, cloth, dyes, medicines, surgical instruments, dressings, musical instruments, ball bearings, telescopes, optical instruments, engineering instruments, gas mask supplies, glycerine." In some cases the enemy-owned corporations under the supervision of the Alien Property Custodian were running 100 per cent of their capacity of the business of the United States Government. See *United States Alien Property Custodian Report*, 1918-19, p. 10.

¹²⁵ Mr. Garvin (speaking of the patents) Take Salvarsan, and that is the most valuable one—

Senator Calder (interposing) The most valuable patent?

Mr. Garvin—Yes, sir. That patent in the hands of a private individual who wanted to confine the manufacture to one man and maintain the price of three dollars and a half would be worth any amount of money, because 10,000,000 syphilitics would want it. We gave it free to the New York State Board of Health, to the Massachusetts State Board of Health,

In the fervor of the war and the zeal of the Alien Property Custodian to do his work thoroughly there must have been many injustices done to enemy owners of property.¹²⁶ A great machine such as that of the Custody of Alien Property could hardly have been free from some complaint of this character. As long as the Nation was waging war the chief demand it was likely to make on this office or any officer was that it be efficient in accomplishing its undertaking. This it undoubtedly was. The niceties of International Law could wait for adjudication until the war was ended.

VII

ALIEN PROPERTY UNDER THE TREATY OF VERSAILLES AND THE GERMAN-AMERICAN TREATY

By February 15, 1919,¹²⁷ the Alien Property Custodian was able to inform the President that "all known enemy property in the United States has been taken over by me."¹²⁸ The last property seized under the Trading With the Enemy Act, however, took place in May, 1921.¹²⁹ The Alien Property Custodian also forecast the later confiscation of alien property by advocating its retention by the United States.¹³⁰

The Treaty of Versailles, signed June 28, 1919,¹³¹ included among other provisions for¹³² the victors' complete discretion as to the disposal of sequestrated alien property.¹³³ Germany assumed the obligation of reimbursing her own nationals for

and will give it free to any State Board of Health which will equip itself to manufacture it safely. The Foundation will never get anything from them. We want by experimentation to help cure disease. Of course that patent is not worth anything; I mean as far as income is concerned, because we want it to help the public and not to make money out of it." See *Statement of Mr. Garvan*, December 13, 1919, p. 51.

¹²⁶ See Henrichs: *op. cit.* in 111 *Nation* 528, for an account of some of the injustices of the administration of the Alien Property Custodian's office.

¹²⁷ The first Report of the Alien Property Custodian included all transactions prior to February 15, 1919.

¹²⁸ See *United States Alien Property Custodian Report*, 1918-19, p. 3.

¹²⁹ On May 27, 1921, the Bergdoll properties were seized. See *Report of the Alien Property Custodian*, 1922.

¹³⁰ See Cohen, J. H., "The Obligation of the United States to Return Enemy Property," in 21 *Columbia Law Review* (1921), 676; see also Palmer, *op. cit.* in 87 *Central Law Journal*, 61.

¹³¹ See 10 *Current History* (August, 1919), 285.

¹³² See Article 252, of Treaty of Versailles.

¹³³ It has been said that these provisions were largely the result of agitation conducted to that end in America. See Veritas, "The Alien Property Custodian," in 28 *New Republic* (Sept. 21, 1921), 98.

the losses of their property abroad¹³⁴ and the Allied and Associated Powers were authorized to compensate their nationals from the sequestered property.¹³⁵ The paper balance was maintained by crediting the sequestered property to Germany's Reparation account.¹³⁶ The provision which requires payment to be made by Germany for the sequestrations of her late enemies has a rather dubious aspect in that the Allies possess a mortgage on all German assets under the Reparations provisions.¹³⁷

The clearing house arrangements set up under the Treaty¹³⁸ have been denounced as "highly artificial schemes."¹³⁹ They were set up in Great Britain in accordance with the treaty, but apparently did not work very satisfactorily.¹⁴⁰

Since the United States failed to ratify the Versailles Treaty of Versailles it was deemed necessary to take some means of formally resuming diplomatic relations with Germany. The Republican party had favored peace by declaratory resolution of Congress.¹⁴² As soon as the Harding Administration entered upon its duties this step was taken.¹⁴³ The German Government, however, had protested against American treatment of the property of German nationals in the United States,¹⁴⁴ and it seemed best to arrive at an understanding relative to this. Commercial intercourse, indeed, had been resumed between the merchants of the two countries. This seemed to justify resumption of diplomatic intercourse.¹⁴⁵

¹³⁴ See "German Property in the Allied Countries," in 11 *Current History* (Part 1, October, 1919), 105.

¹³⁵ Con't. See Palmer, *op. cit.* in 62 *Forum*, 593.

¹³⁶ See Bemis, *op. cit.* in 131 *Outlook* (August 30, 1922), 711.

¹³⁷ See Article 248 of the Treaty of Versailles.

¹³⁸ See Annex to Article 296 of the Treaty of Versailles; also "German Property in Allied Countries," in 11 *Current History*, 105.

¹³⁹ See "The Property of Ex-enemy Aliens," in 154 *Law Times* (July 8, 1922), 23.

¹⁴⁰ See Roxburgh, R. F.: "German Property in War and Peace," in 37 *Law Quarterly Review* (1921), 46.

¹⁴¹ See "Peace at Last," in 113 *Nation* (July 13, 1921), 24.

¹⁴² See "Veto of the Knox Resolution," in 12 *Current History*, 707 et seq.

¹⁴³ The so-called Knox-Porter Resolution was passed July 2, 1921. See Hays, Arthur Garfield, *Enemy Property in America*, 353-355. This provided for the retention of the sequestered alien property by the United States. See "Attack on Private Property," in 116 *Nation*, 205.

¹⁴⁴ In October, 1918, some weeks prior to the Armistice the German Government filed a formal protest against the American policy of selling German property. The sale of the ships belonging to German steamship companies was especially disapproved. See *New York Times*, Oct. 8, 1918.

¹⁴⁵ See "Peace at Last," in 113 *Nation* (July 13, 1921), 24.

Shortly after the passage of the peace resolution the American High Commissioner to Germany, Mr. Loring Dresel, together with the German Foreign Minister, Mr. Frederich Rosen, negotiated the German-American Treaty of Peace.¹⁴⁶ This treaty was signed August 25, 1921. Ratifications were exchanged on November 11, 1921, and proclamation of the Treaty in force took place on November 14, 1921.¹⁴⁷ Thus peace was technically and formally in force three years after the armistice. The Knox-Porter Peace Resolution, together with portions of the Treaty of Versailles, were included by citation in the German-American Treaty.¹⁴⁸ Among other provisions, the seizure of German ships and property by the United States Government was recognized.¹⁴⁹ In brief, the Treaty provided that the United States should keep all seized German property until such time as Germany should make "suitable provision for the satisfaction of all claims against" the German Government.¹⁵⁰ All rights which would have been enjoyed by the United States under the Versailles Treaty had she ratified it, were accorded to her under the Separate Peace Treaty of 1921.¹⁵¹ The Treaty is very brief and is rather in the nature of an outline of reservations of the United States as the basis for future diplomatic negotiations.¹⁵²

Under the German-American Treaty the problem of Alien Property has not been solved to the satisfaction of either party. American economic interests received very little consideration in the various negotiations relative to reparations since it was thought that American policy would be chiefly directed toward securing payment of the war loans.¹⁵³ The Dawes Plan, indeed, provided for ultimate payment of some of the American claims, but no payment was to be made prior to 1927.¹⁵⁴ In August,

¹⁴⁶ See "Our Treaty of Peace With Germany," in 15 *Current History*, October, 1921, 59.

¹⁴⁷ See Hays *op. cit.* 355.

¹⁴⁸ See text of this treaty in 15 *Current History*, 58-60.

¹⁴⁹ *Ibid.* 58-60; *New York Times*, August 13, 1925. See especially Philipson, Coleman: *Termination of War and Treaties of Peace*, 220; also *Alien Property Custodian Report*, 1922, p. 6.

¹⁵⁰ See Hays: *Enemy Property in America*, pp. 258-9.

¹⁵¹ *Ibid.* 256-258.

¹⁵² See "Peace With Germany," in 28 *New Republic* 31. It was said in Berlin in criticism of the treaty that "the Government has swallowed the devil at sight." See Dernburg, "Peace with America," in 311 *Living Age* (October 15, 1921), 148.

¹⁵³ See Plachy, Frank: "The United States and Payment of an Indemnity by Germany," in 95 *Annals of the American Academy* (May, 1921), 284-290.

¹⁵⁴ See *New York Times*, August 13, 1925.

1925, Baron Von Maltzen, German Ambassador at Washington, presented a note from his Government requesting the return of the sequestered property.¹⁵⁵ He was informed by the State Department that such action was wholly dependent upon Congressional consent.¹⁵⁶

During the Harding-Coolidge regime¹⁵⁷ there has been a gradual decrease in the amount of enemy property held by the Government due to restoration of such property to its owners under Congressional Authorization.¹⁵⁸ In 1925 the Alien Property Custodian still held some \$300,000,000 worth of enemy property,¹⁵⁹ about half of which was cash.¹⁶⁰ There has been steady pressure from some quarters to bring about the complete restoration of this property, but the next move must be made by the Congress.¹⁶¹ The Sixty-ninth Congress recently adjourned without passing the Alien Property Bill. This bill was killed in the Senate due to the long filibuster at the end of the session over the resolution to continue the Senatorial committee for investigating corrupt practices in elections. The Alien Property Bill had non-partisan support and was designed to liquidate all enemy property held by the government.

¹⁵⁵ *Ibid.* August 13, 1925.

¹⁵⁶ *Ibid.* August 14, 1925.

¹⁵⁷ See *Alien Property Custodian Report*, 1922, pp. 6-7; *New York Times*, August 13 and 14; *Hearings op. cit.* 4-6; "The German Patents," in *23 New Republic* (July 19, 1922), 203.

¹⁵⁸ See *Hays op. cit.* 334. The Winslow Act as amended March 4, 1923, provided for the return of trusts worth \$10,000 or portions of more valuable trusts up to that amount. See also *Alien Property Custodian Report*, 1922, p. 6.

¹⁵⁹ See *New York Times*, August 13, 1925.

¹⁶⁰ *Ibid.* August 14, 1925.

¹⁶¹ See Nagel, *op. cit.* in 117 *Nation* 165; *New York Times*, January 31, 1926; 73 *Current Opinion* 401; Palmer, in 53 *American Law Review* 66; 117 *Nation* 131; and 23 *New Republic* (August 2, 1922), 270.

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