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THE present war, more than any previous one, is a tridimensional total war. It is being fought in three major fields: the military, the economic and the psychological. In all types of warfare numerous weapons, devices and means are openly or secretly used. "Camouflage" is not the exclusive domain of military warfare; it is more frequently and more successfully used in economic and psychological warfare. Economic and psychological warfare may, and usually do, precede military warfare. Imminent military conflict projects its fatal shadow on the prewar period, creating a status which is neither peace nor war, neither neutrality nor belligerency, but something intermediate, not yet determined by international law. The successful prosecution of the war requires the maximum mobilization of all physical, economic and intellectual resources of the country. The importance of the economic component of the so-called "war potential" is generally recognized. The numerous measures taken, legislative and administrative, are directed, on the one hand, at augmenting the resources of the country and adapting them to the requirements of war, and, on the other hand, at depriving the enemy of everything which might increase his war potential.

One of the legislative measures which is directed at both ends, the strengthening of the economic power of this country and the weakening of the enemy, is the regulation of trading with the enemy.

The purpose of this paper is to discuss two aspects of the Trading with the Enemy Act[1] of October 6, 1917: (1) The evolution of the T.E.A. through legislative enactments and executive orders; (2) Some

*The various defintions of "enemy" within the framework of the Trading with the Enemy Act, and some problems of international law in connection therewith, will be discussed by the same author in the next issue of the REVIEW.

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[1] 40 Stat. L. 411 (1917), as amended, 50 U. S. C. (Supp. 1942), Appendix, § 1 et seq. (hereinafter referred to as T. E. A.).

problems of constitutional and administrative law raised by the last amendment to the act.

I

EVOLUTION OF THE TRADING WITH THE ENEMY ACT

A. *Legislative History*

The provisions of the T.E.A. and the scope of their effectiveness can best be understood and construed against the background of their legal history and the public policy which led to their enactment, and further evolution. This can be done here only sketchily and to the extent necessary for the ensuing discussion.[2]

The Trading with the Enemy Act was originally enacted on October 6, 1917, six months after the entry of the United States into World War I. At that time the other countries had been at war for three years and their experiences with the handling of alien enemy property was taken into consideration. The British Trading with the Enemy Act[3] was used as a model, though the American act incorporated many important differences.

The reasons given for the adoption of the act are briefly: (1) to prevent aid and comfort to enemies; (2) to make available for the financing and successful prosecution of the war such funds and property in this country as belong to enemies or the allies of enemies; and (3) to protect interests in property rights of private persons.[4]

There was a certain disagreement as to the purpose of protection of

[2] For more details, see ADMINISTRATION OF THE OFFICE OF ALIEN PROPERTY CUSTODIAN, S. Doc. 182, 69th Cong., 2d sess. (1926); U. S. ALIEN PROPERTY CUSTODIAN, ANNUAL REPORTS, covering the years 1917-1932, issued annually from 1918 to 1933; THIESING, TRADING WITH THE ENEMY, S. Doc. 107, 65th Cong., 1st sess. (1917); CHARLES R. ALLISON, ALIEN ENEMIES AND PROPERTY RIGHTS (1921) (privately printed); Borchard, "Enemy Private Property," 18 AM. J. INT. L. 523 (1924); Borchard, "Treatment of Enemy Private Property in the United States before the World War," 22 id. 636 (1928); Borchard, "Reprisals on Private Property," 30 id. 108 (1936); GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940).

[3] 4 and 5 Geo. 5, c. 87 (1914).

[4] For statements of the purposes of the T.E.A., see United States v. Chemical Foundation, 272 U. S. 1, 47 S. Ct. 1 (1926); Banco Mexicano de Comercio e Industria v. Deutsche Bank, 53 App. D. C. 266, 289 F. 924, (1923), affd. 263 U. S. 591, 44 S. Ct. 209 (1924); Swiss Nat. Ins. Co. v. Miller, 53 App. D. C. 173, 289 F. 571 (1923), affd. 267 U. S. 42, 45 S. Ct. 213 (1925); American Exchange Nat. Bank v. Palmer, (D. C. N. Y. 1919) 256 F. 680; U. S. ALIEN PROPERTY CUSTODIAN, BULLETIN OF INFORMATION 5 (1918); HUBERICH, THE LAW RELATING TO TRADING WITH THE ENEMY 46 (1918).

the interests of the owners of private property,[5] and this purpose was emphasized during the progress of the bill through Congress.[6]

Numerous amendments have been adopted since the passage of the original act, three of which are here mentioned.

Exercising the power granted in section 5(b) of the T.E.A., President Roosevelt, on March 6, 1933, declared a national banking holiday, placed an embargo on all gold shipments out of the United States, and licensed the banks to be reopened after the banking holiday. On March 9, 1933, an act was passed by Congress declaring the existence of a serious emergency, making section 5(b) applicable, not only during time of war but also "during any other period of national emergency declared by the President," and approving and confirming all prior actions taken by the President or the Secretary of the Treasury.[7]

By virtue of the authority vested in him by the amendment, the President, on January 15, 1934, issued Executive Order 6560 requiring foreign exchange transactions to be licensed by the Secretary of the Treasury except where entered into in response to normal commercial or business requirements and to cover reasonable travelling and other expenses. By a general license issued on November 12, 1934 by the Secretary of the Treasury, full freedom to trade in foreign exchange was practically re-established.

Following the German invasion of Denmark and Norway on April 9, 1940, the President issued on April 10th Executive Order 8389[8] prohibiting certain transactions involving property in which Norway or Denmark or any national thereof had an interest at any time on or

[5] See Borchard, "Reprisals on Private Property," 30 AM. J. INT. L. 108 (1936); GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940) especially introduction by Borchard; J. B. MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924).

[6] 55 CONG. REC. 4850, 4857, 4859, 4863 (1917). See also statement of Charles Warren, then Assistant Attorney-General, in HEARINGS BEFORE SUBCOMMITTEE OF SENATE COMMITTEE ON COMMERCE ON H. R. 4960, 65th Cong., 1st sess., pp. 130, 131 (1917); Warren, Book Review, 12 AM. J. INT. L. 676 at 678 (1918); and a recent case, Pflueger v. United States, (App. D. C. 1941) 121 F (2d) 732.

[7] 48 Stat. L. 1 (1933). The act made some other changes: (a) The omission of all restrictions on authorization to regulate transfers of credit "relating solely to transactions to be executed wholly within the United States"; (b) the omission of the phrase authorizing the regulation of transfers of ownership of property; (c) the omission of the phrase "whether enemy [or] ally of enemy"; (d) the omission of the phrase specially referring to the President's authority to investigate and regulate transactions in bonds and certificates for the purpose of strengthening the market for these instruments.

[8] 5 FED. REG. 1400. The effective date of the Executive Order was April 8, 1940.

since April 8, 1940. In view of the concern expressed as to whether the order and section 5(b) were applicable to securities,[9] section 5(b) of the T.E.A. was again amended on May 7, 1940 by a joint resolution of Congress. Provisions for the regulation of the transfer, withdrawal or exportation of, or dealing in "any evidences of . . . ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest" were inserted.[10] This public resolution also ratified Executive Order 8389 of April 10, 1940 and the regulations and general rulings issued thereunder by the Secretary of the Treasury.

The amended provisions of section 5(b) authorized the President to define the countries whose assets should be frozen. No criterion for this determination was provided in the amended section. However, in practice, originally these were countries which were victims of aggression—Denmark, Norway. As other countries were invaded or dominated by the Axis—the Netherlands, Belgium, France, and the Balkan states[10a]—freezing was successively extended, during 1940 and the first half of 1941, to their assets by executive orders fixing effective dates which corresponded approximately to the dates of invasion or domination.[11] In June 1941, by Executive Order 8785, dated June 14, 1941, control was extended to the aggressors themselves, Germany and Italy, and, with the exception of Turkey, to the rest of continental Europe, including such previous victims of German aggression as Austria, Czechoslovakia, and Poland, and the four European neutrals—Portugal, Sweden, Switzerland, and Spain.[12] The U.S.S.R. was also de-

[9] On this point the Senate Report [S. REP. 1496, 76th Cong., 3rd sess., p. 1 (1940)] states: "The purpose of the resolution is to remove any doubt that section 5(b) of the act of October 6, 1917, as amended, authorizes the President to regulate transactions in evidences of indebtedness and evidences of ownership of property in which foreigners have an interest, and to require reports concerning all foreign-owned property." Senator Wagner, Chairman of the Senate's Banking Committee, in introducing the Joint Resolution to the Senate stressed that Congress, in amending § 5(b) in 1933, did not intend to recover in any way the power of the President to deal with these matters but rather to extend those powers, and therefore the omission of the words "evidences of indebtedness" was due to inadvertence. See 86 CONG. REC. 5006 (1940).

[10] 54 Stat. L. 179 (1940).

[10a] Freezing was extended to the Baltic states after Soviet entry into the war.

[11] For the effective dates fixed by Freezing Orders, see § 3 of Executive Order 8785 as amended, 6 FED. REG. 2897 (June 14, 1941).

[12] 6 FED. REG. 2897 (1941). Subsequently, general licenses were issued to these neutral countries: Sweden, No. 49, June 20, 1941; Switzerland, No. 50, June 20, 1941; Spain, No. 52, July 11, 1941; Portugal, No. 70, August 11, 1941. 6 FED. REG. 3057, 3404, 4046.

clared a blocked country at this time.[13] On July 26, 1941, when Japan overran Indo-China, control was invoked against her. At the same time freezing was extended to another victim of aggression and friendly government, China, at the specific request of Generalissimo Chiang Kai-Shek.[14] On December 9, 1941 freezing was extended to Thailand, and to Hong Kong on December 26, 1941. Finally the Executive Order 8998[15] provided for the automatic extension of freezing control to such new countries as may be controlled or occupied by any of the existing blocked countries.

Originally the purposes of foreign funds control were:

1. To protect the property of victims of aggression.
2. To prevent increase of the financial resources of the Axis states.
3. To protect American banks and business institutions from double liability.
4. To protect the American security market.
5. To protect American creditors.

As the international crisis deepened, and as the scope of the foreign funds control was widened to include more and more countries, the efficacy of the control as an implement of foreign policy and weapon of economic warfare became more and more apparent. Furthermore, this control became an important aid in pursuance of the United States policy of Western Hemisphere solidarity and security. With the entry of the United States into the present war, the use of control for the purpose of implementing the war effort became dominant.[16]

The latest legislative step in the evolution of T.E.A. followed our entry into the present war. It was taken by Congress on December 18,

[13] Immediately following the German attack on Russia, a general license was granted to the U.S.S.R., No. 51, June 24, 1941. 6 FED. REG. 3100.

[14] 6 FED. REG. 3715. See Treasury Press Release No. 7, July 26, 1941.

[15] December 26, 1941, 6 FED. REG. 6785. Executive Order 8998 amended Executive Order 8785—and this provision became subdivision (iii) of § 5(D).

[16] For a more detailed statement of the general purposes of foreign funds control, see U. S. TREASURY DEPARTMENT, FOREIGN FUNDS CONTROL, ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT 2 ff., 7 ff. (1942); the Brief of the United States of America as Amicus Curiae, p. 4, Commission for Polish Relief v. Banca National a Rumaniei (National Bank of Rumania), 288 N.Y. 332, 43 N.E. (2d) 345 (1942) and the statements of the Appellate Division, 262 App. Div. 543, 30 N.Y.S. (2d) 690 (1941) and of the New York Court of Appeals in the same case; LOURIE, FREEZING OF FOREIGN ASSETS IN THE UNITED STATES 44, 73, (1941) (unpublished Master's Essay, Burgess Library, Columbia University).

1941 with the adoption of the First War Powers Act 1941,[17] Title III of which contains an amendment to section 5(b).

B. THE ACT AFTER THE ENTRY OF THE UNITED STATES INTO THE PRESENT WAR

1. *Principal Reasons for the 1941 Amendment to Section 5(b)*

With the entry of the United States into the present war, it became necessary to co-ordinate the system of "freezing control," which had been operating very satisfactorily for almost two years, with other provisions of the T.E.A. of October 6, 1917 concerning "enemy property" and "trading with the enemy." A partial co-ordination was effected by the issuance by the President on December 13, 1941 of a general license[18] under section 3(a) of the T.E.A. permitting any transaction which the Secretary of the Treasury should license under the freezing control.

The state of war brought about its legal consequences, e.g., the Axis countries became enemies, the constitutional "war power" could be invoked, and the wartime legislation became effective—and these legal consequences pointed up the inadequacy of both the system of prewar foreign funds control and of the T.E.A. to deal with the exigencies of modern war. Even before our country entered this war, it was evident that the measures and definitions of the T.E.A. were obsolete instruments with which to cope, in economic and psychological warfare, with such dangerous enemies as the Axis, particularly Germany. Prior to this war Germany had made exceedingly extensive preparations—far more extensive than those made prior to 1917. In the first place she was able to reduce to a comparatively small amount investments held openly in her name and by her nationals. In the second place, she succeeded in disguising her ownership and control of important commercial and industrial enterprises by using citizens of the United States and of neutral or other countries as her instrumentalities. Germany also used her influence, gained by participation in certain cartel and patent agreeements, to add to her own strength and to weaken her enemy's war potential.[19] Furthermore, not only were German subsidiaries abroad mobilized to

[17] 55 Stat. L. 838 (1941), 50 U.S.C. (Supp. 1942), Appendix, § 5 et seq. (hereinafter called "F.W.P.A. 1941").

[18] 6 FED. REG. 6420 (1941).

[19] Kronstein, "The Dynamics of German Cartels and Patents," 9 UNIV. CHI. L. REV. 643 (1942), 10 id. 49 (1942); GUENTER REIMANN, PATENTS FOR HITLER (1942). Cf. GILBERT, EXPORT PRICES AND EXPORT CARTELS (1940) (U.S. Temporary National Economic Committee, Monograph No. 6).

serve the gigantic war machine, but foreign subsidiaries in Germany were geared into the German war economy, and were used to influence the activities of the parent corporations.

Also, the situation as to foreign property at the outbreak of the present war differed substantially from that at the outbreak of the First World War. During the last war the Alien Property Custodian at the peak of his activity administered property valued at something over $500,000,000. When the United States entered this war, over $7,000,000,000 worth of property was already subject to existing control.[20] This situation created a need for flexibility in legislation on wartime alien property control which the terms of the T.E.A. could not provide.

Under the prewar freezing control the government could exercise supervision over transactions in foreign property, either by prohibiting such transactions or by permitting them on condition and under license; it could not affirmatively compel the use and application of foreign property in the best interests of the United States.

Last but not least, doubts were expressed as to the effectiveness of some of the sections of the T.E.A.[21] These were the principal reasons which brought about the last amendment to section 5(b).

2. *The Main Changes Brought About by the Amendment*

The main changes made by the last amendment to section 5(b) may be summarized as follows:

1. The authority conferred upon the President by this section extends to all foreign property interests, not only to those of countries as defined by the President.[22]

[20] H. REP. 1507 ON H. R. 6233, 77th Cong., 1st sess., p. 3 (1941).

[21] See id., p. 2. It is interesting to note that Title II of the bill introduced in the House on December 11, 1941 by Mr. Sumners (H.R. 6206) provided: "Section 301. All of the provisions of the Trading with the Enemy Act, approved October 6, 1917 (40 Stat. 411), together with all of the amendments to such Act, which have for any reason ceased to be in effect, are hereby reenacted." A similar bill was introduced in the Senate as S. 2118. This original bill, called a "shot-gun" measure [Rep. Michener in 87 CONG. REC. 9856 (1941)], was not approved but was referred to the Committee on the Judiciary, which rewrote it and submitted it on December 15, 1941 as H. R. 6233 and S. 2129. See also 87 CONG. REC. 9862 (1941) (Rep. Gwynne) and id. at 9856 (Rep. Michener).

[22] Practically, this change does not amount to an extension of authority, because there were no standards or requirements of findings set up in the superseded text of this subsection; however, it makes a big difference from the theoretical and political points of view. Formerly, the countries were defined by the President in the Executive Order; now they are determined by the Secretary of the Treasury in consultation with the Secretary of State. Executive Order 9193, July 7, 1942, 7 FED. REG. 5205, § 11.

2. The President is given authority to define all terms employed in the section.[23]

3. The President is authorized not only to "freeze" foreign property, or interest in property, but to *vest* it when, as, and upon the terms directed by the President, in such agency or person as may be designated from time to time by the President.

4. The president is authorized, upon such terms and conditions as he may prescribe, to order that such foreign property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest and for the benefit of the United States.

5. The President is authorized to subdelegate authority conferred upon him by this subsection to an agency designated by him.

6. The President is authorized to take other and further measures not inconsistent with the provisions of the subdivision for its enforcement.

7. The authority described in subdivision (A) is extended also to "securities." The words "evidences of indebtedness or evidences of ownership of property" are omitted.

8. The President is authorized not only to investigate, regulate or prohibit, as before, but in addition, to direct and compel, nullify, void, and prevent 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 transactions involving, any property in which any foreign country or national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

9. Territorial limitations to the jurisdiction of the United States are more precisely defined.[24]

10. It broadens the President's investigatory and reporting powers: the President may require any person to keep a full record and to furnish under oath in the form of reports or otherwise, complete information relative to any act or transaction referred to

[23] See § 5(b) (3). Prior to its last amendment § 5(b) had conferred upon the President a power to define in the following words: "the President may . . . investigate, regulate, or prohibit . . . any . . . dealing in, any evidences of indebtedness or evidences of ownership of property, in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest. . . ."

[24] New text: "by any person, or with respect to any property, subject to the jurisdiction of the United States. . . ." Old text: "by any person within the United States or any place subject to the jurisdiction thereof. . . ." The old text was considered as an unnecessary, restrictive limitation as it might have been construed not to extend to assignments made abroad with respect to frozen assets in the United States. See Kalnin v. Kleewen, (N.Y. City Ct. Nov. 15, 1941), 106 N. Y. L. J. 1515:3, which held the freezing order did not affect an assignment made in Latvia.

in this subdivision before, during or after completion thereof, or relative to *any "foreign property"* as defined by the President. In any case in which a report could be required, the President may not only require the production of books of account, records, etc., but also seize them if necessary to national security or defense. It is to be noted that this power includes the power to require reports of American property abroad.

The amendment purported to be and is a substantial enlargement of the president's authority.[25] There can be no doubt that section 5(b) as amended deals with American and foreign-owned property, and not merely enemy-owned property. Subdivision (1)(A) confers upon the President authority which can be briefly described as that for the exercise of "exchange control" in the broader sense of this term.[26] This authority, if it is to be effective, is not and cannot be limited to "foreign exchange," gold or silver, etc., belonging only to foreigners. Besides, the fuller power was enjoyed and exercised by the President during the last war, in the crisis of 1933, and after the amendments of March 9, 1933 and May 7, 1940; subdivision (1)(A) of section 5(b), as amended by F.W.P.A. 1941, incorporated the Joint Resolution of May 7, 1940 in substantially identical language.[27] The limitation of the application of section 5(b), subdivision (1)(A), to foreign funds only would constitute a serious curtailment, not an enlargement, of the President's powers.

However, subdivision (1)(B) of section 5(b) extends only to foreign-owned property. Confusion in Congress with respect to this has been caused by the unfortunate language of the amended section 5(b). The conjunctive "and" after subdivision (A), followed in subdivision (B) by "power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any

[25] See S. REP. 911, 77th Cong., 1st sess., p. 2 (1941); H. REP. 1507 on H. R. 6233, 77th Cong., 1st sess., p. 3 (1941); 87 CONG. REC. 9845 (1941), especially Senator Van Nuys at 9846 ff.

[26] For different meanings of the term "exchange control," see LOURIE, FREEZING OF FOREIGN ASSETS IN THE UNITED STATES, c. 5, "Exchange Control and Freezing" (1941) (thesis); PAUL EINZIG, EXCHANGE CONTROL (1934); M. A. HEILPERIN, INTERNATIONAL MONETARY ECONOMICS 237 (1939); E. B. DIETRICH, WORLD TRADE 125 (1939); ARTHUR NUSSBAUM, MONEY IN THE LAW 475 (1939); HOWARD S. ELLIS, EXCHANGE CONTROL IN CENTRAL EUROPE (1941); L. of N. 1938. II. A. 10 (II. Economic and Financial, Report on Exchange Control).

[27] See also the statement made by Rep. Sumners toward the end of the debate on the F.W.P.A. 1941, which pointed out that under the F.W.P.A. 1941, the Executive retained all powers theretofore conferred by § 5(b), as amended, 87 CONG. REC. 9946 (1941).

interest"[28] conjoins two phrases which ought to be separate, and is thus apt to convey a wrong impression at the first reading.[29]

3. *Executive Action Pursuant to the Amendment*

February 12, 1942, the President delegated to the Secretary of the Treasury all power and authority conferred upon him by sections 3(a) and 5(b) of the T.E.A. as amended.[30]

By the Presidential Order 9095 of March 11, 1942,[31] the Office of the Alien Property Custodian[32] in this war was established within the Office of Emergency Management. The Constitution, the F.W.P.A. 1941, and the T.E.A. of October 6, 1917, as amended were referred to as a basis for authority.

All power and authority conferred on the President by sections 3(a) and 5(b) of T.E.A. of October 6, 1917, as amended, except such as were delegated to the Secretary of the Treasury by executive orders issued prior to February 12, 1942, and to the Board of Governors of the Federal Reserve System by Executive Order 8843 of August 9, 1941,[33] were delegated to and vested in the Alien Property Custodian. The delegation of powers and authority under sections 3(a) and 5(b) of T.E.A. to the Secretary of the Treasury on February 12, 1942, was revoked.

Also on March 11, 1942, pending staffing and organization of the Office of the A.P.C., the A.P.C. temporarily redelegated to the Secretary of the Treasury these powers and authority. The Treasury exercised both these powers and the freezing control powers until July 6, 1942.[34] As of that date, Executive Order 9193, amending Executive Order 9095, provided for a co-ordination and division of powers between the A.P.C. and the Treasury Department. It also provided that no person affected by any action taken by either the Secretary of the

[28] Rep. Hancock, referring to this phrase, remarked: "This limitation applies to both (A) and (B), as I see it." 87 CONG. REC. 9861 (1941). See id. at 9862 for remarks by Reps. Sumners and Gwynne.

[29] However, during the debate in the House, the confusion was removed from the minds of some representatives (but not from the text of the act). See 87 CONG. REC. 9861, 9863 (1941).

[30] Treasury Department Release 28, dated February 23, 1942.

[31] 7 FED. REG. 1971, as amended by Executive Order 9193, 7 FED. REG. 5205, hereafter referred to as "alien property order."

The Office of A.P.C., established during World War I, ceased on July 1, 1934; the A.P.C.'s powers and duties were transferred to the Department of Justice and all money and property held or in trust for him was transferred to the Attorney-General.

[32] Hereafter called A.P.C.

[33] 6 FED. REG. 4035.

[34] Press Release 31, March 18, 1942.

Treasury or the A.P.C. should be entitled to challenge the validity thereof on the ground that the action was within the jurisdiction of the A.P.C. rather than of the Secretary of the Treasury or vice versa. Under this order the Secretary of the Treasury has been redelegated residual authority under sections 3(a) and 5(b) of T.E.A. as amended. The Secretary of the Treasury also retains the licensing authority over trade and communications with the enemy.[35]

The A.P.C. is authorized (section 2) 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

1. Enemy-owned[36] or controlled business within the United States and the dollar balances and other assets of such business.
2. All other enemy property including claims of enemy nationals involved in estates, trusts, receivership proceedings, etc., except dollar balances, bullion and securities, which the Treasury will continue to handle unless these are needed by the A.P.C. in the management of other property taken from the same enemy.
3. Business owned or controlled by a national of any foreign country where the A.P.C. certifies that it is necessary in the national interest for him to assume control. (If he does not so certify, these businesses, like any other property of persons who are not nationals of a designated enemy country, remain under the Secretary of the Treasury[37] by virtue of the residual powers granted him by section 5(b) of T.E.A., as amended.)
4. All foreign owned patents, copyrights, and trade-marks.
5. Foreign ships.

The A.P.C. is authorized to take measures concerning representation of the interest of any person within any designated enemy country or any enemy-occupied territory in connection with any judicial or administrative proceedings as in his judgment and discretion is or may be within the interest of the United States, and to issue regulations governing the service of process on such persons. (Section 5.)

The A.P.C. and Secretary of the Treasury are further authorized, jointly and severally, to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this executive order. (Section 4.)

[35] See § 3(a) of T.E.A. and General Ruling No. 11.

[36] "Enemy," in this phrase means "national of a designated enemy country."

[37] The Treasury Department uses these powers, for example, for the directive licensing program under which a large volume of strategic assets held for foreign accounts have been diverted to war uses.

The order subdelegates the powers conferred upon the President by section 5(b) and authorizes further subdelegation in order to carry out the functions under the order.

In the exercise of the authority delegated to the A.P.C. he shall be subject to the provisions of Executive Order 8839 of July 1941 [38] establishing the Board of Economic Warfare, and shall designate a representative to that board. (Section 7.)

The order provides for consultations between the Secretary of the Treasury or the A.P.C., as the case may be, and the Secretary of State before vesting any property or adding any additional foreign countries to section 3 of Executive Order 8389 as amended. (Section 11.) The order establishes a presumption of required and appropriate consultations. (Section 13.)

The order defines, for the purposes of this executive order, the terms "designated enemy country" as any foreign country against which the United States has declared the existence of a state of war and any other country with which the United States is at war in the future; and "national" as having the meaning given to it by the freezing order with certain qualifications.

Pursuant to this order the A.P.C. issued, on March 26, 1942,[39] regulations establishing procedure for the receipt and disposition of claims to property vested in the A.P.C. and for the hearing of such claims by the Vested Property Claims Committee.

On March 25, 1942, the A.P.C. issued his first vesting order, vesting in himself the property of I. G. Farbenindustrie, Standard-I. G. Co.,[40] and at the time of the writing of this paper there have been issued over five hundred such vesting orders.[40a]

C. *Extent of Effectiveness of Old Provisions of the Act*

Though Title III of the F.W.P.A., 1941 was intended also to dispel doubts as to the extent of the effectiveness of some sections of the T.E.A., it cannot be said to have succeeded in this respect. It does not *expressly* repeal any provisions of T.E.A. of 1917, as amended, but the extent to which it does so by implication will probably be a frequently arising question. Judicial dislike for implied repeal offers no guide, though it must be reckoned with.[41]

[38] 6 FED. REG. 3823.
[39] 7 FED. REG. 2290.
[40] 7 FED. REG. 2417 (1942).
[40a] At the present time the vesting orders number over two thousand.
[41] See 37 COL. L. REV. 292 (1937).

This question has already troubled the legislature and courts on several occasions.[42] The arguments pro and con may be summarized as follows:

1. The T.E.A. of October 1917 was enacted as a permanent piece of legislation, to become effective on the occurrence of the contingency provided for—a declaration of war.

2. The act was not terminated by the cessation of hostilities, by the joint resolution declaring the state of war between Germany, Austria, and the United States at an end, by the President's proclamation of peace,[43] or by the public resolution terminating wartime legislation.[44]

3. The administration evidently proceeded on the theory that the T.E.A. remained in effect, referring to various provisions of the act in measures taken after our entry into the war.[45]

4. The Supreme Court has expressly referred to sections 2(b), 7, and 7(b) in its decisions.[46] Other courts have made similar references.[47]

5. A Report of the Committee on the Judiciary states that some

[42] Senator Reed, on March 9, 1933, during debates on the Emergency Banking Act, stated that no one knew definitely whether it had been repealed by the Knox-Porter Joint Peace Resolution, 77 CONG. REC. 60 (1933), approved July 2, 1921, by which Congress declared the war to be at an end. However, the Public Resolution of March 3, 1921, terminating wartime legislation, expressly exempted the T.E.A. from its operation. Irrespective of the question of the revival of the T.E.A. with the entry of this country into war, there are authoritative court pronouncements that it was not terminated by the cessation of hostilities, by the Knox-Porter Joint Resolution, or by the President's proclamation of peace. Commercial Trust Co. v. Miller, 262 U.S. 51, 43 S. Ct. 486 (1922); Munich Reinsurance Co. v. First Reinsurance Co. of Hartford, (C.C.A. 2d, 1925), 6 F. (2d) 742, appeal den., 273 U.S. 666, 47 S. Ct. 458 (1927).

[43] See cases cited supra, note 42.

[44] Pub. Res. 64, 41 STAT. L. 1359 (1921).

[45] Presidential License of December 13, 1941, 6 FED. REG. 6420, referred to § 3(a); Executive Order 9095, 7 FED. REG. 1971 (Mar. 11, 1942), referred, in addition, to F.W.P.A. 1941, and to T.E.A. of October 6, 1917; Press Release 31 of the Treasury Department, March 18, 1942, refers to § 3(a).

United States censorship regulations are issued by the Office of Censorship, 8 FED. REG. 1644 (1943), under § 3(c) of the T.E.A., among other authority; the regulations issued by the Secretary of State on March 5, 1943, relating to the Transportation of Enemy Aliens on American Vessels and Aircraft, are issued pursuant to § 3(b) of the T.E.A., 8 FED. REG. 2820 (1943). Indicative also is the fact that the A.P.C. now refers in his vesting orders to the T.E.A. and not merely to § 5(b) as amended, as he did formerly.

[46] Ex parte Colonna, 314 U. S. 510, 62 S. Ct. 373 (1942); Ex parte Kawato, 317 U.S. 69, 63 S. Ct. 115 (1942).

[47] See Kaufmann v. Eisenberg, 177 Misc. 939, 32 N.Y.S. (2d) 450 (1942); The Pietro Campanella, (D. C. Md. 1942) 47 F. Supp. 374; Drewry v. Onassis, 179 Misc. 578, 39 N.Y.S. (2d) 688 (1942); Draeger Shipping Co. v. Crowley, (D.C.N.Y. 1943) 49 F. Supp. 215.

sections are still in effect[48] and the fact that Congress did not approve the bill introduced by Mr. Sumners in the House on December 11, 1941,[49] purporting to re-enact all provisions of the T.E.A. together with all the amendments, which have ceased to be in effect, might lead to the inference that Congress has proceeded on the theory stated in the report: "Some sections of that act are still in effect. Some sections have terminated, and there is doubt as to the effectiveness of other sections."

6. The amendment does not cover the whole field and should be treated merely as an adaptation of the law to present conditions, and other provisions of the T.E.A. should be considered to be superseded only to the extent that they are inconsistent with the latter amendment, according to the principle *"Lex posterior derogat priori."*

7. The effectiveness of certain provisions of the T.E.A.[50] might assist in upholding section 5(b) as amended by F.W.P.A. 1941 against attack on constitutional grounds.

On the other hand:

1. Title III of the F.W.P.A. 1941 is so comprehensive a measure and contains so many duplications of unrepealed sections of the T.E.A. that it should be considered as intended not only to modify the T.E.A. but to be in itself a complete and comprehensive measure for covering the whole field[51]—dealing with "exchange control" and foreign property in time of war and emergency. The apparent duplications are:

(a) Section 5(b) has a so-called acquittance provision [subdivision (2)]; the original T.E.A. contained a like provision in section 7 (e).

(b) Section 18 of the T.E.A. is included almost *in corpore* in subdivision (3) of section 5(b).

(c) Section 5(a) of the T.E.A. provides for subdelegation of authority conferred upon the President by the act, and the same is done by section 5(b) as amended.

(d) The penalty provision of the T.E.A., section 16, is duplicated by section 5(b).

(e) Section 5(a) of the T.E.A. confers authority upon the President to make such rules and regulations as may be proper

[48] H. REP. 1507, on H. R. 6233, 77th Cong., 1st sess., p. 2 (1941).

[49] H. R. 6206. A similar bill was introduced in the Senate as S. 2118.

[50] Particularly § 9(a). Cf. Draeger Shipping Co. v. Crowley (D.C.N.Y. 1943) 49 F. Supp. 215.

[51] See supra, note 41.

and necessary to carry out the provisions of the T.E.A. Section 5(b) makes similar provision for its enforcement.

2. Congress, by rejecting the bill introduced by Mr. Sumners on December 11th, which was an administration bill, providing for the re-enactment of all provisions of the T.E.A., manifested its intent to substitute a new comprehensive scheme for dealing with foreign-owned property. The administration bill at the same time indicated that the administration itself supposed a further Congressional act necessary for the re-enactment of the provisions of the T.E.A. with the exception of section 5(b) as amended.

3. Congress, by approving and confirming previous measures of the administration, and by extending the system of foreign property control, intended to establish a new, integrated and comprehensive legal basis for that extended treatment of foreign property.[52] This intent might be said to be evidenced by the fact that freezing control before the amendment and ratification and the new text of section 5(b) of the T.E.A. is phrased in terms of "national" and "foreign country" and not, as the original T.E.A., in terms of "enemy" and "ally of enemy."

4. The inadequacy of measures and definitions provided for in the T.E.A. necessitated the adoption of an entirely new scheme which does not fit well into the old scheme of the original T.E.A., and forcing it into the old framework might thwart the legislative purpose.

5. To adopt the contrary view, that is, that Title III of the F.W.P.A. 1941 merely amended one section of the T.E.A. and that the other sections, so far as not amended, are effective, would lend support to the argument against the validity of many measures of the administration taken pursuant to amended section 5(b), as they are inconsistent with other sections of the T.E.A. And it is well-settled that the construction placed on a statute by administrative officers who are charged with its application should be given great, if not controlling, weight in its interpretation.[53]

The relevancy of such arguments for the interpretation and construction of statutes can be supported by a long array of judicial and

[52] See 87 CONG. REC. 9858 ff. (1941), especially p. 9861 for remarks of Rep. Hancock and p. 9865 for remarks of Rep. Robison.

[53] Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 53 S. Ct. 350 (1933); Securities & Exchange Commission v. Associated Gas & Electric Co., (C.C.A. 2d, 1938) 99 F. (2d) 795; Skeen v. Lynch, (C.C.A. 10th, 1931) 48 F. (2d) 1044.

other learned authority.[54] It is obvious that any court which may have to deal with the above-discussed problem will construe the amended section 5(b) in a way best effectuating the public policy intended to be served by its enactment. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate the legislative intent.[55]

II

PROBLEMS OF CONSTITUTIONAL AND ADMINISTRATIVE LAW

A. *Problems of Constitutional Law*

1. *Congressional Authority*

The T.E.A. as originally enacted, together with later amendments, has been held constitutional and a valid exercise of the war power.[56] Section 5(b) of the T.E.A. as amended in 1933[57] was also upheld as a valid exercise by Congress of its broad and comprehensive national authority over the subjects of revenue, finance, and currency, derived from the aggregate of the powers granted to Congress.[58] The constitutionality of the amendment adopted by the Joint Resolution of May 7, 1940 and the new executive orders issued pursuant thereto have not been challenged in the courts,[58a] and the courts have rendered their decisions touching the freezing regulations in tacit assumption of

[54] United States v. Fisher, 2 Cranch (6 U.S.) 358 at 386 (1805); United States v. American Trucking Assn., 310 U.S. 534 at 562, 60 S. Ct. 1059 (1940). Cf. Radin, "Statutory Interpretation," 43 HARV. L. REV. 863 (1930); Landis, "A note on 'Statutory Interpretation,'" id. 886 (1930); Jones, "The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes," 25 WASH. UNIV. L. Q. 2 (1939); Radin, "A Short Way with Statutes," 56 HARV. L. REV. 388 (1942).

[55] See United States v. Cooper Corp., 312 U.S. 600, 61 S. Ct. 742 (1940).

[56] U.S. Const., Art. I, § 8, clause 11; Stoehr v. Wallace, 255 U.S. 239, 41 S. Ct. 293 (1921); United States v. Chemical Foundation, 272 U.S. 1, 47 S. Ct. 1 (1926); Commercial Trust Co. v. Miller, 262 U.S. 51, 43 S. Ct. 486 (1922); Central Union Trust Co. v. Garvan, 254 U.S. 554, 41 S. Ct. 214 (1920); The Pietro Campanella, (D.C. Md. 1942) 47 F. Supp. 374.

[57] 48 STAT. L. 1, § 2 (1933). See supra at note 7.

[58] Norman v. Baltimore & Ohio R. R., 294 U.S. 240, 55 S. Ct. 407 (1935); Nortz v. United States, 294 U.S. 317, 55 S. Ct. 428 (1935); Perry v. United States, 294 U.S. 330, 55 S. Ct. 432 (1935); Campbell v. Chase Nat. Bank of New York, (D.C. N.Y. 1933) 5 F. Supp. 156; Uebersee Finanz-Korporation A.G. v. Rosen (C.C.A. 2d, 1936) 83 F. (2d) 225, cert den., 298 U.S. 679, 56 S. Ct. 946 (1936); British-American Tobacco Co. v. Federal Reserve Bank, (C.C.A. 2d, 1939) 104 F. (2d) 652, 105 F. (2d) 935, cert. den., 308 U.S. 600, 60 S. Ct. 131 (1939).

[58a] However, a decision rendered after the completion of this paper, United States v. Von Clemm, (C.C.A. 2d, 1943) 136 F. (2d) 968, shows that a challenge

their validity. The doubts raised extrajudicially,[59] in so far as they concern statutory support for the measures taken by the Executive, are settled by the "ratification clause" of Title III of the F.W.P.A. 1941.

The last amendment to section 5(b) of the T.E.A., however, raises difficult problems of far-reaching implications. Unfortunately, the regulatory setup resulting from various attempts to readjust the outmoded T.E.A. to peacetime emergency situations and to conditions of modern warfare is not faultless.

While the statute authorizes not only the freezing of foreign-owned property, but also its seizure, administration, control, use, liquidation, etc., it does not make any provision for immediate or later compensation for the "taking" of the property. Neither does it distinguish between "enemy" and "non-enemy" foreign property. However, this distinction is made in the subsequent acts of the Executive pursuant to the amended section.

The first question that arises is whether Title III of the F.W.P.A. 1941 is a valid exercise of Congressional power. The constitutional authority principally relied on here is the so-called "war power." Said the Supreme Court in a leading case:

> "The Trading with the Enemy Act, whether taken as originally enacted . . . or as since amended . . . is strictly a war measure and finds its sanction in the constitutional provision . . . empowering Congress 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water'." [60]

However, other constitutional authority has and can be invoked for support in our case. In the cases following the amendment of 1933, the powers to "coin money, [and] regulate the value thereof" and to regulate foreign commerce have been resorted to.[61] As the holdings in these cases were with respect to the validity of section 5(b) in its form and application *at that time*, these cases could serve as authority for our problem only to the extent the provisions of 5(b) in effect *at that time* have been substantially incorporated into F.W.P.A. 1941. And even

to the constitutionality of the Act of May 7, 1940 was made by an attack on Executive Order 8405 of May 10, 1940. See notes 71 and 75, infra.

[59] 41 COL. L. REV. 1039 at 1067 et seq. (1941); THIESING, CONTROL OF FOREIGN-OWNED PROPERTY IN THE UNITED STATES 5, 23 (1941); Harris and Joseph, "Present Problem Concerning Foreign Funds Control," 105 N.Y.L.J. 336, 354, 372 (1941).

[60] Stoehr v. Wallace, 255 U.S. 239 at 241, 41 S. Ct. 293 (1921).

[61] See supra, note 58.

then one case indicated the limitations of these powers in the "inhibitions of the Fifth Amendment against taking private property for public uses without just compensation." [62]

Certainly, it could be maintained that freezing control comes within the police or regulatory power of the state. The demarcation line between eminent domain where just compensation must be paid and regulatory power where no compensation is required is a shadowy one. Many cases may fall within this twilight zone and have to be finally determined by considering the whole background. In view of the general change in attitude toward the so-called "exchange control" [63] (that it is a matter of economic exigency), the freezing of foreign assets as a regulatory scheme akin to it can also be regarded as a measure within the regulatory power of the state.[64] However, the origin, scope and purpose of freezing and exchange control have to be distinguished.[65] On the other hand, the vesting of foreign property in the national interest in a "designated agency" would seem to fall within the area of eminent domain. Thus far the requirements of total war have not changed the constitutional concept as to the area in which and occasions on which the taking of American and foreign-owned property (except that owned by enemies) for war purposes would be permissible without just compensation. This conclusion is based on the history of the

[62] United States v. Driscoll, (D.C. Mass. 1935) 9 F. Supp. 454 at 456.

[63] E.g., the government of the United States, considering the increasingly general nature of exchange control, deemed it to be ground for intervention only in cases of discrimination against American citizens. See GANTENBEIN, FINANCIAL QUESTIONS IN UNITED STATES FOREIGN POLICY, c. 3 (1939) (especially p. 99); 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 68 (1941).

[64] This, however, does not mean that in conflict of laws situations the courts are going to enforce foreign exchange control rules. On the contrary, the majority of states deny extraterritorial effect to such laws and refuse them recognition as against the public policy of the forum even when the state of the forum has itself analogous laws. Consult Cohn, "Currency Restrictions and the Conflict of Laws," 52 L. Q. REV. 474 (1936); F. A. MANN, THE LEGAL ASPECT OF MONEY 259 (1938); NUSSBAUM, MONEY IN THE LAW 487 (1939); Nussbaum, "Public Policy and the Political Crisis in the Conflict of Laws," 49 YALE L. J. 1027 (1940); WEIDEN, FOREIGN EXCHANGE RESTRICTIONS (1939) (N.Y. Univ. School of Law Contemporary Law Pamphlets Series I, No. 11); Domke, "Foreign Exchange Restrictions," 21 J. COMP. LEG. & INT. L. (3rd ser.) 54 (1939); Domke, "International Aspects of European Expropriation Measures," 22 PROC. AM. FOR. L. ASSN. 5 (1941); Freutel, "Exchange Control, Freezing Orders and the Conflict of Laws," 56 HARV. L. REV. 30 (1942).

For a most recent pronouncement of an American court to this effect, see International Investment Co., S. A. v. Swiss Bank Corp., N.Y.L.J. 355:7 (Aug. 15, 1943).

[65] LOURIE, FREEZING OF FOREIGN ASSETS IN THE UNITED STATES, c. 5 (1941) (thesis).

Property Requisitioning Act, illustrating that the advocates of an all-inclusive requisitioning act with payment (rather than piecemeal legislation) failed even in this lesser task and their efforts resulted in a compromise measure.[66]

It is noteworthy, in this connection, that even the view of the Supreme Court and lower courts, that the power "to make rules concerning capture on land and water" authorizes confiscation of enemy-owned private property, was sharply criticized by eminent writers after the last war.[67]

There exists a divergence of opinion as to whether Congress did or did not make use of this power to confiscate after the last war.[68]

Our difficulties are complicated by two factors: (1) the act exceeds all previous Congressional acts in its treatment of enemy property in this country, for its sweeping grant of authority to the President embraces not only enemy property, but all foreign property, and (2) section 5(b) of T.E.A., as amended by F.W.P.A. 1941, is not only for wartime but for any other period of national emergency.

In view of the legislative history of the act, it can hardly be inferred that Congress intended to confiscate property of alien friends.[69] The holding of the Supreme Court, in *Russian Volunteer Fleet v. United States*,[70] that when the United States expropriates the property

[66] See HEARINGS BEFORE THE HOUSE MILITARY AFFAIRS COMMITTEE ON S. 1579 and H. R. 4959, 77th Cong., 1st sess., p. 5 (1941); 87 CONG. REC. 6791, 6811, 7556, 7527, 7532, 7678 (1941); S. REP. 944, 74th Cong., 1st sess., pt. 2, pp. 3-6, (1935). As to this question in general, see TOBIN and BIDWELL, MOBILIZING CIVILIAN AMERICA (1940); Cormack, "The Universal Draft and Constitutional Limitations," 3 So. CAL. L. REV. 361 (1930); West, "The Validity of Forced Loans in Time of War —A Consideration of S. 1650," 8 GEO. WASH. L. REV. 904 (1940); "American Economic Mobilization," 55 HARV. L. REV. 427 at 506 ff. (1942); Marcus, "The Taking and Destruction of Property under a Defense and War Program," 27 CORN. L. Q. 317, 476 at 506 ff. (1942).

[67] MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924); Borchard, "Enemy Private Property," 18 AM. J. INT. L. 523 (1924); Borchard, "Treatment of Enemy Private Property in the United States before the World War," 22 id. 636 (1928); Borchard, "Reprisals on Private Property," 30 id. 108 (1936).

[68] See Cummings v. Deutsche Bank und Discontogesellschaft, 300 U.S. 115, 57 S. Ct. 359 (1937). For a survey of the American treatment of enemy property see GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940). See further Borchard, Introduction to Gathings' work just cited and his articles in the American Journal of International Law cited supra, note 67.

[69] See Turlington, "Vesting Orders under the First War Powers Act 1941," 36 AM. J. INT. L. 460 (1942). See also Cummings v. Deutsche Bank und Discontogesellschaft, 300 U.S. 115, 37 S. Ct. 359 (1937).

[70] 282 U.S. 481, 51 S. Ct. 229 (1931).

of an alien friend, the Fifth Amendment requires that it pay just compensation equivalent to the full value of the property contemporaneously with the taking, must still be considered good law, though the case itself might have been decided differently today. However, section 5(b) provides no standards for differentiation between friendly and enemy foreign countries and nationals thereof as guidance for the Executive in the administration of the act. If standards should be held to be necessary, they could eventually be found in the approval and confirmation of preceding administrative measures, i.e., in freezing control,[71] where the criterion—Axis and countries invaded or controlled by Axis—has more or less crystallized. To apply the standards of the T.E.A. would probably remove this doubt but would eventually frustrate the purpose of the amendment.

A further possible argument could be made that the expression, "in the interest and for the benefit of the United States," used in section 5(b) as amended by F.W.P.A. 1941, does not establish an intelligent standard for the exercise of authority delegated to the President in dealing with "any property or interest of *any* foreign country or national thereof." Such a contention would raise the questions to what extent the principal authorities[72] that might be cited in its support have retained their original force and whether they are applicable in our case. The principal authorities just referred to deal with acts relating to internal affairs, two with the National Industrial Recovery Act, and the third with the Agricultural Adjustment Act, and have to be judged in

[71] As can be deduced from the decision handed down in United States v. Von Clemm, (C.C.A. 2d, July 14, 1943) 136 F.(2d) 968, the appellants contended that § 5(b) of the T.E.A., as it was in effect when the first freezing order No. 8389 of April 10, 1940 (5 FED. REG. 1400) was issued, and as it was in effect at the time of Executive Order No. 8405 of May 10, 1940 (5 FED. REG. 1677) (the order with which the instant case is concerned) after amendment by the Act of May 7, 1940, was an improper delegation of authority from Congress to the President and that the test established in Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241 (1933), and A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837 (1935) was not met. The circuit court (L. Hand, Swan and Frank) rejected this contention and upheld the constitutionality of § 5(b) as amended by the Act of May 7, 1940 and the validity of Executive Orders No. 8389 and 8405 because the approval and confirmation clause [§ (2)] in the Act of May 7, 1940 "removed all question of improper delegation with regard to Order 8389 and provided an adequate standard and guide for his [the President's] exercise of discretion in Order No. 8405." 136 F. (2d) at 970.

[72] Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837 (1935); United States v. Butler, 297 U.S. 1, 56 S. Ct. 312 (1935).

the light of surrounding circumstances and the political situation prevailing at that time. The act under discussion relates to national defense and external affairs,[73] and in these spheres the doctrine of the *Curtiss-Wright* case,[74] to the extent that it dispenses with the rigid requirement of standards, seems to be in point.[75]

The fact that section 5(b) provides powers which may be used in peacetime emergencies lays it open to attack, as it does not then have the support of the constitutional war power. However, it must be borne in mind that modern wars do not start in fact with the formal declaration of war, which is frequently omitted, but long before. The powers conferred by section 5(b) envisage this situation, as they are principally powers necessary for the successful conduct of economic warfare which might precede and does parallel actual military hostilities.

Protection of the currency and the furtherance of the monetary policy require, among other powers, authority for the establishment of exchange control. This is the substance of subdivision (1) (A) of section 5(b) and finds support in the constitutional powers "to coin money, [and] regulate the value thereof" and to regulate foreign commerce. To sustain exchange control the determinations in the *Gold Clause* and other cases[76] concerning the validity of section 5(b) could be invoked. Moreover, one of the incidents of sovereignty is the exercise of control over foreign funds in this country to prevent their use for purposes inimical to the interests of the United States and obnoxious to its public policy.

It may be further argued that Congress intended to create a broad

[73] Subdivision (1) (A) of § 5(b) deals with currency or exchange control questions, and has been upheld previously. See supra, note 58.

[74] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S. Ct. 216 (1936).

[75] See the circuit court of appeals decision in the Von Clemm case, note 71, supra, where the court said: "Moreover, there is much persuasive force in the appellee's argument that the power exerted by the Executive with regard to property of foreign nationals in a time of proclaimed emergency falls within the sphere of foreign relations and is thus free from the limitations imposed on delegated authority." 136 F. (2d) at 970. The court cited Hamilton v. Dillin, 88 U.S. 73 (1874); United States v. Belmont, 301 U.S. 324, 57 S. Ct. 758 (1937); United States v. Curtis-Wright Corp., 299 U.S. 304, 57 S. Ct. 216 (1916); United States v. Pink, 315 U.S. 203, 62 S. Ct. 552 (1942).

The adoption of the doctrine of the Curtiss-Wright case does not necessarily mean approval of the historical reasoning of the case. Cf. Goebel, "Constitutional History and Constitutional Law," 38 COL. L. REV. 555 (1938).

[76] See supra, note 58.

statutory basis with flexible boundaries[77] which could be expanded by the executive to their utmost constitutional limits, and that the administration, in the enforcement of the act, has so far remained within these limits.[78]

2. *Presidential Authority*

Do the President's powers as commander-in-chief of the army and navy and as the sole organ of the federal government in the field of external relations form a basis for the taking of foreign property? The alien property order[79] expressly refers to the Constitution, in addition to the F.W.P.A. 1941 and the T.E.A. of October 6, 1917, as authority for the order, stating further that the President is also acting in his capacity as President of the United States. It is noteworthy that a similar order by President Wilson, issued during the last war,[80] and President Roosevelt's orders relating to freezing control[81] did not expressly mention the Constitution as a source of authority. This may indicate that the draftsmen of the alien property order were aware of questions of constitutional law which might arise in the present connection. But the President's powers can add nothing to the authority of Congress in delegating powers to the President. On the other hand, the President's constitutional powers may, in some cases, give additional support or even sole support for certain treatment of foreign property.

The suggestion has been made[82] that it is likely that there is some area beyond express Congressional delegation in which the Executive possesses the power to take property. But that there are no limits on this power is untenable, unless the "practical construction" theory, that the "construction of the scope of executive power by holders of the presidential office is entitled to great weight in determining the effect

[77] S. REP. 911, 77th Cong., 1st sess., p. 2 (1940): "It gives the President flexible powers . . . to deal comprehensively with the many problems that surround alien property or its ownership or control in the manner most effective in each particular case."

[78] However, certain provisions of Executive Order 9095 of March 11, 1942 (7 FED. REG. 1971), and of other regulations, orders, etc., issued by the administration may cast doubt on this statement. E.g., Executive Order 9193, § 2(b), 7 FED. REG. 5205 (July 6, 1942).

[79] Executive Order 9095, March 11, 1942, as amended by Executive Order 9193, July 6, 1942.

[80] Executive Order Vesting Power and Authority in Designated Officers and making Rules and Regulations under Trading with the Enemy Act and Title VII of the Act approved June 15, 1917 (October 12, 1917).

[81] Executive Order 8389 of April 10, 1940, as amended.

[82] 55 HARV. L. REV. 427 (1942).

of the Constitution" [83] is carried to its logical extreme. So far, in almost every instance, the President has used only that power to take property which the Congress has delegated to him.[84]

Whatever theory of the origin, scope and nature of the power over external affairs of the national government and of the President and Congress we adopt, we cannot deny the comprehensiveness of the President's power. One recent case [85] went so far as to extend extraterritorial effect to a confiscatory decree of a foreign government affecting property having a situs in the United States. This amounts to the same thing practically as confiscation of foreign property in the United States by a President's executive agreement.[86] This decision has been held, from the point of view of our constitutional law, one of the most far-reaching inroads upon the protection which it was supposed the Fifth Amendment accorded to private property.[87] But it can hardly be conceived how the President's powers in external affairs can serve as authority for the taking, without just compensation, of foreign property by an executive order.[88] The Supreme Court, as recently as 1935, said that "the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation." [89] And in a recent research on the applicability of the Fifth Amendment to treaties, the author concludes:

> ". . . Treaty stipulations and those of the treaty implementing instruments must be, or be construed to be, consistent with the due process and just compensation clauses of the Fifth Amendment of the Constitution or be held inoperative as domestic law." [90]

Though *United States v. Pink*[91] casts some doubt on this conclusion, nevertheless unilateral acts of the sole or chief organ of foreign

[83] See Culp, "Executive Power in Emergencies," 31 MICH. L. REV. 1066 at 1081 (1933).

[84] CORWIN, THE PRESIDENT, OFFICE AND POWERS 158-163, 189-193 (1940).

[85] United States v. Pink, 315 U.S. 203, 62 S. Ct. 552 (1942).

[86] See Borchard, "Extraterritorial Confiscations," 36 AM. J. INT. L. 275 (1942); and cf. Jessup, "The Litvinov Assignment and the Pink Case," 36 id. 282 (1942).

[87] Jessup editorial cited supra. Cf. COWLES, TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW (1941), especially pp. 288-289.

[88] 41 COL. L. REV. 1039 (1941), especially pp. 1064, 1065.

[89] Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 at 602, 55 S. Ct. 854 (1935).

[90] COWLES, TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW 302 (1941). Cf. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 291 ff. (1941).

[91] See supra at note 85.

relations cannot escape the inhibitive force (admittedly "relaxed" in wartime) of this constitutional guaranty.

B. *Problems of Administrative Law*[92]

The administration of the T.E.A., especially owing to its latest developments, is a difficult task which will require great skill, expertness and tact from the officers entrusted with it. Many problems of an intricate nature are lurking in every stage of the enforcement of the act: in the determination of the character of the property ("enemy," "national," etc.), seizure, management and administration, and disposition of the foreign-owned property. The difficulties, however, do not stem from insufficiency of the statutory authority but rather from the abundance of power conferred upon the executive branch of the government by the F.W.P.A. 1941. The awareness of these officers of complications which may arise in connection with the discharge of their duties with respect to foreign-owned property is manifested by the guarded terms of the vesting orders[93] and regulations establishing the procedure for disposition of claims to property vested in the Alien Property Custodian or in the Secretary of the Treasury.

Furthermore, in the press release issued by the Secretary of the Treasury bearing the same date as his first vesting order, we find a term which indicates that the "vesting" of the property in the Secretary or in the A.P.C. is considered to be a sequestration not a confiscation: "... the question of the ultimate disposition of the property *sequestered* is being left open."[94]

One of the difficulties in the application of section 5(b), as amended by F.W.P.A. 1941, is the proposition that where Congress has not repealed, expressly or by implication, a legislative act, in whole or in part, an administrative agency cannot do so in its enforcement of an amendment to that act. Our problem arises mainly from the apparent inconsistencies which exist between some definitions and provisions of the executive orders, regulations, etc., issued pursuant to the amendment and definitions and other provisions of the T.E.A. One example will be discussed.

The T.E.A. defines and uses "enemy" and "ally of enemy" (section 2). The executive order creating the office of A.P.C. and the

[92] Only certain aspects of the multitude of problems of administrative law will be here indicated.

[93] See 7 FED. REG. 2417 (Mar. 31, 1942), and 8 id. 2126 (Feb. 17, 1943).

[94] Treasury Press Release, Feb. 16, 1942 (italics supplied).

A.P.C.'s vesting orders define and use the term "national of a designated enemy country"; General Ruling 11, issued by the Treasury Department,[95] defines and uses the term "enemy national"; and "designated national" is used by the A.P.C. in certain of his so-called general orders. The last three terms revolve about the pivotal term "national" used in the freezing order. The terms of the T.E.A. are not identical, as to definitions given and their content, with those of the executive order, general ruling, etc. The question, therefore, naturally arises whether administrative officers entrusted with the enforcement of the act have, in the exercise of their delegated power, varied basic terms of the T.E.A., and, if they have, to what extent the definitions of "enemy" and "ally of enemy" of the T.E.A. have been changed by the new definitions.

The T.E.A., section 9(a), provides for relief and remedy to "Any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property" which may have been transferred to or seized by the A.P.C. Section 7(c) of the T.E.A. designates this "relief and remedy" as the "sole" one.[96] It consists of a notice of the claimant's claim under oath and in such form and containing such particulars as the custodian shall require; the claimant may further make an application to the President for an order of payment or transfer of the property. If the President (or the Attorney General, who is empowered thereto) shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, suit in equity may be brought by the claimant without waiting on the action of the President (or Attorney General) and if so, the res is held intact to abide the adjudication of the court.

The Secretary of the Treasury (on February 16, 1942) and the Alien Property Custodian (on March 26, 1942) issued similar regulations for the receipt and disposition of claims to property vested in the Secretary or the A.P.C. The regulations provide that the claims shall be filed with the A.P.C. or the Secretary of the Treasury on a special form; [97] and establish a Vested Property Claims Committee for hearing

[95] March 18, 1942, as amended by Public Circular 19, Sept. 22, 1942, and on Nov. 8, 1942.

[96] Central Union Trust Co. v. Garvan, 254 U.S. 554, 41 S. Ct. 214 (1920); Stoehr v. Wallace, 255 U.S. 239, 41 S. Ct. 293 (1922); United States Trust Co. v. Miller, 262 U.S. 58, 43 S. Ct. 489 (1923).

[97] A.P.C.-1, 7 FED. REG. 2290; TFVP-1, id. 1021.

these claims. The committee is to transmit the record, including findings and recommendations, to the A.P.C. (or the Secretary of the Treasury) who will issue a decision after an examination of the record and will give appropriate notice of it.

The question probably will arise whether these regulations substitute, supplement or amend the "sole relief and remedy" provided for in section 9(a).[98] The new forms for the filing of claims do not refer to section 9 of the T.E.A. as did the old forms prescribed during the last war. The use of the new forms is expressly limited to persons (1) who assert a claim arising as a result of a specific vesting order, and (2) who are permitted to file a notice of claim pursuant to the provisions of such vesting order or pursuant to regulations promulgated by the Office of the A.P.C. The regulations of the A.P.C. do not provide who is permitted to file a notice of claim, but under the vesting orders it can be done by any person except a "national of a designated enemy country." As an American citizen or friendly alien, acting for the benefit or on behalf of or as a cloak for "a designated enemy country," may himself be included in this category, does this limitation then mean that he can resort neither to the procedure prescribed by A.P.C. nor to section 9(a) of the T.E.A.? It does not, for that would deprive a citizen or a friendly alien of a right to establish in a judicial or administrative proceeding that he is not a "national of a designated enemy country," and furthermore would raise serious doubts as to the constitutionality of the provisions of section 5(b) of T.E.A., as amended, and as to the validity of the acts of the executive branch pursuant thereto.[99] Assuming section 9(a) to be effective *mutatis mutandis*, does the filing of notice of claim have the same effect as it had under this section prior to F.W.P.A. 1941? That is, can the claimant go ahead without awaiting the decision of A.P.C. and bring his suit in equity? Whatever the answer to this question may be,[100]

[98] In a case decided after the completion of this article, Draeger Shipping Co. v. Crowley, (D.C. N.Y. 1943) 49 F. Supp. 215, one of the issues involved was whether § 9(a) of the T.E.A., as amended, applies to action taken under § 5(b) of the T.E.A., as amended by the F.W.P.A. 1941. This was resolved by Judge Bondy, in the affirmative.

[99] Draeger Shipping Co. v. Crowley, supra. The A.P.C. construes these regulations and his vesting orders as authorizing *any person* whose property has been vested to establish that he should not be treated as a "national" of a designated "enemy country." This construction is pointed out in the brief of the government in this case (p. 49).

[100] An answer in the affirmative may be inferred from Judge Bondy's decision in Draeger Shipping Co. v. Crowley, supra.

that result seems not to have been intended by the regulations of the A.P.C., which, in establishing a specific procedure to be followed for filing and disposing of claims, seem to disregard the provisions of section 9(a).

Under the original T.EA. the determination, after investigation by the A.P.C., as to enemy-owned property, was conclusive and final *for purposes of his immediate possession* or right to possession, and the courts were without jurisdiction to hear and determine issues of fact or law in any suit at law or in equity as to the enemy status of a person or of property, except as provided in section 9 of T.E.A. But the custodian's determination was not conclusive against a claimant's rights asserted under that section.[101] The executive order establishing the Office of the A.P.C. provides that for the purpose of this order any determination by the A.P.C. 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 shall be *final and conclusive* as to the power of the A.P.C. to exercise *any of the powers or authority* conferred upon the President by section 5(b) of the T.E.A., as amended.[102] The foregoing apparently manifests a presidential purpose to limit judicial review to such extent as would be proper in view of his powers under section 5(b) and the constitutional requirements. If section 9(a) has not been superseded, and since, according to the T.E.A., it provides the "sole relief and remedy," suits pursuant to it must be strictly within its terms, for these are suits against the United States and the rule is well-established that the suitor's cause must come within the government's consent.[103] Furthermore, the fact should not be overlooked that the T.E.A. was held to be constitutional, because the remedy under the provisions of section 9 was considered adequate;[104] and conversely, it was held that "If persons not alien enemies, or allies of alien enemies, were given no means to protect their interests in such property the seizure would be unconstitutional

[101] Central Union Trust Co. v. Garvan, 254 U.S. 554, 41 S. Ct. 214 (1920); Stoehr v. Wallace, 255 U.S. 239, 41 S. Ct. 293 (1921): Simon v. American Exchange Nat. Bank, 260 U.S. 706, 43 S. Ct. 165 (1922).

[102] Sec. 10(a) of Executive Order 9095, as amended by E. O. 9193, 7 FED. REG. 5205 (July 6, 1942).

[103] Banca Mexicano de Comercio e Industria v. Deutsche Bank, 53 App. D.C. 266, 289 F. 924, affd. 263 U.S. 591, 44 S. Ct. 209 (1924).

[104] Stoehr v. Wallace, 255 U.S. 539, 41 S. Ct. 293 (1921); Garvan v. Commercial Trust Co. (D.C. N.J. 1921) 275 F. 841, affd. 262 U.S. 51, 43 S. Ct. 486 (1921).

as without due process of law; but they are given such remedies under section 9" of the act.[105] The answer to the question whether the remedy as provided under *present* regulations will be considered adequate might be determined by the change of attitude and the new doctrinal trend with respect to administrative procedure (findings and determination).[106]

Assuming the effectiveness of section 9(a), it is submitted that one possible solution would be to require the claimant to exhaust the administrative remedies first, and only then would the courts have jurisdiction.[107] The scope of the judicial review would then have to be determined. Whether the determination of the "enemy" or "national" character would be considered a "jurisdictional fact" is an obscure question.[108] It seems that such a solution might, in case of attack on this point, uphold the validity of the act as amended and best serve its purposes.

CONCLUSIONS

Our discussion of the evolution of the T.E.A. and of some problems of constitutional and administrative law arising in connection therewith, permit the following observations and conclusions to be made:

1. The T.E.A., a war measure adopted during the First World War, has been resorted to as the statutory basis for various measures in time of national economic emergency (1933) in peacetime. The broad powers conferred upon the chief executive after the amendment of 1933 were again used in April 1940 for the creation of a new implement of foreign policy and a new weapon of economic defense

[105] Garvan v. $20,000 Bonds, (C.C.A. 2d, 1920) 265 F. 477 at 479.

[106] Cf. Perkins v. Endicott Johnson Corp., (C.C.A. 2d, 1942) 128 F. (2d) 208 at 223. However, the decision in the Draeger case (supra, note 98) might lead to the inference that even though the right to judicial review of the A.P.C.'s determination after the filing of the claim might be implied in the regulations, nevertheless the procedure set up by the A.P.C. could be considered inadequate unless full recourse to the remedies of § 9(a) is available to the claimant.

[107] See 35 COL. L. REV. 230 (1935), and Berger, "Exhaustion of Administrative Remedies," 48 YALE L. J. 981 (1939). This viewpoint was expressed as an alternative in the Government's Brief in the Draeger case (p. 42) before the District Court, the main contention of the government being that an action does not lie under § 9(a) to review or restrain actions taken by the A.P.C. under § 5(b) of the T.E.A., as amended by F.W.P.A. 1941.

[108] Perkins v. Endicott Johnson Corp., (C.C.A. 2d, 1942) 128 F. (2d) 208 at 224.

in an economic and psychological war already going on without military hostilities. The extension of freezing control to Axis powers on June 14, 1941 marks the transition of this weapon of economic defense to one of offense. Finally, recourse to the war measure to its fullest extent has again been had in a new war, the Second World War.

2. The profoundly changed character of the new war and the different methods of warfare imperatively demanded a change of weapons and methods not only on the battlefields but also in the fields of economic and psychological warfare. The T.E.A. of 1917 bore the brunt of these changes as reflected in the amendments to it. The amendment made by the F.W.P.A. 1941 represents an attempt to adapt an old and obsolete statute to entirely different conditions. And as the amendment to one section of the act and the measures taken pursuant thereto do not fit into the old pattern, this "adaptation" is only liable to create problems which might have been avoided, and at the same time impede the successful application of the act. In time of war the burden of agencies entrusted with the enforcement of vital measures should not be increased by an unfortunate and easily correctible statutory scheme. The adoption of an entirely new T.E.A. would be much more desirable and expedient. The clarity of the statutory scheme would not impair the necessary flexibility of the measures. Unless the necessary "streamlining" is done by the legislature, it will be done by the courts and must be done at least as much as possible by the agencies in the process of the enforcement of the act. This is not to say that the courts will strike down the act itself, but in sustaining it, they may be forced to interpretations which might adversely affect its efficacy.

3. In order to meet the exigencies of a total war the executive branch of the government has to be equipped with broad powers. The F.W.P.A. 1941 provides the administration with powers enabling it to meet an insidious enemy with adequate weapons. The variety of unscrupulous means used by the Axis in the prosecution of the war demands flexible devices to combat them. The Axis has miscalculated on the "weakness" of the great democracies in adjusting themselves to the unlawful measures employed by the Axis in its bid for world domination. The Axis did not expect that its unlawful methods, frequently covered with a thin veil of legality, would be met and defeated with the perfectly lawful methods of the democracies.

4. The saying that law, and particularly statutory law, lags behind real life does not find support in our case. Section 5(b) of the T.E.A. as amended by the F.W.P.A. 1941 looks far ahead, foreshadowing

and forestalling events to meet not only wartime exigencies but national peacetime emergencies as well.

5. The act is a valuable example in the study of the sociology of law. Its evolution reflects perfectly events which have taken place since its enactment. The last amendment manifests a dwindling respect for private property, particularly foreign-owned private property. Though it is perfectly clear that Congress did not intend to pass an act for the confiscation of foreign-owned property, yet it did pass an act enabling the taking of foreign-owned, "non-enemy" property without making provision for compensation. The usual cautiousness in passing such a far-reaching measure affecting private property was not present. An investing nation and the guardian of private property rights in the world found itself, because of the steady undermining of this legal institution by other nations, in a situation where recourse to *ultima ratio* appeared to be necessary. Whether the form it took was really necessary and expedient and politically wise, only the future will show. The enlightened character of the administration is an assurance of the prudent use of this extraordinary measure.