

ADMINISTRATIVE MACHINERY AND STEPS FOR THE LAWYER

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TREASURY DEPARTMENT: FREEZING AND LICENSING

If a nation is being engulfed in war, it initiates forthwith control and supervision of all enemy property within its territory. Such measures are justified by inherent war powers of a sovereign state. We had been engaged in defensive economic warfare long before the military war actually started. Hence, we had to invent new forms of property control which, while designed to limit the capacity of our undeclared enemies to dispose of their properties and to protect assets within the United States of invaded countries, would not transgress the pale of international law prescribed for a nation not at war. Thus, the freezing regulations came into existence, administered by the Foreign Funds Control of the Treasury Department, and after the declaration of war, they were extended and interwoven with the wartime legislation relating to enemy property that falls within the administration of the Alien Property Custodian. Both are now co-existent, and both are of vital interest and importance to the practicing lawyer concerned with problems of enemy or alien property.

Foreign Funds Control, based upon Presidential Executive Order 8389 of April 10, 1940, as frequently amended, is a mere administrative measure, though, of course, supported by express statutory authorization.¹ The main objectives of Foreign Funds Control after the entrance of the United States into the war, have been defined as the complete severance of all financial and commercial intercourse with the enemy, especially of indirect and circuitous relations via neutral countries, the prevention of all intercourse or transactions which could benefit our enemies directly or indirectly, the elimination of all financial and commercial activities of persons within the United States whose influence or activities are deemed inimical to the security of the Western Hemisphere, and the frustration of attempts to use in this country assets looted from invaded countries.

The Foreign Funds Control is functioning under the Treasury Department, with central offices at Washington, D. C. It is organized into several divisions. The one most important to the practicing lawyer is the Licensing Division which de-

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¹ Sec. 5(b) of the Trading with the Enemy Act of Oct. 6, 1917, 40 STAT. 411, 50 U. S. C. APP. (Supp. III, 1941-1943) §616.

cides, in all more important cases, the question whether or not a license is to be granted for any proposed transaction. License applications for transactions of minor importance, or where the granting of the license appears to be clearly justified, are handled directly by the Federal Reserve Bank in the district in which the application has been filed. The twelve Federal Reserve Banks in the United States act as agents and field offices for the Foreign Funds Control, not only in those cases in which the banks themselves actually grant the licenses, but in all other cases as well, and no license application is being sent to the central office in Washington without a recommendation, positive or negative, by the Federal Reserve Bank.

As by far the greatest part of all transactions requiring a license are performed by banks and other financial institutions, these banks and institutions have to be depended upon for an efficient operation of the freezing control. In order to facilitate their work, the Federal Reserve Banks which are themselves constantly being kept advised by the Foreign Funds Control regarding the orders and policy of the Department, maintain close contact with the banks in their respective districts.

The practicing lawyer's problems in connection with the Foreign Funds Control are manifold. When consulted with regard to transactions involving either foreign nationals or assets, or rights in foreign countries, he has to consider whether the proposed transaction requires a license under the freezing regulations. Permitting his client to consummate a transaction without a license, if one is necessary, may subject the client not only to severe penalties, but the client may also find the contract entered into in violation of the freezing regulations unenforceable.

In examining whether the transaction comes under the freezing regulations, three different tests are to be applied, namely:

- a. whether the transaction is being entered into by or on behalf of a designated foreign national (or country), or
- b. whether the transaction involves property in which any such national (or country) has any interest of any kind, and
- c. whether the transaction is one coming under sec. 1, subd. A to F of Executive Order 8389, as amended.

If either "a" or "b" coincide with "c," a license is required; otherwise, no license is necessary.²

The designated foreign nationals and countries, which were at the beginning of

² The lawyer will find it useful in working in this field to obtain a copy of the pamphlet, the last edition of which (March 30, 1944) runs to around 140 pages, issued by the Treasury Department and entitled "Documents Pertaining to Foreign Funds Control," hereinafter cited as "DOCUMENTS." This pamphlet contains the pertinent sections of the Trading with the Enemy Act, as amended, the pertinent Executive Orders, Regulations, Rulings, Licenses, Public Circulars, Public Interpretations, Press Releases and Proclamations (including that relating to the "Black List"). Editions of this pamphlet were published as of March 30, 1940, March 30, 1943, March 30, 1944; one may anticipate a new edition in the Spring of 1945. The pamphlet is obtainable from United States Treasury Department, Washington, D. C.

The lawyer will also find it useful to have access to services such as the C. C. H. War Law Service, Second Edition (1942), First Unit which is entitled "Statutes, Proclamations, Interpretations" (hereinafter cited as 1 C. C. H. War Law Serv.), and the Supplemental Unit entitled "Foreign Supplement." Access to the Federal Register facilitates keeping abreast of current developments.

the control only a few, comprise at present, roughly, all continental Europe (except Turkey), China, Japan and the states invaded by Japan. Any person who has been domiciled in, or a subject, citizen or resident of one of the respective countries on or since the date when the freezing regulations for that respective country became effective, is included in the definition of a foreign "national." Corporations, associations and partnerships are considered foreign nationals if either organized under the laws of the respective foreign country, or if they have their principal place of business in the same, or if they, or a substantial part of their stock, are controlled by the foreign countries or a national thereof. Any person to the extent that he acts or purports to act for the benefit or on behalf of a foreign national or country is likewise considered for this reason alone a foreign national, and so is any other person who there is reasonable cause to believe is a national as defined in the regulations.³

The term "property" is used in its broadest sense and includes all kinds of property interests, among others: checks, drafts, debts, bills of sale, options, judgments, insurance policies, and contracts of any nature whatsoever.⁴

The "transactions" as enumerated under A to F of Section 1 of Executive Order 8389 are transfers of credit between, and judgments by or to, banking institutions, transaction in foreign exchange and the export of gold or silver coin or currency, transfer or dealing in evidences of indebtedness or of ownership of property, and any transaction for the purpose, or which has the effect of, evading or avoiding the prohibitions contained in the order. Further prohibited are all dealings in securities which show any signs, present or past, of foreign stamps or imprints of a blocked country, and dealings in interests in securities if the attendant circumstances indicate that the latter are not physically situated within the United States.⁵

If, having applied the above tests, the lawyer reaches the conclusion that a license is necessary, he will have to prepare a license application which is to be filed with the appropriate Federal Reserve Bank on blanks supplied by them. Not infrequently, however, he will face a situation where a license application had already previously been filed by a third person, as a bank or a broker firm, and had been denied. This is not necessarily fatal to a new application. Experience shows that third persons frequently lack detailed knowledge of the facts of the situation, and that the lack of such details caused the denial of the license. While previous applications, and their disposition, must be mentioned in a new application, the principle of *res adjudicata* does not apply, and it does not make any difference whether or not the previous application had been submitted by the same or another person.

In drafting a license application, the lawyer should take special care that all facts which have any connection whatsoever with the matter in question, and which

³ Relative to the statements in above paragraph, see U. S. TREAS. DEP'T, DOCUMENTS, *supra* note 2, at 5-9; I C. C. H. War Law Serv., *supra* note 2, ¶14,011.

⁴ Full definition is given in 31 CODE FED. REGS. (Cum. Supp. 1944) §131.2 (c); DOCUMENTS, *supra* note 2, at 16.

⁵ EXEC. ORDER No. 8389, §2, DOCUMENTS, *supra* note 2, at 5.

may be of any conceivable relevance to the decision, are included and set forth in the application. The procedure is not comparable to civil litigation where the lawyer is mainly interested in setting forth the points which appear to be in favor of his client's case, leaving it to the opposing party to stress the unfavorable points. Foreign Funds Control is not engaged in adjudicating private issues between litigants, but is an integral part of our economic war effort, and only if all relevant facts are brought to the attention of the Control is an appropriate decision likely to result. In strictly adhering to this principle, the lawyer will not only assist in the war effort, but he will also do most good to his client. An applicant may find his license application rejected because he did not set forth relevant facts which the Control knew from other sources, and the omissions may have been deemed sufficient to prove that the applicant cannot be considered trustworthy and reliable; and yet, the omitted facts may have been entirely harmless, and, if only properly set forth, may have in no way formed an obstacle to the granting of the application. Furthermore, the application should avoid to be argumentative, but should confine itself to the relevant facts.

If the license application be granted, it usually fixes a time within which the proposed transaction has to be executed, and the applicant is requested to file a report regarding such execution. In case the transaction cannot be executed within the period of time allotted, an extension of time, on showing of good reason, is usually granted almost as a matter of course.

The Control has made it a practice to extend an opportunity to an applicant, upon request, to discuss the merits of his application with an officer of the Control in case the application could not be granted. Such informal procedure offers to the lawyer an opportunity to explain in detail the facts which, in his opinion, justify the granting of the application. This is especially true in cases where a rejected application had been drawn by a person not learned in the law, or not familiar with the particular aspects of foreign funds control; in such cases a discussion of the facts in connection with a renewed application, prepared on the basis as outlined above, may lead toward the reversal of an unfavorable prior decision.

The regulations under Executive Order 8389 provide that the decision of the Secretary of the Treasury with respect to an application for a license shall be final.⁹ While such regulation does not necessarily exclude the jurisdiction of the courts in cases where the refusal of a license appears arbitrary and unreasonable, the adjudication of the propriety of the granting or denying of a license does not lend itself to a court's procedure, and none appears to have been attempted.¹⁰ The administrative decisions in these matters are in such direct connection with and support of the war effort that in absence of abuse they cannot be interfered with by the courts while the war is being fought. However, the practical application of this doctrine may be somewhat different after the end of hostilities.

⁹ 31 CODE FED. REGS. (Cum. Supp. 1944) §130.3.

¹⁰ Cf. *Hartmann v. Fed. Res. Bank of Philadelphia*, 55 F. Supp. 801 (E. D. Pa. 1944), where an attempt to challenge in court an administrative determination miscarried for procedural reasons.

License applications, so far as they relate to property, are mainly concerned with authorization of payments, or other dispositions of assets prohibited by the Executive Order.

By far the greatest part of all applications pertains to the first category, permission to make payments or other disposition of assets prohibited by the Executive Order. Before preparing such application, the lawyer should ascertain whether the proposed transaction is already covered by one of the general licenses. There have been issued approximately 90 such general licenses, some of which were later revoked, licensing generally various kinds of transactions and rendering it unnecessary in the situations covered thereby to apply for an individual license.

It is frequently impossible for the lawyer to advise his client whether the license application may be expected to be granted. There are, nevertheless, certain criteria which, if present, usually foretell a denial of the application. If it is conceivable that the transaction may tend to benefit the enemy, the application will, of course, be denied. But even if the proposed transaction appears to result in a benefit to the United States, the application will be denied if it involves even indirectly any communication with the enemy, or if any of the persons interested in the transaction is listed in the Proclaimed List of Certain Blocked Nationals, frequently known as the Black List.⁷ There are a great many more considerations, connected with the conduct of the war and the sometimes changing purposes of our foreign economic policy, which may or may not affect the granting or denial of the application, and which are not expressed in any rule or regulation. The only way open to the practicing lawyer, in such cases, it appears, is the method of trial and error, which is somewhat eased by the fact that the filing and denial of an application does not involve any statutory fees or disbursements.

In case of litigation between parties where one of such parties, or both, are amenable to the restrictions of Executive Order affecting blocked assets, and in cases of attachments, the lawyer may face the problem whether first to procure a license and thereafter to start litigation, or to proceed with the litigation and apply for the license only after a judgment or attachment or other decision was reached in the judicial procedure. The latter method conforms to the Treasury Department's General Ruling No. 12, issued April 21, 1942,⁸ which stated that it had no desire to limit the bringing of suits in courts within the United States provided that no greater interest was created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. This method has been sanctioned by various court decisions. Thus, the lawyer may safely proceed with litigation and may postpone the filing of the license application until after the litigation has resulted in a decision.

⁷ This list, prepared by the collaboration of several Departments of the Government, contains names of persons in neutral countries whose activities have brought them within the application of the President's Proclamation 2497 of July 17, 1941. DOCUMENTS, *supra* note 2, at 13-15. The latest edition of the list is Revision VIII, Sept. 13, 1944. Cumulative Supplements are issued periodically. Requests for printed copies should be addressed to the Federal Reserve Banks or the Department of State.

⁸ DOCUMENTS, *supra* note 2, at 36.

THE ALIEN PROPERTY CUSTODIAN

Whereas the freezing of foreign funds appeared to be an appropriate device of economic defense for a nation formally at peace, the outbreak of war necessitated a stricter and tighter control of enemy assets. The Trading with the Enemy Act of October 6, 1917, was still on the statute books when Title III of the First War Powers Act of December 18, 1941, amending Section 5(b) of the Trading with the Enemy Act, confirmed the President's powers to vest foreign property in any agency or person as the President may designate, to be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest and for the benefit of the United States."⁹

By Executive Order No. 9095 of March 11, 1942, the President established the Office of Alien Property Custodian. This was amended by Executive Order No. 9193 of July 6, 1942, defining in detail the competences of the Alien Property Custodian.¹⁰ The Alien Property Custodian has been authorized and empowered by such Order to take such action as he deems necessary in the national interest with respect to six classes of alien property, including, but not limited to, the power to direct, manage, supervise, control or vest such property. The first class consists of business enterprises within the United States of enemy nationals, and of interests which enemy nationals have in business enterprises within the United States. In the second class are all business enterprises within the United States of foreign nationals, and interests which foreign nationals have in business enterprises within the United States, provided the Alien Property Custodian has determined, and certified to the Secretary of the Treasury in detail, what action is necessary in the national interest in regard to such businesses or interests therein. The third class includes any other property owned or controlled by enemies; monies, securities and other cash credits, however, only to the extent that they are necessary for the maintenance or safeguarding of other property subject to vesting, funds not necessary for such purpose remaining under the jurisdiction of the Treasury Department. The fourth and fifth class consist of patents, trademarks, copyrights, and ships and vessels respectively, held by any foreign country or national, while the sixth class comprises property under judicial supervision or partition proceedings, payable to an enemy country or national. When the Alien Property Custodian determines to exercise any power and authority thus conferred upon him to any property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the latter must release all control of such property, except as authorized or directed by the Alien Property Custodian.

Under the broad authority thus received, the Custodian has developed three main types of administrative procedure under which control of alien property is exercised by him.

The least stringent kind of supervision is the one exercised through the issuance of general orders. Such orders do not apply to specific items of property, but to

⁹ 55 STAT. 841 (1941), 50 U. S. C. APP. (Supp. III, 1941-1943) §616.

¹⁰ DOCUMENTS, *supra* note 2, at 10.

certain general classes of property. Persons who claim any kind of interest to such properties will be requested, by such orders, either to perform or to refrain from certain acts pertaining to such properties. To the first categories belong, for instance, such General Orders as requiring reports concerning patents and patent applications in which there is an enemy or foreign national interest;¹¹ requiring persons acting under judicial supervision or court proceedings to report property, involved in such supervision or proceedings, in which there is enemy or foreign national interest;¹² requiring service of process, upon any person within an enemy or enemy-occupied country, to be made upon the Alien Property Custodian;¹³ requiring reports of unfiled patent applications and disclosures of enemy nationals;¹⁴ requiring reports of royalties due and payable to the Alien Property Custodian under vested patent rights,¹⁵ and others. Orders prohibiting acts are, e.g., the General Order prohibiting transactions by or on behalf of foreign nationals respecting patents or trademarks,¹⁶ the Order prohibiting certain transactions respecting interests in works subject to copyrights,¹⁷ and the Order prohibiting participation of employees of the Office of Alien Property Custodian in transactions affecting properties in which the Office has any interest.¹⁸ In addition, there have been issued a few general orders requiring specific acts, as, for instance, termination of certain employment contracts of General Aniline and Film Corporation.

A second form of alien property supervision, in use mainly during the first few months of this war, when the nature of some enterprises could not be decided definitely at the moment, was exercised by the means of supervisory orders providing for the management and control of certain foreign-owned businesses and of certain American businesses where there was reason to believe that the management was disloyal to the national interest, without vesting of title in the Alien Property Custodian. Such supervisory control is still being employed in order to protect the interests of residents of enemy-occupied countries in business enterprises in the United States, as well as to protect the property of internees.

The procedure mostly used for property administration is the method of seizing the property and vesting title to it in the Alien Property Custodian as representative of the United States Government. The vesting of title takes place by virtue of the issuance of an order by the Alien Property Custodian directing such vesting. Nearly two thousand vesting orders have been issued and the value of the properties thus vested in the Alien Property Custodian is estimated to approximate \$360,000,000, excluding the value of patents, trademarks, copyrights and ships.

If the property vested by the Alien Property Custodian belongs indisputably to

¹¹ 7 FED. REG. 4634 (1942), 1 C. C. H. War Law Serv. ¶7202.

¹² 7 FED. REG. 6199 (1942), 1 C. C. H. War Law Serv. ¶7205.

¹³ 7 FED. REG. 6199 (1942), 1 C. C. H. War Law Serv. ¶7206.

¹⁴ 7 FED. REG. 9476 (1942), 1 C. C. H. War Law Serv. ¶7212.

¹⁵ 8 FED. REG. 1707 (1943), 1 C. C. H. War Law Serv. ¶7218 (and ¶7223 as to copyrights).

¹⁶ 7 FED. REG. 9475 (1942), 1 C. C. H. War Law Serv. ¶7211.

¹⁷ 7 FED. REG. 9476 (1942), 1 C. C. H. War Law Serv. ¶7213.

¹⁸ 7 FED. REG. 8377 (1942), 1 C. C. H. War Law Serv. ¶7208.

an alien enemy nation or national, not many problems arise for the practicing lawyer at this time. The Alien Property Custodian may either seize the property forcibly by his own agents, or he may, if he so prefers, bring suit against any person or corporation holding such property. Such suit is of possessory nature, as it is based on seizure *in pais*.¹⁹ The determination by the Alien Property Custodian that the property is held by an enemy is conclusive for such suit²⁰ and the question of enemy property *vel non* cannot be even inquired into therein.²¹ If the Alien Property Custodian makes any such requirement for the delivery of property, a duly certified copy of the demand may be registered or recorded in any office for the registering or recording of conveyances, transfers, or assignments, and if so filed, shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian.²² In case the Alien Property Custodian requires the transfer to him of shares or stocks, or of beneficial interests in trusts, the corporation or the trustee is under a duty to cancel the shares or the beneficial interest, and in lieu thereof to issue certificates or similar instruments to the Alien Property.²³

Under the Trading with the Enemy Act, as amended, the Alien Property Custodian is not only vested with all of the powers of a common-law trustee in respect of all property, except money, conveyed to him, but he has also the power to manage such property and to do any act or things in respect thereof, or make any disposition thereof, in like manner as though he were the absolute owner thereof.²⁴ The Alien Property Custodian has been thus left entirely free to decide whether to sell the properties transferred to him, or to manage the same himself. While it has been said that it is the policy of the Alien Property Custodian to transfer to private enterprise all vested properties, except patents and copyrights, as soon as appropriate measures can be taken to remove the influences of enemy control and as soon as satisfactory terms of sale can be arranged, it would appear that the Office has only sparingly liquidated its assets. The Act²⁵ requires that, in general, the property is

¹⁹ Commercial Trust Co. v. Miller, 262 U. S. 51 (1923).

²⁰ Stoehr v. Wallace, 255 U. S. 239 (1921); Stern v. Newton, 180 Misc. 241, 39 N. Y. S. (2d) 593 (1943).

²¹ Central Trust Co. v. Garvan, 254 U. S. 554 (1921).

²² Sec. 7(c) of the Trading with the Enemy Act of 1917, 40 STAT. 416 (1917), 50 U. S. C. APP. (1940 ed.) §7(c). It should be noted, however, that a question has been raised whether this section, as well as other sections of the Act following Section 5(b) relating to the Alien Property Custodian, really apply to the Office of Alien Property Custodian which the President created under the World War II amendment to Section 5(b). The World War II agency, it is contended, is not necessarily *the* Alien Property Custodian of old Sections 6, 7 *et seq.* as one will appreciate by asking: Suppose the President had called the agency which he set up under new Section 5(b) by some other name, such as "Sequestrator of Enemy Property?" See Dulles, *The Vesting Powers of the Alien Property Custodian* (1943) 28 CONN. L. Q. 245; McNulty, *The Constitutionality of Alien Property Controls*, *infra*, this symposium, p. 135. This writer believes such doubts to be unjustified; cf. Wechsler, *Constitutionality of Alien Property Control: A Comment on the Problem of Remedies*, *infra* this symposium, at 149.

²³ Trading with the Enemy Act, *supra* note 22, §7c.

²⁴ *Id.* at §12. Again, attention is called to the caveat *supra* note 22 and to the fact that this power of the Alien Property Custodian can probably be supported without going outside Section 5(b) and EXEC. ORDER No. 9193 thereunder.

²⁵ *Ibid.* Also, this requirement can rest on new Section 5(b), EXEC. ORDER No. 9193 thereunder, and the Custodian's General Order No. 26 of May 29, 1943, 8 FED. REG. 7628 (1943), 1 C. C. H. War Law Serv. ¶7226.

to be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of the sale, and the Alien Property Custodian has the right to reject all bids and to resell the property at public sale or otherwise. General Order No. 26, of May 29, 1943,²⁶ specifies that prospective purchasers should submit sealed bids in writing which are to be opened in public, and awards will be made to the highest qualified bidders. If the Office should deem it necessary to reject bids, the reasons for such rejection shall be stated. Of course, property will not be sold to enemies, or to persons listed in the Proclaimed List of Certain Blocked Nationals (Black List). It is a misdemeanor, punishable with a fine up to \$10,000 and imprisonment up to ten years, to purchase property from the Alien Property Custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of such a person.²⁷

After the last war, the Alien Property Custodian tried to insure against the return of properties to the control of its former owners by contractual stipulations forbidding future transfers to enemy interests. In important cases, the sales contracts provided for voting trusts by which the trustees were instructed to guard against such transfers. However, such devices did not prove effective and were soon superseded by direct or indirect schemes conceived to eliminate their operation. Hence, it is the practice of the Alien Property Custodian to carefully select prospective buyers, not only with the view of avoiding the reverting of the properties to enemy control, but also to see to it lest monopolies or international cartels are favored or created, or other combinations inimical to our economy are assisted.

If the practicing lawyer is consulted in connection with the buying of property from the Alien Property Custodian, he should carefully analyze the background and economic integration of the interests of the prospective buyer. No general rule will assist him in the consideration of the various points which will establish the chances of his client to be permitted to buy the respective properties. In such instances, exact economic research and analysis of economic facts in each respective case will be of more determining importance than mere legal considerations. It may be added that in disposing of enemy minority interests in American enterprises, sales may, in appropriate cases, be transacted through public exchanges, just as well as in the disposition of real estate, the assistance of real estate brokers may be found desirable.

While thus the lawyer's work in connection with the liquidation of assets by the Alien Property Custodian tends more towards economic facts and considerations, questions of considerable legal interest are involved when non-enemy persons or corporations claim interests in properties vested by the Alien Property Custodian. Section 9(a) of the Act, as amended, provides that a person not an enemy nor ally of an enemy who claims any rights or interests in property conveyed to the Alien Property Custodian, or who has any claims against an enemy person whose property here has been seized by the Alien Property Custodian, may file with the Alien

²⁶ *Supra* note 25.

²⁷ Trading with the Enemy Act, *supra* note 22, Section 12.

Property Custodian a notice of his claim under oath. He may also make application for payment of his claim, and if the application is deemed justified, payment of the monies, or transfer of the assets seized, to such claimant may be ordered by the President or for him by the Custodian. In any event, however, whether or not such application has been made, the claimant may, if he has filed his notice of claim, institute an action at law or in equity in the appropriate Federal District Court to establish his right, title or interest which he may have in such money or other property.

Section 9(a) of the Act, as amended, was already in force before the outbreak of the present war, and so was Section 7(c) of the Act, as amended, which formed up to that time the only basis for vesting of property in the Alien Property Custodian before the enactment of the First War Powers Act of 1941. Hence, the right to judicial determination of the validity of the vesting of property vested under the authority of Section 7(c) of the Act, as amended, is guaranteed beyond question, at least if the vesting power is exercised under Section 7(c) as distinguished from 5(b), for reasons about to be explained. That remedy, of course, as the language of the statute clearly indicates, applies only to citizens, allies and neutrals whose property has been mistakenly seized and it does not apply to enemies or allies of enemies.²⁸ However, if a person or corporation, while itself being a citizen or resident of a neutral country, is doing business within enemy or enemy occupied countries, it becomes an "enemy" under Section 2(a) of the Act, and cannot claim the privileges of Section 9(a); and that is true even if such business within enemy or enemy-occupied countries was subsequently discontinued.²⁹

Certain doubts have arisen in regard to the availability of the right to judicial determination as guaranteed by Section 9(a) of the Act, in connection with the enactment of the First War Powers Act of 1941. That Act³⁰ amended Section 5(b) of the Trading with the Enemy Act. Previous to this amendment, that section authorized the President to investigate, regulate, or prohibit certain transactions in time of war or during any other period of national emergency. The amendment extended such power and added that property or interest of any foreign country or national thereof shall vest, as directed by the President, in such agency or person as designated, and upon such terms and conditions as prescribed, by him.

The President's Executive Order 9193 of July 6, 1942,³¹ outlining in detail the powers of the Alien Property Custodian is based upon this amendment. It has been contended by the Alien Property Custodian that all seizures of property made under the authority of Section 5(b) as amended are exempt from judicial supervision as provided in Section 9(a) of the Act, and such opinion has been shared by others.³² It appears, however, that prevailing judicial opinion, at the time this

²⁸ United States v. Chemical Foundation, Inc., 272 U. S. 1 (1926).

²⁹ Swiss Insurance Co. v. Miller, 267 U. S. 42 (1926).

³⁰ *Supra* note 9.

³¹ *Supra* note 10.

³² Thus, Dulles, *op. cit. supra* note 22, suggests that instead of the statutory remedy provided in Section 9(a), a common law *in rem* proceeding in the nature of replevin is available. See also same

is being written, accords the right to judicial supervision also to such cases where the seizure occurred upon the authority of Section 5(b). As Judge Bondy said in the *Draeger* case³³ the First War Powers Act expressly purported to amend only the first sentence of Subdivision (b) of Section 5 of the Trading with the Enemy Act; if Congress had intended that the amendment should have the effect of an entirely new and separate enactment (by which it meant to exclude the applicability of Section 9(a)), Congress would have enacted it as it did the other titles of the Act, namely as a separate Act, and not as an amendment; as it is, it must be assumed that Congress intended that all provisions of the Trading with the Enemy Act shall be held applicable to this amendment; and it cannot be presumed, in the absence of compelling reasons, that Congress intended to withhold a judicial remedy from United States citizens which it grants to everyone but an enemy or an ally of enemy, where property has been seized as enemy property. To this reasoning may be added the further argument, *a minore ad majorem*, that if Congress held judicial supervision necessary and appropriate for seizures under the limited powers of the original Act, Congress probably believed such judicial supervision even more necessary under the much broader and sweeping powers bestowed upon the Custodian by the last amendment of Section 5(b). And while the power and authority of the Alien Property Custodian to initially seize property if he deems that necessary and justified should be strained to the limit, correlative judicial supervision appears indispensable.³⁴

By Regulations of March 26, 1942,³⁵ as amended, the Custodian established administrative procedure for claims to property vested in the Custodian pursuant to Section 5(b) of the Act, as amended. Such claims are to be filed on a form issued by the Custodian (APC-1), in triplicate.^{35a} The claims will be submitted by the Custodian to the Vested Property Claims Committee, which consists of three members designated by the Custodian. The Committee is empowered to hear claims respecting property vested under Section 5(b) of the Act, and the Committee has authority to formulate its rules and procedure. It has all powers necessary to carry out its functions, including the power to call witnesses and to compel production of books of accounts, records, contracts, memoranda, and other papers. The Custodian as well as the respective claimant is entitled to representation by counsel before the Committee. After a claim has been heard, the complete record, including a transcript of testimony, and the findings and recommendations of the Com-

author in 109 N. Y. L. J. No. 104. Cf. McNulty, *op. cit. supra* note 22. This writer does not agree with such a contention. Among other reasons, to substitute a common law action for the Sec. 9(a) remedy would mean that in many instances the claimant could not sue in the federal district court of his residence, as expressly authorized by Sec. 9(a)—an unnecessary inconvenience.

³³ *Draeger Shipping Co. v. Crowley*, 49 F. Supp. 215 (S. D. N. Y. 1943).

³⁴ This is not to say, however, that if the judicial remedy of Section 9(a) is not available, then none is available. See McNulty, *op. cit. supra* note 22, at 146.

³⁵ 7 FED. REG. 2290 (1942), 8 FED. REG. 16711 (1943), 1 C. C. H. War Law Serv. ¶7101, 8 CODE FED. REGS. (Cum. Supp. 1944) §501.1.

^{35a} The time to file such claims has been extended to April 1, 1945, and a further extension may reasonably be expected.

mittee are to be transmitted to the Custodian. The Custodian will, after an examination of the record, issue his decision in the matter and will give appropriate notice to the claimant.

The practicing lawyer, faced with the problem of contesting a seizure of property effected by the Alien Property Custodian, should ascertain whether the Custodian based his action *explicite* on Section 5(b) or Section 7(c) of the Act. While some of the vesting orders state expressly that the vesting is decreed "pursuant to Section 5(b)," a great many orders fail to disclose upon what section of the Act they are based. If the seizure is based on Section 7(c), the remedy guaranteed by Section 9(a) exists without doubt. However, in view of the decision in the *Draeger* case,³⁰ there is a probability that the claimant may in any event, whether the seizure is based on Section 5(b) or Section 7(c), or if the seizure is based on no particular section, resort to the judicial proceeding outlined in Section 9(a) of the Act. Assuming that 9(a) procedure is available (and statements in this paragraph are based on that assumption), before starting proceedings, the claimant must file with the Custodian, as outlined above, a notice of his claim under oath. If he so desires, the claimant may also make an application for the restitution of the property to him. If he makes such application, he must wait sixty days from the filing of the application for an administrative decision. If the application is granted within such time, that ends the matter, except that any other person who alleges any right, title, or interest in or to such property, may institute a suit at law or in equity against the claimant to establish such right, title, or interest. If the application is not granted within sixty days after its filing, or if the claimant preferred not to make such application, but has duly filed the notice of his claim, then the claimant may institute a suit in equity either in the Supreme Court of the District of Columbia, or in the District Court of the United States for the District in which the claimant resides, or, in case of a corporation, where it has its principal place of business. The suit is directed either against the Alien Property Custodian or against the Treasurer of the United States, whoever holds possession of the property. If the suit has been instituted, the Custodian, or the Treasurer respectively, must retain the property in his custody until a final judgment or decree in favor of the claimant is fully satisfied, or until final judgment or decree has been entered against the claimant, or the suit has been otherwise terminated.

Inasmuch as the procedure before the Vested Property Claims Committee, established as above stated, is expressly limited to property vested in the Custodian pursuant to Section 5(b) of the Act, or where such procedure has been explicitly reserved in the vesting order, it would appear that such procedure is not available for claims in regard to property vested pursuant to Section 7(c) of the Act. This is the more anomalous as Section 5(b) does not contain any provisions for an administrative hearing of claims to property vested under Section 7(c), whereas Section 9(a), which, as contended by the Alien Property Custodian, does not apply

³⁰ *Supra* note 33.

to vestings under Section 5(b), but only to property vested under Section 7(c), expressly envisages an administrative proceeding to determine the validity of the claim. Hence, it would seem desirable that the said regulation be amended so that there remains no doubt whether the procedure provided therein may also be available for claims in regard to property vested under Section 7(c) of the Act. This is the more necessary as numerous vesting orders do not make it clear whether they are based on Section 5(b) or 7(c), and as the Custodian has contended that no judicial proceeding is open to any claimant before he has exhausted existing administrative remedies. This of course brings us right back to the question whether 9(a) proceedings are available to 5(b) vestings, for if they are, then, under the special provisions of 9(a), as was held in the *Draeger* case,³⁷ the claimant need not exhaust administrative remedies before resorting to 9(a) judicial proceedings. If, on the other hand, 9(a) proceedings are not available against 5(b) vestings, the usual rule requiring exhaustion of administrative remedies prevails, as has been recently held with respect to the Treasury's freezing controls.³⁸

To be successful in either the administrative or judicial proceeding, the claimant has the burden of proof for his alleged rights, which proof must be established by a preponderance of evidence. If the seizure is based upon Section 7(c) of the Act, he must prove that he is neither an enemy nor an ally of an enemy, as defined in Section 2 of the Act, and that he has an interest, right, or title to the money or other property held by the Custodian or the Treasurer, or that a debt is owing to him from an enemy or ally of enemy whose property is held by the Custodian or Treasurer. If the seizure was based on Section 5(b), such showing alone is, of course, not satisfactory to warrant a return of the property to the claimant, as that would nullify the much larger powers to vest contained in Section 5(b). In order to entitle the claimant to a return of property vested under Section 5(b), it must be followed, in the way of reasonable statutory interpretation, that the claimant must prove, by a preponderance of evidence, that none of the sets of facts stated in Section 5(b) and in Executive Orders Nos. 8389, as amended, and 9193, entitling the Custodian to vest the property, are present—specifically, that he is not a "national" of a designated enemy or foreign country, as therein defined.³⁹

Two identical bills (S. 1940 and H. R. 4840) have been introduced in the 78th Congress, Second Session, to amend the Trading with the Enemy Act in regard to the return of properties to non-enemies. Under these bills, American citizens whose properties have been wrongly seized by the Alien Property Custodian would have remedies similar to those at present provided for in Section 9(a) of the Act, as heretofore outlined. If the claimant is not an American citizen, but a foreign national (and, as obviously meant, though not clearly defined in the bills, not an

³⁷ *Ibid.*

³⁸ *Hartmann v. Fed. Res. Bank of Philadelphia*, 55 F. Supp. 801 (E. D. Pa. 1944); *Carbone Corp. v. First Nat. Bank of Jersey City*, 130 N. J. Eq. 111, 21 A. (2d) 366 (1941). For the general doctrine, see *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51 (1938).

³⁹ *Draeger Shipping Co. v. Crowley*, 49 F. Supp. 215 (S. D. N. Y. 1943).

enemy national) then his remedy is a suit against the United States under the appropriate sections of the Judicial Code providing for just compensation for taking of property for public use.⁴⁰

In addition to cases of law suits directed against the Alien Property Custodian, the practicing lawyer comes into contact with the Custodian's office whenever a person within enemy or enemy occupied country is a party to an action or other proceeding. Executive Order No. 9193 of July 6, 1942, authorized the Custodian to issue appropriate regulations governing the service of process or notice upon any person within enemy or enemy-occupied territory in connection with any court or administrative action or proceeding within the United States. By General Order No. 6 of August 3, 1942,⁴¹ the Custodian directed that in such cases, the receipt by the Custodian of a copy of the process or notice sent to him by registered mail to his main office at Washington, D. C., shall be considered service of such process or notice upon the respective person if the Custodian, within sixty days from the receipt thereof, files with the respective court or administrative body a written acceptance of the service. The form of the notice or process to be served is determined by the rules and practice of the respective court or administrative body.

While the problems which face the practicing lawyer in connection with alien property, as outlined above, are at present still limited, the necessity of liquidating and disposing of the enemy property holdings or their proceeds after the war will add numerous new problems. What form this process will take is, of course, not yet foreseeable. A model for a solution which would avoid conceded mistakes made after the last war, yet remain within the limits of the traditional American policy to avoid confiscation, is contained in a bill introduced in Congress on November 15, 1943, by Representative Gearhart.⁴² The bill, in the form of an amendment to the Trading with the Enemy Act, provides that all enemy properties seized by the Custodian, excluding properties of invaded countries and their nationals, are to be sold, the proceeds, together with proceeds of previous sales of enemy property and with certain enemy monies at present held under "freezing control" by the Treasury, to become the property of the United States, to be used to indemnify American nationals as Congress shall at a later time direct, for damages caused by measures of enemy governments and adjudicated by the courts of the United States. In order to assure full reimbursement to the former enemy owners, the bill declares it the policy of the United States that enemy governments are to be required, as a condition of the terms of the peace, to reimburse their nationals, in their respective domestic currencies, for the full value of their properties taken over by the United States. In order to guarantee and fortify the rights of the former owners to complete reimbursements by their governments, the courts of the United States are vested with jurisdiction to adjudicate

⁴⁰ 28 U. S. C. (1940 ed.) §41 (20) and §250 (28).

⁴¹ 7 FED. REG. 6199 (1942), 1 C. C. H. War Law Serv. ¶7206, 8 CODE FED. REGS. (Cum. Supp. 1944) §503.6.

⁴² H. R. 3672, 78th Cong., 1st Sess. See Gearhart, *Post-War Prospects for Treatment of Enemy Property, infra*, this symposium, p. 183.

the claims of such former owners, and their governments will have to pay the judgments entered by our courts.

An equally strong assurance of full compensation to former owners is not contained in two identical bills (S. 2038 and H. R. 5118) introduced on June 23, 1944, which, while likewise conveying absolute ownership of enemy property to the United States, provide merely that no trade agreement shall be concluded with any enemy nation unless it agrees to compensate its nationals for properties taken over by the United States. In addition, such bills provide that the United States shall assume liability for compensation of all claims of United States citizens for damage suffered on account of measures of enemy governments, and that the Reconstruction Finance Corporation is authorized to make loans to any claimant in the amount up to seventy-five percent of his claim.

The solution proposed in Representative Gearhart's bill, H. R. 3672, entrusts American lawyers with the noble and honorable task not only of securing just indemnification for war losses to American citizens out of available enemy properties in our hand, but simultaneously to assure to the former enemy owners through our courts full compensation in their own currency by their own governments, and thus to adhere to the established American policy of non-confiscation of private property. That there is no confiscation involved if full compensation is being paid for property taken for public use, is clear beyond argument; even American citizens fully protected by our Constitution have frequently to submit to such process. If, on the other hand, we would return enemy property unconditionally to the aggressor nations and would permit American claims for damage to American property by such aggressor nations remain to be unsecured and unpaid, as they undoubtedly would on account of inability of such nations to secure the necessary foreign exchange, we would deal a deadly blow to the protection of American property rights abroad. For, if we do not find the strength or ability now to compel indemnity for violation of American property rights, after a long and costly war, we would give the green light to all foreign forces intent on preying on American property rights and investments abroad. Should the American lawyers be called to assist in averting such results, one feels assured that they will be well prepared to assume such task, and to perform it to their credit.