

CONSTITUTIONALITY OF ALIEN PROPERTY CONTROLS

GEORGE A. McNULTY*

The controls over alien property that have been utilized during this war are two: one is the freezing control exercised by the Treasury; the other is the Alien Property Custodian's power to supervise and to vest. The Freezing Control has been in effect since April 10, 1940, the day following the invasion of Norway and Denmark. It was inaugurated by Executive Order 8389 issued pursuant to Sec. 5b of the Trading with the Enemy Act. The Custodian's authority derives from Executive Order 9095 of March 11, 1942, as amended by Executive Order 9193 of July 6, 1942, also resting on the Trading with the Enemy Act.

POWERS OF CONGRESS AND THE PRESIDENT

Basic to federal regulation of this sort is the constitutional question: Does the regulation fall within the powers of Congress and the President? Affirmative answer as to both controls seems clear. Executive Order 8389, as amended, establishing the Freezing Control, forbids certain transactions (unless licensed) if those transactions, roughly, involve the property of foreign nationals or are by, for or in the interest of those nationals; the transactions forbidden are movements in bank credits, bank payments, foreign exchange, bullion and currency, and (perhaps the broadest of all) dealings in evidences of indebtedness or evidences of ownership of property by any person within the United States. Analogous freezing of such transactions, except the one last mentioned, under that same 5(b) which, though amended frequently, has been in existence since 1917, had been upheld in the Gold Clause cases even in peace-time.¹ The powers of Congress to regulate transactions in and affecting money and currency;² the powers of Congress over transactions affecting interstate and foreign commerce, even if the primary aim be something other than the protection of that commerce and even if the regulation is not incidental to some other federal sphere of activity;³ the extent of federal power in respect of foreign or external affairs, said to be inherent in sovereignty and not dependent on affirm-

* A.B., 1921, St. Louis University; LL.B., 1925, Harvard University; Member of the Missouri Bar; Special Assistant to the Attorney General and Chief, Alien Property Unit, War Division, Department of Justice, May, 1942 to September, 1944.

¹ Norman v. Baltimore & Ohio R. R., 294 U. S. 240 (1935); Nortz v. United States, 294 U. S. 317 (1935); Perry v. United States, 294 U. S. 330 (1935).

² *Ibid.*

³ United States v. Darby, 312 U. S. 100 (1941). And see, as to federal control of instrumentalities of credit and exchange in interstate transactions; United States v. Ferges, 250 U. S. 199, 204 (1919). S.E.C. v. Torr, 15 F. Supp. 315, 320 (S. D. N. Y. 1936), reversed on other grounds, 87 F. (2d) 446 (C. C. A. 2d, 1937); Wright v. S.E.C., 112 F (2d) 89, 94 (C. C. A. 2d, 1940).

ative grants of the Constitution;⁴ finally, the war powers of Congress and the President⁵—one or more of these powers are adequate bases for the freezing control (leaving out for the moment questions of due process, etc.). Similarly there can be little doubt that the Alien Property Custodian's supervision and vesting, even if vesting includes confiscation, falls within an area over which federal power extends⁶—just what can be done under that power being another question. Moreover, the Freezing Control and the Custodian's authority both rest upon Executive Orders of the President and hence can find support in the war powers and extensive foreign affairs powers that pertain to that office.⁷

DELEGATION TO THE PRESIDENT

It is unnecessary to discuss at length constitutional questions concerning presidential exercise of improperly delegated legislative powers under the Trading with the Enemy Act. Even if (as the writer does not intend to imply) Sec. 5(b) of the Act, as it stood when the President first inaugurated the freezing control, could have been said to lack proper standards relative to declaration of emergencies or the designation of specific foreign countries or to lack both standards and statutory authority for Executive definition of terms like "national" (broadly defined in Executive Order 8389, as amended),^{7a} both the Joint Resolution of Congress of May 7, 1940,⁸ and the First War Powers Act⁹ expressly ratified the presidential orders and the departmental rulings and regulations thereunder. Not only did this Congressional action set at rest any question of unguided delegation as to any transaction thereafter arising¹⁰ but may have validated prior administrative actions,¹¹ as for as the Freezing Control is concerned.

As to the Custodian's powers, similar conclusions can be reached in favor of the delegated powers, although no administrative background existed, in this war, with reference to supervision and vesting before the 1940 and 1941 amendments of 5(b). For one thing, the same guiding principles approved by Congress for freezing controls would seem applicable. Also, the provision in 5(b) that vested property should be held used, etc., "in the interest and for the benefit of the United States" would seem to supply an adequate standard.^{11a} Moreover, the new "vesting" provision of

⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936).

⁵ *Hirabayashi v. United States*, 320 U. S. 81 (1943), also a "freezing" case in a sense: restricting movement of the person.

⁶ *Brown v. United States*, 8 Cranch 110 (U. S. 1814); *Miller v. United States*, 11 Wall. 268 (U. S. 1870); *Stoehr v. Wallace*, 255 U. S. 239 (1921); *United States v. Chemical Foundation, Inc.*, 5 F. (2d) 191 (C. C. A. 3d, 1925), modified 272 U. S. 1 (1926).

⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936); *Hirabayashi v. United States*, 320 U. S. 81 (1943); *United States v. Von Clemm*, 136 F. (2d) 968 (C. C. A. 2d, 1943).

^{7a} See *infra* p. 137.

⁸ 54 STAT. 179 (1940).

⁹ 55 STAT. 840 (1941) 50 U. S. C. APP. (1943 Supp.) §§616, 617.

¹⁰ *Hirabayashi v. United States*, 320 U. S. 81 (1943); *United States v. Von Clemm*, 136 F. (2d) 968 (C. C. A. 2d, 1943).

¹¹ *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297 (1937).

^{11a} Cf. *Curran v. Wallace*, 306 U. S. 1 (1939); *Mulford v. Smith*, 307 U. S. 38 (1939); *Nat. Broadcasting Co. v. United States*, 319 U. S. 190 (1943).

5(b) is no more lacking in standards than was the old (and still retained) "seizure" provision of Section 7(c), under which World War I seizures were upheld.^{11b}

Moreover, there is always the possibility that the above mentioned Executive Orders can stand on the President's war powers and his powers over foreign affairs¹² wholly aside from any question of delegation to him.

SUBSTANTIVE DUE PROCESS

Questions of spheres of federal power and of delegation aside, there is still the problem of due process. The *procedural* due process to which a person is entitled where factual determinations are sought to be established against him will be discussed later. The other facet of due process—*substantive* due process—raises the question of the reasonableness of the regulatory measures. In plain language the problem can be stated: Does the measure in question go too far? The far reaching nature of the controls is noticeable at several points: The broad definition of "national" of a foreign country, the wide category of transactions that are frozen and the possibly drastic meaning of "vesting" of the property of foreign nationals.

Freezing of the Property of a "National" of a Foreign Country

The concept of "national" of a foreign country (as distinguished from "enemy," "ally of enemy," etc., in the original text of the Trading with the Enemy Act), newly introduced by the Executive Orders under consideration, is broadly defined to include:

- (i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order.
- (ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined.
- (iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and
- (iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

Without pausing to consider the significance of certain other related provisions, such as who shall determine who is a "national," one readily sees that the foregoing general licenses issued by the Treasury and by the possibility of specific licensing in any particular case. Of course there is a question whether a citizen or friend can be regulated even to the extent of having to seek a license. The answer would seem

^{11b} *Stoehr v. Wallace*, 255 U. S. 239 (1921); *United States v. Chemical Foundation, Inc.*, 5 F. (2d) 191 (C. C. A. 3d, 1925), *modified* 272 U. S. 1 (1926).

¹² See cases cited *supra* footnote 7.

to depend, under accepted due process approach, on whether there is any rational basis for a reasonable belief in the need for the regulation as a means to achieve appropriate ends sought by the Control.^{12a} One obvious end is to prevent any transaction which might give aid, material or moral, to the enemy. This end would seem to justify, for instance, freezing regulations calculated to prevent the enemy from cashing in on foreign-owned American-held assets by sales to speculators discounting post-war values. Limitations of space make it impossible to discuss the validity of the freezing controls in the infinite number of situations that might be presented; by way of illustration, the above reasoning would clearly uphold the position, early taken by the Treasury Department in its General Ruling No. 2,¹³ that the freezing control prohibits, except under license, the transfer by banking institutions within the United States of stock certificates from or into the names of "nationals" of Norway or Denmark. Short of arbitrary or capricious action in administration, it is difficult to perceive violation of due process under the freezing regulations, whatever might be the case as to destruction or confiscation of property. Due process allows for a margin of error on the side of the conceived public welfare,¹⁴ particularly in wartime.¹⁵

It is significant that of the attacks in the courts upon the Freezing Control, two cases were voluntarily dismissed,¹⁶ the others have resulted favorably to the Government. One case upheld the conviction of an American citizen making unlicensed payment for diamonds imported from a blocked country.¹⁷ Another case¹⁸ absolved an employer of liability for breach of a contract of employment, both parties being "nationals"¹⁹ of a foreign country, where the contract had been terminated at the instance of the Treasury Department.²⁰ Two cases have denied an injunction to a

^{12a} ". . . regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis. . . ." Mr. Justice Stone, in *United States v. Carolene Products Co.*, 304 U. S. 144, 150 (1938). *A fortiori* it would seem, as to national defense measures. Moreover, the court, in passing upon legislation, is not called upon, as are the other branches of the government, "to determine what, in its judgement, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected." Mr. Justice Stone, in *South Carolina Hwy. Dept. v. Barnwell Bros.*, 303 U. S. 177, 190 (1938).

¹³ CODE FED. REGS. SUPP. (1940) 4381.

¹⁴ Cf. *Jacob Ruppert v. Caffey*, 251 U. S. 264 (1920), upholding, a provision of a statute that defined intoxicating liquor as including beverages that contained even one-half of one percent alcohol.

¹⁵ *Hirabayashi v. United States*, 320 U. S. 81 (1943).

¹⁶ *McLaughlin v. Morgenthau* (D. C. S. D. Cal.); *Aickelin v. General Aniline & Film Corp.* (S. Ct. N. J., Union County). Not reported.

¹⁷ *United States v. Von Clemm*, 136 F. (2d) 968 (C. C. A. 2d, 1943).

¹⁸ *Alexewicz v. General Aniline & Film Corp.*, 181 Misc. 181, 43 N. Y. S. (2d) 713 (Sup. Ct. Broome County, 1943).

¹⁹ The court, after observing that the employer was a "national" of a foreign country, as defined, said that the employee was also a "national," since as employee he was acting in behalf of a "national." This particular holding was not necessary to the decision and is questionable in that it ignores the possible effect of the limiting words "to the extent that" contained in paragraph (iv) of the definition of a "national." See *supra* p. 137.

²⁰ The court reasoned that the termination of this contract was a condition that the Treasury Department could impose on the continued operation of the employer's business. Despite certain broad language, the court did not probably mean to intimate that any condition could be imposed. Cf. *United States v. Appalachian Power Co.*, 311 U. S. 377 (1940); *United States v. Butler*, 297 U. S. 1 (1936); *Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583 (1926).

designated "national" seeking to prevent the defendant bank from interfering with his withdrawal of funds immobilized under the Freezing Control.²¹

Moreover, unconstitutionality of a regulative scheme is not to be determined by a demonstration that the statutory and administrative provisions are broad enough to permit, in some conceivable hypothetical situations, unconstitutional results. Rather, constitutionality is to be tested with respect to the particular application of the measure to the challenger.²²

Supervisory Powers

The statutory authority for the supervisory powers delegated to the Alien Property Custodian is precisely the same as that from which the Freezing Control stems.²³ Constitutional questions about these powers, consequently, would seem to turn upon the same considerations as in the case of the freezing power (except that the supervisory powers are hardly related to Congress's authority over currency). Indeed the *Alexewicz* case²⁴ upheld supervisory action taken by the Secretary of the Treasury (at a time when all powers under 5(b) were delegated to him) and later adopted by the Custodian. Like the freezing power, the Custodian's supervisory powers even as applied to non-enemies probably are not subject to the just compensation requirement of the Fifth Amendment for the reason that their exercise does not amount to a taking of property.

The Vesting Power

The vesting power is conferred by that part of 5(b)(1)(B) which immediately follows the provisions from which flow the Treasury's Freezing Control authority and the Custodian's supervisory powers. The pertinent language is as follows:

" . . . and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes. . . ."

At the threshold of any constitutional discussion lies the question of what is meant by "vest" as used in the statute. Even if it means the most extreme of measures, *i.e.*, confiscation without payment (now or ever), that probably does not, of itself, constitute a deprivation of property without due process of law so far as enemies are concerned. At least that is undoubtedly the tenor of an unbroken line of Supreme

²¹ *Hartmann v. Fed. Res. Bank of Phil.*, 55 F. Supp. 801 (E. D. Pa. 1944); *Carbone Corp. v. First National Bank*, 130 N. J. Eq. 111, 21 A. (2d) 366 (1941).

²² Authority need hardly be cited for this familiar proposition. One recent application of this is to be found in the OPA case, *Yakus v. United States*, 321 U. S. 414 (1944); an interesting application is to be found in *Hendrick v. Maryland*, 235 U. S. 610 (1915).

²³ Section 5(b)(1)(B) of the Trading with the Enemy Act as amended, 50 U. S. C. APP. (Supp. III, 1941-1943) §616.

²⁴ *Supra* footnote 18.

Court decisions,²⁵ although strenuous efforts have been made to show that the cases do not necessarily so hold.²⁶ From what has already been said, in the discussion of the Freezing Control, the vesting provision of 5(b) would not be unconstitutional *in toto*, even if it were held unconstitutional as to "nationals" that are non-enemies. Certainly an enemy could not complain because the statute might be invalid as to a "non-enemy."²⁷

Still pursuing this analysis, if 5(b) had provided that the property of a "national" of a foreign country should be confiscated, seized, used, sequestered, disposed of or held in trust, it would not be unconstitutional *in toto*. On the contrary, probably all of the authorized treatments would be constitutional as to some nationals, and some would be constitutional as to any national. And it might be argued that the term "vest" is broadly used in the statute so as to embrace these various ways of treating property of "nationals."

However, no different result would follow if "vesting" be construed, as the writer thinks it must, to connote a *transfer of title* rather than as permitting the above extreme flexibility of control.^{27a} The legal consequences that flow from a taking of title by the United States in the exercise of its war powers are not necessarily rigid. As to some classes of "nationals" such a taking might (and constitutionally) mean confiscation without payment; as to others, it might constitutionally require a different consequence. It might, for instance, require the payment of just compensation. The point is, the validity of the title taken (or the validity of a subsequent sale by the Alien Property Custodian) is to be distinguished from the property owner's rights, if any, against the United States. The question of title may be concluded by the vesting, irrespective of what such other rights may be. In other words, it does not follow either that all takings must be confiscatory or that no takings can be confiscatory.

This position is at variance with the analysis formulated by John Foster Dulles,²⁸ of the New York Bar, who concludes that since it could not have been the intent of

²⁵ *Cummings v. Deutsche Bank und Disconto Gesellschaft*, 300 U. S. 115 (1937); *Henkels v. Sutherland*, 271 U. S. 298 (1926); *Miller v. United States*, 11 Wall. 268 (U. S. 1870); *Brown v. United States*, 8 Cranch. 110 (U. S. 1814); *United States v. Chemical Foundation, Inc.*, 5 F. (2d) 191 (C. C. A. 3d, 1925), *modified*, 272 U. S. 1 (1926).

²⁶ See Littauer, *Confiscation of the Property of Technical Enemies* (1943) 52 YALE L. J. 739, 757-8, where even the *Cummings* case (see preceding footnote) is apparently analyzed to mean no more than that alien enemies can be divested of every right so far as may be necessary "for the purpose of retaining part of the enemy property as security for American claims." Small comfort would seem derivable from this qualification in this war.

²⁷ Cf. cases cited *supra* footnote 22.

^{27a} The term "vest" ordinarily connotes a transfer of title. This usual meaning is buttressed here by legislative history which plainly shows that the powers conferred on the President to use, administer, liquidate, sell or otherwise deal with vested property "in the interest of and for the benefit of the United States" were not granted for conservatory purposes. Mere conservatory powers might not serve the interests of the United States, and the Congressional debates show Congress was intent not upon safe-guarding the interests of the persons whose property was to be vested, but the interests of the United States in using such property. They show Congress intended that the property might be completely expended if the President or his delegate deemed that would serve the war effort of the country. 87 CONG. REC. (Part 9, 77th Cong., 1st Sess., Dec. 16, 1941, House), pp. 9856, 9861, 9862, 9866.

²⁸ Dulles, *The Vesting Powers of the Alien Property Custodian* (1943) 28 CORN. L. Q. 245.

Congress to make 5(b) either a condemnation statute or a confiscation statute (because it applies in war and peace, to enemy and non-enemy) it must be merely a regulatory measure. This would make "vesting" a sort of conservation receivership or trusteeship, although coupled, in view of the specific language of 5(b), with power to hold, use, administer, liquidate or sell, just as often is the case with other holders of non-beneficial title. One difficulty with the above "regulation" analysis is that it assumes that vesting must mean only one of three possibilities: condemnation, confiscation or regulation. The writer, on the other hand, conceives of "vesting" as a generic term that can include them all.

Another difficulty with the theory that the vesting power is simply a facet of a purely regulatory statute is that the legislative history of Title III of the First War Powers Act, 1941, considered as a whole, hardly supports it. If there is anything that is plain from the legislative history, it is that Congress, 11 days after Pearl Harbor, intended to authorize the use of every power our government constitutionally possessed to wage total war, economic as well as military.²⁹ Moreover, the Supreme Court has construed the old Trading with the Enemy Act as a confiscatory statute, stemming from the constitutional provision empowering Congress "to declare war . . . and make rules concerning captures on land and water."³⁰

In view of the situation that confronted Congress when it enacted the First War Powers Act, and in view of the Congressional debates on the measure, it seems clear that Congress did not intend to withhold from the President a power given him during the last war and consistently held to be constitutional,³¹ namely, the power to confiscate the property of enemies and of those aiding the enemy's cause.

The case of alien friends, it is true, presents a different situation. It must be presumed that Congress intended to act constitutionally when it authorized the vesting of their property. The *Russian Volunteer Fleet* case holds that taking the property of alien friends without compensation would be unconstitutional.³² However, the court that decided that case did not have before it the situation that confronted this nation when the First War Powers Act of 1941 was enacted. One consideration militating against construing 5(b) as in part a condemnation statute is that the assurance of eventual payment to alien friends might permit the Axis invaders, by techniques of duress, to effectuate sale of American-held assets during the war in return for crucially needed foreign exchange, thus enabling the enemy to cash in on assets of coerced persons in occupied nations. Consequently it is possible that due process, which does not require the *best* solution of a difficulty,³³ would not foreclose seizure

²⁹ (1941) SEN. REP. No. 911, 77th Cong., 1st Sess., p. 2. See (1941) H. R. Rep. No. 1507, 77th Cong., 1st Sess. (1941) for a substantially similar statement on the part of the House Committee. See also 87 CONG. REC., 9801, 9828, 9855 to 9868, 9893 to 9895, 9946, 9947.

³⁰ *Stoehr v. Wallace*, 255 U. S. 239, 241 (1921).

³¹ See cases cited *supra* footnote 25.

³² *Russian Volunteer Fleet v. United States*, 282 U. S. 481 (1931). In the case of nationals of some countries it would also be a violation of our treaties.

³³ Cf. *South Carolina Hwy. Dept. v. Barnwell Bros.*, 303 U. S. 177 (1938).

without a right to compensation if Congress eventually took some reasonable action for the protection of friendly aliens.³⁴

In any event, even if citizens and alien friends must, at the least, be afforded a right to just compensation for the "vesting" of their property, it does not follow that merely regulatory powers were conferred upon the Custodian. There is no inherent reason why Section 5(b) cannot operate in part as a condemnation act. If, in order to avoid unconstitutionality implication be raised³⁵ that compensation is intended with respect to the property of alien friends, this is sufficient, despite the silence of the statute, to maintain suit under the Tucker Act³⁷ against the United States.³⁸ The same argument would hold with regard to other persons who are "nationals" but not enemies, including American citizens whose property was vested by mistake where a return does not make them whole (although it might be argued that mistaken vestings are tortious actions for which the Tucker Act provides no remedy). The argument does not hold for enemies; there is no reason to believe that 11 days after Pearl Harbor, Congress was squeamish about taking enemy property or that it intended that the American taxpayer bear the burden of compensation.

The effort to construe 5(b) as not authorizing confiscation, even of enemy property, seems to stem from the notion that confiscation is abhorrent to present day international law and should be unconstitutional.³⁹ This view has never been accepted by the courts in this country⁴⁰ and the concepts of Grotius and Rousseau do not fit present-day war. War has again become total almost in the same degree as when savage tribes annihilated and enslaved one another. The theory that war is exclusively the concern of the Prince and his professional soldiers and that the citizens of the state are to be isolated from its rigors, is as inapplicable to Japan and Germany as it was to the horde of Genghis Khan. The "regulation" theory would create the great practical disadvantage, as Dulles points out, that the property would immediately revert upon the expiration of the present emergency (unless, of course, Congress did something about it in the meantime).

PROCEDURAL DUE PROCESS

Besides the question of the degree of property invasion that can be visited upon enemies or other "nationals," there are certain constitutional requirements embodied in the concept of "due process" regarding the procedure for establishing

³⁴ For example, due process might be satisfied by eventual payment of compensation to the government of the national in question, leaving that government to settle the score with the claimant.

³⁵ Cf. *Becker Steel Co. v. Cummings*, 296 U. S. 74 (1935); *Yearsley v. W. A. Ross Construction Co.*, 309 U. S. 18 (1940); *Hamburg American Co. v. United States*, 277 U. S. 138 (1928); *Portsmouth Harbor L. & H. Co. v. United States*, 260 U. S. 327 (1922); *Jacobs v. United States*, 290 U. S. 13 (1933).

³⁷ 36 STAT. 1136 (1911), 28 U. S. C. (1940 ed.) §250.

³⁸ *Jacobs v. United States*, *supra* footnote 36; *Phelps v. United States*, 274 U. S. 341 (1927); *United States v. Cress*, 243 U. S. 316 (1917).

³⁹ Dulles, *supra* footnote 28; Turlington, *Vesting Orders Under the First War Powers Act, 1941* (1942) 36 AM. J. INT. L. 460; BENTWICH, *THE LAW OF PRIVATE PROPERTY IN WAR* (1906); BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1915).

⁴⁰ Cases cited *supra* footnote 25.

the fact that a person is an enemy or other "national." If the crucial fact can be tried in court, procedural due process difficulties largely disappear, assuming, of course, that proper procedure is otherwise observed in the court action. This is not to say that the constitutional difficulties are otherwise insuperable, to be discussed later.

This brings up an interesting problem as to 5(b) vestings. In December, 1941, after Pearl Harbor, by Title III of the First War Powers Act, Congress adopted a new Section 5(b) to go into the old Trading with the Enemy Act. Conceivably, this new Section 5(b) could be viewed as if it were a separate autonomous statute all by itself with its own sanctions, etc. On the other hand, it could be viewed as simply another section tying in with and to be synthesized with the rest of the Act. The significance is this: The Act still retains old Section 9(a); by that section any person not an enemy or ally of enemy (old World War I words of art) claiming an interest in property seized by "the Alien Property Custodian" may institute suit in the federal courts to establish his interest and obtain appropriate relief. If that remedy extends to 5(b) vestings, the day in court that 9(a) gives obviates a major procedural due process difficulty. The trouble is that the literal language of 9(a) would permit anybody not an enemy or ally of an enemy to step into court and recover property even if he is a "national," thereby nullifying the vesting that 5(b) expressly provides for such a "national." One way, however, to avoid this and still treat 9(a) as affording a judicial remedy for 5(b) vestings is to say that 9(a) must *now* be construed in the light of the new 5(b) and consequently requires the claimant to establish, in order to succeed in a 9(a) court action, that he is not even a 5(b) "national." Indeed this was Judge Bondy's approach in the *Draeger* case,⁴¹ thus synthesizing 9(a) with 5(b).

The synthesis itself, however, raises certain due process problems as to those nationals whose property is not constitutionally subject to confiscation. If 9(a) applies it is the plaintiff's only remedy.⁴² What will happen if a 9(a) plaintiff concedes that he is a 5(b) "national" but convinces the court that he is not an enemy whose property is forfeit? Has he no redress, such as a claim under the Tucker Act for just compensation? If not, is 5(b) constitutional in its application to him?

It is no answer to say that to date the Custodian has exercised his vesting power only over the property of true enemies or persons found to have been acting for them. For example, the property of many persons has been vested on the ground that they have been "acting or purporting to act directly or indirectly for the benefit

⁴¹ *Draeger Shipping Co. v. Crowley*, 49 F. Supp. 215 (S. D. N. Y. 1943). The same result is reached in *Kenji Iki v. Crowley* (not reported) and in *Hayden et al. v. Crowley* (not reported). In *Duisberg v. Crowley*, 54 F. Supp. 365 (D. N. J. 1944) the court held it unnecessary to pass upon the question whether 5(b) has amended 9(a) because it construed the complaint, which alleged that plaintiff was a resident American citizen, was the "sole and absolute" owner of the property and that it was taken from him without "warrant of law," as in effect denying that plaintiff is a national as defined.

⁴² *Stern v. Newton*, 39 N. Y. S. (2d) 593 (1943); *The Brennero*, 53 F. Supp. 441 (1944); *J. C. Pflueger v. United States*, 121 F. (2d) 732 (1941), *cert. denied* 314 U. S. 617 (1941); *Sigg-Fehr v. White*, 285 Fed. 949 (App. D. C. 1923).

or on behalf of a national" of a designated enemy country. Although the language of the *Miller* case is broad,⁴³ it is not certain that every person who is found to have been acting for the benefit or on behalf of a foreign national to an extent that warranted the vesting of his property will be judicially held to be an enemy subject to forfeiture.

Again, the definition of "national" (*supra* page 137) includes a person "who there is reasonable cause to believe is a 'national' as herein defined." Although in wartime there is great leeway in preventive measures based on reasonable belief,⁴⁴ it may be doubted that an American citizen's property can be confiscated on that basis.⁴⁵

The questions above posed lead us to reconsider Judge Bondy's analysis. The difficulty with that analysis is that little support can be found for it in the history of 5(b) or in its language or in the legislative debates on Title III of the First War Powers Act, 1941.

It must be remembered that the vesting power, conferred by the 1941 Amendment, was added to the pre-existing powers to regulate and control coin, bullion, and currency, transactions in foreign exchange, etc. Neither at the inception of these powers in 1917 nor at their revival in 1933, nor upon their expansion at the outbreak of World War II did Congress give any indication that these powers were subject to review by 9(a) proceedings. Despite the litigation growing out of the 1933 and 1934 amendments⁴⁶ (the Emergency Banking Act of March 9, 1933 and the Gold Reserve Act of January 31, 1934) it occurred to no one that a 9(a) remedy was available.

An examination of the original act and of the history of executive action under it confirms the thesis that a 9(a) remedy is available *only as against actions taken under Section 7(c)*. Original Section 6 authorized the appointment of "an Alien Property Custodian" who was empowered "to receive all money and property in the United States due or belonging to an enemy or ally of enemy." Section 7(c) authorized the Custodian to seize such property. Section 9(a) was a procedural complement of 7(c), providing a remedy for persons "not an enemy or ally of enemy" who claimed title to or an interest in money or property seized by the Alien Property Custodian and held by him or by the Treasurer of the United States. The terms "enemy" and "ally of enemy" were words of art defined in Section 2. Furthermore, Sections 6, 12, 24 and others of the 1917 Act provided a complete code

⁴³ *Miller v. United States*, 11 Wall. 268 (U. S. 1870). However, the case involved an active resident of enemy territory using the seized property in active raid of the enemy.

⁴⁴ *Hirabayashi v. United States*, 320 U. S. 1 (1943).

⁴⁵ The aggrieved person in the *Hirabayashi* case, preceding footnote, was a citizen, but this was not a confiscation case.

⁴⁶ See e.g., cases cited *supra* footnote 1; *Nortz v. United States*, 294 U. S. 317 (1935); *Uebersee Finanz-Korporation A. G. v. Rosen*, 83 F. (2d) 225 (C. C. A. 2d 1936); *Blanchard v. United States*, 86 Ct. Cl. 585 (1938); *Smith v. United States*, 88 Ct. Cl. 169 (1938); *Alaska-Juneau Gold Mining Co. v. United States*, 94 Ct. Cl. 15 (1941); *United States v. Campbell*, 5 F. Supp. 156 (S. D. N. Y. 1933); *British-American Tobacco Co. Ltd. v. Federal Reserve Bank of New York*, 104 F. (2d) 652; 105 F. (2d) 935 (C. C. A. 2d, 1939).

for the administration of property taken over by the Alien Property Custodian, without coming anywhere near 5(b).

In the post-war administration of World War I enemy property, the office of Alien Property Custodian envisaged in Section 6 was eventually abolished and its functions transferred to the Department of Justice by Executive Order 6694, May 1, 1934.⁴⁷ At the time of the enactment of the First War Powers Act of 1941, the old Section 6 Alien Property Custodian functions were being exercised by the Attorney General. After the enactment of the First War Powers Act in 1941, the President first delegated all 5(b) powers to the Secretary of the Treasury,⁴⁸ who shortly thereafter vested, for example, substantially all the stock of General Aniline & Film Corporation, a Delaware corporation, on the ground that the shares were held by "nationals of a foreign country." It was not until March 11, 1942, that the President established, by Executive Order 9095, in the office for Emergency Management of the President, "the office of Alien Property Custodian," at the head of which there was to be "*an Alien Property Custodian.*" In April, 1942, the Department of Justice functions under the 1917 Act were transferred to the new Alien Property Custodian. This transfer, however, was only for the duration of the war and six months thereafter. On July 6, 1942, a further Executive Order re-distributed and re-delegated the power of the President under amended 5(b) to both the Alien Property Custodian and the Secretary of the Treasury, prescribing the jurisdiction of each.

Now, it must be emphasized that 9(a) authorizes actions only against the Alien Property Custodian or the Treasurer, not against other officers.⁴⁹ It would seem clear that there is no jurisdiction under 9(a) over a suit against the Secretary of the Treasury; the same is true of the new World War II "Alien Property Custodian," who merely happens to have the same name as the occupant of the old World War I office. No "Alien Property Custodian" is referred to in 5(b) and it is sheer coincidence that the President used that term to designate the new delegate of the President's authority. That authority could have been, and at various times has been, delegated to other officers.⁵⁰

The committee reports relative to Title III of the First War Powers Act of 1941⁵¹ and the debates on the floor disclosed an intent to confer upon the President, and to include in 5(b), authority for a complete and autonomous system of foreign property control. For one thing, there was doubt as to whether the old Act was still vital;⁵² it was felt that an entirely new measure was desirable. The legislative

⁴⁷ Further powers under the Act were delegated to the Department of Justice by EXEC. ORDER No. 8136, May 15, 1939, 4 FED. REG. 2044 (1939). ⁴⁸ 7 FED. REG. 1409 (1942).

⁴⁹ Cf. *Von Bruning v. Sutherland*, 29 F. (2d) 631 (App. D. C. 1928).

⁵⁰ Including, besides the officers already mentioned, the Secretary of Agriculture, the Farm Security Administrator, and the Regional Director of the Farm Security Administration for Region IX; 7 FED. REG. 2713, 2715, 2747 (April 9 and 10, 1942).

⁵¹ See H. R. REP. No. 1507, 77th Cong., 1st Sess. (1941) 2-3; SEN. REP. No. 911, 77th Cong., 1st Sess. (1941) 2.

⁵² On December 11, 1941, Mr. Summers introduced H. R. 6206 which would have reenacted all of the provisions of the original Trading with the Enemy Act "which have for any reason ceased to be in effect." Senator Reed pointed out: "The Trading with the Enemy Act is today of doubtful validity; no one knows definitely whether it was repealed by the Knox Resolution." 77 CONG. REC. 60 (1933).

history of H. R. 6233, eventually the First War Powers Act of 1941, indicates that new 5(b) was to be self-sufficient and unfettered by the rest of the old Act, much of new 5(b) covering matters already embodied in other sections of the old Act.⁵³ Moreover, 5(b)'s provisions conferring broad powers to investigate, to require the keeping of books and records and the furnishing of information, to request the production of and if necessary to order the seizure of books and records, to prescribe definitions, rules, and regulations—all of these show an intent that 5(b) should be self-sufficient.

It is submitted, in view of all these reasons, that 9(a) is not an essential procedural complement of 5(b).

Constitutionality of an Autonomous 5(b)

One reason that Judge Bondy was led to synthesize 9(a) and 5(b) in the *Draeger* case⁵⁴ was that he seemed to have doubts whether an autonomous 5(b), silent as to remedies available to a person administratively found to be a "national," would otherwise be constitutional.^{54*} It is submitted that these doubts are not well-founded. For one thing, 5(b) is not entirely silent; it contains general language which would seem adequate to authorize the President or his delegate to set up flexible remedial machinery. The section provides that the President may vest property "when as and upon the terms directed by him," and further provides that "on such terms and conditions as the President may prescribe, such interests or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States, and such designated agency or person may perform all acts incident to the accomplishment or furtherance of such purposes. . . ." As a matter of fact, both the Secretary of the Treasury⁵⁵ and the Alien Property Custodian⁵⁶ have prescribed rather full regulations setting forth a complete administrative procedure for persons having claims to property vested or controlled pursuant to 5(b). Although 5(b) does not spell out the administrative procedures set up by the Secretary of the Treasury and by the Alien Property Custodian, this is not fatal, for the language of the statute would seem broad enough to provide for such procedures.⁵⁷

Furthermore, even if the Secretary of the Treasury or Custodian lacked authority to provide administrative remedies, the fact remains that they did so and that

⁵³ Thus, 5(b) has an acquittance provision like that in old 7(e); a penalty provision like that in old 16; another provision almost bodily the substance of old 18; power to delegate is found in 5(b) and also elsewhere.

⁵⁴ *Supra* footnote 41.

^{54*} In this respect Judge Bondy's position is fortified by a statement in the opinion rendered in *Standard Oil Company v. Markham*, 57 F. Supp. 332 (S. D. N. Y. 1944). In the *Standard Oil* case the Government did not raise the question whether 9(a) is available for the return of property vested under 5(b). The court consequently was proceeding on the assumption that 9(a) and 7(e) which makes 9(a) the exclusive remedy, were applicable. Following the World War I cases, the court said: "The existence of a right upon the part of claimant to regain his wrongfully seized property, and to do so completely, is essential to the constitutionality of the Act." This is not to say, however, that the right necessarily could not be secured by an administrative as distinguished from a purely judicial remedy.

⁵⁵ 7 FED. REG. 1021 (1942).

⁵⁶ 7 FED. REG. 2290 (1942) 8 FED. REG. 16709 (1943).

⁵⁷ Cf. *Goldsmith v. United States Board of Tax App.*, 270 U. S. 117 (1926), and the concurring opinion of Mr. Justice Stone in *United States v. Illinois Central Ry. Co.*, 291 U. S. 457, 464 (1934)

the remedies are being widely utilized. True, the *Goldman* case⁵⁸ indicates that a wholly unauthorized administrative procedure need not be exhausted before recourse may be had to the courts, but in that case, the court found not even an *implied* authorization and, besides, the agency involved had not set up any general regulation for the procedure in question. Indeed, the administrative procedure that has been set up by the Secretary of the Treasury under 5(b) (and which is very similar to that set up by the Custodian) has already been recognized and upheld in two cases to the extent of invoking the doctrine that a claimant must exhaust those administrative remedies before resorting to the courts.⁵⁹ In any event, it would seem questionable that the constitutionality of a statute could be successfully challenged on the ground that the plaintiff had no adequate remedy if in fact he were provided with one, though gratuitously. It may be that, as the Supreme Court has recently indicated in another connection, when the issue is one of due process of law, it is the end result that counts.⁶⁰

Neither is it an essential condition of the constitutionality of a statute that Congress make detailed provision for judicial review. The courts have always found ways to review administrative determinations even in the absence of directions from Congress.⁶¹ If due process prevents, on the substantive side, confiscation of the property of some "nationals" in line with the previous discussion, the way seems open for the determination of claims by procedures that comply with procedural due process requirements.

PENDING LEGISLATION

There remains to be considered the effect the enactment of pending legislation would have on the constitutionality of Section 5(b). A bill for the amendment of Title III of the First War Powers Act, 1941, sponsored by the Office of the Alien Property Custodian and by the Department of Justice, was introduced in the Senate and the House on May 19, 1944. The Senate Bill was S. 1940 and the House Bill H. R. 4840. The bills were referred to the Committee on the Judiciary of the Senate and of the House, respectively.

This proposed amendment would in large measure adopt Judge Bondy's synthesis, but at the same time it would obviate the difficulties, referred to above, which would result from acceptance of the synthesis under existing legislation. The bills provide that any person claiming an interest in vested property may, after filing a claim with the Custodian, institute a suit in equity in the appropriate United States

⁵⁸ *Goldman v. American Dealers Service*, 135 F. (2d) 398 (C. C. A. 2d, 1943).

⁵⁹ Cases cited *supra* footnote 21.

⁶⁰ *Fed. Power Comm. v. Hope Nat. Gas Co.*, 320 U. S. 591 (1944).

⁶¹ *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902) (postal fraud order); *Ng Fung Ho v. White*, 259 U. S. 276 (1922) (alien deportation); *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316 (1903) (determination by the Land Office of the extent of a land grant); *Lloyd Sabaudo Societa Anonima v. Elting*, 287 U. S. 329 (1932) (imposition of fine by Secretary of Labor for bringing diseased aliens into the United States); SEN. DOC. No. 8, 77th Cong., 1st Sess., REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE ("Administrative Procedure in Government Agencies," 1941) 81. See also this Committee's MONOGRAPH No. 13, "Post Office Department," SEN. DOC. No. 186, 76th Cong., 3d Sess., Part 12, at 7, 38; also, MONOGRAPH No. 15, "War Department," at 4; MONOGRAPH No. 20, "Department of the Interior," at 46.

District Court for the recovery of such interest (or the proceeds thereof if it has been sold prior to the institution of the action), and further provide that the claimant can prevail in such an action only if the court adjudicates that he is not "a foreign country or national thereof." The bills also make plain the right of a foreign national who is not an enemy (presumably this would include United States citizens who were "determined" by the Secretary of the Treasury to be foreign nationals) to sue for just compensation under the Tucker Act.⁶² Like the 1917 Trading with the Enemy Act, the amendment would provide that the relief and remedy provided therein are exclusive. The bills, if enacted, would seem to lay at rest any doubts as to the constitutionality of Section 5(b) insofar as it authorizes the vesting of property of foreign "nationals." Citizens who can establish that they are not foreign nationals would be given a remedy,⁶³ already established as adequate.⁶⁴ Foreign "nationals" who are entitled to the protection of the Fifth Amendment (including certain citizens as well as friendly aliens) would be given a remedy for just compensation. These bills, which do not deal with ultimate disposition of enemy property and claims, would create no remedies for enemies.

CONCLUSION

Freezing Control and the supervisory authority of the Custodian seem to rest firmly upon a compendium of the powers of the national government to wage war and to regulate currency, commerce and the external relations of the nation.

Amendments to the statute have eliminated problems of unconstitutional delegation of legislative powers.

The vesting power, like the freezing and supervisory powers, would seem to be unfettered by the restrictive provisions of the 1917 Trading with the Enemy Act, including those provisions of Section 9(a) which permit any person not an "enemy" or "ally of enemy" to recover property conveyed to or seized by the Section 6 Alien Property Custodian.

Considered as autonomous, the vesting provisions of Section 5(b) are not unconstitutional as failing to spell out an administrative or judicial remedy. The Act is an enabling grant of power and its broad terms authorize the establishment of an administrative procedure, which in fact has been provided and which the courts will review even in the absence of directions from Congress. This is an adequate remedy for non-foreign nationals whose property has been vested by mistake. The law will imply a promise to pay just compensation in the case of alien friends and other non-enemies whose property 5(b) authorizes the President to vest.

Pending legislation would, if enacted, set at rest any doubts as to the constitutionality of the vesting power conferred by 5(b).

⁶² Cf. *Russian Volunteer Fleet v. United States*, 282 U. S. 481 (1931).

⁶³ The bills contain elaborate provisions for the treatment of debt claims which are not discussed herein since there is no constitutional requirement that any relief be accorded to creditors of the former enemy owners of seized property. See *Kogler v. Miller*, 288 Fed. 806 (C. C. A. 3d, 1923); and cf. *Miller v. Robertson*, 266 U. S. 243, 248 (1924); *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491 (1923).

⁶⁴ *Stoehr v. Wallace*, 255 U. S. 239 (1921); *Kahn v. Garvan*, 263 Fed. 909 (S. D. N. Y. 1920).