

Vesting Powers of the Alien Property Custodian

John Foster Dulles

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

John Foster Dulles, *Vesting Powers of the Alien Property Custodian*, 28 Cornell L. Rev. 245 (1943)
Available at: <http://scholarship.law.cornell.edu/clr/vol28/iss3/6>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

THE VESTING POWERS OF THE ALIEN PROPERTY CUSTODIAN†

JOHN FOSTER DULLES

1. INTRODUCTION

The present office of Alien Property Custodian has been established by the President¹ pursuant to the authority of the Trading with the Enemy Act as amended,² and the Custodian derives his power and authority from that Act and delegations by the President thereunder.

The Act itself is a composite of enactments made at varying times and for varying purposes. Any adequate approach to the construction of its present provisions requires some review of this history.

The original Act³ was adopted on October 6, 1917, for the purposes of the First World War. It had two main characteristics: First, regulation to prevent trading with and helping the enemy; and second, sequestration of enemy-owned property. Section 2 of the Act contains definitions and defines an "enemy" to include not only persons of enemy nationality, but persons resident within territory occupied by the military forces of any nation with which the United States is at war. Sections 3, 4, and 5 subject to Presidential ordering and licensing transactions in which an enemy might be involved and Section 5 (b), of which we shall have much more to say hereafter, at that time dealt with the regulation of "any transactions in foreign exchange . . . and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country, whether enemy, ally of enemy, or otherwise, or between residents of one or more foreign countries, or by any person within the United States."

Section 6 of the Act then went on to authorize the appointment of an Alien Property Custodian and Section 7 provided for the transfer to such Alien Property Custodian of money or other property "which the President after investigation shall determine" is owing or belongs to an "enemy or ally of enemy." Section 9 permitted persons "not an enemy or ally of enemy" to reclaim their property from the Custodian. Section 12 defined the powers of the Custodian and required that property delivered to him "shall be safely

†A lecture delivered at the house of the Association of the Bar of the City of New York, April 27, 1943.

¹Exec. Order No. 9095, March 11, 1942, 7 FED. REG. 1971 (1942).

²50 U. S. C. A. APPENDIX § 5 (Supp. 1942).

³40 STAT. 411 (1917).

held and administered," and he was "vested with all the powers of a common law trustee." Section 12 further provided that "after the end of the war" the claims of an enemy to property held by the Alien Property Custodian "shall be settled as Congress shall direct."

Practical operation under the original Act quickly showed the need of some amendment and a number of amendments were made in 1918.⁴ Of these, the most important for our purposes was the amendment of Section 12 to enlarge considerably the powers of the Custodian beyond that of "common law trustee" and also to permit under certain exceptional circumstances his disposition of property other than under conditions calculated to realize the maximum going value therefor.⁵

In the decade following the end of the war (1920 to 1930) there were some ten amendments to the Act principally involving an exercise by Congress of its reserved power "after the end of the war" to deal with claims.⁶

Then, during the domestic banking and financial crisis of 1933, Section 5(b) was invoked by the President in aid of his policies of monetary control⁷ and, on March 9, 1933, that Section was amended to make clear the continuing effectiveness of that Section not merely in "time of war," but also "during any other period of national emergency," and so as to make its regulatory powers more appropriate to distinctly domestic transactions.⁸

The next significant amendment occurred during the Second World War, while we were still non-belligerent. On May 7, 1940, Section 5 (b) was further amended to re-emphasize its international, rather than domestic, operation. It extended the presidential controls over "any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof . . . has any interest."⁹ The purpose was to offset the control which Germany through the occupation of the Netherlands and Belgium might exercise over financial instruments in the United States owned by such invaded peoples.

The latest amendment of the Trading with the Enemy Act, that of December 18, 1941, immediately followed our formal entry into the Second World War. Section 5 (b) was then amended to strengthen the President's existing regulatory power and to add the sweeping power to "vest" the property of any foreign country or national thereof.¹⁰

⁴40 STAT. 966 (1918); 40 STAT. 1020 (1918); 40 STAT. 460 (1918).

⁵40 STAT. 460 (1918).

⁶41 STAT. 35 (1919); 41 STAT. 977 (1920); 41 STAT. 1147 (1921); 42 STAT. 351 (1921); 42 STAT. 1065 (1922); 42 STAT. 1511 (1923); 44 STAT. 406 (1926); 45 STAT. 254 (1928).

⁷Proclamation No. 2039, March 6, 1933; Proclamation No. 2070, March 9, 1933, both reprinted after 12 U. S. C. A. § 95 (1936).

⁸48 STAT. 1 (1933).

⁹54 STAT. 170 (1940).

¹⁰55 STAT. 839 (1941), 50 U. S. C. APPENDIX § 5 (b) (1) (Supp. 1941).

The Act as it now stands on the statute books is thus a patchwork. The original Act has been amended no less than twenty times, over a twenty-five year cycle of belligerency, post-war adjustment, peace, domestic emergency, neutrality, and belligerency. At no time have new amendments been coupled with repealers or revisions designed to clear away past provisions which, it might have been thought, had become obsolete. Thereby has been created for the Bench and Bar a task of statutory interpretation and reconciliation which is one of extreme difficulty. That Congress is aware of this difficulty appears from the Report of December 15, 1941, of the Judiciary Committee of the House of Representatives dealing with the then pending amendment of Section 5(b). The Report said, with reference to the Trading with the Enemy Act: "Some sections of that Act are still in effect. Some sections have terminated, and there is doubt as to the effectiveness of other sections."¹¹

II. THE VESTING SECTIONS—7(c) AND 5(b)

The Act now contains two separate sections dealing with "vesting" or "seizure." These two sections are Section 7(c) which, as we have seen, is part of the First World War legislation, and Section 5(b), as most recently amended with relation to the Second World War.

Section 7(c) permits the seizure by the Custodian of "any money or other property including patents" which, after investigation, are found to be owned by an "enemy," a word which, as we have noted, is defined in Section 2 to include any person "resident within the territory (including that occupied by the military or naval forces) of any nation with which the United States is at war."

Section 5(b), as now amended, permits the "vesting" in such agency as the President may designate, of "any property in which any foreign country or a national thereof has any interest." The Custodian is presently the agency designated by the President in whom business property, patents, *etc.*, are to vest. To the Secretary of the Treasury have been delegated the President's 5(b) powers to vest money and securities although, if the Secretary vests them, they are held by the Custodian for his account.¹²

A possible question exists as to whether Section 7(c), which we have noted was adopted in relation to the First World War, is still operative. It is arguable that this Section, although never expressly repealed, may have either lapsed or been repealed, by implication, by the recent amendment of Sec-

¹¹H. R. REP. No. 1507, 77th Cong., 1st Sess., Part III, 2.

¹²Exec. Order No. 9193, July 7, 1942, 11 U. S. L. WEEK 2025 (1942).

tion 5(b), which might be deemed to be a new, comprehensive, and exclusive method of dealing with all alien (including "enemy") property.

We doubt that Section 7(c) would be held to have lapsed or been repealed by implication. The many amendments of the Act by Congress since the close of the First World War suggest that Congress has considered the Act as a whole to be operative and while certain sections thereof may have "terminated," in the sense that certain specific rights to return of property only apply to property theretofore seized, and thus do not have present practical significance, this is quite a different thing from saying that these or any other sections have ceased to have the status of law. Our courts are very loath to assume a repealer by implication, particularly when, if repeal had been intended, Congress easily could, and probably would, have done this expressly, the subject matter being clearly before it.^{12a}

A. Section 7(c)—Powers

We turn now to consider the powers and duties of the Custodian with respect to property vested by him under 5(b) or which might be seized by him under 7(c). We first consider the matter in relation to 7(c) which is historically the earlier enactment. This Section, as we have noted, is a First World War section. There are many decisions, including several by the United States Supreme Court, dealing with the title and powers of the Custodian with respect to property seized by him under this Section. While the language of the opinions in these cases cannot in all respects be satisfactorily reconciled, it seems to be reasonably clear that the Custodian was looked upon essentially as a conservator. His original powers were those of a common law trustee. These powers proved inadequate and there was added to them, by amendment of Section 12, the power to sell and exercise otherwise powers of ownership "in like manner as though he were the absolute owner thereof." Subject, however, to an exception to which we shall allude, the Custodian appears to have been under the duty to seek to conserve the value of seized property and in the event of sale was obligated to realize the highest possible value thereof through "public sale to the highest bidder." Section 12 further provides that:

"After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct. . . ."

In *Woodson v. Deutsche, etc., Vormals*,¹³ the United States Supreme Court, after referring to this quoted portion of Section 12, said:

^{12a}The Supreme Court seems to assume the Act to be operative as a whole. See *Ex parte Kawato*, 317 U. S. 69, 63 Sup. Ct. 115 (1942).

¹³292 U. S. 449, 454, 54 Sup. Ct. 804, 805 (1934).

"While this suggests that confiscation was not effected or intended, it plainly shows that Congress reserved to itself full freedom at any time to dispose of the property as might be deemed expedient and to deal with claimants as it should deem to be in accordance with right and justice, having regard to the conditions and circumstances that might arise during and after the war. . . ."

It thus seems that as regards property seized under Section 7(c) the Custodian, while he had full legal title and the power to use and sell, was under a duty to exercise his powers consistently with conserving the values he had received so that his administration would not, of itself, work a confiscation which by destroying the fund, would impair the power, that Congress reserved, to return values equivalent to those taken, if and as circumstances might make this seem to Congress to be appropriate.

As a possible exception to this general rule, Section 12 provided that the Custodian, in the event that he sold seized property, would *not* have to sell it at public sale to the highest bidder in any case where "the President stating the reasons therefor, in the public interest shall otherwise determine."¹⁴ This the President did in the case of a large number of patents that had been seized by the Custodian from Germans and which the President directed to be sold at a nominal consideration to the Chemical Foundation, which was a quasi-public body.¹⁵ This exceptional treatment was subsequently attacked by the United States. But the validity of the President's action was on the facts sustained in *United States v. Chemical Foundation*,¹⁶ on the ground, among others, that the patents in question were admittedly enemy (German) owned and as such subject to total confiscation and that on such a state of facts, there was no occasion to give the Act a narrow construction.

We assume that Section 12 is still in effect as regards property which the Custodian might have seized under Section 7(c) and that if the exceptional procedure of Section 12 were invoked, the property of enemies could be disposed of for a nominal or no consideration if "the President stating the reasons therefor, in the public interest" should so determine.

The President has as yet made no attempt to invoke this exceptional procedure of Section 12 or operate thereunder. We assume that he would not do so, and we doubt that he could properly do so, with respect to property *bona fide* and absolutely owned by persons not of enemy nationality and not voluntarily aiding the enemy. The "war power" is such that Congress could, perhaps, constitutionally authorize the confiscation of the property even of

¹⁴40 STAT. 460 (1918).

¹⁵Exec. Order, February 26, 1919; Exec. Order, April 5, 1919.

¹⁶272 U. S. 1, 47 Sup. Ct. 1 (1926).

persons who were "enemies" only in the sense that, through invasion or capture, they have, against their will, fallen under enemy control. But such an intent would not readily be presumed and the Act contains no clear evidence of it. The exceptional confiscatory power of Section 12 is directed to be exercised "in the public interest." The "public interest" which Congress thus directed should be the President's guide is, we assume, an interest compatible with the long established practice of the United States which is not to confiscate or destroy the property of allied persons and American prisoners, even though, through enemy action, such persons may temporarily fall within enemy power so that their property may appropriately be taken into custody as against the risk, recently pointed out by the present Custodian, of "transfer of title under duress."¹⁷

B. Section 5(b)—Powers

We now consider the powers of the Custodian with respect to property vested under Section 5(b).

This Section was one of the original regulatory sections of the 1917 Act, which, as we have noted, has been frequently amended.¹⁸ As amended December, 1941, it provides that "During the time of war or during any other period of national emergency declared by the President, the President may:

- (1) "investigate, regulate, or prohibit" any transactions in foreign exchange, gold or silver coin or bullion, currency or securities; and
- (2) "investigate, regulate, direct and compel, nullify, void, prevent or prohibit" transactions involving "any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States"; and
- (3) "any property or interest of any foreign country or national thereof shall vest" in such agency as the President may designate, "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."

Various theories may be and have been advanced as to the nature of the title and right to use which Congress intended should result from a "vesting" under the third of the above-enumerated powers. We here consider those which can most plausibly be advanced.

Eminent domain. The phrase "used . . . for the benefit of the United States" suggests eminent domain. But otherwise the language and structure of Section 5(b) is not that of an eminent domain statute. Neither is "eminent domain" the theme of the Trading with the Enemy Act, into which the 5(b)

¹⁷CROWLEY, PATENTS AT WORK—A STATEMENT OF POLICY.

¹⁸See notes 8, 9, and 10 *supra*.

vesting power was introduced. In the case of an eminent domain statute there should be provision for a finding that the use of the particular property to be condemned was in fact required by the United States and such a finding should be made before the property is condemned. Furthermore, the constitutional obligation to pay just compensation must be recognized, and it is customarily recognized and provided for by the eminent domain statute itself. Neither 5(b) nor any other section of the Act makes provision for either of these matters.¹⁹

It may be suggested that the right to just compensation is taken care of by the so-called Tucker Act.²⁰ That Act provides that certain classes of claims against the United States may be brought in the Court of Claims. The classes of permitted claims would probably include claims for property condemned through exercise of the Government's right of eminent domain. However, as noted, in the case of an eminent domain statute, the legislative practice is not to rely on the Tucker Act. If that had been intended, Congress would almost certainly have amended Section 7(c) of the Trading with the Enemy Act which provides that "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian . . . shall be that provided by the terms of this Act." While this probably does not apply to Section 5(b); it certainly creates a doubt that Congress would have removed had it conceived of Section 5(b) as an eminent domain statute, the constitutionality of which depended on the availability of the Tucker Act.

Confiscation. It seems that Section 5(b) was not intended by Congress to be a confiscation statute. As noted, Section 5(b) is operative not merely in time of war, but "during any other period of national emergency." A peacetime period of "emergency" does not bring into play the war power of confiscation. Further, the Section applies not to "enemy" property as such, but to all property in which any foreign country or national thereof has an interest. Thus, if Section 5(b) were a confiscatory statute, it would authorize confiscation not merely in time of war, but in time of domestic emergency, of all allied and neutral owned property in this country. It would, as regards the victims of German and Japanese aggression, have authorized a completion of that despoliation which the enemy has begun. Not only is there nothing in the Congressional hearings or debates to suggest this, but on the contrary there is ample indication that Section 5(b), ever since its amendment of

¹⁹See, by way of contrast, the Act of October 16, 1941, 55 STAT. 742 (1941), 50 U. S. C. § 721 (Supp. 1941), authorizing the requisition of military equipment, where both provisions appear.

²⁰36 STAT. 1136 (1911), 28 U. S. C. § 250 (1941).

May, 1940, has, to an extent at least, been looked upon as a measure to protect the invaded peoples from being despoiled of their American assets through German coercion. The present Custodian recognizes this when he says in his *Patents at Work—a Statement of Policy* that “this Office has a great measure of responsibility toward the nationals of enemy-occupied countries . . . there is the ever-present danger of transfer of title under duress. In order to prevent the enemy from making use of these patents, in order to safeguard, under this country’s broader responsibilities, the rights of the unfortunate residents of occupied countries . . . title to these patents and applications is also being vested in the name of the United States Government.”²¹

Nothing in the Congressional hearings or debates suggests any intention to confiscate the property of friendly allies, neutrals, and the victims of German aggression. We do not believe that the courts would attribute to Congress such a purpose, unless this had been made so clear by the Act and its legislative background, that no alternative construction was available. Even then, there would be grave doubt as to its constitutionality, for alien property here is probably protected by the “due process” clause, except as, in time of war, it may be cut across by the power to confiscate enemy property.

We have little hesitation in concluding that Congress did not intend that the “vesting” under Section 5(b) would effect a confiscation of the property vested.

Regulation. Having rejected the theory that Section 5(b) is an eminent domain statute or a confiscation statute, we turn to consider what meaning can be given it consistently with the views above expressed. The conclusion to which we come is that vesting under Section 5(b) was intended to give the President, through such agency as he might designate, power, through a vesting of legal title, to assure the effectiveness of the regulatory and control powers which historically have been and still are the heart of Section 5(b). We have already noted the regulatory use to which the Section was put during the former war, during the banking crisis of 1933, and during the period inaugurated by German invasion of western Europe. Then, in December, 1941,²² the regulatory power was extended to include “any property in which any foreign country or a national thereof has any interest” and as a culmination to (1) the power to regulate all financial transactions, domestic or foreign, and (2) the power to “regulate, direct and compel” the use of any property of foreigners, there was added a third power; namely, the right to vest property of the latter category. The Congressional Report on the bill which effected these changes said that “the bill to a considerable extent fol-

²¹*Op. cit. supra* note 17.

²²55 STAT. 839 (1941), 50 U. S. C. APPENDIX § 5 (b) (1) (Supp. 1941).

lows the pattern of existing law and is a *logical extension of the present foreign property control system*, which has been operating very satisfactorily for almost two years. The extension could be put into immediate operation with a minimum amount of trouble or dislocation of legitimate activities."²³

"The pattern of existing law" of which the present amendment "is a logical extension" is neither a pattern of confiscation nor of eminent domain. It is, as the Report says, a pattern of "control" and the extension effected is entirely "logical." In the case of American citizens who owe an allegiance to the United States and who are, broadly speaking, personally amenable to rules and regulations, the results desired could be obtained by reliance upon rules and regulations. In the case of foreign nationals, however, there exists neither that allegiance to the United States nor, usually, that personal presence here, which could be relied upon to make effective a regulation that depended wholly on "rules and regulations." Property here could, to be sure, be "frozen," but without something more, regulation alone as regards such property might not be effective to "direct and compel" its affirmative use in desired channels under Section 5(b)(B). Therefore, to assure the effectiveness of the regulation, both negative and positive, authorized by the preceding portions of the amendment, a vesting of title was authorized, in the case of property owned by foreigners, so that the United States might thereby assure for itself the effectiveness of the positive regulation which was and is the primary theme of Section 5(b).

To be sure, Section 5(b) after providing for vesting goes on further, as we have seen, to provide that the vested property shall be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States." Such "benefit" of the United States is not, however, necessarily a benefit in a proprietary capacity. To vest for that purpose would be to condemn in exercise of the power of eminent domain, a construction which we have rejected because of the failure of the Act to provide for a finding that the particular property is, in fact, needed by the United States and because of the failure to make adequate provision for just compensation as required by the Constitution. The "benefit" to the United States sought to be secured seems to be precisely the same benefit as is sought to be secured by the preceding portion of the amendment and which benefit is primarily to be secured by regulation applicable both to foreign and domestic property. The right to sell or liquidate is not inconsistent with this, for once title is vested, circumstances may well arise where a sale or liquidation is indispensable to preserve values intact. Experience in

²³*Op. cit. supra* note 11, Part III, 3. (Italics added).

the First World War showed that the Custodian, even when acting purely as a "conservator," had occasion to use such powers as those of sale and liquidation.

Our suggested construction of Section 5(b) brings the Act into conformity with treaty engagements of the United States with friendly states, such as, for example, those expressed in the General Multilateral Convention for the Protection of Industrial Property.²⁴ That Convention provides that the "industrial property" including "patents" of nationals of each of the ratifying powers shall "enjoy the advantages that their respective laws now grant, or may hereafter grant, to their own nationals. . . . Consequently they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights."²⁵

While, of course, Congress could legislate in disregard of treaty obligations, such an intent is never lightly presumed and nothing in the 1941 amendment of Section 5(b) or its legislative background would seem to suggest such an intent.

A further consideration that suggests that Section 5(b), as amended, is essentially a regulatory statute is that any other construction would make it difficult to reconcile this Section with Section 9(a). That Section permits "any person not an enemy or ally of enemy" to reclaim from the Custodian property which may have been "seized by him." Obviously, if Section 9(a) permits any person not an "enemy" to get back his property if vested under 5(b), the clearly intended scope of 5(b) is drastically contracted. For 5(b) in terms applies to any property that is owned by any foreign national, be he ally, neutral, or enemy. We cannot believe that the explicit affirmation, in December, 1941, of this broad Congressional intent is nullified by the language of 9(a) adopted in 1917.

There is, we believe, no real clash between these two sections. It seems to us that, as a matter of statutory construction, 9(a) applies only to property seized under 7(c), because the owner was believed to be an "enemy," and not to property vested under 5(b), where the ground for vesting is merely the foreign nationality of the owner. Furthermore, 9(a) speaks of property "delivered, or paid to the Alien Property Custodian or seized by him." Such language seems to us to envisage property which, under the statute, must go, and can go only, to the Custodian (which is true of 7(c) property) and not to 5(b) property of which anyone might be the custodian through delegation of presidential power and where it is only fortuitous if the Alien Property

²⁴Signed at London on June 2, 1934. Ratified and proclaimed by the United States, October 28, 1938, 53 STAT. 1748 (1938).

²⁵Art. II, § 1.

Custodian happens to be chosen. Surely Congress cannot have intended the substantive rights sought to be accorded by 9(a) to be dependent upon the accidental circumstance of to whom the President might choose to delegate his power to vest. Nevertheless, it was held in the recent case of *Draeger Shipping Co., Inc. and Frederick Draeger v. Leo T. Crowley, as Alien Property Custodian*,²⁶ that Section 9(a) might be invoked, at least by an American citizen, in aid of the recovery of property which had been vested under 5(b) as property in which a national of a foreign (enemy) country had an interest. This conclusion was reached because the court felt this necessary in order to save the constitutionality of 5(b). The court quotes Judge Buffington in the *Bonds* case,²⁷ to the effect that:

"If persons not alien enemies, or allies of alien enemies, were given no means to protect their interests in such property the seizure would be unconstitutional as without due process of law; but they are given such remedies under section 9:"

and went on to say:

". . . to hold that Section 9(a) does not apply to action taken under Section 5(b) as amended . . . would raise a serious question as to the constitutionality of the provisions of Title III."²⁸

The court apparently assumed that 5(b) was confiscatory and that, unless there was power to get back property under 9(a), this would be violative of the "due process" clause. The view of 5(b) which we take appears not to have been considered by the court. All of these difficulties, both constitutional and of statutory and treaty reconciliation, are largely avoided if 5(b) is construed as a regulatory measure. In that event there would be no constitutional reason to strain Section 9(a) to make it applicable to property vested under 5(b) and the natural construction would be put on Section 9(a); namely, the construction that it applied only to property seized by the Custodian under 7(c). If, by mistake, the property of persons who are not nationals of a foreign country is taken under 5(b), they do not have to depend upon Section 9(a) for relief. There exists a well established common law right to bring an *in rem* proceeding, in the nature of replevin, to recover property which has wrongfully been taken into the custody of an officer of the United States. Such an *in rem* proceeding is not deemed to be a "forbidden" suit against the sovereign.²⁹

²⁶U. S. D. C. S. D. N. Y. February 16, 1943.

²⁷*Garvan v. \$20,000 Bonds*, 265 Fed. 477, 479 (C. C. A. 2d, 1920).

²⁸Title III of The First War Powers Act amended § 5 (b) of the Trading with the Enemy Act, 55 STAT. 838 (1941), 50 U. S. C. APPENDIX § 616 (Supp. 1941).

²⁹*United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240 (1882).

We, therefore, conclude that in the case of property vested under 5(b) there is neither a confiscation nor a condemnation through exercise of the power of eminent domain, but a vesting of title and of right to control and use, so as to assure the effectiveness of the system of regulation which is the primary goal of Section 5(b). If our conclusion is correct, the "use" made of the property vested should be conservatory, subject only to such unavoidable loss in principal value or income or change of form as might be an inevitable incident to regulation, control, and use such as could be lawfully imposed on American nationals owning like property without violation of their right to "due process." It might well be, however, that, as was the case following the last war, the courts would not construe the Section "narrowly" where the Custodian acted in relation to the property of true enemies clearly subject to outright confiscation.³⁰

III. THE RETURN OF VESTED PROPERTY

We now turn to consider the question of the ultimate relief, of persons whose property may have been rightfully taken by the Custodian. This calls for separate treatment as regards property taken under 5(b) and property taken under 7(c), assuming that Section 7(c) has been or may be used by the present Custodian.

Section 7(c) provides, as we have noted, that the sole relief of any person having any claim to any property seized by the Custodian "shall be that provided by the terms of this Act," and while the Act contains, through amendments made after the First World War, certain specific provisions for the return of property theretofore seized, it is probable that none of these "return" provisions applies to property, if any, which has been seized by the Custodian under 7(c) subsequent to the date of such amendments.

Further, the Supreme Court has, in substance, held that a right to return, such as that given to non-enemies under Section 9(a), does not come into being if between the date of seizure and the date of claim the status of the owner has changed so that he has ceased to be an "enemy."³¹ Such a section operates, the Supreme Court has held, only to give relief if the original seizure was erroneous on the basis of the facts then existing. If the principle of that case is adhered to, it would appear that no relief under Section 9(a) could be obtained if those who are now technical "enemies," by reason of German occupation, ceased to be such because their territory was liberated. Probably, however, such a development would lead to Congressional reconsideration of the position.

The only presently applicable provision dealing with ultimate relief of per-

³⁰See *United States v. Chemical Foundation*, 272 U. S. 1, 47 Sup. Ct. 1 (1926).

³¹*Swiss Insurance Co. v. Miller*, 267 U. S. 42, 45 Sup. Ct. 213 (1925).

sons whose property may have been rightfully seized under 7(c) appears to be Section 12 which provides: "After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."

In the case of alien owned property vested under 5(b) the position as regards right to return seems to be different than if property has been seized as "enemy" property under 7(c). If the construction of 5(b) which we have adopted above is sound, then vesting thereunder is merely an act in aid of regulation. The regulation itself is only "During the time of war or during any other period of national emergency declared by the President." It would seem, therefore, that when regulation under 5(b) was no longer legal due to the fact that the time was no longer a "time of war or of national emergency" the power of the Custodian to hold property vested in him under 5(b) would cease and this property and its increment, or the proceeds thereof as sold or liquidated, should promptly then be returnable to the former owner.

It should perhaps be noted that the Supreme Court in the *Swiss Insurance Company* case held that the end of the war did not *ipso facto* bring with it a right to return of property taken under 7(c). In this connection, the Court relied upon the above quoted language of Section 12 to indicate that "Congress did not intend that such a right should exist."³² It would seem that the same reasoning would not apply to the situation resulting from vesting under 5(b), for the "intent" evidenced by Section 12 is expressed only in relation to "enemy" property, whereas the scope of 5(b) is much broader. The Congressional intent with respect to 5(b) seems to be found in that Section itself, the opening language of which is "During the time of war or during any other period of national emergency declared by the President, the President may" *etc.* No doubt, as a practical matter, Congress would legislate an orderly procedure for dealing with the return of vested property and it might perhaps then differentiate between non-enemy property and true enemy property which is subject to confiscation. But Congress' failure to do so would not, in our opinion, automatically extend the Custodian's right to hold 5(b) vested property after the end of the war or emergency.

The Custodian has established administrative procedure whereby, usually, "any person, except a national of a designated enemy country"³³ may file a claim within one year after vesting (which time has now in some cases been

³²*Id.* at 44, 45 Sup. Ct. at 214 (1924).

³³Exec. Order No. 8389, April 10, 1940, 5 FED. REG. 1401 (1940).

extended). The nationals thus excluded from making claims, in the main, are true enemies. Thus persons of allied or neutral nationality are allowed presently to file a claim. However, the administrative procedure appears to be purely voluntary, with no explicit sanction in law and with no statutory duty on the part of the Custodian to return the property claimed unless he chooses to do so. Practically, under war conditions, this administrative relief is unavailable to much of the class to which it applies. In any event, the Custodian presumably would return only when the claimant makes it apparent, and the Custodian recognizes, that the property was vested by the Custodian on the basis of "mistakes of fact."^{33a} In other words, the administrative relief made available is essentially a procedure designed to facilitate the correction of judgments, and consequent action, that the Custodian may have taken on the basis of misinformation. In this connection it may be observed that the propriety of the Custodian's administrative procedure regarding possible return of property vested under 5(b) may well be dependent upon 5(b) being merely a regulatory measure. If a proprietary interest has once been lawfully vested in the United States it normally cannot lawfully be divested without explicit Congressional authority and there is none such with reference to 5(b)—if, as we assume, 9(a) is inapplicable to vestings under 5(b). Because of this lack of statutory basis for administrative claims for return, it would also appear that it is not necessary for prospective claimants to exhaust the possibility of administrative relief as a condition precedent to legal action in the courts.^{33b}

IV. THE CUSTODIAN'S CHOICE BETWEEN 7(c) AND 5(b)

In view of different rights which may arise, depending upon whether property has been vested under 5(b) or 7(c), it is relevant to consider which section is being invoked.

The language used in the vesting orders has varied from time to time. Some have been expressly stated to be "pursuant to Section 5(b)."^{33a} Others, and the more recent, are not specific on this point, and while they use language peculiarly appropriate to Section 5(b), they state that the seizure is "under the authority of the Trading with the Enemy Act, as amended, and Executive Order No. 9095,³⁵ as amended, and pursuant to law," and that the property described "is property in which nationals of a foreign country or countries have interests and having made all determinations and taken all action,

^{33a}See, *e.g.*, Divesting Order No. 1, April 19, 1943, 8 FED. REG. 5276.

^{33b}*Draeger* case, *supra*, and *Goldman v. American Dealers Service*, C. C. A. 2d, decided April 2, 1943.

³⁴See, *e.g.*, Vesting Order No. 1, 7 FED. REG. 1046 (1942).

³⁵7 FED. REG. 1971 (1942).

after appropriate consultation and certification, required by said order or act or otherwise, and deeming it necessary in the national interests hereby vests," etc.³⁶ Where the foreign country is an enemy country, it is usually identified by name.³⁷

It would not be surprising, particularly in view of the decision in the *Draeger* case,³⁸ if the Custodian should feel some uncertainty as to his procedure. But we have doubt as to whether the Custodian could successfully claim to have seized under Section 7(c) unless he makes reasonably clear that such is his intent and unless the order of seizure shows that there has been a determination by the President (or by the Custodian as his agent) that the property is owned by an "enemy." The fact, if as we believe it is the fact, that a quite different status attaches to property seized under 7(c) from that which attaches to property vested under 5(b), would seem to require that the Custodian make it clear whenever he is seizing under the narrower provisions of Section 7(c) and seeking to acquire the more drastic powers accorded by Section 12.

V. CONCLUSION

In conclusion, we revert to our introduction. As there pointed out, the state of the Act is such as to render it very difficult to come to clear legal conclusions. This is understandable. It was necessary, in the face of ruthless and unexpected attack, to move quickly to revitalize and adapt an obsolete piece of legislation to meet the conditions of modern war and the subterfuges of clever enemies. The December, 1941, amendment³⁹ was sweeping in its scope. Many billions of dollars of property was subjected to vesting. This property included that of persons of many categories—enemies, prisoners, and victims of enemies, allies, and neutrals. This was just as well, for the imperative need was national safety. Mistakes against our friends could be corrected, but mistakes in favor of our enemies might be fatal. There was not, in December, 1941, the time to seek to reconcile, with nicety, the new legislation with the existing provisions of the Act or with the provisions of treaties with friendly countries. Now, however, the alien property field has been exhaustively explored by the painstaking investigations so thoroughly carried out by the Treasury Department and by the Alien Property Custodian, with the aid of other departments. The amended Act has served, in their hands, as an indispensable tool. A second phase may now have been

³⁶See, e.g., Vesting Order No. 201, 8 FED. REG. 625 (1943).

³⁷See, e.g., Vesting Order No. 1148, 8 FED. REG. 4358 (1943).

³⁸*Draeger Shipping Co., Inc., and Frederick Draeger v. Crowley, as Alien Property Custodian*, U. S. D. C. S. D. N. Y. February 16, 1943.

³⁹55 STAT. 839 (1941), 50 U. S. C. APPENDIX § 5 (b) (1) (Supp. 1941).

reached where it is desirable to reappraise that tool and decide whether in its present form it is well adapted to produce the further consequences which we now want and whether, in any event, greater clarity and certainty should not be sought by new legislation.