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## FOREIGN FUNDS CONTROL AND THE ALIEN PROPERTY CUSTODIAN

KENNETH S. CARLSTON

*"War never breaks out quite suddenly, and its spreading is not the work of a moment.*

*"War is nothing but a continuation of political intercourse with an admixture of other means."*

VON CLAUSEWITZ, ON WAR

*"Freezing Control is but one phase of the present war effort; it is but one weapon in the 'total' war which is now being waged on both economic and military fronts. Coupled with Freezing Control as a part of this nation's economic warfare are to be found export control, the promulgation of a Black List, censorship, seizure of enemy-owned property, and financial and lend-lease aid to allied and friendly nations."*

Brief of the United States as  
Amicus Curiae, *Commission for  
Polish Relief v. Banca Nationala  
a Rumaniei*, 288 N. Y. 332  
(1942).

The past decade or so has witnessed a vast expansion in governmental controls in the foreign economic sphere. At first adopted as a refuge from the disastrous and world-wide economic storms of the 'thirties, measures such as devaluation and the establishment of systems of foreign exchange control were soon seen to have a positive utility as economic weapons both nationally and internationally. In Germany particularly, foreign exchange control became a powerful instrument in a national policy of authoritarian control. As a means for directing the currents of foreign trade, it became an instrument of political power for economic penetration and political persuasion of specific countries, and for the control of production and consumption in desired channels within Germany itself.<sup>1</sup> By 1934, a broad foreign

<sup>1</sup>ELLIS, EXCHANGE CONTROL IN CENTRAL EUROPE (1941) 289; see HAYEK, THE ROAD TO SERFDOM (1944) 92, n. 2.

trade control of exports and imports was established, regulating the types and quantities of goods, prices, means of payment, and countries to be favored or disfavored.<sup>2</sup>

In the United States, however, the establishment in 1940 of foreign funds control under Executive Order No. 8389, as amended,<sup>3</sup> was primarily a measure of defense against the Axis. It was designed to prevent the use of property, in which an Axis interest existed, in a manner inimical to the interests of the United States, and to safeguard the property of citizens of Axis-occupied countries.<sup>4</sup> It was authorized by Section 5(b) of the Trading with the Enemy Act, as amended,<sup>5</sup> and its application is limited

<sup>2</sup>*Id.* at 284-285.

<sup>3</sup>EXEC. ORDER No. 8389, 5 FED. REG. 1400 (1940). This Order, as amended, will be generally referred to herein as "Order 8389" or "the Order"; various other Executive Orders will be referred to by number with only the prefix "Order." The Order prohibits all transactions in foreign exchange and various other transfers of property, "if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect."

<sup>4</sup>86 CONG. REC. 5180 (1940); SEN. REP. No. 911, 77th Cong., 1st Sess. (1941) 2; H. R. REP. No. 1507, 77th Cong., 1st Sess. (1941) 3, quoted *infra* note 54. Other purposes are facilitating the use of blocked assets in the war effort, protecting American banks, business institutions and creditors, and negotiating in the post-war settlements, Brief of the United States as Amicus Curiae, Commission for Polish Relief v. Banca Nationala a Rumaniei, 288 N. Y. 332, 43 N. E. (2d) 345 (1942).

<sup>5</sup>55 STAT. 839 (1941), 12 U. S. C. § 95a (Supp. 1941-1945), reading in part as follows: "The first sentence of subdivision (b) of Section 5 of the Trading with the Enemy Act of October 6, 1917 (40 STAT. 411), as amended, is hereby amended to read as follows:

"(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

"(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; 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."

by the terms of that section to "time of war or during any other period of national emergency." It is accordingly an instrument of exceptional and limited use and not an instrument of our peacetime economy.

As a war instrument, Order 8389 is directed in a negative way. Its commands are prohibitive rather than positive. It does not compel but rather prevents action. Hence with the entry of the United States into the present war, the need of broad powers became apparent whereby the Government could "affirmatively compel the use of application of foreign property" in the interests of the United States.<sup>6</sup> However, under the applicable Trading with the Enemy Act, which had been enacted in World War I, the president's power was limited to the appointment of "an official to be known as the alien property custodian," who would have the power to seize and liquidate property of an "enemy" and "ally of enemy."<sup>7</sup> These statutory categories of enemy interest were terms of much more limited application than those now applied in the control of enemy property. In general, they made residence in enemy or enemy-occupied territory the criterion of the power to seize. Order 8389, on the other hand, permitted the use of every possible test to seek out enemy interest. In addition to the classic tests of foreign residence or domicile,<sup>8</sup> it established the criteria of foreign nationality, foreign control and even "reasonable cause to believe" as means for determining alien interest.<sup>9</sup> Previous legislation, moreover, had as its primary objective custody and only incidentally liquidation. As stated by Judge John Bassett Moore:

The idea of provisionally holding enemy property in custody in order to prevent its use in the enemy interest is by no means new. In England, it is at least as old as Magna Carta. No one understood the act of Congress to contemplate a hostile seizure. The very terms of the act

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The Trading with the Enemy Act of October 6, 1917, as amended, will generally be referred to herein as "the Act" and the various sections thereof by number only, without the prefix "Section."

<sup>6</sup>SEN. REP. No. 911, *supra* note 4, at 2.

<sup>7</sup>§§ 2, 6, 7(c) and 12 of the Act. See *Commercial Trust Co. v. Miller*, 262 U. S. 51, 43 Sup. Ct. 486 (1923); *Munich Reinsurance Co. v. First Reinsurance Co.*, 6 F. (2d) 742 (C. C. A. 2d, 1925), *appeal dismissed* 273 U. S. 666, 47 Sup. Ct. 458 (1927).

<sup>8</sup>Until the issuance of Executive Order No. 8389, it may fairly be said that residence was the test of enemy status under American law, WHEATON, *INTERNATIONAL LAW* (6th ed. 1929) 674 *et seq.*; *Kahn v. Garvan*, 263 Fed. 909, 915 (S. D. N. Y. 1920); and § 7(c) was not construed to establish nationality as a test of enemy character, *Behn, Meyer and Co. v. Miller*, 266 U. S. 457, 472-473, 45 Sup. Ct. 165, 167 (1925).

<sup>9</sup>See *Lourie, "Enemy" under the Trading with the Enemy Act and Some Problems of International Law* (1943) 42 MICH. L. REV. 383; Note, *New Administrative Definitions of "Enemy" to Supersede the Trading with the Enemy Act* (1942) 51 YALE L. J. 1388; *Littauer, Confiscation of Property of Technical Enemies* (1943) 52 YALE L. J. 739.

preclude such an interpretation. It merely authorized the provisional holding of the property in custody, and appropriately styled the official, who was to perform this function, the Alien Property Custodian.<sup>10</sup>

It was apparently the intention of Congress in the Act as it stood in World War I not to confiscate outright enemy property but to hold it for the benefit of the original owners.<sup>11</sup> In the view of one authority:

The tenor of the debates in Congress, together with the reports of the committees to Congress and the statements of the Secretaries of State and Commerce, all point to the fact that it was the intention of Congress to hold the private property of persons living in Germany or doing business in Germany in order to preserve the property for the actual owners.<sup>12</sup>

The complexities of modern economic warfare and the many fronts upon which it is to be waged<sup>13</sup> demanded a tool of greater flexibility than that afforded by the then existing provisions of the Act.<sup>14</sup> Section 5(b) of the Act was therefore amended in the First War Powers Act, 1941,<sup>15</sup> by the inclusion of the following new provision:

. . . 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.

Untrammelled by any statutory tests of enemy character, power to "vest" any foreign property was granted the Executive. In addition, active powers of use and disposition of vested property were granted in the specific authorization and direction that such property "shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States."<sup>16</sup>

<sup>10</sup>MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924) 22.

<sup>11</sup>Woodson v. Deutsche G. & S. S. V. Roessler, 292 U. S. 449, 454, 54 Sup. Ct. 804, 805 (1934) stating that 12 of the Act "suggests that confiscation was not effected or intended"; Cummings v. Societe Suisse Pours Valeurs de Metaux, 85 F. (2d) 287, 289 (App. D. C. 1936) (United States never declared the seized property their own but rather eventually regarded it as a trust fund); Kahn v. Garvan, *supra* note 8.

<sup>12</sup>GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ENEMY ALIEN PROPERTY (1940) 65.

<sup>13</sup>EINZIG, ECONOMIC WARFARE (1940); Bidwell, *Our Economic Warfare* (1942) 20 FOREIGN AFFAIRS 421.

<sup>14</sup>SEN. REP. NO. 911, H. R. REP. NO. 1507, *supra* note 4.

<sup>15</sup>See note 5 *supra*.

<sup>16</sup>These powers will sometimes be referred to herein as the "5(b) powers."

## "VESTING"—CONFISCATION OR SEQUESTRATION?

The nature and effect of the custodian's powers were examined by Dulles in *The Vesting Powers of the Alien Property Custodian*,<sup>17</sup> and the conclusion reached that these must be regarded not as confiscatory in nature but rather as a form of sequestration in aid of the system of regulation and control of property of foreign nationals established under Order 8389. The power to liquidate and sell vested property was viewed as ancillary to the power of sequestration and to be exercised only in exceptional circumstances as a means of preserving property values.

This conclusion, though carefully elaborated, is not felt to be supported in the history, purpose and language of the amendment to 5(b) in the First War Powers Act, 1941. This amendment contemplates and provides for more than merely "vesting" and the control of foreign property established in the Alien Property Custodian pursuant to its provisions is more than merely "freezing control." The latter is regulatory in nature. It prohibits any use of so-called blocked assets except under Government license. "Vesting," on the other hand, is the act marking the assumption of the broad powers over specific foreign property permitted under the amendment to 5(b) by the "agency or person" designated by the president. The exercise of these powers, so far as the terms of 5(b) are concerned, is restricted only by the qualification that it must be "in the interest of and for the benefit of the United States." There is nothing in 5(b) or congressional committee reports to indicate that the exercise of these powers was to be solely in aid of a system of regulation and that, for example, the power of sale was to be limited to cases where required to preserve values intact.<sup>18</sup> Both the House and the Senate considered the amendment of 5(b) made in the First War Powers Act, 1941, necessary in order that the Government could "affirmatively compel the use and application of foreign property" in the interests of the United States.<sup>19</sup> The amendment was considered to graft into 5(b) "the power contained in the Trading with the Enemy Act with respect to alien property, extending those powers."<sup>20</sup> Thus enemy resources were, through "vesting," to be taken over by the United States and thereafter used or disposed of in whatever way the national interest might dictate.

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<sup>17</sup>(1943) 28 CORN. L. Q. 253.

<sup>18</sup>*Id.* at 253, relying on the isolated phrase that the enlargement of 5(b) is "a logical extension of the foreign property control system" and ignoring the portions quoted *infra* note 54 showing the real purpose of such "extension."

<sup>19</sup>SEN. REP. NO. 911, *supra* note 4, at 2. See generally *infra* note 54.

<sup>20</sup>H. R. REP. NO. 1507, *supra* note 4, at 3.

It is true that Congress, in so amending 5(b), used terms of such breadth that in the exercise of the authorized powers confiscatory acts could conceivably take place and yet be within the apparent scope of such powers. This does not necessarily mean, however, that the amendment must be more narrowly construed if its constitutionality is to be saved. In determining the constitutionality of 5(b), it is not to be presumed that the Executive, in carrying out the powers thus conferred, will do so in a manner violative of the Constitution or of treaty rights or of international law. If executive discretion exists, as it does here, to carry out delegated powers in a manner consonant with our laws and traditions, it is to be presumed that this discretion will be exercised in the light of its limitations. Confiscation is a question of fact. While 5(b) does not preclude the exercise of the power of confiscation of enemy property or, indeed, of alien friends, whether confiscation results depends upon what action is taken by the Executive under 5(b). Dulles contends that 5(b) should not be construed to *permit* of confiscatory action, since, if permissible at all, its exercise is not limited solely to time of war and the property of alien enemies.<sup>21</sup> But this ignores not only the plain language of the statute providing for the use, liquidation or sale of alien property (including alien enemy property) but, as above noted, also the intent of Congress, which, rather than contemplating that the use of these additional powers would be limited to cases of prevention of waste, instead looked forward to their active use in whatever way the best interests of the United States might require.

An analysis of the terms of the vesting orders themselves, as heretofore issued by the Secretary of the Treasury and the custodian, indicates that the power to confiscate is being held in reserve and is not exercised by the act of vesting itself. Vesting Order No. 1 of the Secretary, and all vesting orders of the custodian, recite that the property in question is by the Order being vested "to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States." In other words, vesting is an act of custody preliminary to such use and disposition of the property as may be later determined. It does not preclude a later return of the property vested or payment of compensation for its taking. Vesting Order No. 1 of the Secretary of the Treasury expressly reserved and provided for the possibility of return of the property vested or payment of compensation for its taking,<sup>22</sup> and a similar recital appears

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<sup>21</sup>Dulles, *loc. cit. supra* note 17, at 251.

<sup>22</sup>"Such property and any proceeds thereof shall be held in a special account pending further determination of the Secretary of the Treasury. This shall not be deemed to

in all vesting orders of the custodian.<sup>23</sup> In its press release on Vesting Order No. 1, the Treasury Department remarked that the property vested was to be considered as "sequestered."<sup>24</sup>

The conclusion that the step of vesting is to be regarded not as confiscation but as preliminary custody receives support in the decisions on the legal effect of seizures made by the former custodian under World War I legislation. Under 7(c) of the Act as it then stood the custodian was authorized to *seize* enemy property and by 12 of the Act he was granted the power of sale and other rights incidental to ownership of seized property as though he were its absolute owner.<sup>25</sup> Such a seizure was considered to result in a complete and absolute divestment of title from the enemy,<sup>26</sup> leaving the enemy owner remediless as against the custodian for resulting losses.<sup>27</sup> Yet notwithstanding this very clear and explicit loss of title and interest by the enemy, seizure was regarded by the courts as preliminary custody.<sup>28</sup> It was said that the power to confiscate implicit in the Act was held in reserve, and was not, except in small part, exercised; "the contrary would have violated international usage of at least one hundred years."<sup>29</sup>

A review of the treatment of enemy property as in fact carried out by Congress fairly leads to the conclusion that, subject to exceptional instances, such as the *Chemical Foundation* case,<sup>30</sup> respect was given to the rule of international law "that the state may not confiscate private property of aliens within their borders at the outbreak of war."<sup>31</sup> The first step taken towards the return of enemy property was in the Act of July 11, 1919, which amended the Act so as to empower the president to return seized property of citizens

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limit the power of the Secretary of the Treasury to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return or compensation should be made." 7 FED. REG. 1046 (1942).

<sup>23</sup>*E.g.*, Vesting Order 4191, 9 FED. REG. 13818 (1944).

<sup>24</sup>Treasury Press Release, Feb. 16, 1942.

<sup>25</sup>40 STAT. 460 (1918), 50 U. S. C. § 12 (Appendix).

<sup>26</sup>Cummings v. Deutsche Bank, 300 U. S. 115, 57 Sup. Ct. 359 (1937); Woodson v. Deutsche G. & S. S. V. Roessler, *supra* note 11.

<sup>27</sup>Swiss National Insurance Co. v. Miller, 267 U. S. 42, 45 Sup. Ct. 213 (1925); Klein v. Palmer, 18 F. (2d) 932 (C. C. A. 2d, 1927); Von Bruning v. Sutherland, 29 F. (2d) 631 (App. D. C. 1928).

<sup>28</sup>Central Union Trust Co. v. Garvan, 254 U. S. 554, 569, 41 Sup. Ct. 214, 216 (1921); Sielcken-Schwarz v. American Factors, 60 F. (2d) 43, 45 (C. C. A. 2d, 1932).

<sup>29</sup>Commissioner of Internal Revenue v. Stearns, 65 F. (2d) 371, 374 (C. C. A. 2d, 1933), *cert. den.* 290 U. S. 670, 54 Sup. Ct. 90 (1933); see *supra* note 11.

<sup>30</sup>United States v. Chemical Foundation, 272 U. S. 1, 47 Sup. Ct. 1 (1926). Note that in this often questioned disposition of enemy patents the forms prescribed by the statute with respect to private sales of property were observed and a consideration found by the president to be adequate was paid.

<sup>31</sup>GATHINGS, *op. cit. supra* note 12, at 14.

or subjects of countries allied with the United States whose property had been taken by virtue of their residence in occupied territory.<sup>32</sup> The return of certain additional classes of seized property, including that of citizens or subjects of the states newly created by treaty and of persons no longer classifiable as enemies, was authorized under the Act of June 5, 1920.<sup>33</sup> Then the Winslow Act of March 4, 1923, authorized the return of all property claimed by former enemies in the amount of ten thousand dollars or less.<sup>34</sup> In addition, the Winslow Act directed the former alien property custodian to return any patent which had not been sold, licensed or otherwise disposed of. Finally, the Settlement of War Claims Act of 1928 provided for the return of 80% of the property of nationals of Germany, Austria and Hungary and directed that they should receive participating certificates for the remaining 20%.<sup>35</sup> Under arbitration proceedings instituted pursuant to the last mentioned Act, the United States voluntarily awarded \$12,485,387.83 to German nationals for use by the United States of patents seized by the custodian.<sup>36</sup>

Vesting, in other words, is the act whereby the door is opened to such supervision, use and disposition of foreign property as may thereafter be found to be in the national interest. While the term "vest" as used in its real property sense signifies the fixation of a present right to the immediate or future enjoyment of property,<sup>37</sup> whether its use in a statute signifies the acquisition of a fee interest is dependent upon all the facts and circumstances and the statutory intent.<sup>38</sup> In view of the breadth of powers authorized in 5(b) with respect to vested property, vesting may be held to effect a divestment of title of the owner,<sup>39</sup> but whether this is to be returned to him through a divesting order or whether vesting is to lead other later acts, which may or may not eventuate in confiscation of vested property, is dependent upon legislation and executive policy as yet undetermined. For the present, vesting, and the exercise of the powers over vested property which 5(b) permits, ensures that all productive resources controlled by the enemy shall be utilized in the most effective manner.

<sup>32</sup>41 STAT. 35 (1919), 50 U. S. C. § 9 (Appendix).

<sup>33</sup>41 STAT. 977 (1920), 50 U. S. C. § 9 (Appendix).

<sup>34</sup>42 STAT. 1511 (1923), 50 U. S. C. § 9 (Appendix).

<sup>35</sup>45 STAT. 254 (1928).

<sup>36</sup>Holtzoff, *Enemy Patents in the United States* (1932) 26 AM. J. INT. L. 272.

<sup>37</sup>Safe Deposit & Trust Co. v. Sheehan, 169 Md. 93, 179 Atl. 536 (1935).

<sup>38</sup>Ross v. Trustees of University of Wyoming, 31 Wyo. 464, 228 Pac. 642 (1924); Busick v. Busick, 65 Ind. App. 655, 115 N. E. 1025 (1917).

<sup>39</sup>United States v. Borax Consolidated Ltd., et al., — F. Supp. — (N. D. Cal. 1945). See Opinion of the Alien Property Custodian General Counsel, 57 U. S. P. Q. 202 (1943).

“DIVESTING” AND POST-WAR SETTLEMENTS

A hitherto neglected aspect of foreign funds control is that of its relation to the post-war settlements. As stated in the brief of the United States in the Polish Relief case:

From the very inception of freezing control, one year and eight months before Pearl Harbor, this Government has been concerned with blocked assets from the point of view of any post-war settlement. This country even then was interested in having a voice at any peace conference—whether or not we entered the war. One of the issues that may have to be decided at that conference is what happens to “blocked assets.” Obviously this Government has a vital interest in the disposition of that problem.<sup>40</sup>

This same issue applies even more sharply to property vested by the Alien Property Custodian under 5(b) of the Act.<sup>41</sup> Yet 5(b), and, for that matter, the other provisions of the Act, are silent on any approach to this problem. Obviously no solution can be adopted in advance of the peace treaties. But consideration of the legislative problems involved should not for that reason be ignored and delayed.

No power would seem to exist in the custodian to divest property once properly vested, except as a part of the relinquishment of freezing control generally under presidential and congressional direction. The custodian has recognized this in his divesting orders issued to date, which have been limited to cases of “mistake of fact.”<sup>42</sup>

NATURE OF THE OFFICE OF ALIEN PROPERTY CUSTODIAN

The 5(b) powers can be, and were in fact originally, reposed in another body than the present Office of Alien Property Custodian. They were first delegated to the Secretary of the Treasury and administration of all foreign property control questions under a single direction or authority was thus preserved.<sup>43</sup> But in Order 9095, as amended by Order 9193,<sup>44</sup> this was re-

<sup>40</sup>Brief of the United States as Amicus Curiae, *supra* note 4, at 13.

<sup>41</sup>Note that the British counterpart of the Act recites that its purpose lies in “preserving enemy property in contemplation of arrangements to be made at the conclusion of peace,” Trading with the Enemy Act, 1939, 2 & 3 GEO. 6, c. 89.

<sup>42</sup>*E.g.*, Divesting Order 72, 9 FED. REG. 13817 (1944).

<sup>43</sup>Memorandum of the President of February 12, 1942, 7 FED. REG. 1409 (1942).

<sup>44</sup>7 FED. REG. 1971 and 5205 (1942). Order 9095, as thus amended, will be referred to herein as “Order 9095.” This Order reads in part as follows:

“By virtue of the authority vested in me by the Constitution, by the First War Powers Act, 1941, by the Trading with the Enemy Act of October 6, 1917, as amended, and as President of the United States, it is hereby ordered as follows:

voked and a system of dual direction and authority was established. This Order established the Office of Alien Property Custodian within the Office for Emergency Management, the head of which was to be an Alien Property Custodian. The Executive power to create this new Office was declared to be based on "the Constitution," "the First War Powers Act, 1941," and "the Trading with the Enemy Act of October 6, 1917, as amended." Obviously so broad a recitation of authority is by itself of little help in determining the nature and functions of the office so created. Yet, at the outset of the Order and without any preliminary explanation, we find the Alien Property Custodian so identified being "authorized and empowered to take such action as he deems necessary in the national interest." It is clear that this authorization cannot be construed to permit him to range the entire field of the various sources of authority mentioned. We must therefore look to later language in the Order if we are to determine his exact role. The Order subsequently provides that his authority is to include, but not to be limited to, "the power to direct, manage, supervise, control or vest, with respect to" six separately defined categories of foreign property. These terms, these powers, are a part of the system of the control and use of foreign property contemplated by 5(b) of the Act and it accordingly becomes clear that the custodian is to aid in carrying out that system.

The scope of the authority of the present custodian under Order 9095 is quite different from that of the "custodian" whose appointment is permitted under 6 of the Act as enacted in World War I.<sup>45</sup> The domain of the present custodian in part coincides with, in part exceeds, and in part falls short of, that of the "custodian" referred to in Section 6. He can reach property which

"Executive Order No. 9095 of March 11, 1942, is amended to read as follows:

"1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the President. . . .

"2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:"

The Order then lists six classes of property in respect of which the custodian may exercise such powers.

<sup>45</sup>§ 6 reads in part as follows:

"The President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed \$5,000 per annum) of an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act."

was beyond the power of the old "custodian" (*e.g.*, patents, trademarks, copyrights, ships and certain business enterprises of *any* "foreign national," whether or not an "enemy" or "ally of enemy"), and yet be unable to reach property (*e.g.*, cash, currencies, deposits, credits, securities, etc. of an "enemy") which the latter possessed by statutory authority.

Nowhere in Order 9095 is there a reference as such to the power of seizure of enemy property authorized by 7(c), yet, significantly, the delegation of authority to the "custodian" in World War I expressly recited 7(c) and the other sections of the Act which he was empowered to administer.<sup>46</sup> Order 9095 uses terms applicable within the framework of control of foreign property created pursuant to 5(b) and refers only to that section and 3(a) in its various specific delegations of authority. The entire structure of the Order suggests that its establishment of the "Office of Alien Property Custodian" was pursuant to 5(b) only and no appointment of a "custodian" was made under the authority of 6 of the Act and with the power of seizure specified in 7(c). Section 5(b) of the Act provides that the "agency or person" in whom foreign property is to "vest" shall be designated by the president. The present custodian could very readily have been the "official to be known as the alien property custodian" referred to in 6 of the Act, but it is questionable whether the present custodian is such "official" and is delegated with the powers elsewhere stipulated in the Act to be exercised by such "official." Clearly he possesses the power to "vest" certain foreign property, that is, to assume possession of and title to such foreign property, and to exercise certain of the 5(b) powers over it as provided in the Order. But it is doubtful whether he possesses, or can possess consistently with the purposes of 5(b), the power of seizure under 7(c) if subject to the limitations of 7(c) and of the other provisions of the Act.

It was apparently the intention of the Order to limit the custodian's functions to the control of business enterprises, and *productive properties* generally, in which an enemy interest exists. It is his duty to ensure that this type of property is managed in the manner most effective in the conduct of the war effort. The Secretary of the Treasury, on the other hand, is primarily concerned with the control of *liquid* foreign assets,—cash, securities, etc., including the regulation of foreign exchange transactions.<sup>47</sup> The exact

<sup>46</sup>EXEC. ORDER No. 2729-A, October 12, 1917. § 7(c) authorizes the custodian to seize property of "an enemy or ally of enemy."

<sup>47</sup>See Hearing before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 78th Cong., 2d Sess., on H. R. No. 4840, amended and reintroduced as H. R. No. 5031, Ser. No. 18, p. 73; ANNUAL REPORT, OFFICE OF ALIEN PROPERTY CUSTODIAN, FISCAL YEAR ENDING JUNE 1944, pp. 2-3; but see Execu-

nature of the present Office is perhaps best stated by the custodian himself in a letter to the president:

The present Office is a *new agency*, created to deal with foreign-owned property problems arising from our participation in the present war.<sup>48</sup>

If he were limited to the powers of a custodian appointed pursuant to Section 6 and denied the power to seek out enemy property interests in whatever form they might lie which the flexible provisions of 5(b) permits, the results would be disastrous to the delicately articulated system of control and use of foreign property now established. Clearly the present custodian does not possess the power of seizure under 7(c).

The present Alien Property Custodian, is, however, successor in responsibility for enemy property matters remaining from World War I. The Office of the "custodian" then created pursuant to 6 of the Act was abolished in 1934 and its functions and property were transferred to the Department of Justice.<sup>49</sup> By Order 9142 these were on April 21, 1942, transferred to the present custodian.<sup>50</sup> His jurisdiction in this connection is limited to property seized as the result of World War I which has not been returned to its former owners,<sup>51</sup> and does not involve *per se* a reconstitution of the old office of the "custodian."<sup>52</sup>

#### THE ALIEN PROPERTY CUSTODIAN AN ENEMY PROPERTY ADMINISTRATOR

It has been noted that the title of the present "Alien Property Custodian" is something of a misnomer. He is not the "custodian" referred to in 6 of the Act though he has many powers which are equivalent to those of such custodian. He is more than a mere custodian in the common law sense, since he exercises the powers of use and sale of vested property. He is not limited to enemy property, for he may theoretically reach certain classes of foreign property without regard to whether it is that of an enemy or even of an alien friend.<sup>53</sup> The custodian thus has overlapping roles which might as well

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tive Order No. 9567, June 8, 1945, 10 FED. REG. 6917, authorizing the vesting of liquid assets of Germany and Japan.

<sup>48</sup>ANNUAL REPORT, OFFICE OF ALIEN PROPERTY CUSTODIAN, MARCH 11, 1942 TO JUNE 30, 1943, p. 1. Italics herein are the writer's except where otherwise indicated.

<sup>49</sup>EXEC. ORDER NO. 6694, May 1, 1934.

<sup>50</sup>7 FED. REG. 2985 (1942).

<sup>51</sup>ANNUAL REPORT, *supra* note 48, at 7.

<sup>52</sup>DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II (1943) 264. Accord as to the conclusion reached in this section that the custodian's powers are limited to 5(b), McNulty, *Constitutionality of Alien Property Controls* (1945) 11 LAW AND CONTEMP. PROB. 134, 145-146.

<sup>53</sup>Terms herein such as "enemy," "enemy property" and "enemy interest" are not

be characterized by the titles "Enemy Property Administrator" or "Foreign Property Control Agent" as by his present title.

The amendment of 5(b) by the First War Powers Act, 1941, had as its purpose to permit the widest flexibility possible in the treatment of enemy property, ranging from mere sequestration (*i.e.*, "held") to active use (*i.e.*, "used, administered, . . . or otherwise dealt with") and finally to liquidation (*i.e.*, "liquidated, sold").<sup>54</sup> But the role of the custodian with respect to vested property, so far as the terms of Order 9095 are concerned, may well be viewed as primarily managerial and supervisory, with the power to use and dispose of vested property being shared with the Secretary of the Treasury. Certainly the Order is far from clear in indicating the exact scope of authority intended to be delegated to the custodian and the functions to be assumed by him, when considered against the background of the statute and the wide range of powers contemplated by it.

The delegation of authority to the custodian under Order 9095 presents a curious inversion in the use of terms in the Order as contrasted with the statute. 5(b) permits of a delegation of specifically enumerated and limited powers with respect to vested property (*i.e.*, "such . . . property shall be

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necessarily used in the strict sense of the defined terms "enemy" or "national of a designated enemy country."

<sup>54</sup>SEN. REP. NO. 911, *supra* note 4, at 2:

"While existing law permits the Government to prevent transactions, it is now necessary for the Government to be able to affirmatively compel the use and application of foreign property in a manner consistent with the interests of the United States.

"Section 301 would remedy this situation. It gives the President flexible powers, operating through such agency as he might choose, to deal comprehensively with the many problems that surround alien property or its ownership or control in the manner most effective in each particular case."

H. R. REP. NO. 1507, *supra* note 4, at 3:

"At present the Government exercises supervision over transactions in foreign property, either by prohibiting such transactions or by permitting them on condition and under license. It is, therefore, a system which can prevent transactions in foreign property prejudicial to the best interests of the United States, but it is not a system which can affirmatively compel the use and application of foreign property in those interests.

"Section 301 remedies that situation by adding to the existing freezing control, in substance, the powers contained in the Trading with the Enemy Act with respect to alien property, extending those powers, and adding a flexibility of control which experience under the original act and the recent experience under freezing control would have demonstrated to be advisable. The provisions of section 301 would permit the establishment of a complete system of alien property treatment. It vests flexible powers in the President, operating through such agency or agencies as he might choose, to deal with the problems that surround alien property or its ownership or control in the manner deemed most effective in each particular case. In this respect the bill avoids the rigidity and inflexibility which characterized the alien property custodian law enacted during the last war."

held, used, administered, liquidated, sold, or otherwise dealt with") and prescribes a standard for their exercise (*i.e.*, "in the interest of and for the benefit of the United States"). But the phrase establishing the standard of conduct for the appointee under 5(b) becomes in the Order the conduit for the delegation of power to the appointee, for the Order empowers the custodian "to take such action *as he deems necessary in the national interest*, including, but not limited to, the power to direct, manage, supervise, control or vest." To what extent does this empowerment permit the exercise of those further powers referred to expressly in 5(b) under which vested property may be "held, used, administered, liquidated, sold, or otherwise dealt with," which are not mentioned as such in the delegation of authority made in the Order?

The answer to this question lies in part in an analysis of the terms of the grant itself and in part in the remaining context of the Order. Solution will not be found in a meticulous comparison of the terms of the statute and of the Order, for the Order uses in this connection only one of the relevant terms in the statute defining the 5(b) powers. The phrase "direct, manage, supervise, control or vest" clearly evinces an intent to grant the power to vest and to exercise supervisory and regulatory authority with respect to vested property. The question whether the custodian was intended to carry out *subject to no other superior or concurrent authority* the more radical and equally important powers of use, liquidation and sale was equally before the drafter of the Order and the fact that these were left unmentioned is not without significance. It would have been a simple matter to have settled this question in charting the custodian's functions by an express grant of these powers instead of leaving it to implication in the phrase "to take such action as he deems necessary in the national interest." *What* action under *what* statutory or other authority? The president cites "the Constitution," "the First War Powers Act, 1941," and "the Trading with the Enemy Act of October 6, 1917, as amended," as the sources of his authority in making this direction to the custodian, with the result that up to this point in the Order the custodian is free to act "as he deems necessary" so long as he confines himself to these wide-flung sources of authority. So vast a grant of authority is obviously absurd and unintended. Hence, what are the "duties and functions" which the Order elsewhere assumes he has been directed to carry out?

The first clue to an answer to this question lies in the next immediately following phrase of the Order "including, but not limited to, the power to direct, manage, supervise, control or vest." One of these terms, *i.e.*, "vest,"

will be found in 5(b) of the Act. Elsewhere in the Order other references appear to 5(b) and to the structure of foreign property control erected under it from which an intent to proceed under and carry out the provisions of 5(b) can clearly be demonstrated. The issue is accordingly narrowed to the question whether the recital of the limited powers to "direct, manage, supervise, control" is merely confirmatory of part of a broader general grant under which the custodian, free from any coordinate or superior authority, was to exercise the full range of the 5(b) powers or whether such recital limits the custodian's powers, in effect, to those of vesting, supervision and control.

It must be remembered that the powers delegated to the custodian apply to six specific categories of property, three of which include property of *any* foreign national, whether he be alien friend or enemy. The Secretary of the Treasury may by Section 11 of Order 9095 extend his sphere of control established in Order 8389 to any *new* foreign country not mentioned therein after consultation with the Secretary of State. This delegation of authority to the Secretary of the Treasury has as its statutory sanction the fact that the last amendment of 5(b) deleted the limiting phrase "as defined by the President" in the portion thereof from which the Secretary's authority over foreign funds control is derived.<sup>55</sup> Subject possibly to a similar prior consultation with the Secretary of State—as to which the Order (*i.e.*, Section 11) is not quite clear—the custodian himself, under the order, may apparently determine the foreign countries and nationals thereof whose property of the three classes in question shall come under his control. For example, there is nothing to prevent the custodian from vesting, say, a ship of a British national or a patent of a Canadian national, inasmuch as each such national is a "foreign national."

The breadth of this power would tend to support the conclusion that the failure to expressly grant the power to use and dispose of vested property in the public interest was intentional, and was with a view to its being withheld from the custodian. Such a conclusion does not necessarily lead to the result that *no* delegation of such authority was made in the Order. Section 3 of Order 9095 delegates to the Secretary of the Treasury, subject

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<sup>55</sup>Prior to the First War Powers Act, 1941, the Executive powers to regulate transactions in foreign exchange were applicable to "property in which any foreign state or a national or a political subdivision thereof, *as defined by the President*, has any interest." 54 STAT. 179. After such Act they were applicable to "any property in which any foreign country or a national thereof has any interest." Admittedly, the omission of the above *italicized* words can as well indicate an intent to delete mere surplusage, with no change in meaning, as an intent to permit the power to define the foreign countries involved to be a delegable power.

to the other provisions of the Order, all authority conferred upon the president by 5(b), thereby granting to the Secretary any power withheld from the custodian. The practical difficulties involved are settled by Section 4 of the Order under which the Secretary of the Treasury and the custodian are empowered "jointly . . . to prescribe from time to time, regulations, rulings, and instructions to carry out the purposes of the Executive Order." Hence, the Order is susceptible of the interpretation that the power to use and dispose of property vested in the custodian is to be exercised in such manner as the Secretary and the custodian may together determine. Quite possibly by reason of the tremendous value of the assets involved,<sup>56</sup> the president felt that the use or sale or other disposition of foreign property should be subject to the general control of his fiscal officer and that in this respect the Secretary should be the final policy-making authority with regard to both enemy and non-enemy foreign property.<sup>57</sup>

A further delegation of authority to the custodian under 3(a) and 5(b) of the Act is made in Sections 6 and 12 of Order 9095, but the purpose of these grants is to implement him with the necessary authority to "enable" him to carry out his "functions" or "duties and functions" under the Order.<sup>58</sup> The scope of these "functions" is specifically laid down at the outset of the Order in Section 2. Sections 6 and 12 are not "catch-all" clauses, granting all authority under 5(b) of the Order not otherwise granted; Section 3 of the Act rather appears to serve such a purpose and to grant all residual

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<sup>56</sup>Nearly \$8,000,000,000 of foreign-owned property in the United States has been subjected to Government control of which the custodian has vested approximately \$197,000,000 of property and some 45,000 patents and patent applications as well as 200,000 copyrights and 410 trademarks. ANNUAL REPORT, *supra* note 47, at 14-15. A compilation based on Treasury Department figures gives \$8,500,000,000 as the value of blocked assets. N. Y. Times, March 6, 1945, p. 4.

<sup>57</sup>*Cf.* BLACHLY AND OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION (1934) 83-84, noting that the approval of rules by some agency other than that which makes them is a fairly common method of control and achieves a "harmonizing of action not possible otherwise."

<sup>58</sup>§ 6 of Order 9095 provides in part as follows:

"To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian or any person, agency, or instrumentality designated by him all powers and authority conferred upon me by section 5(b) of the Trading with the Enemy Act, as amended."

§ 12 of the Order 9095 contains the following provision:

". . . to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3(a) and 5(b) of the Trading with the Enemy Act of October 6, 1917, as amended and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941."

authority to the Secretary of the Treasury. Sections 6 and 12 do not enlarge the field of the custodian's authority; their declared purpose is to grant him the necessary powers to make that authority effective. Thus these sections do not necessarily involve a grant to the custodian of the powers of use and sale if not granted under the chart of his powers made in Section 2.

The apparent freedom of the custodian under the Order to determine the foreign countries and nationals thereof whose property of certain classifications, such as patents, shall be subject to his supervision, whether or not such countries may be "designated enemy countries," raises certain questions as to whether 5(b) permits of such a broad delegation of power. In so far as purely regulatory acts of the custodian are concerned, it is believed that the delegation of the power to designate the foreign countries and nationals thereof whose property is to come under such regulation is sanctioned by 5(b).<sup>59</sup> But when the issue is one of vesting, with all its consequences, 5(b) seems to require the *president* to determine each foreign country whose property is to come under the system of control through vesting and to designate the agency or person to exercise such control. It provides that "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*." Here the issue is not one of the exercise of the powers of the president "through any agency that he may designate," as provided in another connection in 5(b),<sup>60</sup> but the validity of a delegation to the custodian of the power to determine not only what *specific* property shall be vested but also the *foreign countries* whose property shall be subject to vesting. To the extent the custodian has confined his acts of vesting of foreign property to property which is found to be enemy property, it seems probable that such acts would be sustained as acts in performance of and within the war powers of Congress,<sup>61</sup> notwithstanding this technical deficiency of a delegation perhaps otherwise too broad in its scope. But when the issue involved is the further delegation by the president of the power to determine what non-enemy property shall be affected by vesting control, it is questionable, in the light of the limitations imposed in this connection by 5(b), whether the

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<sup>59</sup>See note 55 *supra*.

<sup>60</sup>*Cf.* *Stoehr v. Wallace*, 255 U. S. 239, 245, 41 Sup. Ct. 293, 296 (1921) (personal determination by president of enemy ownership not required).

<sup>61</sup>U. S. CONST. Art. 1, § 8, Cl. 11; *Brown v. United States*, 8 Cranch 110, 3 L. ed. 504 (1814); *Miller v. United States*, 11 Wall. 268, 20 L. ed. 135 (1871); *Stoehr v. Wallace*, *supra* note 59; *Alexewicz v. General Aniline & Film Corp.*, 181 Misc. 181, 43 N. Y. S. (2d) 713 (Broome Cty., 1943) (constitutionality of 5(b) sustained).

*Curtiss-Wright Export Corporation* case<sup>62</sup> would sustain such a redelegation of the 5(b) powers the exercise of which is so provocative of consequences in the conduct of our foreign relations. So far, the courts have sustained only the delegation by Congress to the president of the "freezing" powers under 5(b).<sup>63</sup>

The custodian has nevertheless adopted a comprehensive policy of selling or "transferring vested property to private enterprise,"<sup>64</sup> thereby effectually liquidating the enemy interest in our economic structure. In General Order No. 26 regulations were established governing the sale of vested property without reference to the Secretary.<sup>65</sup> The disposition of the proceeds of such sales creates something of a dilemma for the custodian. On the one hand, consistently with his apparent purpose that vesting orders shall not *ipso facto* be confiscatory, it is provided in his vesting orders that "such property and any or all of the proceeds thereof shall be held in an appropriate account or accounts, pending further determination of the Alien Property Custodian."<sup>66</sup> But 12 of the Act, if applicable, requires that the "alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."

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<sup>62</sup>United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 57 Sup. Ct. 216 (1936).

<sup>63</sup>United States v. Von Clemm, 136 F. (2d) 968 (C. C. A. 2d, 1943). See generally *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 Sup. Ct. 837 (1935).

<sup>64</sup>ANNUAL REPORT, *supra* note 48, at 70. The power of the custodian to sell vested property is now being tested in *Uebersee Finanz-Korporation v. Markham* (Civil Action No. 26543, U. S. D. C., Dist. of Columbia).

<sup>65</sup>8 FED. REG. 7628 (1943).

<sup>66</sup>*Cf. Becker Steel Co. v. Cummings*, 296 U. S. 74, 79, 56 Sup. Ct. 15, 18 (1935), which, in view of the conclusion reached *infra* that 9(a) relief is inapplicable against a vesting under 5(b), would seem to require the custodian to preserve the identity of vested property or the proceeds thereof in order to save the adequacy of remedies of claimants against the custodian. The custodian has stated:

"In the light of conflicting opinions which now obtain regarding the ultimate disposition of controlled property, ranging from approval of outright confiscation to complete compensation of the former owners, it is perhaps necessary to add at this point that the program of converting vested property into cash does not in any way prejudice the character of any ultimate settlement which will appear appropriate in the light of conditions and policies prevailing after the war. The original owners are in general interested not in specific pieces of property but in the economic value of their property as a source of income. The current market price of any property represents the best estimate of its economic value. The vested properties are in general to be sold at the best prices which can be obtained under current market conditions. Hence our program of selling vested properties is not incompatible with a possible decision to provide full compensation of the former owners." ANNUAL REPORT, *supra* note 48, at 70.

The use of vested property by the custodian, aside from the management of vested business enterprises, has largely manifested itself in the licensing of vested patents. The custodian has made the claim that "by delegation of Presidential authority under Section 5(b) of the Trading with the Enemy Act, as amended by the First War Powers Act, 1941, the Custodian is directed to hold, use, administer, or otherwise deal with vested (*i.e.*, seized) patents 'in the interest of and for the benefit of the United States'."<sup>67</sup> The language is that of 5(b), rather than that of Order 9095, and it has been seen to be open to question whether the language of the Order permits of the claimed delegation; if included in the Order, it must be found in some theory of implied or inferred powers.<sup>68</sup>

The custodian's policy with respect to the licensing of vested patents was first made public in a letter from the custodian to the president, dated December 7, 1942, the text of which was released on December 8 by the White House.<sup>69</sup> In this letter the custodian states that the president has "directed the Office of the Alien Property Custodian to seize all patents controlled by the enemy, regardless of nominal ownership, and to make these patents freely available to American industry, first for war purposes of the United Nations, and second for general use in the national interest." In the same letter the means to be used to attain these objectives were outlined. Licenses were to be granted for the life of the patents upon payment of a nominal fee, subject to no royalty in the case of enemy patents, and subject to reasonable royalty only after six months after the termination of the war in the case of patents of nationals of *enemy-occupied* countries. Recently the custodian granted the Government a royalty-free release and license under all enemy-owned patents vested by the custodian.<sup>70</sup>

Whatever criticism may be made of this policy,<sup>71</sup> it is clear, therefore, that the custodian's patent licensing policy has presidential approval, though no order specifically authorizing that policy has been made. But in embarking upon a program of this magnitude and complexity and involving property of such value to the United States as well as to its former owners (if compensation to such owners should ever be considered), it is believed that the custodian's authority therefor should have been more clearly set forth

<sup>67</sup>PATENTS AT WORK, A STATEMENT OF POLICY (Alien Property Custodian, 1943) 5.

<sup>68</sup>*Cf.* discussion on inferred powers of administrative agencies in Pound, *The Challenge of the Administrative Process* (1944) 30 A. B. A. J. 121; Field, *Rationing Suspension Orders: A Reply to Dean Pound*, *id.* at 385; and Smith, *Comment on Mr. Field's Reply for the O.P.A.*, *id.* at 390.

<sup>69</sup>N. Y. J. COMM., Dec. 9, 1942, at 10.

<sup>70</sup>10 FED. REG. 8271 (1945).

<sup>71</sup>*See, e.g.*, ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION (1943) 456-457.

than it now is in Order 9095. The necessity of such a further implementing of the custodian's powers is emphasized by the provisions of 10 of the Act, if applicable, which contemplate the licensing of enemy patents against substantial royalties.

Though the policy is in terms carried out under a system of licensing, it should be appreciated that its real effect is that of expunging the patents involved for the period of royalty-free use. Since the value of a patent lies in the right therein granted to exclude others from the manufacture, sale and use of the patented invention, permitting substantially all applicants to engage in such manufacture, sale and use upon a royalty-free basis is tantamount to destruction of the right.<sup>72</sup> In practical effect, the patents become a part of the public domain during the period when they are available royalty-free.

#### THE ALIEN PROPERTY CUSTODIAN AS FOREIGN PROPERTY CONTROL AGENT

For three categories of foreign property in the United States the custodian's powers under Order 9095 are not limited to "nationals of designated enemy countries" but, as has been noted, extend to "any foreign country or national thereof." In respect of that property, which includes, among other things, patents, trademarks and copyrights, the custodian is not limited to interests of nationals of countries with which we are at war, but may extend to any blocked country. Within this enlarged field of blocked, but not necessarily enemy, interests, the custodian's control has been primarily that of carrying out the regulatory functions formerly carried out by the Secretary of the Treasury. For the sake of simplicity an examination of his acts in this connection will be confined to the matter of patents.

In his General License No. 72, the Secretary of the Treasury established regulations governing the obtaining of United States patents and patent applications in which a blocked national had an interest and also the obtaining of patents in blocked countries. Following the making of Order 9095, Section 2(d) of which authorized the custodian to take control over patents and patent applications "in which any foreign country or national thereof has any interest," the Secretary amended his General License No. 72 so as to relinquish his control over such United States patents and patent applications to the custodian.<sup>73</sup> The custodian at the same time established by his General Order No. 11 and regulations thereunder his control over the ob-

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<sup>72</sup>*Ibid.*

<sup>73</sup>7 FED. REG. 9480 (1942).

taining of such United States patents and patent applications.<sup>74</sup> On the other hand, the Secretary, by General License No. 72A, retained his jurisdiction over patents issued by a *foreign* country in which a blocked interest exists, and permitted under certain restrictions any person not a blocked national to prosecute and receive blocked foreign patents.<sup>75</sup>

APPLICABILITY TO THE PRESENT CUSTODIAN OF THE TRADING WITH  
THE ENEMY ACT (OTHER THAN SECTION 5(b))—REMEDIES  
AGAINST THE CUSTODIAN

In reporting on the proposed amendment to 5(b) in the First War Powers Act, 1941, the House Committee said with respect to the status of the Act:

Some sections of that act are still in effect. Some sections have terminated, and there is doubt of the effectiveness of other sections.<sup>76</sup>

One of the sections of the Act whose status seems to be in doubt is 9(a). This provides a means for a person who is "not an enemy or ally of enemy" to institute suit against the "custodian" to recover property mistakenly seized by him. Certain recent decisions in suits against the present custodian for the return of vested property have been sustained on the theory that they are sanctioned by 9(a), since otherwise 5(b) would be unconstitutional for failure to provide an adequate remedy for the return of property of American citizens and alien friends mistakenly seized.<sup>77</sup> In so holding, it is believed that they have unnecessarily added to the confusion as to the applicability of the sections of the Act, other than 5(b), to the present custodian. Though the remedy provided in 9(a) was held by the Supreme Court in *Stoehr v. Wallace*<sup>78</sup> to be sufficiently adequate to save the constitutionality of seizures under 7(c), it does not follow that other judicial remedies available to the aggrieved citizen or alien friend in respect to a vesting under 5(b) may not also be adequate to save its constitutionality. Since the decision in *Stoehr v. Wallace* there has been a great growth in the body of administrative law and change in the attitude of the courts towards administrative agencies. Methods of judicial supervision over administrative agencies and the princi-

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<sup>74</sup>7 FED. REG. 9475 (1942).

<sup>75</sup>See note 71 *supra*.

<sup>76</sup>H. R. REP. NO. 1507, *supra* note 4, at 2. See Lourie, *The Trading with the Enemy Act* (1943) 42 MICH. L. REV. 205, 233.

<sup>77</sup>*Draeger Shipping Co. v. Crowley*, 49 F. Supp. 215 (S. D. N. Y. 1943), complaint dismissed upon showing plaintiff was a foreign "national," 55 F. Supp. 906 (S. D. N. Y. 1944); *Duisberg v. Crowley*, 54 F. Supp. 365 (D. N. J. 1944); *Standard Oil Co. v. Markham*, 57 F. Supp. 332 (S. D. N. Y. 1944); but *cf.* *Stern v. Newton*, 39 N. Y. S. (2d) 593 (N. Y. Cty., 1943).

<sup>78</sup>See note 60 *supra*.

ples applicable to judicial relief against the acts of such agencies have since been greatly elaborated and clarified. The courts, in the exercise of their broad equity powers and without express statutory direction, have granted injunctive or other equitable relief against the imposition of wrongful administrative orders.<sup>79</sup> And such equitable remedies are not "limited to the cases in which the Constitution is deemed to require judicial review."<sup>80</sup>

As a safeguard for the protection of the interests of American citizens and alien friends which might be prejudiced by acts of vesting, both the Secretary of the Treasury, during his brief interim of authority to vest,<sup>81</sup> and the custodian<sup>82</sup> established procedures for the presentation, hearing and decision of claims by such persons. The claims procedure of the custodian provides for notice of hearing and of decision rendered, the right to be represented by counsel or otherwise, the making of a record of the proceedings and of findings, and an examination of the record by the custodian before rendering decision. The procedure, at least in so far as its form is concerned, seems to preserve the basic constitutional requirements for administrative review.<sup>83</sup>

In the light of the system of administrative relief provided by the custodian and the non-statutory judicial remedies available, it is not believed necessary that the relief against mistaken seizures provided for in 9(a) of the Act must be held to be applicable to a vesting under 5(b) in order to save its constitutionality. The absence of any provision in 5(b) for judicial relief against wrongful vesting has, with other aspects of 5(b), led one authority to the view that this section cannot be considered to envisage the taking and use of foreign property for the public benefit as under an eminent domain statute.<sup>84</sup> But the taking of property for public use may occur otherwise than through a condemnation proceeding.<sup>85</sup> And it is well settled

<sup>79</sup>CHAMBERLAIN, DOWLING AND HAYS, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) 175-182; FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 80-82; BLACHLY AND OATMAN, *op. cit. supra* note 57, at 185-195; *cf.* 28 U. S. C. A. § 41 (20) and 250, cases cited *infra* note 86.

<sup>80</sup>FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 81.

<sup>81</sup>7 FED. REG. 1021 (1942).

<sup>82</sup>7 FED. REG. 2290 (1942).

<sup>83</sup>*Cf.* *Morgan v. United States*, 304 U. S. 1, 58 Sup. Ct. 773 (1938); *Timken-Detroit Axle Co. v. Alma Motor Co.*, 144 F. (2d) 714, 719 (C. C. A. 3d, 1944); ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION (1943) 452.

<sup>84</sup>Dulles, *loc. cit. supra* note 17, at 251-252; *contra* McNulty, *loc. cit. supra* note 52.

<sup>85</sup>*Hurley v. Kincaid*, 285 U. S. 95, 52 Sup. Ct. 267 (1932); *United States v. North American Transportation & Trading Co.*, 253 U. S. 330, 40 Sup. Ct. 518 (1920); *United States v. Lynah*, 188 U. S. 445, 23 Sup. Ct. 349 (1903).

that no statutory provision for payment of compensation is necessary, inasmuch as when the United States takes private property for public use it impliedly contracts to make just compensation therefor in view of the Fifth Amendment.<sup>86</sup> Hence, the silence of 5(b) as to compensation for takings made under it does not import its unconstitutionality. The Act of March 9, 1933, in which 5(b) was recast into substantially its present structure, also empowered the Secretary of the Treasury to requisition gold.<sup>87</sup> The constitutionality of this was sustained notwithstanding the absence of provision for compensation.<sup>88</sup> When vesting only is in issue, rather than sale or liquidation or other acts involving damage, it may be that a claimant should be required to exhaust his administrative remedy before the custodian before invoking judicial relief.<sup>89</sup> But when the claimant's property is threatened with loss or damage by virtue of acts of the custodian, the court "would have full power, and be under a compelling duty, by way of coercion upon the Custodian to preserve the property intact."<sup>90</sup>

Relief under 9(a) is, moreover, limited by its terms to property transferred to or seized by the "official" or "custodian" whose office is created under 6 of the Act, and it has been seen that the present custodian is not that "official." Hence, the fact that 7(c) provides that the relief provided in 9(a) shall be the "sole relief and remedy" of claimants against the "custodian," does not act as a bar to the resort to nonstatutory remedies available to persons aggrieved by the *present* custodian's acts taken under the authority of 5(b). These former sections are part of an entirely different structure of enemy property control from that erected under 5(b).<sup>91</sup> For example, 9(a) is available to "any person not an enemy or ally of enemy." This would permit a person who might not be technically an "enemy" yet in fact a "national" of a "designated enemy country," because of the breadth of these latter terms as against the relatively narrow statutory meaning of

<sup>86</sup>Campbell v. United States, 266 U. S. 368, 45 Sup. Ct. 115 (1924); United States v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306 (1884).

<sup>87</sup>48 STAT. 1 (1933), 50 U. S. C. § 5 (Appendix).

<sup>88</sup>Campbell v. Chase Nat. Bank, 5 F. Supp. 156 (S. D. N. Y. 1933), *aff'd* 71 F. (2d) 669 (C. C. A. 2d, 1934), *cert. den.* 293 U. S. 592, 55 Sup. Ct. 108 (1934).

<sup>89</sup>Stern v. Newton, *supra* note 77; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 Sup. Ct. 459 (1938); Prentiss v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67 (1909); Berger, *Exhaustion of Administrative Remedies* (1939) 48 YALE L. J. 981; *cf.* Hartmann v. Federal Reserve Bank of Philadelphia, 55 F. Supp. 801, 810 (E. D. Pa. 1944) (review of "freezing" of bank account by Secretary of Treasury).

<sup>90</sup>See Standard Oil Co. v. Markham, *supra* note 77, at 334.

<sup>91</sup>*Cf.* DOMKE, *op cit supra* note 52, at 262. Judge Knox, in Standard Oil Co. v. Markham, *supra* note 77, at 334, considers the limitations of 7(c) and 9(f) as involving "situations that arise when the Custodian has made disposition of seized property prior to the time at which claimant, under the privilege given him by 9(a) institutes suit against the Custodian for the purpose of reacquiring his property."

"enemy," to sue for the recovery of vested property under the authority of 9(a). The plaintiff in the *Duisberg* case quite properly limited his allegation of non-enemy character to the statement that he was a United States citizen, ignoring any requirement of adducing proof that he was not a "foreign national" within the meaning of 5(b) and Orders 8389 and 9095 pursuant thereto.<sup>92</sup> On the other hand, the court in the *Draeger Shipping Company* case, without sanction of 9(a) as such but reading it and 5(b) as in harmony, required the plaintiff to prove that it was not such a "foreign national."<sup>93</sup> Though no other course was open to the court, if the consequences of its holding were not to subvert the purposes of 5(b) by requiring the return of property falling within the sphere of control of 5(b) and yet outside the system of seizure of enemy property established under World War I legislation, in establishing the requirement of the furnishing of such proof by the plaintiff the plain direction of 9(a) that the plaintiff need only show that he is not "an enemy or ally of enemy" was ignored. Yet if 9(a) were held to be available as relief against action under 5(b), and were strictly applied in accordance with its terms, the results would be so disruptive of the technique of control established under 5(b), as above seen, as to lead 9(a) so to be adopted only in the most compelling circumstances. The only such circumstance thus far advanced is that of saving the constitutionality of 5(b), which has been shown to be without basis.<sup>94</sup>

#### REMEDIAL LEGISLATION AND EXECUTIVE ORDERS

It is of course recognized that the deficiencies and doubts in the present structure of legislation and executive orders relating to enemy property is but a necessary consequence of the press of legislation in the early days of our participation in the war. When the need for action is paramount, time is lacking for the creation of a nicely articulated legal structure to support steps essential in the war effort. The flow of legislative authorization and executive delegation and direction is not always likely to pass through neatly marked channels. But the task of amplifying existing legislation in order to establish the necessary measures of protection and compensation required by the Constitution and applicable treaties and principles of international law, and of refining and supplementing the provisions of existing executive orders in order to eliminate evident deficiencies, is one not to be indefinitely postponed.

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<sup>92</sup>*Supra* note 77.

<sup>93</sup>*Supra* note 77.

<sup>94</sup>Similar conclusions to those herein expressed will be found in McNulty, *loc. cit. supra* note 51, at 143-147.

## LEGISLATION

Among the legislative problems awaiting consideration are the following:

1. *Disposition of property held by the custodian.* It is directed in 12 of the Act that all property taken by the custodian (other than money, which was to be deposited in the Treasury) was to be retained by him and after the war enemy claims thereto were to be "settled as Congress shall direct." The existing doubt as to the applicability of this section to property held by the custodian should be removed by expressly declaring it to be so applicable, subject to such exceptions as may be necessary to accommodate its terms to the provisional character of the custodian's vesting orders and other measures of the custodian designed to preserve the identity of vested property and the proceeds thereof. Alternatively, Congress should formulate at least in general terms its policy as to the disposition to be made of such property. The disposition of property of the value of that now taken over by the custodian should not any longer be left to his personal discretion and determination of what may be "in the interest of and for the benefit of the United States." Questions of constitutional requirements, international responsibility both under treaty and principles of international law, the arrangements which may be made in the peace treaties, must all be weighed in determining what is in "the interest . . . of the United States." On the one hand, it seems established that international law condemns the confiscation of enemy private property.<sup>95</sup> Yet on the other hand, the courts of the United States have been loath to deny that power exists in the sovereign to confiscate the property of the enemy wherever found.<sup>96</sup> But whether departure from the rules of international law, aside from the retrogressive effect to such a step,<sup>97</sup> is in the best interests of the United States is at least open to question. The adoption of such a precedent would inevitably have a long-term preju-

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<sup>95</sup>*Supra* notes 29, 31; *infra* notes 96, 97, 99. See generally Sommerich, *A Brief against Confiscation* (1945) 11 LAW AND CONTEMP. PROB. 152.

<sup>96</sup>*Brown v. United States*, *supra* note 59; *Miller v. United States*, *supra* note 61; *United States v. Chemical Foundation*, *supra* note 30. But on the battle front itself the Hague Regulations, according to which "private property cannot be confiscated," would seem to apply, inasmuch as their ratification by the United States stands in force and effect. *Hague Conventions of 1899 (II) and 1907 (IV) Respecting the Laws and Customs of War on Land, Regulations, Art. 46.* SCOTT, *THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907* (1915) 123, 129, 131.

<sup>97</sup>*Cf.* Herz, *Expropriation of Foreign Property* (1941) 35 AM. J. INT. L. 243, 254, 262, in which the author concludes that the present world struggle, representing a conflict between, on the one hand, an order seeking world supremacy in which the system of private property is replaced by state regulation, and, on the other hand, the existing system of equality between states and the protection of private property, will decide the fate of the established rules of international law condemning the confiscation of foreign property without compensation.

dicial effect on the approximately thirteen and one-half billion dollars of United States' investments abroad.<sup>98</sup> As stated by former Secretary Hull:

The confiscation of these private enemy funds by this Government and their distribution to American nationals would react against the property interests (some very large) of American nationals in other countries. It would be an incentive to other governments to hold American private property to satisfy claims of their nationals against this Government and to pass upon such claims in their own way. It is important from my point of view, therefore, that the United States should not depart in any degree from its traditional attitude with respect to the sanctity of private property within our territory whether such property belongs to nationals of former enemy powers or to those of friendly powers. A departure from that policy and the taking over of such property, except for a public purpose and coupled with the assumption of liability to make just compensation, would be fraught with disastrous results.<sup>99</sup>

One recently proposed bill would convert all vested property into cash funds which would "become the absolute property of the United States," leaving it to each country affected "to compensate its nationals for their property . . . and to release the United States from any and all claims arising therefrom." The United States would then compensate its citizens for war loss claims sustained since January 1, 1937.<sup>100</sup> Another bill with a program of using enemy funds and funds realized from sales of enemy property to compensate American nationals for war damage, proceeds on the assumption—believed to be mistaken—that the custodian's acts of vesting have also operated as seizures under 7(c) of the Act.<sup>101</sup>

2. *Relinquishment of foreign property control generally.* The problem of the post-war control of foreign property and foreign exchange is not confined to the peace treaty settlements. The manifold problems incident to the relinquishment of "freezing control," the continuance of some system of foreign exchange control during the troubled days of world-wide conversion to a peace-time economy and restoration of shattered trade areas demand specific legislation. Section 5(b) was not designed to meet these problems and its limitation to "time of war" or "national emergency" might prove disastrous. The necessary tools must be at hand for use when needed and consideration should be given to the enactment of the required legislation.<sup>102</sup>

<sup>98</sup>N. Y. Times, March 6, 1944, p. 32. According to recent Treasury Department TFR-300 and TFR-500 Census, enemy-owned assets in the United States total \$441,000,000 against \$1,775,000,000 American-owned assets in enemy countries. Hearings, *supra* note 47, at 104.

<sup>99</sup>Letter from Secretary Hull to Senator Capper, May 27, 1935, quoted in (1937) 31 AM. J. INT. L. 680.

<sup>100</sup>S. 1322, 79th Cong., 1st Sess. (1945).

<sup>101</sup>H. R. 3371, 79th Cong., 1st Sess. (1945).

<sup>102</sup>See Littauer, *The Unfreezing of Foreign Funds* (1945) 45 COL. L. REV. 132.

3. *Remedies against the custodian.* H.R. 1530 was introduced by Representative Sumners to settle the question of the availability of judicial relief against acts of the custodian.<sup>103</sup> This provides a system of judicial and administrative relief superseding altogether that of 9(a). The present doubt as to whether the administrative remedies must first be exhausted by a person claiming an interest in property vested in the custodian is removed by a provision that it is only necessary, in order to institute suit against the custodian, that a claim shall have been filed by the plaintiff with the custodian. The right to a return of the claimant's property through court order is, however, dependent upon his establishing that "he is not a foreign country or national thereof as defined pursuant to subsection (b) of Section 5" of the Act. Presumably this means that he must establish that he is not a blocked national under Order 8389. For so long as he is a blocked national, the foreign national is barred access to our courts and denied the return of his property. Not even the grant of a general license by the Secretary of the Treasury would relieve him of this disability. Many blocked nationals are, nevertheless, alien friends, and some blocked countries, such as Poland, Norway and The Netherlands, are members of the United Nations. Even a "national" of the National Government of the Republic of China might be barred from suit under this interpretation.<sup>104</sup> No valid reason for this discrimination can be seen and to the extent that alien friends are denied the relief to which they are entitled under the Constitution,<sup>105</sup> this proposed measure seems deficient. Though it saves the rights of alien friends under 28 U. S. C. A. Section 41(20) and 250, denial of this right of suit, with its

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<sup>103</sup>H. R. 1530, 79th Cong., 1st Sess. (1945) formerly H. R. 5031, 78th Cong., 2d Sess. (1944).

<sup>104</sup>China is under Order 8389 a "foreign country designated in this Order" and a blocked country, but by General License No. 60 the National Government of the Republic of China was made a generally licensed national. Persons were, however, thereby "generally licensed" only "to the extent they are acting for or on behalf of such government."

<sup>105</sup>*Russian Volunteer Fleet v. United States*, 282 U. S. 481, 51 Sup. Ct. 229 (1931); Littauer, *loc. cit. supra* note 9. Note that the custodian in his vesting orders permits the filing of claims on account thereof by any person except a "national of a designated enemy country." The blanket prohibition of suit by blocked nationals would, among others, affect resident alien enemies, of whose status the Supreme Court has recently said: "The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy." *Ex parte Kawato*, 317 U. S. 69, 75, 63 Sup. Ct. 115, 118 (1942). The circumstances requiring "freezing control" are not necessarily applicable to the same extent and for the same period of time as those prohibiting resort to the courts. "Freezing control" and the consequent creation of the status of blocked nationals will probably continue after the termination of the war when traditionally the right of access to our courts is restored even as to nonresident aliens of the former enemy. See § 7(b) of the Act.

consequent loss of right to the return of the property itself, seems unnecessary in view of the abundant measures of foreign property control already existing to prevent the use of such a right in a manner helpful to enemy interests.<sup>106</sup> A recent and more limited version of this bill is H.R. 3750, which would empower the custodian to return vested non-enemy property and which does not expressly deny access to our courts against blocked nationals.<sup>107</sup>

Provisions of H.R. 1530 intended to provide for the payment of certain debt claims have been strongly criticized. It has been pointed out that the debt claims which the measure protects are only those "which arose prior to, vesting with reference to or out of actions related to" vested property.<sup>108</sup> Even these creditors seem denied access to the courts, and payment may be rejected or postponed whenever the custodian "shall be of the opinion that the payment of any debt claim would be contrary to the interest of the United States." Moreover, frozen or blocked property under Treasury Department control would still remain free from debt claims of American creditors.<sup>109</sup>

4. *Claims of enemy owners.* While it is premature now to determine the extent to which claims of enemy owners of vested property shall be compensated, the practice of the custodian to keep vested property and the proceeds thereof in appropriate accounts should be sanctioned and 12 of the Act declared not applicable thereto in its requirement that proceeds of sales be deposited forthwith in the Treasury, with perhaps the consequent result that their identity will be lost. The door will thus be kept open to such later disposition of the claims of enemy owners as Congress, or the peace treaties, may finally determine.

5. *Administrative problems in the Office of Alien Property Custodian.* The lack of doubt as to the applicability of the remaining sections of the Act to acts of the custodian appointed pursuant to 5(b) would be cured, so far as various administrative problems of the custodian are concerned, by H.R. 5031.<sup>110</sup> This bill is limited to "property or interest vested by the Alien Property Custodian by action subsequent to December 18, 1941," while still

<sup>106</sup>Cf. *The Pietro Campanella*, 47 F. Supp. 374 (D. Md. 1942) in which former enemy owners of vessels vested by the custodian were permitted to defend libels for forfeiture notwithstanding the vesting of their title by the custodian. Moreover, the prohibition of suits by nonresident enemy aliens still prevails as a protective measure. *Ex parte Colonna*, 314 U. S. 510, 62 Sup. Ct. 373 (1942); *Ex parte Kawato*, *supra* note 105, at 75, 76. Professor Borchard has stated: "The Custodian could have legalized his far-reaching proposal by providing for royalty compensation on the patents he licenses, the compensation to be held in trust for private owners." Borchard, *Nationalization of Enemy Patents* (1943) 37 AM. J. INT. L. 92, 96.

<sup>107</sup>H. R. 3750, 79th Cong., 1st Sess. (1945). For an earlier form of this bill see H. R. 3749, 79th Cong., 1st Sess. (1945).

<sup>108</sup>Cf. *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591, 44 Sup. Ct. 209 (1924).

<sup>109</sup>Hearings, *supra* note 47, at 33, 38, 46, 55, 62-65; N. Y. Times, Feb. 11, 1945, § 5, at 4S.

<sup>110</sup>*Supra* note 103.

preserving otherwise the provisions of the existing Act, thereby avoiding the problems incident to a repeal by implication or otherwise of inconsistent and duplicating provisions of the Act. The custodian's authority under existing law would remain unimpaired, the new provisions acting to supplement and reinforce that authority. Questions such as the authority of the custodian to pay current expenses out of funds held by him, the applicability of taxes to vested property, and the liability of vested property to attachment proceedings, would be settled by this proposed measure.

#### EXECUTIVE ORDERS

The drafting of executive orders necessarily takes place without the advantage of the fully developed legislative technique of Congress. The refining process which is involved in the consideration in committee and on the floor of the objectives and effect of a proposed bill, the debate and the accompanying weighing and sifting of the terms employed in the bill, are lacking. The drafting of executive orders is less deliberate and is confined to fewer hands; opportunities for human error and oversight are therefore more likely to be present.<sup>111</sup>

Approaching in this light the defects in Order 9095 establishing the Office of Alien Property Custodian discussed above, it is believed that this Order should be amended and supplemented by further executive orders in the following respects:

1. In order to settle the question whether the custodian may exercise, independently of the Secretary of the Treasury, the 5(b) powers under which vested property may be "used, . . . liquidated, sold or otherwise dealt with," an express conferment of such powers upon the custodian should be made. But the exercise of these powers, partaking as they do of appropriation instead of custodianship, should be limited to property of "nationals of designated enemy countries," with such enlargement in meaning of that term as may be necessary for the purpose, and should not be permitted to extend to property of other "foreign nationals" except as first determined by the president.

2. The "terms and conditions" upon which the delegated powers shall be exercised should be amplified, at least to the extent of reaffirming the

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<sup>111</sup>Problems incident to executive regulations of the nature of Executive Orders are not confined to this country. In England, the "Active Back Bench" (as opposed to the Front Bench where the ministers sit) composed of 28 Members of Parliament, "has set itself to watch the overwhelming flood of statutory orders whose terminology is often obscure. . . . The group claims that the number of obscurities and orders has already diminished, but they are proud, above all, of inducing the Government to appoint a committee to examine continuously such delegated legislation." WALL STREET JOUR., Aug. 14, 1944, at 1.

standard prescribed in 5(b) for their exercise that it shall be "in the interest of and for the benefit of the United States."

3. Designation should be made of the "foreign countries" referred to in Section 2(b), (d) and (e) of the Order whose property of the classes therein defined shall be subject to the jurisdiction of the custodian. In so far as regulatory measures of the custodian are concerned, these countries should be defined to be the blocked countries designated in Order 8389. In so far as control through vesting is concerned, the exercise of such powers should be limited to "nationals of designated enemy countries" or some newly defined category of enemy interest.

4. There should be an express conferment of authority and direction covering the custodian's patent licensing program and its royalty-free features. It should be appreciated that such an unequivocal executive approval and assumption of responsibility will, however, directly raise questions of international responsibility to protesting nations which at some time must be met.<sup>112</sup>

5. A formal ratification and approval should be made of all prior acts of the custodian performed in reliance on Order 9095, if within the scope of the conferral of authority first above recommended. Apart from questions raised in the patent licensing policy of the custodian in connection with patents of nationals of enemy-occupied countries, it is believed that no acts of the custodian outside the scope of the first recommendation above have taken place, and hence such a ratification should be sufficient to cure any questions raised by virtue of any deficiency in the present terms of Order 9095.

#### CONCLUSIONS

Our foreign property control system in all its present complexity and ramifications has sprung from a relatively simple statutory provision. The very simplicity and breadth of 5(b) has indeed made possible the extraordinary expansion in the system of regulation and administration of foreign property by the Executive which has taken place. But it is now evident that further refinement in the statute and in executive orders under it is necessary. The defects and gaps in the present structure of legislation and executive orders should be remedied. The wartime powers of the statute should be separated from those intended for peacetime use; the problems raised by the existing wartime controls should be recognized and the legislative policy as to their handling should be settled; and it should be definitely determined what remaining parts of the Act continue in force and to what extent.<sup>113</sup>

<sup>112</sup>N. Y. Times, May 13, 1943, at 4; see Littauer, *loc. cit. supra* note 9.

<sup>113</sup>Cf. H. R. REP. No. 1507, *supra* note 4, at 2; Lourie, *loc. cit. supra* note 76, at 233.