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THE TAKING AND DESTRUCTION OF PROPERTY UNDER A DEFENSE AND WAR PROGRAM†

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Under a defense and war program one spotlight of public attention focuses upon property rights. Whether this focal point exists on the same plane of importance as those of life, liberty and labor may be a matter of dispute, but certainly the modern Atlas of a war-burdened earth is a man of property.

In this article it is proposed to explore the effects of the needs of a defense and war program upon property rights. The problems treated are primarily concerned with the direct taking and destruction of property rather than the effect of regulatory measures upon property rights. The rights touched upon are those of ownership, of possession, and of control over the use of property. To what extent are losses of property rights compensable?

After some introductory material this article will be developed under seven major headings: (1) History of expropriation of property for war purposes; (2) The right to take, use or destroy property; (3) The methods by which property is taken; (4) The kinds of property and purposes for which it may be taken; (5) Expropriation under foreign law; (6) The right to and the measure of compensation; and (7) Damage from hostile action.

Regulation versus Expropriation

Primarily, property rights under a war economy are affected by government action in two ways. Regulatory control and the direct acquisition of property have become standard practice. The first normally¹ but not necessarily² is negative in operation. Property still remains in private ownership but limits are prescribed as to what the owner may do with such property and what he may not do. But in ways not inconsistent with these restrictions he still may treat the property pretty much as his own.³ On the other hand, expropriation is a taking of the property from the owner by the government. This does not necessarily mean that the former owners always disappear from the picture save for their rights of compensation.⁴ In Great Britain during

†This is the first of two installments under this heading. The second half of Mr. Marcus' article will appear in the June issue of the Cornell Law Quarterly. [Ed.]

*The views expressed are those of the author and not necessarily those of any government agency.

¹*E.g.*, Necessity of getting a license or permit to dispose of or acquire property (tires, autos).

²A priority order has both positive and negative implications.

³*Cf.* Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 453, n. 162.

⁴Normally, however, they do disappear.

the present war, the government has requisitioned many merchant vessels while permitting them to be managed and operated by the former owners under government instructions.⁵ This was true in the United States during the last world war and is being repeated in the present conflagration.⁶

In time of war or in a time of earnest preparation for defense, both regulatory control and expropriation of property are necessary.^{6a} The two not infrequently are complementary⁷; thus during the first world war the United States requisitioned a large number of hulls which were in the process of construction as ships. By the use of priority orders the government was able to have the vessels built whereas their completion would have been impossible by private owners.⁸ The presence or threat of the requisitioning power often ensures obedience to regulatory control.^{8a}

Differences do exist, however. Regulation is more flexible than expropriation; by leaving ownership intact along with a residue of control it avoids the specter of large-scale government ownership, and, on the surface at least, is less disturbing than a direct taking of property.⁹ It enables an owner to cooperate with the government in the use of his property; not infrequently he may have a chance effectively to present his views to the decision-making officials as to the type or extent of the regulations. Obedience may be compelled in many ways: penal sanctions, economic sanctions, publicity.

⁵See THE ECONOMIST, Jan. 13, 1940, p. 52; World Economic Survey 1939-1941, Economic Intelligence Service, League of Nations (1941) 247; Note, *Role of British Merchant Marine in War* (March 4, 1942) Bulletins from Britain, p. 7.

⁶2d Annual Report, U. S. Shipping Board (1918) 34. Owners of vessels requisitioned in this war will become agents of the War Shipping Administration. See INFORMATION DIGEST, April 20, 1942.

^{6a}See the Price Administrator's remarks, *Hearings before the House Committee on Banking and Currency*, 77th Cong., 1st Sess., 1941, Pt. 1, 774. Mr. Patterson remarked that there was no doubt that priority control, requisitioning, and price control were three closely related elements. *Id.* Pt. 2, 1541.

⁷The Australian National Security (Prices) Regulations confer broad requisitioning powers, not contingent upon disobedience to a price regulation, upon the Minister of State for Trade and Customs (after receipt of a report from the Commonwealth Prices Commissioner). S. R. No. 176, 1940. No similar provision is found in the Price Control Act recently passed in this country. Commandeering powers obliquely conferred upon the Price Administrator by executive order No. 8734, 6 Fed. Reg. 1917, are quite limited in scope and availability. See also Claim of Hirst & Co., 4th Report of the Defense of the Realm Losses Royal Commission (London 1919) for the interplay among requisition orders for existing and future wool tops, priority orders, and price schedules. See *infra* note 8a.

⁸See *Smith v. United States*, 67 Ct. Cl. 182 (1929). Cf. 2d Annual Report of U. S. Shipping Board (1918) 33; (ships as a means of preserving commercial organizations and alleviating hardships).

^{8a}"This power of Congress to commandeer the Nation's resources was the true basis of our control of industry during the last war, supplemented by priorities, price control, conservation, simplification, substitution, and conversion of facilities." Testimony of Mr. Baruch, *Hearings before the House Committee on Banking and Currency*, 77th Cong., 1st Sess., Pt. 2 (1941) 992.

⁹It is customary to regard expropriation as a last resort. See *Hearings, loc. cit., infra* note 15.

On the other hand there are numerous situations where expropriation is the better answer. Complete domination often is necessary, for example, where lands are taken for a military camp, or where chattels or commodities are taken over for central distribution.¹⁰ This is also true where articles in course of construction can only thus be expeditiously completed.¹¹ The burden of war time expenses and war time regulations may be so great that the property owners themselves may request the government to take their property.¹² The government may step in to prevent a going concern from ceasing work because of insolvency,¹³ or because of labor troubles.¹⁴ Difficulty in enforcing numerous regulations may require the government to take over a particular piece of property or the total output of some commodity or article.¹⁵ Regulatory control on a large scale suffers from a time lag between conception and execution,¹⁶ which, on occasion, may make a direct taking and domination preferable. Normally, moreover, a taking of property is followed by payment therefor within a reasonable time.

Voluntary versus Compulsory Acquisition

The compulsory taking of property by the government is wont to be thought of as a castor oil method of acquisition. It goes without saying that voluntary transfer is generally less conducive to headaches and heartaches than compulsory acquisition. But in an emergency period expropriation is a common phenomenon. To the question, why direct purchase is not the most feasible method of acquisition if it is assumed that the property must be paid for, there are many valid answers. Leaving aside donations, a voluntary transfer of property calls for a willing buyer and a willing seller. There are always persons who will not sell their property. Of those willing to sell, some will honestly believe that their property is worth considerably more than the gov-

¹⁰Compare order of War Production Board for all silk processors to sell all their silk supplies to the Defense Supplies Corporation, *VICTORY*, Feb. 17, 1942, p. 4; *A WEEK OF THE WAR*, Feb 20, 1942: (raw sugar). See *Hearings before House Committee on Banking and Currency on H. R. 5479*, 77th Cong., 1st Sess., Pt. 1 (1941) p. 774.

¹¹See 2d Annual Report of U. S. Shipping Board (1918) 33; *Foreign Relations* (1917) Supp. 2, Vol. 1, p. 616: ships.

¹²See *THE ECONOMIST*, Oct. 12, 1941, at p. 459.

¹³This appears to have been the occasion for the requisitioning of the Federal Enameling and Stamping Company plant during the last world war. See Note, *American Economic Mobilization* (1942) 55 *HARV. L. REV.* 427, 519. Recently, machinery equipment and supplies of a t.n.t. plant were seized for this purpose. See *INFORMATION DIGEST*, Jan. 31, 1942.

¹⁴See Note, *American Economic Mobilization* (1942) 55 *HARV. L. REV.* 427, 519 *et seq.*

¹⁵*Cf.* Mr. Henderson's remarks, *Hearings before House Committee on Banking and Currency on H. R. 5479*, 77th Cong., 1st Sess., (1941) 58; *A Week of the War*, March 14, 1942, p. 6.

¹⁶*Cf.* Note, *American Economic Mobilization* (1942) 52 *HARV. L. REV.* 427, 447, n. 135, 448-449.

ernment's estimate; others will attempt to take advantage of the government's needs to use hold-up tactics.¹⁷

But the unwilling seller is by no means the major factor in the use of compulsory methods. Wars have little use for loiterers. Speed is essential. And speed is generally not an element in the process of negotiating a voluntary purchase. When two traders meet it is rarely a case of love at first sight. Acquisition cannot wait the completion of a dicker. In a very great number of instances the government, after taking property by compulsory means, has found it possible, with little friction, to come to an agreement with the owner as to the price to be paid.¹⁸ Again, the title of the purported owner may be so clouded that it would be improvident for the government to pay him even a mutually agreeable price. Many a condemnation suit is brought merely to give the United States a clear title—the title it takes by compulsory means is a fresh title, free from infirmities¹⁹—and to enable the person entitled to compensation to receive payment as promptly as possible.²⁰ A similar necessity for getting a fresh title may exist where the total amount of encumbrances against the property exceeds the value of the property.

A further reason for administrative officials resorting to compulsory methods is to avoid charges of fraud and negligence which may arise from direct purchases, especially in connection with land, where competitive bidding and cost plus fixed fee contracts are out of the question.²¹ The War Depart-

¹⁷Gt. Brt. Defence of the Realm Losses Royal Commission, First Report of the Commissioners, 1915-16, pp. 4, 5. "Comparison of the scale of payments in the Autumn and Winter 1914-15 as the result of bargains for indispensable accommodation in a time of public emergency, and of payments made more recently on the footing of compensation for loss suffered will, we think, show that in the time of a great war the difference of cost involved in the two systems may be a matter of very grave public concern." See also, SALTER, ALLIED SHIPPING CONTROL (1921) 39.

¹⁸Cf. *Hearings before the Subcommittee of the Senate Committee on Appropriations on H. R. 4965, 77th Cong., 1st Sess.* (1941) 48.

¹⁹Cf. *Declaration of Taking Act*, 46 STAT. 1421 (1931), 40 U. S. C. § 258 a (1941). This is because the government in the exercise of its power to take property may determine the extent of the interest to be taken. *Shoemaker v. United States*, 147 U. S. 282, 298, 13 Sup. Ct. 361 (1893); *Warm Springs Irrigation District v. Pacific Livestock Co.*, 270 Fed. 560 (C. C. A. 9th 1921); *Oakland Club v. South Carolina Public Service Authority*, 30 F. Supp. 334 (E. D. S. C. 1939), *affirmed*, 110 F. (2d) 84 (C. C. A. 4th 1940). In Massachusetts, where the United States has condemned lands held under a registered title, for practical reasons, the government has desired to have issued to it a title certificate. Under Section 46 of c. 185 of the Laws of Massachusetts, the certificate to be issued by the registrar contains certain qualifications and exceptions which give the person to whom it is issued quite clearly a marketable title but not one absolutely free from encumbrances. Nevertheless in cases where the government has taken the property by condemnation, the registrar has issued certificates without any such qualifications or exceptions.

²⁰Quite often no other person than the purported owner appears as a claimant, and he is paid the agreed price.

²¹Ultimately where compulsion is used, an impartial tribunal may be availed of to determine the compensation to be paid. See *infra* Part VI.

ment during the defense program found itself much embarrassed by its use of brokers acting on a commission basis.²²

While the government will resort to direct purchase where possible, its use of compulsory powers is inevitable and necessary.²³

I. HISTORICAL BACKGROUND OF THE TAKING OF PROPERTY FOR WAR PURPOSES

A. Before the 19th Century

In England, at an early date, saltpeter not infrequently was made subject to the crown's demands, while ships were often requisitioned in the middle ages for war purposes.²⁴ Even as today, much of the coastal lands of England were fortified or occupied by the armed forces to repel invasion, early threatened by the Spanish Armada, and later by the building fleets of Napoleon.

Wartime expropriation of property in the United States has had a long history. The Revolutionary War occasioned considerable taking of property, and requisitioning to provide for the needs of the soldiers was extensive.²⁵ But this period was notable especially for its being one of the first instances of large-scale taking of enemy property. Colony after colony found the Tories in their midst inviting objects of expropriation acts,²⁶ for, in the main, the Tories were men of property. Realty as well as personalty was confiscated on a large scale. As the war continued the emphasis shifted from a taking of the former to a taking of the latter.²⁷

²²See *Hearings before a Special Senate Committee Investigating the National Defense Program*, 77th Cong., 1st Sess., Pt. 1 (1941) 54 *et seq.* The use of brokers for this purpose may, under some circumstances, be of genuine benefit to the government, especially when there is lack of trained government personnel. See *Hearings before Subcommittee of the Senate Committee on Appropriations on H. R. 4965*, 77th Cong., 1st Sess. (1941) 46-47.

²³Administrative officials are sometimes either unaware of such considerations or think it politically inadvisable to support compulsory acquisition. Compare the statement by the Under Secretary of War that "The policy is to resort to condemnation only when land cannot be obtained by voluntary sale at a reasonable price," with that of General Somerville to the effect that recourse to condemnation proceedings was being employed as a fixed principle. *Hearings, loc. cit. supra* note 18, at 54. *Hearings before the Subcommittee of the Senate on Appropriations on H. R. 4965*, 77th Cong., 1st Sess. (1941) 48.

²⁴SCOTT v. HILDESLEY, *THE CASE OF REQUISITION* (1920) 59, 148 *et seq.*

²⁵CLARK, *EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER 1917* (1918) 44 *et seq.*, 201 *et seq.*

²⁶Thompson, *Anti-Loyalists Legislation during the American Revolution* (1908) 3 *ILL. L. REV.* 81; Turlington, *Treatment of Enemy Property in the United States* (1928) 22 *AM. J. INT. L.* 270. Many of these statutes are set out in 1 *AM. STATE PAPERS, FOREIGN RELATIONS* 201 *et seq.*

²⁷See Thompson, *loc. cit. supra* note 26, at 154-159.

B. Early 19th Century in the United States

Between this war and the Civil War, property rights were affected on a comparatively minor scale by the recurring instances of conflicts in which the United States engaged. The French spoliation claims, famed for their long-drawn-out judicial history,²⁸ arose out of the troublesome Napoleonic times. But in the War of 1812, British subjects within the United States had the benefit of a grace period given by Congress for the removal of their property.²⁹

During the Mexican War considerable territory came under military occupation and requisitioning seems to have been resorted to freely.³⁰

C. The Civil War and the War with Spain

Expropriation and confiscation were prevalent during the Civil War. Congress passed several confiscation acts. The first made the use to which the property was put the test of confiscability;³¹ but in the following year a more drastic act made rebel ownership enough to justify confiscation.³² This latter act made sales of property by one residing in a loyal state but aiding the rebellion subject to invalidation.³³ Both personalty and realty came within its terms,³⁴ but seizure of the thing condemned was essential to a forfeiture proceeding.³⁵ In the case of realty, doubts as to the constitutionality of absolute forfeiture³⁶ led Congress to limit the forfeiture provisions to the life of the offender.³⁷ These Confiscation Acts were shortly supplemented by the Abandoned and Captured Property Act of March 3, 1863,³⁸ and its amendment of July 2, 1864.³⁹

“The Confiscation Act authorized proceeding only against the interest of the disloyal owner; the Captured and Abandoned Property Act di-

²⁸Discussed in Briggs, *Fanny and Hope v. United States*, 46 Ct. Cls. 214 (1911).

²⁹2 STAT. 780 (1812).

³⁰See Lawrence, *War Claims and Claims of Aliens*, H. R. 262, 43 Cong., 1st Sess., (1874) Ser. No. 1623, p. 16, note 41. Much was unpaid. See CLARK, *EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER 1917* (1918) 32.

³¹12 STAT. 319 (1861). The president was to cause property of persons using it to aid the insurrection to be seized and condemned.

³²Act of July 17, 1862, 12 STAT. 589. Loyal or friendly lienors were protected by an Act of March 3, 1863, 12 STAT. 762.

³³Such sales were upheld where the government did not invoke the statute. *Conrad v. Waples*, 96 U. S. 279, 24 L. ed. 721 (1877).

³⁴*United States v. Republican Banner Officers*, 27 Fed. Cas. No. 16,148 (C. C. Tenn. 1863).

³⁵*Pelham v. Rose*, 9 Wall. 103, 19 L. ed. 602 (1869).

³⁶U. S. CONST. Art. I. § 9, cl. 3.

³⁷Act of July 17, 1862, 12 STAT. 627. For an extended discussion of these acts, see 27 R. C. L. 940 *et seq.*

³⁸12 STAT. 820.

³⁹13 STAT. 375.

rected the seizure of the property itself; and its sale carried the title against all claimants. The former, as respects property, had all the merciless features, inseparable from a war measure, and treated as enemies, whose property could be confiscated, all residents, within the insurgent States; the latter had this beneficent provision, that it made a discrimination among those whom the rules of international law classes as enemies, in favor of those who, though resident within the hostile territory, maintained in fact a loyal adhesion to the Government."⁴⁰

Requisitioning by military commanders was common,⁴¹ and on January 31, 1862, the president was authorized to take over the railroads and place them under military control.⁴²

Initially, the Confederate States adopted a policy of sequestering property of northern sympathizers as alien enemy property upon a theory of reprisal for the confiscatory activities of the Union. By an enactment of August 30, 1861,⁴³ sequestration of such property was made a source of indemnification to Southern sympathizers for the expropriation of their property under some act of the Union. This statute exempted debts of the Confederate government and those of any of its constituent states as well as the property of citizens of certain states, including those of the District of Columbia.⁴⁴ The Confederate provisions were considerably more elaborate and on the whole had fewer earmarks of passion than those of the Union enactments. A subsequent amendment of February 15, 1862,⁴⁵ was considerably more drastic and confiscatory.

During the Spanish-American War, the United States considered itself bound by treaties with Spain to allow its merchants a year to leave with their goods;⁴⁶ but private property on the seas was not infrequently captured by this country.⁴⁷

⁴⁰United States v. Winchester, 99 U. S. 372, 375, 25 L. ed. 479 (1878).

⁴¹See Lawrence, *War Claims and Claims of Aliens*, H. REPORT No. 262, 43d Cong., 1st Sess., (1874) Ser. No. 1623, p. 16. This report is a storehouse of factual information and legal theory on the taking and destruction of property in war time.

⁴²See H. R. EXEC. DOC., Vol. 4, pt. 1, No. 1, 39th Cong., 1st Sess., (1865-1866) Ser. No. 1251. As to requisitions of materials for use in connection with railroads during this period, see Aitchison, *War Time Control of American Railways* (1940) 26 VA. L. REV. 847, 856 *et seq.*

⁴³CONFEDERATE STATUTES AT LARGE, Ch. LXI.

⁴⁴But this exemption did not apply to those actually aiding the Union. It may be surmised that this exception to an exception was one not readily possible to put into practice.

⁴⁵CONFEDERATE STATUTES AT LARGE, Ch. LXXI.

⁴⁶See Turlington, *Treatment of Enemy Property in the United States* (1928) 22 AM. J. INT. L. 270. Spain allowed United States ships anchored in Spanish ports 5 days to leave after publication of a royal decree. FOREIGN RELATIONS (1898) 774.

⁴⁷*E.g.*, The Pedro, 175 U. S. 354, 20 Sup. Ct. 138 (1899). See Finkelnburg, *Private Property on the High Seas* (1904) 38 AM. L. REV. 641, 645.

D. The World War of 1914-1918

The World War of 1914-1918 was a raven-hued harbinger of what might happen to property rights in a war to come. The declaration of war was followed by the requisitioning of numerous German vessels lying within the territorial jurisdiction of the United States.⁴⁸ Other nations followed suit. The seizure of neutral Dutch ships in our ports seriously strained our relations with the Netherlands.⁴⁹ At the outbreak of the war 91 vessels of German registry interned in American ports were first taken into protective custody and then, under a Joint Resolution of May 12, 1917, and a supplementary executive order of June 30, 1917, were taken over by the United States Shipping Board.⁵⁰

In the United States, the Emergency Fleet Corporation on August 3, 1917, requisitioned all ships of over 2,500 tons dead weight capacity under construction; 431 ships were thus acquired.⁵¹ Title to vessels being built for foreign accounts was taken by the United States in order to ban operations under the American flag even when in allied service; former owners of vessels being built for American accounts were given opportunity to resume title on completion of vessels provided they would surrender possession of the vessels to the Board for the duration of the war plus six months, at requisition rates fixed by the Board, provided they would reimburse the Board for all expenditures incurred in completing the vessels, including the cost of speeding construction, and provided they would waive all claims arising from requisitioning.⁵²

The Federal Trade Commission in the United States early recommended that the production and distribution of coal be conducted through a pool in the hands of a government agency.⁵³ Railroads were actually taken over by the government.⁵⁴ The Army and the Navy issued over 7,000 compulsory orders.⁵⁵ The War Department found it necessary to resort to requisitioning

⁴⁸See 2 HYDE, *INTERNATIONAL LAW* (1922) 523.

⁴⁹See *FOREIGN RELATIONS OF THE UNITED STATES* (1918) Supp. 1. Great Britain did likewise. *Ibid.* 87 vessels were taken over by Navy Department in ports which included the Philippines and Puerto Rico. See *SECOND ANNUAL REPORT U. S. SHIPPING BOARD* (1918) 47.

⁵⁰*SECOND ANNUAL REPORT U. S. SHIPPING BOARD* (1918) 19. 99 ex-German vessels were taken over during this war. *Id.* at 22.

⁵¹*Id.* at 33. Many more U. S. vessels were requisitioned before the end of the war. *Id.* at 23 *et seq.* It has been said that all American steamers available for the nation's use were requisitioned. *THIRD ANNUAL REPORT U. S. SHIPPING BOARD* (1919) 14.

⁵²*SECOND ANNUAL REPORT U. S. SHIPPING BOARD* (1918) 11. Cf. British practice, *FOREIGN RELATIONS OF THE UNITED STATES* (1917) Supp. 2, vol. 1, pp. 605-607, 616.

⁵³Letter from Federal Trade Commission, *SEN. DOC.*, vol. 3, 65th Cong., 1st Sess. (1917).

⁵⁴See Aitchison, *War Time Control of American Railways* (1940) 26 *V.A. L. REV.* 847; *Handbook of Economic Agencies of the War of 1917*, p. 380—the American Express Company and certain coastwise steamship lines were also taken over.

⁵⁵Schwartz, *Commandeering of Plants during World War I*, June 19, 1941, Hd. 3621 U. S.

of supplies and equipment to a considerable extent in late 1917 and the first part of 1918.⁵⁶ The War Department alone acquired 571,286 acres of land during the World War,⁵⁷ and realty was acquired in less sizeable amounts by other government agencies. Six plants were taken over by the government during the last war under its requisitioning power.⁵⁸ In a few instances the physical property rather than an operating plant was requisitioned. The Cape Cod Canal came under the control of the government,⁵⁹ radio stations⁶⁰ and telegraph and telephone systems.⁶¹

In the United Kingdom, large quantities of land and numerous buildings were expropriated for military and naval use. The government took control of the coal mines, as did the Russian Provisional Government, while in France the government became the sole vendor.⁶² In Canada the food controller was empowered, with the approval of the Governor in Council, to requisition food.⁶³

Within the belligerent countries, enemy alien property was sequestered on a large scale.⁶⁴ Laws of this sort in a number of Latin-American countries owed their existence largely to the insistence of the United States.⁶⁵ The Alien Property Custodian in the United States took over \$500,000,000 of property,⁶⁶ which included some property taken by mistake from citizens of allies or of the United States.⁶⁷ The possibility of disproportionate retaliation by Turkey gave Turkish interests in this country an immunity not enjoyed by other enemy nationals.⁶⁸

E. The Present Struggle

The present struggle has already brought in its wake an expropriation of property awesome in its scope. In the United States the railroads have not been taken over as was done during the last World War, but otherwise a

⁵⁶Report of Commandeering Section, quoted in Schwartz, *supra* note 55.

⁵⁷See REP. SEC. WAR (1941) 38.

⁵⁸See *Hearings before the Senate Committee investigating the Munitions Industry*, 73rd Cong. (1934) part XVII, pp. 4270-4273.

⁵⁹See *U. S. v. Boston, C. C. & N. Y. Canal Co.*, 271 Fed. 877 (C. C. A. 1st 1921).

⁶⁰Ex. ORDER No. 2585.

⁶¹PROCL. No. 1466.

⁶²Letter from Federal Trade Commission, SEN. DOC., vol. 3, 65th Cong., 1st Sess., p. 49 (1917).

⁶³KEITH, WAR GOVERNMENT IN THE DOMINIONS (1921) 53.

⁶⁴See FOREIGN RELATIONS OF THE UNITED STATES (1918) Supp. 2, p. 259 *et seq.*

⁶⁵See *id.* at 365 *et seq.*; FOREIGN RELATIONS (1919) vol. 2, p. 287 *et seq.*, 400 *et seq.*; FOREIGN RELATIONS (1920) vol. 2, p. 755 *et seq.*, 878-879. As to Haiti, see FOREIGN RELATIONS (1921) vol. 2, p. 233 *et seq.* In some instances American advisers helped draft their acts and American citizens were appointed alien enemy property custodians. As to Cuba, see FOREIGN RELATIONS (1918) Supp. 2, p. 384 *et seq.*

⁶⁶See S. REPORT No. 273, 70th Cong., 1st Sess. (1928) Ser. No. 8829.

⁶⁷See FOREIGN RELATIONS OF THE UNITED STATES (1918) Supp. 2, p. 4.

⁶⁸*Id.* at 272.

comparison between the two periods on this score is clearly one of lesser to greater.

From the fall of 1939, the uneasy neutrality of the United States haltingly but persistently prepared itself for ultimate defense and war by a series of measures demanding greater and greater takings of personal and real property. In the World War, army camps were transitional points from which a constant stream of expeditionary forces were sent abroad. Camps were in the main temporary and comparatively few. American industry during that war never developed into an important source of the weapons of warfare. The army camps of today are more numerous than those of the last war, and need to be of considerably larger size to provide for more trainees and to permit large areas for training in the maneuvers required by modern mechanized warfare.⁶⁹ A bombing range is not a five-acre project. Plant expansion necessitated by the position of the United States as an arsenal, first for the allied powers and now for herself as well, has been another important factor in the large-scale acquisition of property.⁷⁰ A third important factor is defense housing. For a single project the War Department has taken over a greater acreage than it took during the World War. During the fiscal year of 1941 the Department acquired 7,647,551 acres.⁷¹ Since the close of that fiscal year through January, 1942, over 2,000,000 more acres of land have come under the complete control of the War Department, part of it through options, and part through condemnation.⁷² Substantial amounts of realty have been acquired by other agencies, such as the Navy Department, Maritime Commission, Federal Communications Commission, the R. F. C., and the various federal agencies connected with defense housing. During the fiscal year 1941 nearly a million and a half acres were acquired for defense purposes by condemnation.⁷³

Under the Export Control Requisition Act of October 10, 1940,⁷⁴ and the

⁶⁹See Statement of Secretary of War Stimson comparing today's camps with those of 1917-1918. *Hearings Before Special Senate Committee Investigating the National Defense Program*, 77th Cong., 1st Sess., Pt. 1 (1941). As to the need for access roads, see the same statement, and War Dep't Press Release of May 6, 1941.

⁷⁰From June, 1940, through the passage of the Fifth Supplemental Appropriation Act of 1941, \$1,785,000,000 was appropriated for plant expansion. Statement of Under Secretary of War. *Hearings*, *supra* note 69, at 23-24.

⁷¹See Annual Report Secretary of War (1941) p. 38. 140,188 acres were acquired in the fiscal year of 1940. *Ibid.*

⁷²Information supplied by War Department. Over 12,000,000 acres of land have come under the control of the War Department for war purposes. See, *Hearings before Senate Committee on Military Affairs on S. 2212*, 77th Cong., 2d Sess. (1942) 18. As to public lands included in this figure, see *infra*, Part IV.

⁷³See Annual Report Att'y Gen. (1941) p. 147.

⁷⁴54 STAT. 1090 (1940), 50 U. C. S. § 711 (Supp. 1941).

Requisitioning Act of October 16, 1941,⁷⁵ personal property of various kinds⁷⁶ has been requisitioned, and in some instances excessive inventories held by private persons have been seized.⁷⁷

By early 1941 some 87 foreign ships lying idle in United States waters had been seized.⁷⁸ These seizures inspired other American countries to take similar steps, and most of 148 ships laid up there were taken over.⁷⁹ During the fiscal year of 1941, 237 vessels were taken over by the United States for conversion to naval auxiliaries, district and patrol craft.⁸⁰

Thus far at least four plants in operation have been taken over by the government,⁸¹ as well as an inactive plant owned by the Federal Alloy Steel Corporation⁸² and possession has been taken of the Toledo, Peoria, and Western Railroad Company.⁸³ In February, 1942, the Navy Department announced that proceedings had been instituted for the acquisition of the Groton Iron Work at Groton, Connecticut.⁸⁴

The freezing of foreign funds has resulted in the taking over of more than

⁷⁵Pub. L. No. 274, 77th Cong. 1st Sess. (1941).

⁷⁶Raw materials, railroad tracks, etc. Information Digest, Dec. 26, 1941; Information Digest, Jan. 31, 1942, p. 5; see *infra* n. 87.

⁷⁷See Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 455, note 172. Cf. Information Digest, Feb. 24, 1942: Aluminum.

⁷⁸These were mainly Danish and Italian vessels, but included also French, Belgium, German, Greek, Norwegian, Estonian, Lithuanian, Roumanian and Yugoslavian vessels. See WORLD ECONOMIC SURVEY 1939-1941, ECONOMIC INTELLIGENCE SERVICE (League of Nations 1941) 254-255. The French liner Normandie was taken over on December 20, 1941. DEPT. OF STATE BULL. 544. Prior to disastrous fire which laid the boat, renamed the Lafayette, on its side at its Hudson River Pier, it was planned to resell this vessel to its former owners or their successors after the emergency when the vessel should no longer be needed by the United States. See Exec. Order No. 9001-A, Dec. 27, 1941, 7 Fed. Reg. 801.

⁷⁹WORLD ECONOMIC SURVEY, *supra* note 78, at 256. For somewhat different figures see, DEWILDE, *Wartime Economics Cooperation in the Americas* (1942) 17 For. Pol. Rep. 286, 295.

⁸⁰See Annual Report Secretary of the Navy (1941) p. 2.

⁸¹See Notes, *Executive Commandeering of Strike-Bound Plants* (1941) 51 YALE L. J. 282; *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 506. One of such plants seems to have been rescued from insolvency by this action on the part of the government. See Information Digest, Nov. 26, 1941, p. 2: War Department arranged \$500,000 financial assistance. The Triton Chemical Co. Plant in Virginia, not referred to in the above notes, has been taken over. The Federal Shipbuilding and Dry Dock Company plant in Kearny, New Jersey, was taken over August 23, 1942, and given back to its owners January 6, 1942. Writers have treated the *North American Aviation Company* case as an instance of protective custody rather than a taking-over. See Notes, *Executive Commandeering of Strike-Bound Plants* (1941) 51 YALE L. J. 282; *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 506. But the War Department seems to regard this as a temporary taking, see *Hearings before Subcommittee of the Senate Committee for the Judiciary of S. 2054*, 77th Cong., 1st Sess. (1941) 7.

⁸²See Information Digest, Oct. 27, 1941, p. 2. This was taken by condemnation.

⁸³Ex. Order No. 9108, 7 Fed. Reg. 2201; Order No. 1 of Office of Defense Transportation.

⁸⁴Information Digest, February 2, 1942.

\$200,000,000 of materials.⁸⁵ At least one shipyard has been taken over by the Maritime Commission.⁸⁶ The War Production Board has been instrumental in having a good deal of war materials seized,⁸⁷ and many alien enemy business houses in the United States have been padlocked.⁸⁸

In Great Britain substantial amounts of real and personal property have been acquired by the government for war purposes.⁸⁹ It has been said that industries producing war supplies conducted by private manufacturers or contractors are all under government control.⁹⁰ Railways operate under government control.⁹¹ Most of Great Britain's merchant marine is operating under requisition by the government.⁹² Neutral vessels and cargoes have been requisitioned,⁹³ and German exports were seized after the war broke out.⁹⁴ In the United Kingdom and in a number of its dominions and colonies, dollar holdings and United States securities have been requisitioned.⁹⁵

In Germany numerous plants have been designated "war plants" and placed under military control.⁹⁶ At the outbreak of war the German government took over oil and building iron stocks.⁹⁷

In South Africa a shortage of rifles caused the Government to commandeer them, not without opposition based upon real or supposititious fear of the natives.⁹⁸

⁸⁵Information Digest, Jan. 5, 1942, pp. 6-7.

⁸⁶Property of the Savannah Shipyards, Inc. Information Digest, Jan. 6, 1942, p. 3.

⁸⁷See Information Digest, Jan. 31, 1942, p. 5. *A Week of the War*, March 14, 1942. By April, 1942, some 60 separate requisitioning actions had been used to seize a wide variety of property. See W.P.B. press release No. 784, April 6, 1942. Thus far no legal action has arisen from these requisitions, but some litigation is expected.

⁸⁸See Information Digest, Jan. 23, 1942.

⁸⁹In connection with requisitioning land and buildings, it has been said that as of July 4, 1941, 124,411 requisitions had been made for the Army; as of July 5, 1941, 28,000 requisitions for the Royal Air Force; as of the end of July, for the Royal Navy about 10,000 requisitions. A good deal of requisitioning has been had in connection with rehousing homeless, and with caring for civil evacuees. See Report of John W. Morris on the Requisitioning of Land and Buildings and the Operation of the Compensation (Defense Act 1939) 1941, Cmd. p. 4. As to requisitioning railway wagons, see S. R. & O. 1941, No. 1570.

⁹⁰See (January 21, 1942) Bulletins from Britain, p. 4.

⁹¹*Id.* at 5

⁹²See (1940) 21 JOURNAL OF BRIT. PARL. OF THE EMPIRE 246; THE ECONOMIST, April 27, 1940, at p. 766; *id.*, May 25 and June 1, 1940, at pp. 937, 978; *id.* October 11, 1940, at p. 459.

⁹³See letter to THE ECONOMIST, Sept. 14, 1940.

⁹⁴(1940) 21 JOURNAL OF THE BRIT. PARL. OF THE EMPIRE 4, 22, 37.

⁹⁵*E.g.*, S. R. & O. (1941) No. 20. Cf. New Zealand: *Hearings before the Subcommittee of the Senate Committee on Appropriations on H. R. 6159*, 77th Cong., 1st Sess. (1941) 723. As to Indian dollar holdings, see S. R. & O. (1941) No. 142, and THE ECONOMIST, October 4, 1941, p. 417. As to sterling securities, see S. R. & O. (1941) No. 1570. See, in general, Mann, *Exchange Restrictions in England* (1940) 3 MOD. L. REV. 202, 204 *et seq.*

⁹⁶See WORLD ECONOMIC SURVEY, 1939-1941, ECONOMIC INTELLIGENCE SERVICE (League of Nations 1941) 40.

⁹⁷THE ECONOMIST, October 26, 1941, p. 521.

⁹⁸See (1940) 121 ROUND TABLE 158 *et seq.*

In the Netherlands Indies, German ships and other enemy property were promptly seized upon German invasion of Holland.⁹⁹ By a decree of March 5, 1942, the Netherlands East Indies government requisitioned Netherlands East Indies merchant ships.^{99a} Guatemala and Honduras have blocked the funds of Axis nationals,¹⁰⁰ while Brazil has closed Axis news agencies.¹⁰¹ In Cuba, control of transportation and communication facilities was established as of January 1, 1942.^{101a}

In lands conquered by the Axis powers, the taking of property on a large scale by the conquerors has become commonplace.¹⁰²

II. THE RIGHT TO TAKE PROPERTY FOR DEFENSE AND WAR PURPOSES

Under this and other legal systems there is no absolute right of private ownership, of possession, or of control of property as against the government in either peace time or war time.¹⁰³ The power to take property for the public use is known as eminent domain. There is no express authorization in the United States Constitution for the exercise of eminent domain. But this power needs no such sanction since it stems from the very essence of sovereignty and government—a nation's power to maintain its existence and to carry on its governmental functions.¹⁰⁴

The war power is embodied in the Constitution.¹⁰⁵ But on a parity of reasoning, the power would exist without constitutional sanction. In respect to property rights, attempts have been made to distinguish this power from the power of eminent domain, the police power, and the taxing power.¹⁰⁶ As between the first three powers mentioned, distinctions are often difficult to

⁹⁹(June 8, 1940) Com. Reports 528.

^{99a}Netherlands News, April 1, 1942, p. 49.

¹⁰⁰(1942) 6 FOREIGN COMMERCE WEEKLY 15. Guatemala has imposed, also, discriminatory taxes on Axis nationals. *Ibid.*

¹⁰¹(1942) 6 FOREIGN COMMERCE WEEKLY 11.

^{101a}(Feb. 28, 1942) FOREIGN COMMERCE WEEKLY 15.

¹⁰²*Cf.* WORLD ECONOMIC SURVEY, 1939-1941, ECONOMIC INTELLIGENCE SERVICE (League of Nations 1941) 45; (1941) 3 FOREIGN COMMERCE WEEKLY 85; Inter-Allied Review, Nov. 15, 1941. See Washington Sunday Star, Sept. 22, 1941, p. A-6.

¹⁰³See MARIN, EXPROPRIATION FOR PUBLIC USE IN THE DIFFERENT COUNTRIES, International Congress of Social Authorities, Expropriation of land, (Seville Oct., 1928). *Cf.* RANDOLPH, THE LAW OF EMINENT DOMAIN (1894) c. 1.

¹⁰⁴See *Kohl v. United States*, 91 U. S. 367, 371, 374, 23 L. ed. 449 (1874); *City of Oakland v. United States*, 124 F. (2d) 959, 963 (C. C. A. 9th 1942). *Cf.* *Georgia v. Chattanooga*, 264 U. S. 472, 480, 44 Sup. Ct. 369 (1924).

¹⁰⁵Art. I, § 8, (cls. 1-9); Art. IV, § 4; *cf.* Art II, § 2, cl. 1.

¹⁰⁶See FEDERAL EMINENT DOMAIN (1940) sections 5-8, a study prepared in the Lands Division of the Department of Justice. Despite its emphasis upon federal eminent domain it contains probably the most comprehensive treatment of the law of eminent domain now in print in the United States. Published in limited numbers, its distribution has been confined almost entirely to government attorneys and government libraries. See also RANDOLPH, THE LAW OF EMINENT DOMAIN (1894) notes at 9 *et seq.*

make. Broadly, the exercise of eminent domain requires compensation, the exercise of the police power does not. The first generally envisages a use by the taker, whereas the second usually entails destruction without actual use—the thing by its existence is detrimental to the public. But these generalizations fall down often enough¹⁰⁷ to indicate that a balancing of equities, of necessities, and a consideration of what the public pocketbook can and should bear may cause one or the other label to be applied. Nevertheless the distinction is often asserted¹⁰⁸ and different results generally follow a determination that one or the other power has been exercised.

In respect to property rights during a war period, the war power is generally treated as synonymous with the eminent domain power, although sometimes it has the earmarks of an exercise of the police power. The courts use eminent domain principles and terminology in cases of war time taking, and in this article they generally are treated as synonymous. The right to take property in England in war time has been linked with the king's right of purveyance in the middle ages,¹⁰⁹ and so has the right of eminent domain.¹¹⁰ Nevertheless, it is believed that the two lack perfect identification. The precedents of eminent domain in peace time relate almost entirely to real property. There is no backlog of precedent for the taking of personal property in the law of eminent domain. War time expropriation, on the other hand, has been applied on a substantial scale to both personalty and realty. Eminent domain is unfamiliar with the concept of "enemy property."

While the right of a government to possess or take property for war purposes has been universally acknowledged, there has been little law on the right of individuals to go upon or take property for similar purposes. If the danger is acute and such measures are necessary, it would seem that members of the public could take necessary steps no matter how harmful to private property without liability therefor, subject, however, to whether their action was reasonable under the circumstances.¹¹¹ The English common law has recognized just such a right in members of the public to enter upon and use the property of others to repel an invasion.¹¹²

¹⁰⁷See *infra*, Part VI.

¹⁰⁸It has been said the distinction is hard to make but is recognized in international law. Herz, *Expropriation of Foreign Property* (1941) 35 AM. J. INT. L. 243, 251, 254.

¹⁰⁹SCOTT v. HILDESLEY, THE CASE OF REQUISITION (1920) 50 *et seq.*, 138 *et seq.*

¹¹⁰Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 793 (1887).

¹¹¹One test of reasonableness would be the possibility of prompt action by the government itself. Cf. 40 STAT. 895 (1918) (condemnation authorized by any person to furnish electric power). Compare the right of an officer to go on property in the line of his duty. Heinz v. Murphy, 24 A. (2d) 917 (Md. 1942).

¹¹²"And in such case on such extremity they may dig for gravel, for the making of bulwarks, for this for the public, and every one hath benefit by it; but after the danger is over, the trenches and bulwarks ought to be removed so that the owner shall not have

A. The Right to Take Property under International Law

International law permits many instances of forcible taking of property in war time. Capture of property in the heat of battle or at sea is standard practice. And this is true of requisitioning by an invading army.¹¹³ Assessment upon conquered territories has been sanctioned under the name of contribution.¹¹⁴

Retorsion¹¹⁵ and reprisal¹¹⁶ are doctrines under which property can be expropriated and destroyed.¹¹⁷ The destruction of private property in the present war by bombing raids may bring these two doctrines into greater favor than they have been.

International law recognizes the right of angary—the right to take neutral

prejudice in his inheritance; and for the commonwealth, a man shall suffer damage. . . . the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action." The King's prerogative in Saltpetre, 12 Co. 12, 77 Eng. Repr. 1294 (1600). See also argument of the Attorney General in *Feather v. The Queen*, 6 B. & S. 267, 122 Eng. Repr. 1191, 1195 (1865).

¹¹³See CLARK, *EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER 1917* (1918) 35. Cf. 23 Op. A. G. 222, 226-227 (1900). In General Order No. 101, July 18, 1898, sent out by order of the Secretary of War pursuant to a proclamation of President McKinley, the following statement appears:

"It is conceded that all public funds and securities belonging to the government of the country in its own right, and all arms and supplies and other movable property of such government, may be seized by the military occupant and converted to his own use. The real property of the State he may hold and administer, at the same time enjoying the revenues thereof; but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways, and boats belonging to the State may be appropriated to his use, but, unless in case of military necessity, they are not to be destroyed. All churches and buildings devoted to religious worships and to the arts and sciences, all school-houses, are so far as possible, to be protected, and all destruction or intentional de-facement of such places, of historical monuments or archives, or of works of science or art, is prohibited, save when required by urgent military necessity.

"Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupants, but, unless destroyed under military necessity, are not to be retained." FOREIGN RELATIONS OF THE UNITED STATES (1898) 783.

¹¹⁴See Gregory, *Contributions and Requisitions in War* (1915) 15 COL. L. REV. 207. Compare the views of President Polk, 4 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENT (1897) 571 with those of the McKinley administration, General Order No. 101. As to contribution exacted by Germany, see *The Washington Sunday Star*, Sept. 22, 1941, p. A-6.

¹¹⁵A term generally applied to retaliation in kind. See INTERNATIONAL LAW SITUATIONS, NAVAL WAR COLLEGE (1932) 102.

¹¹⁶See War Department Basic Field Manual Rules of Land Warfare (1940) Art. 358. Friedmann, *International Law and The Present War* (1940) 3 MOD. L. REV. 177, 185 *et seq.*

¹¹⁷Cf. INTERNATIONAL LAW SITUATIONS, NAVAL WAR COLLEGE (1933) 39; *id.* (1930) 59 *et seq.*, 1 Op. A. G. 30 (1793).

property.¹¹⁸ Sea powers such as the United States and Great Britain have resorted to this right extensively during the last war and the present one.¹¹⁹ The extent of this right has been disputed¹²⁰ and its exercise in respect to Dutch vessels during the last war brought severe diplomatic repercussions; but in the two nations mentioned the power has been broadly asserted,¹²¹ and exercised by the United States while still a neutral.¹²²

B. *The Right to Take Property under Domestic Law*

The law of eminent domain appears to regard the legislature as the source of that power.¹²³ Whether this is true of the taking of property for war purposes will be referred to subsequently. In general, however, it may be said that the courts and administrative officials are inclined to look for statutory authority to test the right to take property for such purposes. Four main statutes exist under which property may be taken for war and defense purposes:

1. *The Act of August 1, 1888.*¹²⁴ This Act is not self-executing, but authorizes condemnation of realty at the instance of an officer authorized to procure real estate. If another act authorizes an officer to acquire¹²⁵ or purchase¹²⁶ realty, he may acquire it by condemnation.^{126a} In view of the presence

¹¹⁸INTERNATIONAL LAW SITUATIONS, NAVAL WAR COLLEGE (1926) 65. See Harley, *The Law of Angary* (1917) 13 AM. J. INT. L. 267; Allin, *Right of Angary* (1918) 2 MINN. L. REV. 415.

¹¹⁹ Cf. James, *Modern Developments of the Law of Prize* (1927) 75 U. OF PA. L. REV. 505. It has been asserted that requisitioning of neutral property on land and water was not common until the World War [INTERNATIONAL LAW SITUATIONS, NAVAL WAR COLLEGE (1926) 65 *et seq.*], but earlier instances are enumerated in a British memorandum of April 25, 1918 [see FOREIGN RELATIONS OF THE UNITED STATES (1918) Supp. I]. A Hague Convention is concerned with the requisitioning of railway material coming from neutral countries. 25 STAT. 2310, 2326.

¹²⁰See views of Dutch Government, FOREIGN RELATIONS OF THE UNITED STATES (1918) Supp. 1, vol. II, pp. 1440 *et seq.* Cf. statement of James W. Ryan, counsel for the Danish Shipping Committee, *Hearings before S. Committee on Commerce on S. J. Res. 67, 77th Cong., 1st Sess.* (1941) 51 *et seq.*

¹²¹See FOREIGN RELATIONS OF THE UNITED STATES (1918) Supp. 1, vol. II, pp. 1416, 1425, 1435, 1475. As to the problems arising out of this government's promise to redeliver the tonnage seized, see 3D ANNUAL REPORT U. S. SHIPPING BOARD (1919) 21 *et seq.*

¹²²See *supra* notes 78; statement of Mr. Ryan, *supra* note 120. In October, 1941, the War Department ordered seized for ultimate use by Russia bombing planes and equipment purchased in Canada by Peru and awaiting shipment to Peru from Brooklyn, N. Y. Washington Post, Oct. 15, 1941, p. 4.

¹²³See *Smith v. United States*, 32 Ct. Cls. 295, 309, 310 (1897). Cf. *People v. Superior Court*, 10 Cal. (2d) 288, 73 P. (2d) 1221 (1937).

¹²⁴25 STAT. 357 (1888), 40 U. S. C. § 257 (1928).

¹²⁵*Barnidge v. United States*, 101 F. (2d) 295 (C. C. A. 8th 1939). Authority to condemn under this Act recently has been conferred expressly upon the Reconstruction Finance Corporation. Pub. L. No. 506, 77th Cong., 2d Sess.

¹²⁶*Albert Hanson Lumber Co. v. United States*, 261 U. S. 581, 43 Sup. Ct. 442 (1923).

^{126a}It has been thought that the right to requisition includes the right to acquire property by voluntary purchase, 31 Ops Att'y Gen. 344 (1918). This generally will be

of the Act of August 1, 1888, it would seem clear that the presence of a special appropriation act, appropriating funds to be expended in specified land acquisition, would furnish sufficient authority to acquire realty by voluntary conveyance or condemnation.¹²⁷ This is so also where an appropriation act expressly provides for funds to be used for land acquisitions without specification.^{127a} Similar authority, it would seem, may be found in an appropriation act which in general terms empowers some official to use a lump sum for war and defense purposes.¹²⁸ An outstanding example of the latter type of act is the Emergency Fund created for the president.¹²⁹ This would be true even if in peace time the courts might be reluctant to find authority for the use of eminent domain in an appropriation act providing in general terms for the activities of some government agency. The scope of the war effort and the rapidity with which conditions change in war time make the use of property for future undefined purposes a necessity which a lump sum appropriation may be said clearly to include unless the context indicates the contrary.

While this Act is traditionally thought of as activated by an authorizing statute, it does not state that another statute is necessary. If the president, therefore, under his war powers can take realty for war purposes, it is arguable that if he authorized an officer of the government to acquire realty, such officer could initiate condemnation proceedings under the Act.

Under the Act of August 1, 1888, the acquiring agency¹³⁰ requests the Attorney General to institute condemnation proceedings. The action is brought in the name of the United States and title vests in the United States,

a reasonable inference, but it is not necessarily so since Congress may have preferred to leave the matter of compensation to be determined by the courts rather than by an administrative official.

¹²⁷*E.g.*, *Old Dominion Land Co. v. United States*, 269 U. S. 55, 46 Sup. Ct. 39 (1925).

^{127a}Thus, where Congress appropriates moneys for projects which necessarily require land for their consummation, authority to acquire land is implied. *Burns v. United States*, 106 Fed. 631 (C. C. A. 2d 1908). See *Op. Att'y Gen.*, June 3, 1941.

¹²⁸Congress is not consistent in the form of its legislation. In some instances it enacts merely an authorizing act. In other instances it authorizes the acquisition of property and tacks on a clause that a certain sum is authorized to be appropriated therefor, and subsequently, in a separate act appropriates moneys. Again Congress in an act merely appropriates moneys for specified projects which by their nature require the acquisition of realty. Congress also has in a single act appropriated moneys in one paragraph and expressly authorized the acquisition of property in another paragraph (*e.g.* Pub. L. No. 192, 77th Cong. 1st Sess.: Navy; Pub. L. No. 420, 77th Cong. 2d Sess.: Navy).

¹²⁹The first act during the present crisis creating that fund was 54 STAT. 297 (1940), 41 U. S. C. § 5 (1941). That act has since been supplemented by several other acts. One of the most recent is Pub. L. No. 353, 77th Cong., 1st Sess. *Cf.* Pub. L. Nos. 29, 139, 77th Cong., 1st Sess. Not infrequently the appropriation acts for various government agencies provide for the return by such agencies to such fund of monies allocated to them out of it.

¹³⁰The Tennessee Valley Authority is one of very few exceptions. Its own attorneys handle its condemnation suits, a practice reluctantly consented to by the Department of Justice.

but the control over the property is exercised by the agency making the requests.

2. *Possession pending a condemnation suit.*—In a direct expropriation without judicial process possession is taken as a matter of course. Where condemnation proceedings are instituted, the government has generally relied upon the Declaration of Taking Act¹³¹ or some other express statute under which possession might be had pending the condemnation proceeding. When no such statute is available or when it is thought undesirable to invoke the statute, possession has been obtained on application to the court either as a common law right incident to the exercise of eminent domain or as right to be implied from a statutory authorization to take a fee interest.¹³² No instance is known of resort to state statutes providing for immediate possession pending condemnation, but some dicta afford a basis of belief that the federal government could rely upon such statutes if it thought it necessary or advisable to do so.¹³³

Immediate possession is rarely sought by the government. Sometimes up to 60 days are allowed for occupants to remove from the premises, though for war and defense acquisitions considerably less time is allowed. But where large areas are taken it is customary to leave occupants of parts of the area undisturbed until those very parts are needed for construction or other purposes. Notice is usually given; nevertheless, hardship results not infrequently.¹³⁴ Protest in England against taking possession of land without reasonable notice when premises were unoccupied evoked a statement from the Secretary of State for War that service of a notice was not required but was usually given.¹³⁵ When a recalcitrant owner refuses to remove, the government usually procures his removal by a writ of assistance or other judicial remedy.¹³⁶

3. *The Declaration of Taking Act.*¹³⁷—This Act is not an authorizing act.¹³⁸ During the last three years it has been used in over three-quarters of

¹³¹See *infra* note 137.

¹³²Commercial Station Post Office v. United States, 48 F. (2d) 183 (C. C. A. 8th 1931). See Albert Hanson Lumber Co. v. United States, 261 U. S. 581, 43 Sup. Ct. 442 (1923).

¹³³See Brown v. United States, 263 U. S. 78, 44 Sup. Ct. 92 (1928); Morton Butler Timber Co. v. United States, 91 F. (2d) 884 (C. C. A. 6th 1937). City of Oakland, 124 F. (2d) 959, 963 (C. C. A. 9th 1942).

¹³⁴See *infra*, Part VI of this article.

¹³⁵See 84 SOL. J. 458.

¹³⁶See FEDERAL EMINENT DOMAIN (1940) 911. Contempt proceedings would lie for failure to obey an order to remove.

¹³⁷46 STAT. 1421, 1422 (1931), 40 U. S. C. §§ 258 a-e, (1941). A like act exists for the District of Columbia, 45 STAT. 1417 (1929) 40 U. S. C. § 370 (1941). A few states have similar acts.

¹³⁸It may be used in a condemnation proceeding, but authority to condemn must be

the condemnation cases instituted by the government. It permits the filing of a declaration of taking at the outset of a condemnation proceeding¹³⁹ or after the proceeding has already begun, under which title or the interest designated vests in the United States at the time of making a deposit of the amount of estimated just compensation.¹⁴⁰ Upon application to the court an order is made fixing the time when the government is to take possession.¹⁴¹ While an acquisition under a declaration of taking has been had of interests in realty less than a fee, it generally has been used where some sort of fee title was desired.¹⁴²

Its use is regarded by administrative officials as a mixed evil. Under war time pressure, the speed with which these declarations of taking are drafted and the often necessarily hasty determination by officials as to exactly what property must be taken result from time to time in a greater amount of land or a larger interest being taken than necessary.¹⁴³ When this occurs it may happen that the interests of the government may be best served without appreciable harm to the former owner by amending the declaration of taking to exclude the excess. But there is serious doubt whether this may be done without an Act of Congress.¹⁴⁴ Moreover, contrary to the practice in a number of non-contested cases, a recent Circuit Court of Appeals case has held that the government is not entitled to a refund where the ultimate award was less than the deposit which had been withdrawn by the owner.¹⁴⁵

4. *The Export Control Requisitioning Act of October 10, 1940.*¹⁴⁶—This

found elsewhere. Its primary function is to enable title and possession to be acquired at the beginning of a condemnation proceeding rather than at its termination.

¹³⁹It is usually filed together with the condemnation petition.

¹⁴⁰The deposit almost invariably accompanies the filing of the declaration of taking. The Declaration of Taking Act has been upheld as constitutional by all of a number of courts in which its validity has been challenged. *E.g.* *City of Oakland v. United States*, 124 F. (2d) 959 (C. C. A. 9th 1942). The Supreme Court has not had to pass upon its validity.

¹⁴¹This is usually embodied in an *ex parte* judgment on the declaration of taking, a judgment procured by the government as a matter of convenience rather than necessity.

¹⁴²See *infra*, Part IV, where the question of the extent of the interest taken is discussed. The major acts under which the United States takes realty do not expressly refer to interest in land. The effect of absence of such language will be discussed in Part IV.

¹⁴³The Department of Justice has proposed a statute which would minimize this possibility and alleviate most of such situations.

¹⁴⁴*Cf.* U. S. CONST. Art IV, § 4; *United States v. Nicoll*, 27 Fed. Cas. 149, No. 15, 879 (C. C. N. Y. 1826); *Irving v. Marshall*, 20 How. 558 (U. S. 1857). *Wisconsin Railroad Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341 (1890). See 31 Ops Att'y Gen. 570; 34 Ops Att'y Gen. 320. *But cf.* *Butte City Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. 211 (1905); *United States v. P. & L. E. D. Co.*, 272 Fed. 839 (C. C. A. 6th 1921); 31 Ops Att'y Gen. 198, 344; 20 Ops. Att'y Gen. 93 (1891). Two unreported district court cases have refused to permit the acquiring agency, over the objection of an interested party, to amend a declaration by eliminating an interest.

¹⁴⁵*Miller v. United States*, 125 F. (2d) 75 (C. C. A. 9th 1942).

¹⁴⁶54 STAT. 1090 (1940), 50 U. S. C. § 711 (Supp. 1941). Authority under this Act was to endure until June 30, 1942, unless Congress otherwise provided.

Act was passed to implement an earlier act¹⁴⁷ which provided for the restriction of exports of military equipment and munitions as well as tools and supplies necessary therefor. Under the Act of October 10, 1940, the president can requisition military and naval equipment or munitions, as well as tools, machinery or supplies necessary for the manufacture, servicing or operation thereof. This authority is limited to articles ordered, manufactured, procured or possessed for export purposes, but a good deal of personal property has been taken under it. The statute makes considerable personal property available to the government by expropriation. Articles contracted for by foreign countries and articles coming under the Lend-Lease Act are within its terms. Furthermore, since many of the items referred to in the Act are of a kind likely to be sent abroad either for our own forces or for allied forces, an order by the government for such articles under a plausible claim that they were going to be exported¹⁴⁸ would probably be sufficient to justify the exercise of the requisitioning powers granted by the Act.

5. *War Purposes Act.*¹⁴⁹—This law as enacted during the last war was meant to be a permanent act. It provides for the acquisition by the Secretary of War, through condemnation proceedings, of realty for specified purposes.¹⁵⁰ In the event of war or its imminence, immediate possession can be had upon the filing of a condemnation petition. Until recently the Act was little used, but some large scale condemnation proceedings are currently employing it. Declarations of taking are sometimes filed after the Act has been invoked.¹⁵¹ There is nothing in the Act which requires the consent of the court for taking immediate possession; nevertheless, administrative practice has been to apply to the courts for an order of possession.¹⁵² In view of the language of the statute and the time of its passage, however, it would seem that if the need were great and the judge absent or obdurate, possession could be taken by government under the Act without court action.

The Act has been broadened considerably by the Second War Powers Act.¹⁵³ Specified agencies and any other agency or governmental corpora-

¹⁴⁷54 STAT. 714 (1940), 41 U. S. C. prec. § 1 (1941) as amended by Pub. L. No. 507, 77th Cong., 2d Sess.

¹⁴⁸The article could be ordered for export at any time even though initially (at time of order to manufacture) it was not contemplated that it would be used abroad.

¹⁴⁹40 STAT. 241, 518 (1917, 1918), 50 U. S. C. § 171 (1928).

¹⁵⁰The Act was held not to authorize the taking of personalty used with the land. *Bussey v. United States*, 70 Ct. Cls. 104 (1930).

¹⁵¹Settlements and early distribution are promoted by the presence of the deposit under the declaration of taking and the vesting of the interest desired in the government.

¹⁵²This same practice has been followed in condemnation under the Rivers and Harbors Act, which permits the taking of immediate possession. 40 STAT. 911 (1918), 33 U. S. C. § 594 (1928).

¹⁵³Pub. S. No. 507, tit. II, 77th Cong., 2d Sess. (1942).

tion designated by the president may acquire realty for war purposes "by purchase, donation, or other means of transfer," and condemnation proceedings may be brought under the Act of August 1, 1888, "or other applicable Federal statute." On filing a condemnation petition immediate possession is obtainable. The Act is novel in providing that personal property located on the realty or used therewith may be taken together with the land, and this in a single condemnation proceeding.^{153a} The Act is not clear as to whether property may be commandeered by administrative officials without judicial process, but the phrase "other means of transfer" seems broad enough to include a compulsory transfer by any means. The Act provides for disposal "of such property or interest therein by sale, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940." Since the provisions referred to do not mention personal property as such,¹⁵⁴ it requires a liberal construction to find authority in this statute for disposal of personalty used with the land.

The amendment is to endure until December 31, 1944, or such earlier time as the president or Congress may determine.

6. *The Requisitioning Act of October 16, 1941.*¹⁵⁵—This Act started off its career in the form of a bill sponsored by the War Department for requisitioning any property, real or personal. In that form it was an admirable bill.¹⁵⁶ But by the time it had run the Congressional gamut it had become a model of what a requisitioning act should not contain.¹⁵⁷

If the president determines the use of specified articles¹⁵⁸ is needed for the

^{153a}Thus, a fleet of trucks could be taken if used in a plant which was taken over, although at the time of the taking the trucks might not be upon the land.

¹⁵⁴"... plants, buildings, facilities, utilities, appurtenances thereto, and land." 54 STAT. 713 (1940). This provision, furthermore, refers to the Secretary of War only. It is believed, however, that this Act is not limited to disposal by this officer. While this method of providing for disposal by cross reference is not a happy one, the intent seems to have been to confer broad powers of disposal. See *Hearings before House Committee on the Judiciary on S. 2208, 77th Cong., 2d Sess. (1942) 18 et seq.*

¹⁵⁵Pub. L. No. 274, 77th Cong., 1st Sess.

¹⁵⁶It is set out in *Hearings before the S. Com. on Military Affairs on S. 1579, 77th Cong., 1st Sess. (1941) 1-2*. It was based on provisions contained in the War Department's famous M plan of 1931. See *id.* at 6. While it authorized, in terms, only requisitioning, the Act of Aug. 1, 1888, would have operated to permit condemnation proceedings to acquire realty.

¹⁵⁷This is partly due to the fact that the apparent occasion for the bill was the bottleneck in machine tools; but the War Department, with unrewarded foresight, used this occasion to have introduced a bill which could be used in all contingencies. Congress still in a twilight sleep of peace fastened on the machine tool problem and conjured up an administrative bogie ruining business men indiscriminantly by taking their tools away. Confronted by this bogie, administrative officials beat an orderly but consistent retreat. See *Hearings before S. Com. on Military Affairs on S. 1579, 77th Cong., 1st Sess. (1941)*. For another analysis of this Act, see Note, *American Economic Mobilization (1942) 55 HARV. L. REV. 427, 511-513*.

¹⁵⁸They are similar to those covered by the Export Control Requisitioning Act, *supra* p. 335.

defense of the United States, he may requisition such property subject to two conditions:

(a) "Such need is immediate and impending and such as will not admit of delay or resort to any other source of supply."

(b) "All other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted."

The Act expressly disclaims authorization for the requisition of personal firearms.¹⁵⁹ The original Act also excluded machinery or equipment used in an operating factory or business and necessary for continued operation, but this last qualification was deleted by an amendment contained in the Second War Powers Act.¹⁶⁰ The president is authorized to dispose of property thus acquired and can exercise his powers through delegates.

Where the need for any of the items covered by this Act is immediate, the qualifications imposed are utterly impracticable, save only if administrative officials, as they so often must, ignore these qualifications or apply them in a formal, meaningless pattern. The language used is so qualified, moreover, as to imply the possibility that administrative determination may be subject to judicial review,¹⁶¹ a review eschewed by the courts where administrative determination has been challenged under the usual eminent domain statute empowering an executive official to take property needed for certain purposes.¹⁶²

7. *Other Statutory Authority*—Besides the War Purposes Act¹⁶³ discussed above, there are at least two other statutes under which plants may be taken,¹⁶⁴ and possibly a third.¹⁶⁵ But two of them require disobedience

¹⁵⁹Some Congressmen seemed to fear that otherwise the Second Amendment to the Constitution might be violated. It may be doubted that this amendment was meant to deny the government the right to require a private citizen to give up his arms for his nation's defense. A firearm in the hands of a soldier may well be worth two in the hands of a civilian.

¹⁶⁰Pub. L. No. 507, Tit. VI, 77th Cong., 2d Sess. (1942). This provision was never favored by the War Department. See *Hearings before Subcommittee of the Senate Committee on Judiciary on S. 2054*, 77th Cong., 1st Sess. 5. Cf. Note, *Britain Mobilizes Her Industries* (Jan. 21, 1942) *Bulletins from Britain*, p. 4. "Today the Machine Tool Control may remove machine tools from a factory without appeal and only supplies machine tools to firms with night shifts."

¹⁶¹These qualifications are altogether foreign to federal eminent domain statutes which the cases cited in the next footnote deal with. And the courts imply that if decent showing is made as to bad faith or abuse of discretion they will examine the administrative determination. *Sigore v. Chicago*, 139 Ill. 46, 28 N. E. 934 (1891); see *Macfarland v. Elverson*, 32 App. D. C. 81 (1908); *Florida East Coast R. Co. v. Shaw*, 11 F. (2d) 653 (S. D. Fla. 1926).

¹⁶²*Barnidge v. United States*, 101 F. (2d) 295 (C. C. A. 8th 1939); *United States v. Threlfeld*, 72 F. (2d) 464 (C. C. A. 10th 1934), *cert. denied*, 293 U. S. 620, 55 Sup. Ct. 215 (1934). Similarly in England, see *SCOTT v. HILDESLEY, THE CASE OF REQUISITION* (1920) 94 *et seq.*, 101, 102.

¹⁶³40 STAT. 241, 518 (1917, 1918), 50 U. S. C. § 171 (1928).

¹⁶⁴Section 120 of the National Defense Act of 1916, 39 STAT. 213, 214, 50 U. S. C.

to a compulsory order for materials in order to become operative. Specific appropriation acts are continually being passed requiring the acquisition of property; in addition there are many statutes of a general nature which authorize the taking of property.¹⁶⁶ But in all of them their generality is limited by specification of the type of property which may be taken or of a limited purpose for which it may be acquired.

8. *Taking of Property by the Executive.*—In almost every instance Congress exercises its right to take property by delegation of its power to the executive branch of the government. Its right to do so is settled.¹⁶⁷ But this delegation may be taken away at any time or never made. War needs in their urgency have not infrequently caused various presidents to take measures affecting property rights without the sanction of a Congressional enactment.¹⁶⁸ And as long as Congress fails to pass legislation broad enough to cover the taking of property when an urgent war need therefor arises, it may be expected that the executives will continue to take property with or without Congressional action. It is believed that the powers given the president by the Constitution furnish sufficient authority for such action on his part;¹⁶⁹ and it cannot be asserted dogmatically that if Congress were to ex-

§ 80 (1928); Section 9 of the Selective Service Act of 1940, 54 STAT. 892, 50 U. S. C. § 309 (Supp. 1941).

¹⁶⁵The Naval Appropriation Act of 1917, 39 STAT. 1192, 50 U. S. C. § 82 (1928). There is some doubt as to whether the pertinent provisions of this Act are still in existence. This question is treated but not fully discussed in Memorandum with Respect to the Existing Powers of the Executive Branch of the Government to Arrange for Priority of Production and Allocation of Orders in Connection with the National Defense Program, p. 7., U. S. Lib. of Cong., Legislative Reference Service, Memorandum to Members of the Advisory Commission Council of National Defense, Series A.

¹⁶⁶Those existing in the fall of 1940 have been collected and discussed in EXPROPRIATION OF PROPERTY FOR NATIONAL DEFENSE, p. 23 *et seq.* (This is a study prepared in the Lands Division of the Department of Justice in 1940. It has been made generally available in most law libraries.) See also Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 462, 464, 508 *et seq.* Statutory authority has recently been granted to take over or close telephone, cable and telegraph systems or units thereof as well as to remove their equipment. Pub. L. No. 413, 77th Cong., 2d Sess.; *cf.* Public L. No. 239, 77th Cong., 1st Sess.; Pub. L. No. 137, 77th Cong., 1st Sess. (community facilities); Pub. L. No. 173, 77th Cong., 1st Sess. (vessels for Coast Guard). See also Exec. Order No. 8974, 6 Fed. Reg. 6441, authorizing the Secretary of War to take over civil aviation systems. Some of these statutes are temporary but a number are permanent. By the use of Danger Zone Regulations issued by the War Department under the Rivers and Harbors Act [28 STAT. 362 (1894), 32 STAT. 374 (1902), 40 STAT. 266 (1917), 33 U. S. C. § 1 (1928); see 6 Fed. Reg. 2992], by the establishment of Defensive Sea and Maritime Control areas (Proclamation No. 2536, 7 Fed. Reg. 301-302; Exec. Order No. 8970, 6 Fed. Reg. 6417), property rights have been seriously affected. These methods have been used at times as a direct substitute for expropriation. *Cf.* also air space reservations. Exec. Order No. 8961, 6 Fed. Reg. 6325; and see Pub. L. No. 503, 77th Cong., 2d Sess. (1942).

¹⁶⁷*Rindge Co. v. County of Los Angeles*, 262 U. S. 700, 43 Sup. Ct. 689 (1923); *Albert Hanson Lumber Co., Ltd. v. United States*, 261 U. S. 581, 43 Sup. Ct. 442 (1923).

¹⁶⁸See EXPROPRIATION OF PROPERTY FOR NATIONAL DEFENSE, c. IV.

¹⁶⁹EXPROPRIATION OF PROPERTY FOR NATIONAL DEFENSE, c. IV. See Note, *American*

pressly deny him this power the Constitution would require him to obey.¹⁷⁰

9. *Co-operation by the States.*—Largely for the purpose of aiding the defense and war program, more than half the states have enacted legislation making it possible for local bodies to sell, lease, lend or donate property to the state or federal government,¹⁷¹ and more than a score of states have enacted defense housing laws.¹⁷² In some states the Governor has been given power to expropriate property for war emergency purposes, and, in at least one state, the powers conferred are broader in some respects than those granted by Congress to the President.^{172a} Any such powers would, however, be subordinate to the President's powers of expropriation.^{172b} Where such laws have been passed without prior consultation with federal authorities, the federal government occasionally has found it impossible or inadvisable to take advantage of the legislation.¹⁷³

C. *Commentary on the Present State of Authority for Taking Property*

In the last world war some twenty statutes were passed expressly authorizing the compulsory taking of property.¹⁷⁴ Varying in language, in purpose, in specification, their application caused considerable confusion. In this respect no appreciable improvement is evident in the present emergency. In practically every belligerent country other than the United States, democratic or totalitarian, the executive branch of the government has been endowed with broad general powers of expropriation capable of meeting contingencies as they arise.¹⁷⁵ And these powers have been expressed in terms clear enough to avoid the necessity of administrative officials going through the

Economic Mobilization (1942) 55 HARV. L. REV. 427, 516 *et seq.* Considerable light has been thrown on this matter by CORWIN, *THE PRESIDENT, OFFICE AND POWERS* (1940); see also LASKI, *THE AMERICAN PRESIDENCY* (1940). Cf. *United States v. Pink* (U. S. Sup. Ct., No. 42, Feb. 2, 1942); Brief submitted by Office of Price Control Administration, *Hearings before H. Com. on Banking and Currency on H. R. 5479*, 77th Cong. 1st Sess. (1941), Pt. 1, 379 *et seq.* The taking over of strike-bound plants in 1941 has been thought to be without statutory authority, *Hearings before Subcommittee of Senate Committee on Judiciary on S. 2054*, 77th Cong., 1st Sess. 10.

¹⁷⁰But see *The Flying Fish*, 2 Cranch 170 (U. S. 1804).

¹⁷¹See (1941) 14 State Government 256. *E.g.*, Wyo. Sess. Laws (1941) c. 120 (United States authorized to acquire land by purchase, condemnation or otherwise).

¹⁷²(1941) 14 State Government 256.

^{172a}*I.e.* Massachusetts, under laws passed in 1941 and 1942. See (1942) 27 Mass. L. Q. 13 *et seq.* where these statutes are set out.

^{172b}*Northern Pacific R. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502 (1919); *Opinions of the Justices*, 14 Gray 614 (Mass. 1860).

¹⁷³This is true of the action of the New York State Legislature in reviving a statute enacted during the first world war under which the United States could condemn land for war purposes. Laws 1941, c. 670. Certain of its provisions are thought to make it inadvisable to resort to it.

¹⁷⁴See *United States v. Pfitsch*, 256 U. S. 547, 553, 41 Sup. Ct. 569 (1921).

¹⁷⁵See *infra* part V.

enervating experience of finding authority in the interstices of language rather than in the language itself. Congress has been unwilling to give the executive broad express powers of expropriation, suspicious of the use he might make of them. Administrative officials have sometimes been inclined to recommend legislation not on the basis of what is best under the circumstances but what has the best chance of passing Congress. And at times a particular administrative agency will engineer the introduction of an expropriation bill aimed at a minute segment of the broad question of expropriation, pressure for the passage of which may succeed in obscuring a greater need.¹⁷⁶ The result is that administrative officials are often forced to locate their justification for a particular act of expropriation in a no-man's land of construction of a statute or chain of statutes which contains no express authorization, or forced to rely upon their construction of constitutional provisions of amorphous content. And sometimes they must fly willy-nilly in the face of statute in reliance upon a subsequent ratification by Congress or the inaction of the persons concerned. The improvisation which this necessitates is a distinct handicap to an efficient promotion of the war program.¹⁷⁷

The Second War Powers Act¹⁷⁸ is a distinct improvement over past legislation. But it leaves the right to take property by administrative action a matter of interpretation. There should be an express provision to this effect. At present there is no statute expressly giving power to take personalty of all kinds for all war purposes, although it is believed that the emergency fund statute could furnish plausible authority,¹⁷⁹ and possibly the powers of some of the R.F.C.'s subsidiary corporations are broad enough.^{179a} There should be a statute phrased broadly enough not to leave the right to take personalty in the dubious state in which it now is. A single emergency statute might well be used for this purpose.¹⁸⁰ Such statute could establish substantive

¹⁷⁶The amendment in the War Powers Act to Pub. L. No. 274, 77th Cong., 1st Sess. (1941) may be such an example.

¹⁷⁷Cf. testimony of Mr. Baruch on this point, set out in *Hearings before the H. Com. on Banking and Currency on H. R. 5479*, 77th Cong., 1st Sess., (1941) Pt. 2, 228 *et seq.*

¹⁷⁸Pub. L. No. 507, 77th Cong., 2d Sess. (1942).

¹⁷⁹See *supra* p. 336. The Act of October 10, 1940 and the Act of October 16, 1941 are limited in their authorization, but they do not limit authorization which may be found elsewhere.

^{179a}The Reconstruction Finance Corporation, when requested by the Federal Loan Administrator, with the approval of the President, is authorized to create corporations which, among other powers, may "take such other action as the President and Federal Loan Administrator may deem necessary to expedite the national defense program." Pub. L. No. 108, 77th Cong., 1st Sess. The charters of the Defense Plant Corporation and the Metals Reserve Corporation contain such powers.

¹⁸⁰At the time of the armistice in the last world war a general commandeering statute was being considered. See *Hearings before S. Com. on Military Affairs on S. 1579*, 77th Cong., 1st Sess. (1941) 13. Mr. Ginsburg: "I do not know of any statutory power to commandeer or requisition for all aspects of the national defense program." *Hearin.is*

and procedural standards or leave such matters to published regulation by the president. With the background of experience and study on these matters which the present administration¹⁸¹ and Congress possess,¹⁸² the drafting problem does not loom large. Either in such statute or in a separate statute, power should be given to dispose of property similar to that provided for during the last war.¹⁸³ It would be well to provide by statute that government officials or specified members of the public have the right to go upon and use property for air raid precautionary and protective purposes,^{183a} and a federal statute would be helpful to make clear the right to go upon property prior to a taking for preliminary surveys and tests, a right often expressed in state condemnation statutes.

III. METHODS OF TAKING

A. Agencies

Since the time when defense activities on the part of the Government became earnestly pressed, several agencies new and old, have been authorized by the president to exercise requisitioning powers;¹⁸⁴ in some instances authority has been given to one agency to recommend requisition to another agency.¹⁸⁵ This authority has been not infrequently taken from one agency and transferred to another.

before House Committee on Banking and Currency on H.R. 5479, 77th Cong., 1st Sess., Pt. 2 (1941) 1545.

¹⁸¹This is especially true of the Department of Justice, the War Department and the Department of the Navy.

¹⁸²Between the last war and this war, Congress has had many bills before it for the expropriation of property—both for war purposes and for peacetime purposes. See, *e.g.* H. R. Res. 198, 75th Cong., 1st Sess. (1937); War Policies Commission Report, H. Doc. No. 163, 72d Cong., 1st Sess. (1931) Serial No. 9538; and many other hearings and reports. The War Department's mobilization plans are well known by Congress. The early ones contained carefully drawn proposed statutes for expropriation of both personal and real property.

¹⁸³40 STAT. 548 (1918). But it should probably be broadened to include leasing and other methods of disposal. Some of the current authorizing acts contain disposal provisions; some do not. 40 U. S. C. § 204a provides to a limited extent for the disposal of surplus property. Cf. 38 Ops Att'y Gen. 466 (1936) (does not supersede provisions of Merchant Marine Act of 1920, authorizing disposal of houses acquired in war time). Cf. Pub. L. No. 400, 77th Cong., 2d Sess. (1942) (housing). As to the Second War Powers Act, see *supra*, p. 336. In the first world war there was some question as to the right of the U. S. Shipping Board to sell government vessels seized. This doubt was finally settled by legislation. See 4th Annual Report, U. S. Shipping Board (1920) 31.

^{183a}Cf. Ch. 13 of Minn. Laws, 1942, Dec. 6, see *infra* Pt. V.

¹⁸⁴*E.g.*, Exec. Order No. 8964, 6 Fed. Reg. 6367-6368 (radio stations and facilities). The Defense Communications Board is to designate stations for use of or closing by other government agencies. See Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 455, note 172.

¹⁸⁵*E.g.*, Exec. Order No. 8734, 6 Fed. Reg. 1917.

Each requisitioning agency has its own internal procedure. In December 1941, regulations were issued under the Acts of October 10, 1940,¹⁸⁶ and October 16, 1941,¹⁸⁷ pursuant to a prior executive order.¹⁸⁸ Under these regulations¹⁸⁹ the Office of Production Management was given not only direct requisitioning powers but requisitioning by other agencies under these Acts were subject to the approval of that office. At present, the War Production Board is vested with the powers formerly in the Office of Production Management.¹⁹⁰ Within the War Production Board an Inventory and Requisitioning Section in the Division of Industry Operations has been set up which handles requisitioning questions for the Board.

With the War Production Board as an over-all authority on requisitioning under these two acts, it is unlikely that requisitioning by other agencies of the government will be allowed to upset the hair-trigger war time economy established by priority, allocation and price control. But how well this check-up system will work where the need of some item or items cannot brook delay remains to be tested.¹⁹¹ Probably some informal arrangement between the agencies concerned will take care of situations in which consultation becomes a too expensive luxury rather than a proper *modus vivendi*.

At present the War Shipping Administration has the purchasing and requisitioning powers the United States Maritime Commission possessed under the Merchant Marine Act of 1936 as amended.¹⁹² Agencies authorized to purchase or procure land may do so by way of condemnation.¹⁹³ Foreign exchange control has been centralized in the Department of the Treasury.¹⁹⁴

¹⁸⁶54 STAT. 1090 (1940), 50 U. S. C. § 99 note (1942). Initially the determination of the necessity of requisitioning under this Act was made by the Secretaries of War and Navy, acting through the Joint Army and Navy Munitions Board, in co-operation with the Administrator of Export Control. See Exec. Order No. 8567, 5 Fed. Reg. 4123. Regulations were published shortly after the passage of the Act. See 5 Fed. Reg. 4123.

¹⁸⁷Pub. L. No. 274, 77th Cong., 1st Sess. (1941).

¹⁸⁸Exec. Order No. 8942, 6 Fed. Reg. 5909.

¹⁸⁹6 Fed. Reg. 6376.

¹⁹⁰See Exec. Order No. 9024, 7 Fed. Reg. 329; Exec. Order No. 9040, 7 Fed. Reg. 527; Regulation No. 2 of the War Production Board, 7 Fed. Reg. 561.

¹⁹¹Taking a machine tool from a going concern may be very necessary, but in the very nature of things the need is not a matter of minutes or hours. The need for requisitioning a single civilian aeroplane may be such a need.

¹⁹²Exec. Order No. 9054, 7 Fed. Reg. 837-839; cf. Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 455.

¹⁹³*Albert Hanson Lumber Co. v. United States*, 261 U. S. 581, 43 Sup. Ct. 442 (1923). See *supra* p. 336.

¹⁹⁴See Exec. Order No. 8785, 6 Fed. Reg. 2897, which set out detailed regulations and provided for the reporting of all foreign-owned property; the "foreign countries" included Sweden and Switzerland but not England. See 7 Fed. Reg. 145 as to Japanese property.

*B. Methods and Procedure*¹⁹⁵

Most property acquired by the government is secured through negotiations and contract.¹⁹⁶ When expropriation is resorted to, it may take one of several forms. Possession of the property may be taken without more—a *fait accompli*.¹⁹⁷ This method is not often resorted to, outside the area of actual combat. Within that area it is common.¹⁹⁸

Condemnation of realty in wartime still proceeds much as it did in peacetime. The agency desiring certain realty requests the Attorney General to institute condemnation proceedings. Thereafter the Lands Division of the Department of Justice has general supervision over the condemnation proceedings.

A method frequently used in the last world war, and not uncommon in the present one, to expropriate property is through the issuance of an executive order or proclamation. This has the advantage of permitting one order or proclamation to cover future contingencies, by delegating to some responsible officer the discretion of determining when expropriation shall be had and of what. When speed of acquisition is vital, this is an important point. The order of proclamation of course may be used for a single specified expropriation. It has the further advantage of avoiding judicial delays since the taking proceeds without application to the courts. Furthermore, it permits reliance upon constitutional powers when Congressional authorization is lacking. So far as is known, federal condemnation petitions have always invoked statutory authority, although it may well be that the proceeding could be maintained on executive authority alone.

Nevertheless, a taking by condemnation may often be preferable.¹⁹⁹ In the first place an expropriation of property by condemnation proceeding is a normal method used in peace time as well as war time. It has a background of administrative practice which the other methods do not have and that practice is concentrated, largely, in one agency, the Department of Justice. It is a judicial proceeding and both private persons and the government have the benefit of the "day in court." By the use of declarations of taking and orders of possession, property may be acquired almost as rapidly as by executive order or proclamation—sometimes more quickly.²⁰⁰ A condemnation proceeding may bring in hundreds of claimants, most of whom settle their cases by stipu-

¹⁹⁵The effect of procedural requirements upon the measure of compensation will be discussed *infra*, Part VI. See *infra* Pt. IV as to control over enemy alien property.

¹⁹⁶See Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 527, as to the procedure and the problems involved in such acquisitions.

¹⁹⁷*E.g.*, *Hurley v. Kincaid*, 285 U. S. 95, 52 Sup. Ct. 267 (1932).

¹⁹⁸But military commanders may use requisition orders if time and circumstances allow.

¹⁹⁹See Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 509.

²⁰⁰Skeleton petitions facilitate initiation of condemnation proceedings.

lation, and legal issues are decided in one case, thus avoiding the possibility of a hundredfold rehashing of such issues.

Condemnation proceedings, however, are geared only for a single project. Every time an acquiring agency decides to get a piece of property by condemnation, all necessary steps to maintain the action have to be repeated. Moreover, a recalcitrant or ignorant judge may play hob with war needs, while a bombed-out court or unavailable judge is not a far-fetched possibility. It is believed, therefore, that there is a place for all these types of taking.²⁰¹

Requisitioning regulations which have thus far been published emphasize the procedure to be followed by a claimant to secure compensation after the requisition has taken place, but contain little as to the mechanics of requisitioning. In the absence of published complaint it may be assumed that administrative officials have used reasonable requisitioning methods. Nevertheless, since the men actually issuing such requisitioning orders or carrying them out may often be unaware of the practical and legal consequences of their actions,^{201a} it would seem advisable to publish general regulations to act as a guide for such matters, as well as rules concerning essential material to be embodied in any requisition order, the type and time of notice to be given, if any,^{201b} etc. In case of expropriation of personalty, an admonition to secure an inventory as soon as possible, with or without the owner's co-operation, would be advisable.²⁰²

Condemnation statutes usually designate the specific agency which may use the statute. Requisition statutes commonly specify the President as the requisitioning authority. If well drafted the latter type of statute will authorize the power to be exercised through such agents as the President may wish to use. For the most part, executive orders and proclamations have been used to

²⁰¹It might well be provided by statute that the government could or should bring condemnation proceedings to determine compensation where an administrative taking has been consummated.

^{201a}The *Pietro Campanella*, 41 F. Supp. 656 (D. Md 1941) where the court required the Maritime Commission to clarify its notice of taking.

^{201b}Methods of giving requisition notice have varied considerably: (1) telegram; see *Olympia Shipping Corp. v. United States*, 71 Ct. Cls. 251 (1930); (2) marshal; see W.P.B. press release No. 751, March 31, 1942. In a situation involving the requisitioning of property of French citizens under the Export Control Act, the Export Control Administrator asked the Attorney General's advice in respect to giving notice to owners who could not be contacted. The Vichy government was claiming rights under its laws. The Attorney General advised that notice by publication in the United States would suffice, but notice should be given to the French government also. As to the contents and form of a notice given by the United States Maritime Commission, see *The Villarperosa*, 43 F. Supp. 140 (E. D. N. Y. 1942). In the *Villarperosa* case the Maritime Commission adopted a resolution Oct. 31, 1941, which recited that the vessel was taken over as of Oct. 31, 1941, at 12 o'clock; the notice of taking was dated Oct. 30, 1941. The court, in a passing remark, said that the requisition was made on October 30, 1941. Cf. 2 Ops J. Ad. Gen. 233 (1918) where in reference to a tax question it was said that title passed upon service of the requisition order.

²⁰²Such regulations should probably provide that they be followed whenever possible, but that failure to observe them would not invalidate the taking.

requisition property. But even where the statute refers only to the President, the impracticability of requiring him to make individual determinations as to each exercise of requisitioning power makes it apparent that such power, within reasonable limits,²⁰³ is delegable,²⁰⁴ and in this and in the last world war it has been delegated to a considerable extent.²⁰⁵

²⁰³*Cf.* 33 Ops Att'y Gen. 570 (1923).

²⁰⁴*United States v. McIntosh*, 2 F. Supp. 245, 252 (E. D. Va. 1932); *app. dismissed* 70 F. (2d) 507 (C. C. A. 1934); *cert. denied*, 293 U. S. 586, 55 Sup. Ct. 101 (1934).

²⁰⁵*Cf. Ex Parte Whiting Steamboat Corp.*, 249 U. S. 115, 39 Sup. Ct. 192 (1919).