CONSTITUTIONALITY OF ALIEN PROPERTY CONTROLS: A COMMENT ON THE PROBLEM OF REMEDIES

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Under the Trading with the Enemy Act, as it was fashioned during the last war, Section 9(a) afforded a judicial remedy for the return of property which the Custodian had no authority to seize. The *Draeger Shipping Company* case holds that this statutory remedy is available in this war if the Custodian vests without authority of law, as his present authority is defined in the First War Powers Act. My comment is addressed to Mr. McNulty's objections to this result.

First: Mr. McNulty finds in the history of the First War Powers Act evidence that Section 5(b) was intended to be "unfettered by the rest of the old Act," that it was designed to be "self-sufficient." Whatever may be the case with respect to the powers granted by Section 5(b), I think the conclusion overdrawn if it is taken to apply to the remedy of judicial return provided by Section 9(a). Section 5(b) took its present form because Congress, faced with a problem of appalling complexity in determining the provisions of the old Act which had not expired with the passage of time, chose to make an explicit statement of the substantive powers conferred. If I read the record aright, this preoccupation with the scope of granted powers was the dominant theme in Congressional consideration of the bill. It may be, therefore, that the substantive powers conferred by Section 5(b) may be divorced in various respects from the limitations upon similar powers as they are embodied in other provisions of the Trading with the Enemy Act. But the history of the legislation is completely silent with respect to the problem of remedies. I read this to mean that Congress delegated such powers as it did against the background of traditional remedies, including the remedy for unauthorized seizure provided by Section 9(a) in terms which do not restrict its continuing vitality. This seems to me a far more satisfactory inference to draw from Congressional silence than the inescapable uncertainty as to remedies which Mr. McNulty's conclusion involves. I should require evidence that Congress regarded Section 9(a) as extinct to reach the result that it does not apply to vesting under Section 5(b) and I find no such evidence. I conclude, therefore, that in characterizing Section 5(b) as an amendment to the Trading with the Enemy Act, Congress placed it in organic relationship to the judicial remedy of return embodied in Section 9(a).

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Second: That the authority to vest under Section 5(b) may be exercised by "such agency or person as may be designated from time to time by the President" while the remedy specified in Section 9(a) runs against the "Alien Property Custodian or the Treasurer of the United States" does not, in my view, establish that the two sections are independent of each other. Title I of the First War Powers Act, in substance almost identical with the Overman Act of 1918, empowered the President, "in matters relating to the conduct of the present war, to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer." In view of the flexibility of any allocation of function under Title I, I find it difficult to limit remedies by the titles of particular officials rather than the functions to which they relate.

Third: In so far as it afforded a judicial remedy against *unauthorized* takings of property, Section 9(a) was fundamentally undisturbed by the amendment of Section 5(b). It continues to be available as a remedy against unauthorized takings of property. In this connection, the only effect of the amendment of Section 5(b) is to authorize takings of property which would have been unauthorized prior to the amendment.

In so far as Section 5(b) creates a new class of authorized takings, i.e., takings from foreign nationals who are not enemies within the definition of the old Act, it reduces the scope of unauthorized takings against which the judicial remedy afforded by Section 9(a) may be brought to bear. This means that a Federal District Court sitting "in equity," as Section 9(a) provides, would continue to make the same kind of determination in a suit for return as it would have made under the old Act. In deciding whether the claimant was "entitled" to have his property back, however, the court would be bound by the new definition of authority to take property embodied in Section 5(b) rather than by the old definition embodied in Section 7(c).

It is apparent, therefore, that I do not share Mr. McNulty's difficulty when he says (p. 143): "The trouble is that the literal language of 9(a) would permit anybody not an enemy or ally of an enemy to step into court and recover for property even if he is a 'national,' thereby nullifying the vesting that 5(b) expressly provides for such a 'national.'" Under the "literal language of 9(a)" a person who is not an enemy or an ally of enemy but who is nevertheless a foreign national, would not, in my judgment, be "entitled" to have his property returned, since Section 5(b) expressly authorizes the taking of such property. I believe, therefore, that a judge sitting in equity and fully respecting the letter of Section 9(a) would find a statutory bar to an order for return in the language limiting returns to those "entitled" to the property.

Fourth: If a person other than an enemy or ally of enemy as defined in the old Act is nevertheless a foreign national within the scope of Section 5(b), and if

further, he is entitled to immediate compensation under the Fifth Amendment in accordance with the doctrine of the *Russian Volunteer Fleet* case, Mr. McNulty may be right in suggesting that the Tucker Act would afford an appropriate judicial remedy. But it is not necessary to divorce Section 5(b) from the Act of which it is a part to reach this result. The provision in Section 7(c) of the Trading with the Enemy Act that "the sole relief and remedy of any person having any claim to any money or other property . . . shall be that provided by the terms of this Act" is not so clear a barrier to the jurisdiction of the Court of Claims as Mr. McNulty assumes. Is a person suing for just compensation a person "having a claim to any money or other property" seized by the Custodian? Since he would be seeking pecuniary redress payable only on the theory that such money or property has been placed beyond his legal power to compel return there is force in the suggestion that Section 7(c) does not apply. And even if 7(c) applies, there remains the further possibility that Section 5(b) has qualified Section 7(c), so far as constitutionally necessary, to permit access to the Court of Claims.

CONCLUSION

These views accept Section 5(b), as amended, in the posture in which it was enacted, as an amendment, and, therefore, an organic part of the Trading with the Enemy Act. If they have no other virtue, they simplify to a considerable extent the constitutional issues with which Mr. McNulty deals.