

A BRIEF AGAINST CONFISCATION

OTTO C. SOMMERICH*

During the first World War the Alien Property Custodian seized enemy-owned property and funds in an amount aggregating about six hundred million dollars.¹ Most of this or its proceeds has been returned from those from whom it was taken or has been paid to persons having claims against them. About sixty-five million dollars is still held by the Government.²

When the United States entered the second World War in December, 1941, the amount of enemy-owned property and funds in this country was smaller than when we entered the earlier war in April, 1917, notwithstanding that Italy and Japan were not then among our enemies.³ About eight and a half billions in foreign-owned assets has been subjected to Government control since the first freezing order was issued in April, 1940.⁴ But the amount of enemy-owned property and funds, apart from patents, that has been vested or frozen by the Alien Property Custodian or the Treasury Department, is only about four hundred and forty million dollars. The nationality of the owners is as follows: German, \$150,000,000; Italian, \$100,000,000; Japanese, \$150,000,000; Bulgarian, Rumanian, and Hungarian, \$40,000,000.⁵

When war occurs, it was said many years ago, every individual of the hostile nation is an enemy.⁶ "There is no such thing as a war for arms and a peace for commerce."⁷ But total war, though not a new concept, has in the twentieth century acquired a new meaning. A nation which permitted property and funds in its territory to remain in the control of residents of the enemy country would be helping the enemy nation to arm itself and to wage war.

Seizure of such potential resources of the enemy is demanded by imperious necessity. But whether private property thus seized shall be confiscated or shall ultimately be returned is a question governed by other factors. The question must be answered in the light of international law, the historic practice of the United States, and considerations of American interest and of justice.

* A.B., 1896, College of the City of New York; A.M., 1898, LL.B., 1899, Columbia University; Member of the New York Bar. Chairman, Special Committee on Custody and Management of Alien Property of the American Bar Association.

¹ REPORT OF OFFICE OF ALIEN PROPERTY CUSTODIAN (1943) 94.

² *Hearing before Subcommittee of House Judiciary Committee on H. R. 4840, 78th Cong., 2d Sess. (June 9, 1944) 14.*

³ REPORT, *supra* note 1, at 1-2, 94.

⁴ *Hearing, supra* note 2, at 105.

⁵ *Ibid.*

⁶ See *The Rapid*, 8 Cranch 155, 161 (U. S. 1814), per Johnson, J.

⁷ Sir John Nicholl, the King's Advocate, in *Potts v. Bell*, 8 T. R. 548, 554 (1800), quoted by Chancellor Kent in *Griswold v. Waddington*, 16 Johns. 438, 466 (N. Y. 1819).

Property of enemy nationals which is captured at sea is deemed lawful prize; amelioration of this rule has been urged, notably by the United States, but without success.⁸ Property which is the subject of trading with the enemy is invariably regarded as liable to confiscation.⁹ As to enemy-owned private property which is in a belligerent's territory on the outbreak of war, a different rule, however, has long prevailed.

In a leading case which arose from the first World War, it was remarked that in the beginnings of English law the bodies of alien enemies found within the realm were seized and their goods were forfeit to the Crown, that the first relaxation was in favor of the merchant class, a provision to that effect being included in Magna Charta, and that from merchants protection spread to others.¹⁰ Treaties of peace commonly provided for the restoration of private property and debts.¹¹ Confiscation, as distinguished from sequestration, of debts owed to enemy nationals was long ago characterized by an English court as "contrary to good faith" and "not conformable to the usage of nations."¹² During the first World War, eminent English judges asserted that private property of enemy subjects, found within the realm at the commencement of a war, cannot lawfully be confiscated.¹³

The first treaty made by the United States, the treaty with France in 1778, contained a provision (Article XX) that "if a war shall break out between the said two nations, six months after proclamation of war shall be allowed to the merchants in the cities and towns where they live for selling and transporting their goods and merchandizes."¹⁴ In 1784 the Continental Congress adopted resolutions declaring that it would be advantageous to conclude treaties of amity and commerce with the principal commercial powers of Europe and directing that, in the formation of these treaties, it be proposed that, if war should arise, "the merchants of either party then residing in the other, shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance."¹⁵ Provisions in substantially this language were included in a long series of treaties made by the United States during the ensuing century.¹⁶

⁸ HIGGINS AND COLOMBOS, *INTERNATIONAL LAW OF THE SEA* (1943) 370-377; HALL, *INTERNATIONAL LAW* (8th ed., 1924) §147, p. 528; MOORE, *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS* (1924) 20; *infra* notes 48-50.

⁹ *The Hoop*, 1 Ch. Rob. 196 (High Ct. Adm'ty, 1799); *The Rapid*, 8 Cranch 155 (U. S. 1814).

¹⁰ See *Techt v. Hughes*, 229 N. Y. 222, 230, 128 N. E. 185 (1920), per Cardozo, J. See authorities cited in this opinion. Statements of Grotius, Bynkershoek, and Vattel are cited in many of the cases; see, for example, *Ware v. Hylton*, 3 Dall. 199 (U. S. 1796), and *Brown v. United States*, 8 Cranch. 110 (U. S. 1814), *passim*.

¹¹ See *Ware v. Hylton*, 3 Dall. 199, 247 (U. S. 1796); HALL, *INTERNATIONAL LAW* (8th ed. 1924) 523.

¹² See *Wolff v. Oxholm*, 6 M. & S. 92, 100, 106, 105 E. R. 1177, 1180, 1182 (1817).

¹³ Lord Parker of Warrington, in *The Roumanian*, [1916] 1 A. C. 124, 135; Lord Finlay, L. C. (later a judge of the Permanent Court of International Justice), in *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie*, [1918] A. C. 239, 244.

¹⁴ I MALLOY, *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS* (1910) 468, at 475.

¹⁵ 3 *SECRET JOURNALS OF THE CONTINENTAL CONGRESS* (1823) 484.

¹⁶ MARTIN AND CLARK, *AMERICAN POLICY RELATIVE TO ALIEN ENEMY PROPERTY*, SEN. DOC. NO. 181, 69th Cong., 2d Sess. (1926) 5, 19 *et seq.* Such a provision is not applicable to property of a resident of the enemy country. See *Stoehr v. Wallace*, 255 U. S. 239, 251 (1921).

When, in 1798, war with France appeared imminent and the treaty with that country was abrogated, Congress enacted a statute which provided that "aliens resident within the United States, who shall become liable as enemies" because of a declaration of war with their nation, "and who shall not be chargeable with actual hostility, or other conduct against the public safety, shall be allowed, for the recovery, disposal and removal of their goods and effects, the full time . . . stipulated by any treaty, where any shall have been between us and the hostile nation or government," and which further provided that "where no such treaty shall have existed, the President of the United States may ascertain and declare such reasonable action as may be consistent with the public safety, and according to the dictates of humanity and national hospitality."¹⁷ This statute continued to be law until the enactment of the Trading with the Enemy Act in 1917.

Such provisions as these, in treaties and in a statute, are incompatible with the manner in which war is now waged. They are evidence, however, of the practice and policy of the United States with respect to enemy-owned private property.

During the Revolutionary War most of the states enacted statutes for the confiscation or sequestration of property and debts.¹⁸ Some directed such measures only against persons who had removed to England or to Canada or who had gone into the British lines or joined the British Army. Some states confiscated also all British-owned property and debts. In the Treaty of Peace between the United States and Great Britain it was agreed that creditors on either side "shall meet with no lawful impediment to the recovery of the full value . . . of all bona fide Debts heretofore contracted" and also that "the Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the Restitution of" confiscated "Estates, Rights and Properties" of "real British subjects" and also of other persons if these had not borne arms against the United States.¹⁹

Some of the states complied with the treaty provision and with the recommendation which was duly made by the Congress. Other states failed to comply and many British subjects were unable to collect their debts or to recover their property.²⁰ Settlement of their claims was one of the subjects embraced in the Jay Treaty of 1794, the United States agreeing, in Article VI of that treaty, to make full compensation to British creditors for losses occasioned by "lawful impediments."²¹ In 1802 Congress appropriated the sum of \$2,664,000 in payment of the British claims.²²

In *Ware v. Hylton*,²³ where the Treaty of Peace was held by the Supreme Court to nullify a sequestration statute of Virginia and to revive a British creditor's right to recover his debt, several of the justices spoke emphatically concerning confiscation. Justice Paterson stated that he would not "controvert the position, that, by the rigour of the law of nations," debts owed to an individual of an enemy nation may be con-

¹⁷ Act of July 6, 1798, 1 STAT. 577.

¹⁸ Turlington, *Treatment of Enemy Private Property before the World War* (1928) 22 AM. J. INT. L. 270, 271-272; GATHINGS, *INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY* (1940) 15-29.

²⁰ 5 HAMILTON'S WORKS (Lodge ed., 1885) 6.

²² Act of May 3, 1802, 2 STAT. 192.

¹⁹ 1 MALLOY, *op. cit. supra* note 14, at 588.

²¹ 1 MALLOY, *op. cit. supra* note 14, at 594.

²³ 3 Dall. 199 (U. S. 1796).

fiscated, but remarked that this rule “has by some been considered as a relic of barbarism” and, “perhaps, is generally exploded at the present day in Europe.” He added:

“The truth is, that the confiscation of debts is at once unjust and impolitic; it destroys confidence, violates good faith, and injures the interests of commerce. . . . The gain is, at most, temporary; whereas the injury is certain and incalculable, and the ignominy great and lasting. . . . Confiscation of debts is considered a disreputable thing among civilized nations of the present day; and indeed nothing is more evincive of this truth, than that it has gone into general desuetude, and whenever put into practice, provision is made by the treaty, which ends the war, for the mutual and complete restoration of contracts and payment of debts.”²⁴

“When the United States declared their independence,” said Justice Wilson, “they were bound to receive the law of nations, in its modern state of purity and refinement. By every nation, whatever its form of government, the confiscation of debts has long been considered disreputable; and, we know, that not a single confiscation of that kind stained the code of any of the European powers, who were engaged in the war, which our Revolution produced.”²⁵

Shortly before these judicial pronouncements, the subject had been discussed by Alexander Hamilton with the extraordinary lucidity and reasoning power which were among the marks of his genius. In a memorandum submitted to President Washington, in which he analyzed each of the twenty-nine articles of the Jay Treaty, he said concerning Article VI:

“The article of the former treaty [i.e., the Treaty of Peace] on this head was, as I conceive, nothing more than the formal sanction of a doctrine which makes part of the modern law or usage of nations. The *confiscation* of private debts in time of war is reprobated by the most approved writers on the law of nations, and by the negative practice of civilized nations, during the present century. The free recovery of them, therefore, on the return of peace, was a matter of course, and ought not to have been impeded, had there been no article.”²⁶

Besides the provision in Article VI, the Jay Treaty contained, in Article X, a provision reading as follows:

“Neither the debts due from individuals of the one nation, to individuals of the other, nor shares, nor monies, which they may have in the public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestrated or confiscated, it being unjust and impolitic that debts or engagements contracted and made by individuals having confidence in each other, and in their respective Governments, should ever be destroyed or impaired by national authority on account of national differences and discontents.”²⁷

“In my opinion,” said Hamilton, “this article is nothing more than an affirmation of the modern law and usage of civilized nations, and is valuable as a check upon a measure which, if it ever could take place, would disgrace the government of the country, and injure its true interests.” He continued:

²⁴ *Id.* at 254-255.

²⁵ *Id.* at 281.

²⁶ 4 HAMILTON'S WORKS (Lodge ed., 1885) 328.

²⁷ 1 MALLOY, *op. cit.* *supra* note 14, at 597.

"The general proposition of writers on the law of nations is, that all enemy's property, wherever found, is liable to seizure and confiscation; but reason pronounces that this is with the exception of all such property as *exists in the faith of the laws of your own country*; such are the several kinds of property which are protected by this article.

"And though in remote periods the exception may not have been duly observed, yet the spirit of commerce, diffusing more just ideas, has been giving strength to it for a century past, and a negative usage among nations, according with the opinions of modern writers, authorizes the considering the exception as established."²⁸

Hamilton discussed the Jay Treaty more fully in a series of letters published over the signature "Camillus." In one of these, after alluding to Article X as "an obstacle the more to the perpetration of a thing, which, in my opinion, besides deeply injuring our real and permanent interest, would cover us with ignominy," he declared:

"No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation. In my view every moral and every political consideration unite to consign it to execration. . . ."²⁹

"The right of holding or having property in a country always implies a duty on the part of the government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security. . . . Property, as it exists in civilized society, if not a creature of, is, at least, regulated and defined by, the laws. They prescribe the manner in which it shall be used, alienated, or transmitted; the conditions on which it may be held, preserved, or forfeited. . . . No condition of enjoyment, no cause of forfeiture, which they have not specified, can be presumed to exist. An extraordinary discretion to resume or take away the thing, without any personal fault of the proprietor, is inconsistent with the notion of property."³⁰

The spirit of the clause of the Constitution that "no State shall impair the obligation of contracts," he asserted, "must, on fair construction, be regarded as a rule for the United States; and if so, could not easily be reconciled with the confiscation or sequestration of private debts in time of war."³¹

After reviewing the statements of writers on international law, Hamilton said:

"The consequence is that if the right pretended did exist by the natural law, it has given way to the customary law; for it is a contradiction, to call that a right which cannot be exercised without breach of faith. The result is, that by the present customary law of nations, within the sphere of its action, there is no right to confiscate or sequester private debts in time of war. . . ."³²

"But let it not be forgotten, that I derive the vindication of the article from a higher source, from the natural or necessary law of nature—from the eternal principles of morality and good faith."³³

Hamilton made it clear that he was speaking only of private property:

²⁸ 4 HAMILTON'S WORKS (Lodge ed., 1885) 343.

³⁰ *Id.* at 68-69.

³² *Id.* at 86.

²⁹ 5 *Id.* at 60.

³¹ *Id.* at 62.

³³ *Id.* at 90.

"A government may rightfully confiscate the property of an adversary government. No principle of justice or policy occurs to forbid reprisals upon the public or national property of an enemy. That case is foreign, in every view, to the principles which protect private property. The exemption stipulated by the tenth article of the treaty is accordingly restricted to the latter."³⁴

Justice Story, in a notable case, did not concur in Hamilton's view that confiscation was forbidden by the law of nations, but said:

"Looking to the measure, not as of strict right, but of sound policy and national honor, I have no hesitation to say, that the argument is unanswerable. He proves incontrovertibly, what the highest interests of nations dictate, with a view to permanent policy. . . ."³⁵

In 1814, when the Supreme Court decided a large number of cases involving the law of prize and applied rigorously the rule which condemns to confiscation enemy-owned private property captured on the high seas and property engaged in trade with the enemy, it had occasion also, in *Brown v. United States*,³⁶ to deal with a case arising from a seizure of enemy-owned property on land within the territory of the United States. Congress had enacted no statute authorizing such a seizure and the Court held, in an opinion by Chief Justice Marshall, that a declaration of war did not, "by its own operation, so vest the property of the enemy in the government, as to support proceedings for its seizure and confiscation." The Chief Justice, after stating that "war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found," added:

"The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself.

". . . it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace, in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. . . . The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded."³⁷

Marshall's statement that usage, though it will affect the exercise of the right to confiscate, "cannot impair the right itself," is at variance with the carefully reasoned conclusion of Hamilton³⁸ and has been criticized by John Bassett Moore as embodying an inconsistency. "Between the effect of usage on rights and on the exercise of rights," Judge Moore asserts, "the law draws no precise distinction."³⁹ For "the true theory of the law," he suggests, we may turn to "an opinion of the same great judge," delivered twenty years later, in which, alluding to "the modern rule in cases of conquest," Marshall said:

³⁴ *Id.* at 94.

³⁵ See *The Emulous*, 1 Gall. 563, Fed. Cas. No. 4,479, 8 Fed. Cas. 697, 702 (C. C. Mass., 1913), rev'd in *Brown v. United States*, 8 Cranch 110 (U. S. 1814), where Justice Story's opinion in the Circuit Court is again reported.

³⁷ *Id.* at 122-124, 128.

³⁶ 8 Cranch 110 (U. S. 1814).

³⁸ *Supra* notes 28, 32.

³⁹ 7 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 313; MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924) 18-19.

"The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled."⁴⁰

Chancellor Kent, the first American to undertake a connected statement of the rules of international law, spoke of the right of confiscation as a "naked and impolitic right, condemned by the enlightened conscience and judgment of mankind."⁴¹

Of the wars in which the United States was engaged during the nineteenth century, the Civil War was the only one in which the Government confiscated enemy-owned property. Two statutes to that end, enacted in 1861 and 1862,⁴² were held by a divided court, in *Miller v. United States*,⁴³ to be a lawful exercise of the war powers of the Government, and not an exercise of its sovereign or municipal power, and consequently not subject to the restrictions imposed by the Fifth and Sixth Amendments. Referring to the powers conferred on Congress by the Constitution, Justice Strong, who delivered the opinion of the Court, said:

"Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is, and always has been, an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land or water."⁴⁴

Justice Field, in a dissenting opinion in which Justice Clifford concurred, asserted that the statutes could not be regarded as an exercise of the war powers but were penal measures imposing punishment for treason. He said:

"The war powers of the government have no express limitation in the Constitution, and the only limitation to which their exercise is subject is the law of nations. That limitation necessarily exists. . . . The power to prosecute war granted by the Constitution . . . is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe, subject to the condition that they are within the law of nations. There is a limit to the destruction which government, in the prosecution of war, may use, and there is a limit to the means of capture and confiscation, which government may authorize, imposed by the law of nations, and is no less binding upon Congress than if the limitation were written in the Constitution."⁴⁵

Although the statutes were upheld by a majority of the Court as war measures, it is clear from their text that they were not merely war measures. They used the

⁴⁰ See *United States v. Percheman*, 7 Pet. 51, 86-87 (U. S. 1833).

⁴¹ KENT, COMMENTARIES, *65, quoted in *Hanger v. Abbott*, 6 Wall. 532, 536-537 (U. S. 1868).

⁴² Turlington, *supra* note 18, at 284-286.

⁴³ 11 Wall. 268 (U. S. 1871).

⁴⁴ *Id.* at 305. See *Draeger Shipping Co. v. Crowley*, 55 F. Supp. 906, 908 (S. D. N. Y., 1944). But see, as to the meaning of the term "capture," MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924) 21-22.

⁴⁵ See 11 Wall. (U. S. 1871) at 315-316.

words "insurrection" and "rebellion" and, in view of their provisions as well as their terminology, and of the situation in which they were enacted, they cannot be regarded as a precedent for the confiscation of enemy-owned property.⁴⁶

In an earlier case arising from the Civil War, the Supreme Court referred with approval to the statements of Kent and of Wheaton condemning the confiscation of private debts.⁴⁷

Congress in 1904 adopted a resolution declaring it to be desirable "that the President endeavor to bring about an understanding among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents."⁴⁸ At the first of the Hague Peace Conferences, in 1899, the American delegates had urged the adoption of a proposal conforming with this principle.⁴⁹ Secretary of State Root, in instructing the American delegates to the Second Peace Conference, held in 1907, alluded to "the traditional policy of the United States," described the Resolution of 1904 as "an expression of the view taken by the United States during its entire history," and said:

"Whatever may be the apparent specific interest of this or any other country at the moment, the principle thus declared is of such permanent and universal importance that no balancing of the chances of probable loss or gain in the immediate future on the part of any nation should be permitted to outweigh the considerations of common benefit to civilization which call for the adoption of such an agreement."⁵⁰

February 8, 1917, two months before the United States entered the first World War, Secretary of State Lansing issued, with the President's authorization, the following statement:

"The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. It will scrupulously respect all private rights alike of its own citizens and of the subjects of foreign states."⁵¹

In the Trading with the Enemy Act,⁵² adopted six months after we entered the war, Congress followed the spirit of this statement. The Act authorized the President to appoint an Alien Property Custodian with power to take possession of "all money or property in the United States due or belonging to an enemy, or ally of enemy."⁵³ It provided that "After the end of the war any claim of any enemy or ally of enemy to any money or other property received by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."⁵⁴ In its report on the bill the Senate Committee on Commerce quoted, and

⁴⁶ 2 HYDE, INTERNATIONAL LAW (1922) §621, p. 238.

⁴⁷ See *Hanger v. Abbott*, 6 Wall. 532, 536, 537 (U. S. 1868).

⁴⁸ 33 STAT. 592 (1904).

⁴⁹ 6 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 599.

⁵⁰ *Id.* at 598-599.

⁵¹ *New York Times*, Feb. 9, 1917, p. 2, col. 7.

⁵² Act of Oct. 6, 1917, 40 STAT. 411, 50 U. S. C. APP. §1 *et seq.*

⁵³ *Id.* at §6.

⁵⁴ *Id.* at §12.

adopted as its own, a statement of the general principles governing the bill which Charles Warren, assistant attorney general of the United States, the principal draftsman of the bill, had made at one of the hearings. The statement included the following:

"One of the most important features of the bill is that which provides for the temporary taking over of enemy property, its conservation in the hands of the alien property custodian, and its investment in United States bonds. . . .

"The theory of the bill is that enemy property in this country shall not remain in the hands of the enemy's debtor or agent here; but that, if the President so directs, it shall be temporarily conscripted by the Government to finance the Government through investment in its bonds, and to be paid back to the enemy or otherwise disposed of at the end of the war as Congress shall direct. In other words, we fight the enemy with his own property during the war; but we do not permanently confiscate it. Moreover, this temporary conscription of enemy property is also conservation of enemy property; for it is taken from the hands of debtors or agents, as to whose solvency the enemy would otherwise have to assume the risks, and invested in the safest security in the world—United States bonds—or deposited in Government depositories."⁵⁵

As was later said by a committee of the House, "The text of the trading with the enemy act as originally enacted, the reports of the committees accompanying the bill, the discussion on the floor of both Houses of Congress, and numerous court decisions under the original act, clearly indicate that the act contemplated sequestration rather than confiscation."⁵⁶

This view was reiterated also by the Alien Property Custodian three weeks after he took office. He said:

"The broad purpose of Congress as expressed in the Trading with the Enemy Act is, first, to preserve enemy-owned property situated in the United States from loss and, secondly, to prevent every use of it which may be hostile or detrimental to the United States . . . [A] trustee, appointed and paid by the United States, is charged with the duty of protecting and caring for such property until the end of the war. This is his function. There is, of course, no thought of the confiscation or dissipation of the property thus held in trust."⁵⁷

Soon, however, the Custodian took a different view of his function. The statute empowered him to dispose of property, by sale or otherwise, "if and when necessary to prevent waste and protect such property and to the end that the interests of the United States in such property and rights of such persons as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safe-

⁵⁵ SEN. REP. No. 113, 65th Cong., 1st Sess. (1917) 3.

⁵⁶ H. R. REP. 1623, 69th Cong., 2d Sess. (1926) 4 (House Committee on Ways and Means, Report on Settlement of War Claims Bill). For excerpts from debates in Congress, see GATHINGS, *INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY* (1940) 64-65. Among the judicial opinions are: *American Exchange National Bank v. Palmer*, 256 Fed. 680, 685 (S. D. N. Y., 1919); *Stöhr v. Wallace*, 269 Fed. 827, 839 (S. D. N. Y., 1920); *Banco Mexicano v. Deutsche Bank*, 289 Fed. 924 (App. D. C., 1923); *Techt v. Hughes*, 229 N. Y. 222, 244-245, 128 N. E. 185 (1922); *Gregg's Estate*, 266 Pa. 189, 194, 109 Atl. 777 (1920).

⁵⁷ Bulletin No. 159.

guarded.”⁵⁸ By an amendment of March 28, 1918,⁵⁹ adopted at the Custodian’s instance, these qualifying words were replaced by the words, “in like manner as though he were the absolute owner thereof.” The Custodian was thus given a general power of sale, subject only to the proviso that any property, except when sold to the United States, should be sold at public sale to American citizens unless the President in the public interest should otherwise determine.

Going far beyond the purposes which he had stated in urging this amendment,⁶⁰ the Custodian now proceeded to carry out what he described as “Americanization” of enemy-owned property.⁶¹ Especially notable was his disposition of a great number of patents seized early in 1919 under the authority given by an amendment of November 4, 1918.⁶² In April, 1919, 4,700 of these patents and a large number of trade-marks were sold for \$250,000 to the Chemical Foundation, a corporation formed for the purpose of acquiring them and holding them in trust for the chemical industry of the United States. In 1922 the Government brought a suit, which eventually proved unsuccessful, to set aside this sale.⁶³

In the amendment of March 28, 1918,⁶⁴ there was also a provision authorizing the President to purchase, and, if they could not be thus procured, to take possession of, the docks and equipment of the German ship lines on the Hudson River, Congress to “make just compensation therefor to be determined by the President.” German ships had been seized under a Joint Resolution of May 12, 1917, which likewise provided that “just compensation” should be made.⁶⁵

After the termination of hostilities, Congress authorized the return of seized property to several classes of persons who were enemies within the definition of the statute but to whom it was deemed proper to make restitution without further delay.⁶⁶ In recommending the passage of one of these bills in 1920, the House Committee on Foreign and Interstate Commerce said:

“The United States, while holding approximately \$556,000,000 worth of private property which is found in this country belonging to individual citizens of enemy countries residing in their country at the outbreak of the war and still residing there, does not intend to confiscate this property. It was the intention of Congress when the

⁵⁸ This was the original language of §12 of the Trading with the Enemy Act, 40 STAT. 423 (1917); see “Historical Note” to 50 U. S. C. A. APP. (1928) §12.

⁵⁹ Act of March 28, 1918, ch. 28, §1, 40 STAT. 460, 50 U. S. C. APP. §12.

⁶⁰ GATHINGS, *op. cit. supra* note 18, at 77.

⁶¹ REPORT OF ALIEN PROPERTY CUSTODIAN (1919) 15. See MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924) 22; MOORE, *Fifty Years of International Law* (1937) 50 HARV. L. REV. 395, 419-421.

⁶² Act of Nov. 4, 1918, ch. 201, §1, 40 STAT. 1020, 50 U. S. C. APP. §7.

⁶³ *United States v. Chemical Foundation*, 272 U. S. 1 (1926), modifying 5 F. (2d) 191 (C. C. A. 3d, 1925), which aff’d 294 Fed. 300 (D. Del., 1924). Attorney General Harlan F. Stone, in his brief in this case in the Circuit Court of Appeals (p. 156) denounced the transaction as “a dangerous precedent in American public life.” In his oral argument he characterized the transaction as subversive of the future of the country; see Borchart, *Nationalization of Enemy Patents* (1943) 37 AM. J. INT. L. 92, 93.

⁶⁴ *Supra* note 59.

⁶⁵ Jt. Res. of May 12, 1917, ch. 13, 40 STAT. 75.

⁶⁶ Act of July 11, 1919, ch. 6, 41 STAT. 35; Act of June 5, 1920, ch. 241, 41 STAT. 977; Act of Feb. 27, 1921, ch. 76, 41 STAT. 1147. These successive enactments amended §9 of the Trading with the Enemy Act.

property was taken that it should merely be held in custody during the war and that after the war the property or its proceeds should be returned to the owners. It has never been the purpose or the practice of the United States to seize the private property of a belligerent to pay our Government's claims against such belligerent. Such practice is contrary to the spirit of international law throughout the world."⁶⁷

In the Joint Resolution of July 2, 1921,⁶⁸ known as the Knox-Porter Resolution, in which the state of war between the United States and the German and Austro-Hungarian governments was "declared at an end," there was included a provision that all property of those governments or of their nationals, in the possession of the United States, should be retained until those governments or their successors "shall have respectively made suitable provision for the satisfaction of all claims" of American citizens against them. The resolution was incorporated in the treaties of peace which were signed in August, 1921.⁶⁹ The German government undertook, in its treaty, to reimburse persons in its territory whose property had been seized by the Alien Property Custodian. From the debate in Congress on the Knox-Porter Resolution and the debate in the Senate on the ratification of the treaties of peace, it appears that the provision relating to the seized property was not regarded as confiscating the property.⁷⁰

Under the treaty of peace with Germany and a subsequent agreement of August 10, 1922,⁷¹ a Mixed Claims Commission was established for the determination of American claims against Germany.

In 1923 Congress passed an act, known as the Winslow Act,⁷² which provided for the return of property or of its proceeds in all cases in which the value did not exceed \$10,000. If the value exceeded that sum, an amount up to \$10,000 was to be returned.

Three years later a bill known as the Mills bill was introduced in the House.⁷³ It provided, as was stated in a committee report on a later measure, "for the immediate return of all property held by the Alien Property Custodian to its rightful owners and for the settlement of the claims of American citizens by an advance from the Treasury, the said advance to be repaid from the funds received by the United States Government, through the Reparation Commission, from Germany on account of the Dawes Plan annuities. . . ."⁷⁴

American claimants against Germany opposed this bill and suggested that a compromise plan be worked out. At the instance of the House Committee on Ways and Means, conferences were held between representatives of the American claimants and of German interests and an agreement was reached.⁷⁵ A bill, based

⁶⁷ H. R. REP. No. 1089, 66th Cong., 2d. Sess. (1920) 3.

⁶⁸ 42 STAT. 105 (1921).

⁶⁹ 42 STAT. 1939, 1946 (1921).

⁷⁰ GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940) 89.

⁷¹ 42 STAT. 2200 (1922).

⁷² Act of March 4, 1923, ch. 285, 42 STAT. 1511.

⁷³ H. R. 10,820, 69th Cong., 1st Sess. (1926). See 67 CONG. REC. (1926) 7597.

⁷⁴ H. R. REP. No. 17, 70th Cong., 1st Sess. (1927) 3 (Report of House Committee on Ways and Means on H. R. 7201).

⁷⁵ See respondent's brief, pp. 42-46, in *Cummings v. Deutsche Bank*, 300 U. S. 115 (1937); *Hearings before Senate Committee on Finance*, 67th Cong., 2d Sess (1927) 129.

on this agreement, was favorably reported after extended hearings before the committees of the Senate and of the House and, on March 10, 1928, the Settlement of War Claims Act became law.⁷⁶

One of the supporters of the bill accurately described it as a "compromise measure" which "cannot be defended upon academic grounds or upon strict principles of municipal or international law," but which was the result of "years of negotiation and consideration."⁷⁷ The Act provided for the payment in full of claims of American nationals against Germany, the payment of claims of German nationals for ships, patents, and a radio station seized by the United States, the total for these, however, not to exceed \$100,000,000, the immediate return of 80 per cent of the German property or its proceeds still held by the United States, and the ultimate return of the remainder. Return of the 80 per cent to German nationals was made conditional on their consenting in writing to postponement of delivery of the remainder. Moneys to be received by the United States under the Dawes Plan were to be included in the funds from which the foregoing payments were to be made.

All property of Austrian and Hungarian nationals was to be returned on the payment by their governments of an amount sufficient to pay the awards of the Tripartite Claims Commission on claims of American citizens against those governments or their nationals. That amount was later paid by the Austrian and Hungarian governments.

In 1930 the United States and Germany entered into a Debt Funding Agreement in which Germany undertook to pay a specified amount annually in satisfaction of awards made by the Mixed Claims Commission.⁷⁸ The payments were not made and in June, 1934, Congress adopted a resolution,⁷⁹ known as Public Resolution No. 53, and also as the Harrison Resolution, which provided that, so long as Germany remained in arrears, all payments under the Act of 1928 should be postponed. This resolution was held by the Supreme Court to be a valid bar to the recovery of funds for which a claim had been filed before the resolution was adopted.⁸⁰ The United States, the Court held, had acquired absolute title to the property which it seized and consequently the grant made by the Act of 1928 "was made as a matter of grace" and withdrawal of the grant by the resolution did not violate the Fifth Amendment. But the Court remarked:

"Legislative history and terms of measures passed in relation to alien enemy property clearly disclose that from the beginning Congress intended after the war justly to deal with former owners and, by restitution or compensation in whole or part, to ameliorate hardships falling upon them as a result of the seizure of their property."⁸¹

That this was still the policy of the Government of the United States is clear

⁷⁶ Act of March 10, 1928, ch. 167, 45 STAT. 254. ⁷⁷ Senator King in 69 CONG. REC. (1928) 3167.

⁷⁸ U. S. SEC. TREAS. ANNUAL REPORT (1930), H. R. DOC. NO. 526, 71ST CONG., 3D SESS. (1930) 341.

⁷⁹ Jt. RES. OF JUNE 27, 1934, ch. 851, 48 STAT. 1267.

⁸⁰ *Cummings v. Deutsche Bank*, 300 U. S. 115 (1937), rev'g *Deutsche Bank v. Cummings*, 65 App. D. C. 297, 83 F. (2d) 554 (1936).

⁸¹ *Id.*, 300 U. S. at 120-121.

from a statement made by Secretary of State Hull within a year after the adoption of the Harrison Resolution:

"It is important . . . that the United States should not depart in any degree from its traditional attitude with respect to the sanctity of private property within our territory whether such property belongs to nationals of former enemy powers or to those of friendly powers. A departure from that policy and the taking over of such property, except for a public purpose and coupled with the assumption of liability to make compensation, would be fraught with disastrous results."⁸²

There can be no doubt as to the course dictated by international law with respect to enemy-owned private property. Nor can there be any question as to what has been the traditional American policy. That policy has contributed to establishing more securely the rule of international law on the subject.

Of the \$150,000,000 in German property and funds and the \$150,000,000 in Japanese property and funds seized or frozen by the United States, some is government-owned. This may and should be confiscated. The lawfulness and propriety of such a course are clear.⁸³ Nor should confiscation be restricted to that which is admittedly government-owned. It should be applied to property and funds which, though ostensibly private, are in fact government-owned. Among the owners, individual or corporate, there may be some that held the property or funds as agents of an enemy government. In such a case, the cloak of private ownership should be of no avail; the property is public property and, under well established principles of international law, is subject to confiscation.⁸⁴

Some of the property or funds seized or frozen as enemy-owned may later prove not to be in fact enemy-owned; this occurred after the last war. In addition, there will be some which is subject to claims of Americans against the enemy owners. The balance will be large, but the amount should not tempt the United States to incur what Chief Justice Marshall characterized as the "obloquy" attaching to confiscation.⁸⁵ In 1802, when the nation was young, the Government appropriated a substantial sum from the treasury to compensate British creditors whose debts had been confiscated during the Revolutionary War.⁸⁶ The principle which was thus vindicated cannot now with impunity be disregarded.

The considerations of justice and self-interest which demand the return of private property are as valid and cogent today as when they were so eloquently expounded by Hamilton a century and a half ago. "The United States," Judge Moore has observed in this regard, "has an honorable past as well as an expedient future to consider."⁸⁷ And, as he also asserted, "purely as a matter of selfish calculation" it is "directly contrary to the interests of the United States to resuscitate the doctrine

⁸² Letter to Senator Capper, May 27, 1935.

⁸³ HAMILTON'S WORKS, *supra* note 34; 2 HYDE, INTERNATIONAL LAW (1922) §620, p. 235; 2 OPPENHEIM, INTERNATIONAL LAW (6th ed., 1940) §§102, 261-262.

⁸⁴ Carroll, *Legislation on Treatment of Enemy Property* (1943) 37 AM. J. INT. L. 611, 630.

⁸⁵ *Supra* note 37.

⁸⁶ *Supra* note 22.

⁸⁷ MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924) 24.

that enemy private property found in a country on the outbreak of war may be confiscated."⁸⁸

Referring to "the rule that private property within the jurisdiction belonging to citizens of the enemy state is inviolable," Edwin M. Borchard has pointed out:

"The rule was not adopted in any sudden burst of humanitarian sentiment, but was the result of an evolution of centuries. It rests upon a sound development in political and legal theory which was deemed natural and incidental to the evolution of civilization. . . ."⁸⁹

The treatment of enemy-owned private property, Professor Borchard rightly asserts, "lies at the foundation and may be used as a criterion of the future of international relations."⁹⁰

As John Dickinson said in summing up a wise discussion of the subject, "if the United Nations intend to build a durable peace, there should be no confiscation of the privately-owned property which has been seized and sequestered."⁹¹

Never has it been more important that the governance of international law and the standard of international morality be securely established. On the maintenance of these will largely depend, in the final analysis, the enduring peace which is the hope of the world.

⁸⁸ *Ibid.*

⁸⁹ Borchard, *Enemy Private Property* (1924) 18 AM. J. INT. L. 523.

⁹⁰ Introduction to GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940) xiv.

⁹¹ Dickinson, *Enemy-Owned Property: Restitution or Confiscation* (1943) 22 FOREIGN AFFAIRS, 126, 141.