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ENEMY BUSINESS ENTERPRISES AND
THE ALIEN PROPERTY CUSTODIAN, I.

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Introduction

Approximately three months after Pearl Harbor, the President established the Office of Alien Property Custodian1 to deal with certain specific and limited kinds of foreign property and property interests in the United States. Included were only those types for which the already existing blocking and freezing controls of the Treasury Department2 were considered inadequate to protect the national interest after the outbreak of war.3 The Executive Order delegated to the Custodian

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1. Exec. Order No. 9095, 7 Fed. Reg. 1971 (1942), as amended by Exec. Order No. 9193, 7 Fed. Reg. 5205 (1942). Although the Order was completely rewritten by the amendment, it is commonly referred to as “Executive Order 9095, as amended.” It will be herein referred to simply as the “Executive Order.” A further and more recent amendment by Exec. Order No. 9567, 10 Fed. Reg. 6917 (1945), will be treated separately.

2. This jurisdiction was exercised under the famous “freezing order,” originally issued as Exec. Order No. 8389, 5 Fed. Reg. 1400 (1940) under §5(b) of the Trading with the Enemy Act of October 6, 1917, as amended prior to December 13, 1941, 40 Stat. 415, 50 U.S.C.A.App. § 616 (1914). Exec. Order No. 8389 has since been frequently amended. It was rewritten in its present form (subject to subsequent minor amendments) by Exec. Order No. 8785, 6 Fed. Reg. 2897 (1941) and is referred to as “Executive Order 8389 as amended.” For a complete documentation of the various amendments and rulings, regulations, interpretations, licenses, etc., issued thereunder, see United States Treas. Dept., Documents Pertaining to Foreign Funds Control (June 15, 1945) and supplements (United States Govt. Printing Office), hereinafter referred to as “Documents.”

For discussions of the various legal aspects of foreign funds control, see Brief of the Treasury Department as amicus curiae, in Commission for Polish Relief v. Banca Nazionale a Rumania, 288 N.Y. 332, 43 N.E. (2d) 345 (1942); United States Treas. Dept., Administration of the Wartime Financial and Property Controls of the United States Government (1942); Hearings on H. R. 4840 before Subcommittee No. 1 of the Committee on the Judiciary, 78 Cong., 2nd Sess. (1944) entitled Administration of Alien Property; Reeves, The Control of Foreign Funds by the United States Treasury (1945) 11 Law & Contemp. Prob. 17; Littauer, Unfreezing of Foreign Funds. (1945) 45 Col. L. Rev. 132.

3. Generally speaking, the Custodian was given jurisdiction over foreign property and interests, where because of their nature, exercise of affirmative, active powers of ownership, management or supervision was considered necessary, as distinguished from the comparatively negative, passive blocking and freezing controls exercised by the Treasury. See Letter of Transmittal by the Custodian to the President of the Annual Report of the Custodian’s Office for the fiscal year ending June, 1944 (hereinafter
discretionary jurisdiction\textsuperscript{4} over four principal types of such property and interests, enemy business enterprises,\textsuperscript{5} enemy physical property (real and personal),\textsuperscript{6} patents (enemy and foreign),\textsuperscript{7} and enemy property under judicial administration.\textsuperscript{8} The Treasury remained in control in all cases where the Custodian was not given jurisdiction, or did not exercise it. The Custodian, although thus limited as to property, received far broader and more effective powers than those possessed by the Custodian in World War I. The Treasury Department's previous peacetime powers were likewise substantially increased. Both

referred to as "Custodian's 1944 Report") and page 2 of such report; Myron, The Work of the Alien Property Custodian (1945) 11 LAW & CONTEM. PROB. 76; Hearings, supra note 2.

4. Section 2 of the Executive Order reads: "The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to: [listing the various types of property]." (italics added) The language indicates the basic distinction between the jurisdictions of the Custodian and the Treasury. The former's is discretionary, limited as to property, and requires positive, affirmative and specific administrative action to become operative; the latter's under ExEc. ORDER No. 8389, as amended, is automatic, non-discretionary and residual. The exercise of jurisdiction by the Treasury, through general and special licenses, rulings, etc. is discretionary, however.

5. Section 2 (a) of the Executive Order. A "business enterprise" is any individual proprietorship, partnership, corporation or other organization primarily engaged in, or to the extent that it has an office in the United States engaged in, the conduct of business within the United States. The term "enemy", unless the context otherwise requires, will herinafter be used for the longer term "designated enemy country", as defined in § 10 (b) of the Executive Order. Section 2 (b) gives the Custodian the same jurisdiction and powers over foreign (non-enemy) business enterprises, provided he certifies to the Treasury "that it is necessary in the national interest" to exercise the same. The non-enemy business enterprises over which the Custodian has asserted his authority are confined to those in which nationals of enemy-occupied countries have interests, and the Custodian has limited his action to the exercise of supervision only, without vesting ownership interests. They represent only a small fraction of the total business enterprises under his control. CUSTODIAN'S 1944 REPORT, 6-7; 1945 REPORT, 11-12.

6. Section 2 (c) of the Executive Order refers to this "as any other property" of enemy nationals, except liquid property and intangibles, which were left under Treasury jurisdiction unless and until the Custodian determined that such property was "necessary for the maintenance or safeguarding of other property" of the same enemy national, subject to vesting under other sections of the Executive Order. This exception was removed as to German and Japanese property by ExEc. ORDER No. 9567, 10 FED. REG. 6917 (1945); see CUSTODIAN'S 1945 REPORT, Ch. I.

7. Section 2 (d) of the Executive Order. Copyrights and trademarks, and applications, contracts, rights and other interests relating to all three are likewise included.

8. Section 2 (f) of the Executive Order. Section 2 (e) gives the Custodian jurisdiction over foreign ships. See CUSTODIAN'S 1944 REPORT 10, 127-128, 148; Knauth, Prize Law Reconsidered (1946) 46 COL. L. REV. 69.
extensions of power were the result of the amendment to Section 5 (b) of The Trading with the Enemy Act made by Title III of the First War Powers Act of 1941, effective December 18, 1941.9

By far the largest and most important part of the total property and interests vested or controlled by the Custodian consists of business enterprises and interests therein.10 The net equity of the Custodian's vested ownership interests in enemy business enterprises is roughly $150,000,000, or approximately three-fourths of the total value of all property vested. The 408 business enterprises in which the Custodian has vested enemy ownership interests, have total assets of over $375,000,000,11 and are of almost every conceivable type and form. They include individual proprietorships, partnerships, business trusts and associations, non-profit organizations, domestic and foreign corporations, and domestic branches or agencies of foreign organizations of various kinds, and engage in a wide variety of business activity. The interests vested were almost entirely from German, Japanese and Italian former owners, and the Custodian's proportionate equity in the respective enterprises runs from an average minimum minority interest of 25% to complete


10. The total amount of foreign-owned property and interests of all types in this country prior to the war has been estimated at fifteen and a half billion dollars, of which somewhere between seven and nine billions at one time or another have been subject to the blocking and freezing controls of the Treasury Department. These two figures include property and interests owned by allied, neutral, enemy-occupied and enemy countries and their nationals. Total enemy property and interests discovered in this country has been estimated at slightly over one half billion. Much of it has been concealed or "cloaked", and additional items are still being brought to light. The Custodian has vested total property and interests of about one quarter billion, excluding some 46,000 patents, 200,000 copyrights and 400 trademarks, and miscellaneous contract rights and interests therein, also vested, upon which no valuation has been placed by the Custodian's office. Total property and interests subject to direct or indirect control of the Custodian's office are in excess of $400,000,000, however; not counting some $85,000,000 of enemy business enterprise assets located in enemy and enemy-occupied countries, which, until the end of the war at least, could scarcely be considered under the effective control of the Custodian. See Hearings, supra note 2 and Custodian's 1944 Report, ch. III, and pp. 34, 38, and 1945 Report, ch. II, pp. 17-26, wherein the information appears in statistical detail.

11. An additional $30,000,000 consists of assets of business enterprises owned by nationals of enemy and enemy-occupied countries, under the Custodian's supervision, but in which no interests have been vested. See Custodian's 1944 Report 40; 1945 Report 56.
ownership. Many of the enterprises, particularly those of former German nationality, contributed directly and substantially to the war effort.\textsuperscript{12}

It is obvious that the activities of the Custodian in this field amount to "government in business" on a vast and hitherto unprecedented scale, unapproached in World War I,\textsuperscript{13} and wholly inconceivable under any circumstances other than those created by the impact of total war. Basic problems of economic, political and social policy\textsuperscript{14} in the relationship between public and private rights, government and business, national interest and individual gain, have arisen for re-examination, bringing related legal questions for study and decision. The experience of World War I has been of immeasurable value both to the government and to the public in considering these problems, but has been somewhat less helpful to the bar, both in and out of government, in seeking answers to the numerous and sometimes novel and difficult legal problems which have followed upon the establishment and operation of the Custodian's office. Our business economy, particularly in its international aspects, became considerably more complex in the years intervening between the two wars, and devices for foreign ownership and control of property and interests in this country more numerous and varied. Foreign interests were astute in devising new methods for "cloaking", or concealing, beneficial ownership or control, in anticipation of a renewal of conflict.\textsuperscript{15} The complete scheme for control of enemy property envisaged by the Trading with the Enemy Act of 1917 rapidly became obsolete and inadequate, and even in advance of our actual involvement in the war, it became necessary to establish a wholly new and flexible system for coping with the modern means of economic warfare employed by the Axis powers.\textsuperscript{16} The new system, instituted by the Treasury blocking and freezing controls, operated almost entirely by administrative, rather than legislative, action. It was

\textsuperscript{12} For a more detailed description, see Custodian's 1944 Report ch. V; 1945 Report Ch. III.

\textsuperscript{13} Total value of property \textit{of all kinds} seized by the Custodian of World War I was approximately half a billion dollars. See Hearings, supra note 2, p. 70.

\textsuperscript{14} See Custodian's 1943 Report 12-14; 1944 Report 4, 16; 1945 Report 2, 10, 32, 42.

\textsuperscript{15} See the Custodian's statement at the Hearings on Sen. Res. 107, 78th Cong., and Sen. Res. 146, 79th Cong., before a Sub-committee of the Senate Committee on Military Affairs, 79th Cong. 1st Sess., June 28 and 29, 1945, entitled "Elimination of German Resources for War", at 580 et seq. See also, Reeves, \textit{op. cit. supra}, note 2, at 52 et seq.; the Custodian's 1944 Report 28-29; 1945 Report 8.

\textsuperscript{16} See Lourie, \textit{The Trading with the Enemy Act} (1943) 42 MicH. L. Rev. 205, 210-211 (1943).
only natural that this pre-war experience was largely drawn on in fashioning instruments for dealing with enemy property after war was begun. Administrative action under broad legislative and executive delegations of power, was adopted, and the more specific legislative provisions of World War I largely disregarded. The First War Powers Act, although in form an amendment to the earlier statute, in fact was the beginning of a quite different and elastic method for dealing with enemy property. The bill was drafted several months before the Custodian's office came into existence, and there is indication that it was considered by its framers merely as a logical extension of the pre-war powers of the Treasury, to be exercised in the same manner, and by the same agency. Moreover, the Act was considered by some (and perhaps designed) as a virtually autonomous and complete legislative enactment, independent of the World War I statute, and self-sustaining. New concepts of power, new powers, and a new status were given to the Custodian; new terms and definitions were used in describing persons and property subject to the statute. But the Trading with the Enemy Act of 1917 remained on the books, and was even given new life by the declaration of war. Immediately, however, some provisions of the old statute became in terms inapplicable; other provisions appeared inconsistent, contradictory and difficult if not impossible of application in the light of the amendment; the applicability of still other provisions became matters for the courts to decide. Finally, the experiment in wartime dual control of foreign property and interests, as established by the division of jurisdiction between the Treasury and the Custodian, was virtually without precedent in

17. See the statement of Ansel F. Luxford, Assistant General Counsel of the Treasury Department for Foreign Funds Control, at Hearings, supra, note 2, pp. 69, 73; and Committee Reports, supra note 9. The bill was introduced, passed and signed with record speed, eleven days after Pearl Harbor. It does not, however, show convincing signs of draftsmanship as hasty.


19. Aside from a few provisions limited in terms by specific dates of effectiveness or applicability, there is little in the statute to indicate that the Congress did not intend it to apply to any war, present or future, in which the United States found itself engaged. See, for example, the definitions of enemy and ally of enemy, and of the beginning and end of war, in § 2; the blanket legislative prohibitions in § 3; the provision for the Custodian in § 6 and the substantive powers given the Custodian in §§ 7 and 12.

20. Markham v. Cabell, 325 U. S. 847 (1945); Lourie, op. cit. supra note 9, at 216-220.
World War I. 21 Administrative delegation by the President of wartime regulatory powers, under both old and new statutes, to the Treasury 22 and the Custodian, 23 and of wartime "vesting," or seizure powers under the new statute only to the Custodian, 24 created additional difficulties. The Custodian's office also became an instrument of dual control, in that it was given vast governmental regulatory powers as well as the ordinary and well-recognized rights and powers of private ownership under domestic law. These two quite different bases of authority were at the same time differences in status and function; in some cases they supplemented, in others duplicated or overlapped each other. In still others, possibilities of conflict of activity and even of interest arose. There was also the question whether the Custodian's "vesting" powers in World War II were the same or different, greater or less, than his "demand and seizure" powers in World War I; 25 and to what extent the array of judicial decisions dealing with the incidents of the latter were applicable to the former. 26

All of these circumstances have resulted in the emergence of a number of legal problems which are only now being subjected to judicial and legislative scrutiny. As was the case after the last war, it may reasonably be expected that many years will elapse before all

21. For a relatively brief period, the administration of enemy patents in World War I under §10 of the Trading With the Enemy Act was delegated to the Federal Trade Commission. Subsequent amendments to §§ 7 (c) and 12 of the Act, however, authorized the Custodian to seize and dispose of such patents. See Farbwerke v. Chemical Foundation, 283 U. S. 152 (1931); Hicks v. Anchor Packing Co., 16 F. (2d) 723 (C. C. A. 3d, 1926).

22. General License by the President under § 3 (a) of the Trading With the Enemy Act, December 13, 1941, appearing in Documents, op. cit. supra note 2, p. 3; §§ 3 and 12 of the Executive Order.

23. The Executive Order, however, nowhere expressly confers on the Custodian the powers formerly given him by statute under §§ 7 and 12 of the Trading With the Enemy Act. There may even be question whether the "Office of Alien Property Custodian" created by the Executive Order was intended to be the same as the "Alien Property Custodian" provided for by § 6 of the statute.

24. The Treasury also has vesting power, but must turn over vested property (except that belonging to a foreign government or central bank) to the Custodian for administration, under § 3 of the Executive Order.


26. Such decisions dealt with the effect of a taking by the Custodian, against former owners, or third parties; the conclusiveness of his findings; his status as an individual owner, mortgagee, creditor, stockholder, partner, patentee, or licensor under federal and state law; his powers of administration, liquidation or disposition of seized property under federal and state law; his obligations to claimants and suitors.
have been solved, one way or the other. Some may only be solved by international action through treaty or convention, or at peace conferences; some others, happily, are presently on their way to judicial or legislative solution. Only a few have actually been solved. Meantime, the Custodian's office has been functioning steadily and its work progressing. At least in the business enterprise field, the initial phase of vesting or seizure of enemy property and interests seems to have been largely completed, but for a few odds and ends. The process of administration or liquidation is in advanced stages, and the program for sale or other disposition of vested property and interests well begun. More recent developments indicate that the final phases, adjudication of claims and suits, and return of property and interests vested, are already on the threshold. It may therefore be an appropriate point at which to attempt an appraisal of some of the legal problems with which the Custodian has dealt, and continues to deal, in the most significant of his fields of activity, that of enemy business enterprises. An effort will be made to discuss the problems in the order of the various phases of activity to which they relate: vesting, administration, etc. A necessary preliminary to any such discussion, however, is an examination in some detail of the bases of the Custodian's jurisdiction and powers.

The Statute and the Executive Order

By amending Section 5 (b) of the Statute, Congress gave the President (or his delegate) sweeping regulatory powers over any and all property in which any foreign interest existed, and in addition, the vesting power. The jurisdictional basis of the powers conferred

27. That is, insofar as the Custodian's vesting power under Exec. Order No. 9093 as amended by 9193, is concerned. The further amendment by Exec. Order No. 9567 involves a substantial extension of the Custodian's vesting power, which is largely beyond the scope of this article. See note 6 supra.


29. Section 5 (b) gives the Custodian, as the delegate of the President, broad power "... investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal ... of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States ..." The statute further provides that: "Any property or interest of any foreign country or national thereof shall vest, when, as and upon the terms, directed by the President [in the Custodian] ... and such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the
is both *in personam* and *in rem*. It should be carefully noted, however, that although broad *regulatory* powers exist over "any property in which any foreign country or a national thereof has any interest", the *vesting* power extends only to the "property or interest" of such foreign country or national. This is indication enough that Congress did not intend American property interests to be expropriated by our government.\(^3\) This is the source of the vesting and regulatory powers delegated to the Custodian. He must exercise them, however, only with respect to the property and interests of "designated enemy countries", or "nationals" thereof.\(^3\) Such nationals are, of course, but a limited class of the "foreign nationals" referred to but nowhere defined in the statute. Impliedly, the power of definition was likewise delegated, and recourse must be had to Executive Order 8389 as amended, for its various meanings.\(^3\) "National"\(^3\) is there

United States... Any and all incidental powers for carrying out the statutory mandate are granted; the keeping and rendering of records and reports under oath, and the production of books and records (but probably not the testimony of witnesses) may be required; and complete exculpatory from liability is given to anyone complying with any "rule, regulation, instruction or direction" of the Custodian. A similar exculpatory provision appears in § 7 (e) of the old Act. American Exchange Bank v. Garvan, 273 Fed. 43 (C. C. A. 2d, 1921), aff'd. 260 U. S. 706 (1922); Garvan v. Commercial Trust Co. 262 U. S. 51 (1923). Silesian Amer. Corp. v. Alien Prop. Custodian, 156 F. (2d) 793 (C. C. A. 2d, 1946).

30. See Committee Reports and Congressional Record, *supra*, note 9. This distinction is not so carefully or clearly preserved, however, in the delegation of these powers from the President to the Custodian. See Carlton, *op. cit. supra* note 25.

31. Section 10 of the Executive Order. These are the foreign countries against which the United States has declared the existence of a state of war. Such nationals are hereinafter referred to as "enemy nationals". For a different use of the term "enemy national", in connection with trade or communication, see Treasury General Ruling 11, *Documents* 25. For the limited cases where the Custodian's jurisdiction extends to property or interests of foreign (non-enemy) nationals, see notes 5, 7 and 8 *supra*.


33. Section 5E of Exec. Order 8389, as amended. "National" is, of course, the basic term; "foreign" (non-United States) is clear enough. A third classification, intermediate between "foreign" and "designated enemy" appears as "foreign country designated in this order" in § 3. A still different classification, that of "designated national" is used by the Custodian in his General Orders 5, 6 and 20. 7 Fed. Reg. 6199 (1942) 8 Fed. Reg. 1780 (1943).
defined to include: (1) any person\textsuperscript{34} domiciled in, or a subject, citizen or resident of a foreign country; (2) any partnership, association, corporation or other organization organized under the laws of, having its principal place of business in, being controlled by, or a substantial part\textsuperscript{35} of the ownership interests in which are owned or controlled directly or indirectly by, a foreign country or national thereof; (3) Any person to the extent acting or purporting to act directly or indirectly for the benefit or on behalf of any foreign national;\textsuperscript{36} and (4) any other person who there is "reasonable cause to believe" is a foreign national. The most sweeping provisions are, of course, the latter two. The retroactive effect of all the definitions, is, however, frequently overlooked. A (foreign) "national" is any person who fell within the requirements of the definitions "at any time on or since the effective date" of Executive Order 8389 as amended, which is no later than June 14, 1941. Subsequent change of residence or status or cessation of active hostilities, make no difference.\textsuperscript{37}

These definitions control the Custodian's determination of who are

\textsuperscript{34} "Person" includes partnership, association, corporation or other organization (§ 5C of ExEc. ORDER 8389 as amended).

\textsuperscript{35} 25\% is the unofficial rule-of-thumb minimum generally adopted both by the Treasury and the Custodian's Office in determining whether a business enterprise or other organization comes within its respective regulatory powers. It is not prescribed as a minimum by the Statute or either executive order, and under special circumstances, smaller percentages have been considered sufficient. CUSTODIAN's 1944 REPORT 9, 25. Either agency can, of course, regulate or vest, as the case may be, the interest itself, regardless of the smallness of its size. Prior to the amendment of the Executive Orders by ExEc. ORDER 9567, the Custodian generally followed a policy of vesting interests in business enterprises only when they were substantial, and represented under the respective circumstances actual or potential, direct or indirect, control of the enterprise. It may reasonably be expected that all interests of German and Japanese nationals in business enterprises will now be vested, however small. See note 6 supra, and CUSTODIAN's 1945 REPORT 31. For a definition of "control", see Daimler Co. v. Cont'l. Tire & Rubber Co., 2 A. C. 307, 344-345 (1916).

\textsuperscript{36} Cf. § 3 (a) of the Statute, making it unlawful to trade, directly or indirectly, on behalf of, or for the benefit of an enemy. Presidential Proclamation 2497 of July 17, 1941 6 FED. REG. 3555 authorizes the publication of "The Proclaimed List of Certain Blocked Nationals;" i.e., persons who were deemed to be within this subsection or under the "control" provisions of the one immediately preceding. Presence on the Proclaimed List was insufficient in itself, however, to constitute a person an enemy national. The Custodian must make a separate determination to such effect under ExEc. ORDER 9095, as amended. He has not usually done so with proclaimed nationals unless special additional circumstances existed. CUSTODIAN's 1944 REPORT 3-9. The Proclaimed List was withdrawn July 8, 1946, 11 FED. REG. 7567.

\textsuperscript{37} Swiss Insurance Co. v. Miller, 267 U. S. 42 (1925); Farmers Loan & Trust Co. v. Hicks, 9 F. (2d) 848 (C. C. A. 2d, 1925), cert. denied, 269 U. S. 583 (1925). Cf. A. P. C. General Counsel's Opinion F-9, October 29, 1942.
enemy nationals, with certain limited exceptions. A person not within an enemy country shall not be deemed an enemy national unless the Custodian determines (1) that such person is controlled by, acting for or on behalf of, (including “cloaks” for) a person within an enemy country;\(^8\) (2) that such person is within an enemy-occupied country and is also a citizen or subject of an enemy country; or (3) that “the national interest requires” such person to be treated as an enemy national.\(^9\)

The most significant features of the new definitions are their retroactivity and flexibility.\(^40\) Citizenship, residence, place of organization and place of doing business are no longer the sole criteria. Indicia of agency and control have been added, as well as the “reasonable cause to believe” and “national interest” tests, giving a vast field for the exercise of administrative discretion in the making of findings and determinations.

**Exercise of the Custodian's Powers: Vesting**

**A. Findings and Determinations**

The Custodian exercises his powers of vesting or supervision\(^41\) of business enterprises or interests therein, by the execution of specific powers. This can be accomplished by making findings and determinations.

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\(^8\) Cf. § 7 (c) of the Statute.

\(^9\) Section 10 (a) of Executive Order 9095, 7 Fed. Reg. 1971, as amended by Exec. Order 9193, 7 Fed. Reg. 5205. It seems fair to assume that the phrase “within an enemy-occupied country” in this section is limited to presence there during the actual period of enemy occupation. The Executive Order has no separate classification for persons resident in enemy-occupied territory. The Custodian has tended, however, to treat them as a group. See Custodian’s 1944 Report 6-7, 1945 Report 6, 7, 13; and releases by the Custodian under APC General Orders No. 5 and No. 6, 7 Fed. Reg. 6199 (1942); 8 Fed. Reg. 1780 (1943).

\(^40\) The new definitions are to be compared with the simpler, narrower and less flexible ones in the old statute: “enemy” there depended on residence, doing business or incorporation within enemy or enemy-occupied territory. Beyond that, the President could proclaim as enemies only individuals, who must be “natives, citizens, or subjects” of enemy countries. United States citizens resident in the United States and corporations organized in the United States, were excluded. Trading With the Enemy Act of 1917, § 2 (1) (a), (c). The same definitions applied, mutatis mutandis, to “ally of enemy” § 2 (2) (a), (c). “Enemy” includes United States citizens resident in enemy territory, Kahn v. Garvan, 263 Fed. 909, 915 (D. C. N. Y. 1920); and under the wording of the statute, United States citizens residing in enemy-occupied territory as well. The shortcomings of the old definitions under present conditions are pointed out in Lourie, “Enemy” Under the Trading with the Enemy Act (1943) 42 Mich. L. Rev. 383, 387; and Note (1942) 51 Yale L. J. 1388. See also Matter of Biering, and Matter of Klotz and North American Investing Co., Final Determination of A. P. C. Vested Property Claims Committee, December 1943, to March 1946”, U. S. Gov’t Printing Office, 24, 108.

\(^41\) “Supervision” is the normal form adopted by the Custodian for the exercise of his regulatory (non-vesting) powers over specific property, interests or enterprises.
orders,42 designated by number, identified by the name of the enterprise or former owner of the property or interest vested, published in the Federal Register,43 and served on the proper parties.44 Since his jurisdiction is limited by the Executive Order, his orders contain certain "findings" and "determinations" to bring his exercise of jurisdiction within its provisions.45 Commonly accepted administrative law doctrine requires findings of fact to be specific, not merely a repetition or rephrasing of the statute or executive order delegating the powers to the administrative agency.46 In the light of this requirement, the differentiation between "findings" and "determinations" made in the Custodian’s vesting and supervisory orders is somewhat curious.

The findings employed by the Custodian are generally of two kinds: (1) Residence of the person whose property or interest is to be vested or supervised, and (2) ownership of the property or interest involved. When nationality is based on residence in an enemy country, the finding is usually a specific reference to the city or other locality within the country where the national resides.47 If the finding of enemy nationality is based not on residence in an enemy country but on agency, control, or "cloaking", the address of the principal party or beneficial or true owner within the enemy country is usually identified in the same manner.48 Residence of an enemy citizen or subject within an

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42. The vast majority of these orders are of two types, Vesting Orders and Supervisory Orders (hereinafter referred to as "V. O." and "S. O.", respectively, with number, name and Federal Register citation). These orders are clearly in the language of § 5 (b) and the Executive Order, rather than that of § 7 (c) of the Statute.


44. Cf. Miller v. Rouse, 276 Fed. 715 (S. D. N. Y. 1921); Miller v. Lautenburg, 239 N. Y. 132, 145 N. E. 907 (1924). A. P. C. General Order 33, 10 FED. REG. 1363 provides, in effect, that vesting orders are effective when filed with the Federal Register; and that actual notice of the order, by service or otherwise constitutes notice that the Custodian has "undertaken supervision" of the vested property or interest, and that the property or interest vests in the Custodian as of the time of filing with the Federal Register.


47. See V. O. 2062, American Wine Co. 8 FED. REG. 14868, Executive Order, § 10 (a). Residence apparently means more than mere physical presence, Josephberg v. Markham, 152 F. (2d) 644 (C. C. A. 2d, 1945); Stadtmuller v. Miller, 11 F. (2d) 732 (C. C. A. 2d, 1926); note (1946) 55 YALE L. J. 836.

48. See note 47 supra; V. O. 635, Frederick Pustet Co., 8 FED. REG. 1296 (shares
enemy occupied country is likewise so identified. However, the Custodian's jurisdiction is based quite as much upon "determinations" of nationality as upon findings of residence, and these he invariably couches merely in the general language of the Executive Order, whether they be determinations of agency, control or "cloaking", or that "the national interest requires" the person to be treated as an enemy national. It is recognized that, especially in wartime, the same national interest might well forbid disclosure of the facts upon which such determinations are made; nevertheless, a person seeking to attack such determinations is at a disadvantage when the question of enemy nationality is not merely one of residence. Agency, control or "cloaking" determinations have been attacked, however, under Section

registered in name of Swiss neutral, beneficially owned by German resident); Executive Order § 10 (a) (i).


50. The Executive Order speaks nowhere of the necessity for "findings" by the Custodian, but only of "determinations." See §§ 2, 2 (b), 2 (c), 5, 10.

51. Cf. V. O. 230, Republic Filters, Inc., 7 FED. REG. 9094, where, as to 5 of the 493 shares vested, no factual findings of residence or ownership were made. The deficiency was subsequently remedied, however. V. O. 2843, Republic Filters, Inc., 8 FED. REG. 17528.

52. These "blanket" determinations are invariably made, regardless of the presence of fact findings of place of residence. See V. O. 161, Draeger Shipping Co. 7 FED. REG. 8568; V. O. 764 Katsuji Onishi, 8 FED. REG. 2452; V. O. 346, 347, Amerlux Steel Corp., and amendments 7 FED. REG. 11033; 8 FED. REG. 33, 6187; 9 FED. REG. 815, and supra, note 47. Under § 10 (a) of the Executive Order, unless the person is within enemy territory, or is an enemy citizen or subject and within enemy-occupied territory, such additional determinations by the Custodian are necessary to make such person an enemy national. Custodian's 1944 REPORT 5-6, 1945 REPORT 4-5. The orders usually contain a final recital that the Custodian has "made all determinations and taken all action, after appropriate consultations and certification, required by said Executive Order or Act or otherwise." For an interesting vesting, containing a variety of findings and determinations covering a number of different fact situations, see V. O. 14, Spur Distributing Co., 7 FED. REG. 4399, as amended and supplemented July 11, 1944, 9 FED. REG. 8083. The original vesting was before the amendment to the Executive Order, and recited that the shares of stock, registered in the name of one non-enemy and deposited with another "as collateral for a loan made to Fritz Von Opel, are the property of Nationals of a foreign country designated in Executive Order No. 8389 as amended, as defined therein, and that the action 'taken herein is in the public interest, and hereby directs that such property, including any and all interest herein, shall be and the same hereby is vested in the Alien Property Custodian . . ." The amendment made detailed findings and determinations concerning residence, beneficial ownership and control, by various persons, including an internee and a Swiss corporation—almost every situation envisaged by the Executive Order as amended. The vesting of the stock "including any and all interest therein" was repeated.
9 (a) of the Trading with the Enemy Act. These attacks have been permitted by the courts despite the studied attempt of the Executive Order to make determinations or action by the Custodian thereunder conclusive. So far as is known, however, no attack has yet been directed solely against a "national interest" determination of enemy nationality; nor have such determinations, although always made, ever been used to sustain a vesting where other findings or determinations in the order (enemy citizenship, residence, agency, control or cloaking) were held erroneous. Apparently the only group of cases where the Custodians vestings are grounded on "national interest" determinations alone are those involving internees, where the fact that the internee was an enemy citizen or subject would not be enough to bring him within the Executive Order, in view of residence in this country rather than in an enemy or enemy occupied country.


54. Sections 10 (a), 12 and 13. See Lourie, op. cit. supra note 9.

55. See Custodian's 1944 Report 8; A. P. C. General Counsel's Opinion F-5 (Aug. 6, 1942; but cf. V. O. 764 Katsuji Onishi, 8 Fed. Reg. 2452, finding Katsuji Onishi "a subject of Japan interned in the United States," and "therefore" an enemy national. Cf. Ex parte Kawato, 317 U. S. 69 (1943) and Ex parte Colonna, 314 U. S. 310 (1942). The court in Josephberg v. Markham, 152 F. (2d) 644 (C. C. A. 2d, 1945), although placing its decision on the ground that the Custodian's finding (V. O. 1911, 8 Fed. Reg. 11187 (1943)) of enemy residence was erroneous, also held that the property vested (cash and securities), because of its nature and because of the existence of active judicial supervision by a New York court, the absence of any control over the property by its former owner, and because of the Treasury freezing controls, could not and would not be used for war purposes in the interest of the enemy. Thus the court indirectly reviewed the "national interest" determination in the vesting order as well. The statute (Sec. 5b) makes no mention of "national interest" as a basis for vesting, and of course, no provision for judicial review of "national interest" determinations by the Custodian. See note (1946) 55 Yale L. J. 836, and Carlston, op. cit. supra note 25, at 10, 14. The statute (supra note 29) provides only that vested property "shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States." The executive order, in addition to authorizing the Custodian to make determinations of every nationality on the ground of "national interest" (Sec. 10 (a) (iii)), provides (Sec. 2) that the "Custodian is authorized and empowered to take such action as he deems necessary in the national interest," including the power to regulate or vest. It would seem that the Court in Josephberg v. Markham in effect reviewed the Custodian's vesting order under this provision, rather than merely his determination.
Findings of ownership may vary in significant respects. The order may recite that the named enemy national owns (and the Custodian vests or supervises) certain property specifically described in the body of the order or in an ‘exhibit attached;’ or merely that “all property” owned by the enemy national is vested or supervised by the Custodian; or, that “any and all right, title and interest” of a named enemy national in and to certain property (specifically or generally described) is vested or supervised by the Custodian. In the latter two cases, the Custodian has actually made no finding of ownership at all; or if he has, it is in the merest general terms, and the nature of the ownership interest, or quantum of ownership in specific property, has nowhere been found. The Custodian has merely vested the property rights, or interests, of the enemy national, whatever they may be. This distinction first arose in World War I, and is of importance in measuring the Custodian’s right to possession of, and interest in, the property. The courts have held, in the first case above mentioned, that the Custodian’s findings are conclusive to the extent that he is entitled to immediate possession of the property; in the latter two, the issue of ownership may be raised for determination by the court before turnover of the property to the Custodian. In such cases, if property is turned over to the Custodian in the absence of such a finding either by the Custodian or by the court, the protection of the exculpatory provisions of the statute may not be available.

that the former owner of the vested property was an enemy national on “national interest” grounds.

56. See V. O. 66, Korfund Co. 7 FED. REG. 6608; V. O. 725, real property, 8 FED. REG. 1696. Specific property descriptions are strictly construed. Sutherland v. Guaranty Trust Co., 11 F. (2d) 696 (C. C. A. 2d, 1926).

57. The entire phrase, taken from § 2 (a) of the Executive Order, is: “All property of any national whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to...”

58. See V. O. 764, supra note 52.

59. See V. O. 725, supra note 56.

60. Garvan v. $20,000 Bonds, 265 Fed. 477 (C. C. A. 2d, 1920), aff’d sub nom., Central Union Trust Co. v. Garvan, 254 U. S. 554 (1921); Miller v. Rouse, 276 Fed. 715 (D. C. N. Y. 1921); Kahn v. Garvan, 263 Fed. 909 (S. D. N. Y. 1920); and Stern v. Newton, 180 Misc. 241, 39 N. Y. S. (2d) 593 (Sup. Ct. 1943). See V. O. 494, Russ Estate Co., and amendments, 8 FED. REG. 1693, 12764, 10 FED. REG. 268, 2663. If a person refuses to turn over property to the Custodian, the latter resorts to a “summary turnover proceeding” under § 17 of the statute.

61. See note 29, supra. This is for the reason that the order, in such a case, does not require specific property to be turned over, so that it cannot be said to be an “instruction or direction” of the Custodian to such effect. The Custodian may, of course, make the necessary additional finding of ownership dehors the vesting order, as for example in a “Turnover Directive” (Form A. P. C. 34), or other order. See V. O. 29, 7 FED. REG.
The basic distinction between "asset" and "interest" vestings is also important in determining the effect of the vesting order on the property involved. In the former case, the asset itself is vested and becomes government property, with many, if not all, of the incidents thereof. In the latter case, the Custodian is vested only with an interest therein, which may or may not be defined or described, and the property retains its private character. These considerations have varying consequences when applied to business enterprises.

B. Domestic Corporations

In the case of corporations organized under the laws of one of the several states, some or all of the capital stock or shares of which are owned by enemy nationals, the Custodian normally vests only such stock or shares, thus succeeding to the rights of the enemy national as stockholder. But if the degree of enemy ownership is sufficiently

4633 and A. P. C. Special Order No. 1. July 16, 1942 (J. M. Lehmann Co., Inc.), see note 75 infra. If the specific property is known to be in fact owned by the enemy, or the undetermined enemy interest therein is in fact 100%, the danger is academic. Cf. Great Northern Ry. v. Sutherland, 273 U. S. 182 (1927).

62. "...such interest on property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States..." (§ 5 (b)). A vesting order "...has the legal effect of transferring completely to the Custodian for the benefit of the United States..." (the vested property). The Pietro-Campanella, 47 F. Supp. 374, 377 (D. C. Md., 1942). Title to the property or interest vested is completely transferred to the Custodian. Cummings v. Deutsche Bank, 300 U. S. 115 (1921); United States v. Borax Consolidated, 62 F. Supp. 220 (N. D. Cal. 1945); A. P. C. General Counsels Opinion F-12, Feb. 6, 1946, and cases cited. Whether the property vested becomes government property for all purposes is a much-mooted question, the implications of which are numerous, to say the least. Various aspects of the question as it affects business enterprises will be discussed herein.

63. Of the 408 business enterprises in which the Custodian has vested interests, 291 are in the form of stock in domestic corporations. Custodian's 1944 Report 26, 1945 Report 33.

64. Great Northern Ry. v. Sutherland, 273 U. S. 182 (1927); Sutherland v. Selling, 16 F. (2d) 865 (C. C. A. 9th, 1926), cert. denied, 273 U. S. 760 (1927); Silesian American Corp. v. Alien Property Custodian, 156 F. (2d) 793 (C. C. A. 2d, 1946). The Custodian's 1944 Report, 26, refers to this as an "interest" rather than an "asset" vesting. This classification seems questionable in the light of the distinction discussed above. The stock itself, and not an interest therein, represents the intangible property or asset vested. As to it, all the necessary findings of ownership prerequisite to the Custodian's right to immediate possession have been made, and no question remains for the Court to decide. True, the stock represents an "interest" in the enterprise, but not in the same sense. Shares of stock may be vested by the Custodian, regardless of the existence, physical location or situs of the stock certificates under local law or the Uniform Stock Transfer Act. Columbia Brewing Co. v. Miller, 281 Fed. 289 (C. C. A. 5th, 1922); Miller v. Kaliwerke, etc., 283 Fed. 746 (C. C. A. 2d, 1922); Garvan v. Marconi Wireless
“substantial”, it may result in a finding or determination by the Custodian that the corporation itself is an enemy national, within the meaning of the Executive Order.

May such a finding be attacked? Only a strong factual showing that, prior to vesting, the corporation was not controlled by, acting for or on behalf of, or a cloak for, an enemy national, would seem to have any hope of success. The difficulties of overcoming a determination of enemy nationality made on the ground of “national interest” are obvious enough. Without such facts, the attack must of necessity be directed to the definition in the Executive Order, rather than to the action of the Custodian. Moreover, the additional finding may be necessary to bring the business enterprise as a whole within the ambit of the Custodian’s regulatory (or supervisory) power.

Since there is no taking beyond the enemy national stock interest, the attack would resolve itself into one on the power to regulate or supervise (a constitutional question), or on a charge that the regulation or supervision exercised was arbitrary, unreasonable, or discriminatory in some respect, and damage would have to be shown.

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65. Section 10 (a), incorporating by reference the definitions of § 5 of Exec. Order 8389, as amended. See notes 34 to 39, supra. A domestic corporation is a “person” within these definitions, but is not within enemy or enemy-occupied territory, nor is it an enemy citizen or subject.

66. The distinction is, of course, between interests subject to vesting and interests subject to regulation or supervision. See notes 29 and 35 supra. In nearly all cases of vesting of interests in business enterprises prior to Exec. Order 9567 the Custodian also assumed supervision of the enterprise itself, either by a separate supervisory order or by appropriate additional language in the vesting order. See Custodian’s 1944 Report, 11, 25; 1945 Report 8-9, 31.


68. It may be argued that the corporation has been damaged in its business repu-
A different question would arise, however, if the Custodian made use of his own finding, by a species of administrative bootstrap lifting, to vest assets owned by the corporation itself. Even if the corporation's stock is 100% enemy-owned, the question may not be academic, in so far as the rights of creditors are concerned, for the creditors of the corporation and those of the individual stockholders may not be the same. Where outstanding non-enemy stock interests exist, such a vesting would seem palpably improper, probably giving to the injured parties rights against the Custodian under Section 9 (a) of the Trading with the Enemy Act. Only overriding considerations

tation by having been publicly and officially found to be an "enemy national", with all the non-technical popular connotations of the term. The damnum may be real enough; but even if libelous, (cf. Luotto v. Field, 268 App. Div. 227, 50 N. Y. S. (2d) 849 (2d Dept', 1944); Levy v. Gelber, 175 Misc. 746, 25 N. Y. S. (2d) 148 (Sup. Ct. 1941), it is absque iniuria, since the government is without liability in tort. Schillinger v. United States, 155 U. S. 163 (1894).

69. The Custodian's 1944 Report p. 26 n, refers to two cases only in which this was done. One such case (p. 77) was that of Atlantic Assets Corp., all of whose stock was vested, V. O. 84, 7 Fed. Reg. 7051; V. O. 2170, 8 Fed. Reg. 12763. In addition, the Custodian vested 530,145 shares of stock of Hugo Stinnes Corp., some of which were held by Atlantic Assets Corp., V. O. 2050, 9 Fed. Reg. 2504. The World War I statute did not permit seizure of corporate assets in such cases. See Hamburg-American Co. v. United States, 277 U. S. 138 (1923).

70. The stock may be owned by one or several enemy nationals.

71. The Custodian would seem to have an obligation to protect the rights of American creditors of the respective former enemy owners of vested property, which would require him not to mingle such property, at least in cases where the mingling would cause such creditor interests to be adversely affected. Creditors of the corporation become, in a sense, "creditors of the Custodian" by virtue of the vesting; a difference which, under the Custodian's policy until recently, had important disadvantages, Markham v. Cabell, 325 U. S. 847 (1945). Custodian's 1944 Report 140, 141, 1945 Report 16, 170. There is no constitutional right to the payment of debt claims out of enemy property. Miller v. Robertson, 266 U. S. 243 (1924); Kogler v. Miller, 288 Fed. 806 (C. C. A. 3d, 1923), and Sec. 34 of the Statute enacted Aug. 8, 1946, restricts the payment of debt claims to American citizens and residents.

72. The remedy, by suit or claim against the Custodian, is apparently available to the corporation as well as to the non-enemy stockholders. The corporation was joined as a party plaintiff in Draeger v. Crowley, 49 F. Supp. 215 (S. D. N. Y. 1943). Despite the fact that the Custodian's vesting orders uniformly provide in effect that enemy nationals may not file claims, the Custodian's office has taken the position both in court (See Government's Brief, p. 49 in Draeger v. Crowley, supra) and as a matter of administrative policy, that the disqualification as to filing does not apply to an attack on the vesting order in which the finding was made. Where the former non-enemy stockholder is a "foreign national" under Sec. 5b of the Statute, the remedy of Sec. 9a is probably not available to him. Silesian American Corp. v. Alien Property Custodian, 156 F. (2d) 793 (C. C. A. 2d, 1946); see also Iki v. Markham, unreported, (D. Wash. 1944); Hayden v. Markham, unreported, (D. Wash. 1944); Custodian's 1945 Report 162.
of national interest should cause the Custodian to disregard the corporate entity in either case.\textsuperscript{73}

It may be that a determination by the Custodian of enemy ownership of corporate stocks disregards non-enemy property interests in the stock itself. The interests of the secured creditor in enemy property were accorded some measure of protection under Section 8 (a) of the old statute.\textsuperscript{74} The section appears to be applicable to vestings in World War II, despite the amendment to Section 5 (b).\textsuperscript{75} Surrender or loss of possession, even to the

\textsuperscript{73} Cf. Wheeling Steel Corp. v. Fox, 298 U. S. 193 (1936); First Bank Stock Corp. v. Minnesota, 301 U. S. 234 (1937) (tax cases) and 1 \textsc{Fletcher Cyc. Corps.} (1931) §§ 41-46. By refusing to vest directly patents owned by business enterprises in which minority, majority or even 100% stock interests have already been vested, the Custodian has recognized the necessity of protecting non-enemy stockholder or creditor interests in the enterprise. See \textit{Patents at Work, A Statement of Policy by the Alien Property Custodian} (1943) 20; Sargeant & Cramer, \textit{Enemy Patents} (1945) 11 Law & Contemp. Prob. 92, 105-106; \textit{Hearings, supra} note 15, p. 595-596; \textit{Custodian's 1944 Report} p. 101, 1945 \textit{Report} 112; \textit{cf. Custodian's 1943 Report} 76.


\textsuperscript{75} In the matter of Dorothy Krets Lehman, Final Determination of A. P. C. Vested Property Claims Committee, \textit{supra} note 40 at 115, the claimant asserted a lienor's right to the vested stock under § 8 (a), by virtue of certain orders of the New York Supreme Court in a matrimonial proceeding under N. Y. \textit{Civ. Prac. Act} § 1171-a. The claimant had obtained a judgment of separation with alimony from her husband, the former owner of the vested stock. The orders referred to, entered prior to the vesting appointed her matrimonial receiver and sequestrator of her husband's property in the state, including the stock, and directed the corporation to issue new certificates for the shares to her. The latter order, however, was made expressly subject to obtaining any necessary permission from federal authorities under § 5 (b). The company resisted the order and the Custodian vested the stock before any further steps were taken. The Committee decided that the state court orders did not give the claimant any lienor's rights under § 8 (a), but at most, put the stock in \textit{custodia legis}, thus making it vestible under § 2 (f) of the Executive Order.

No cases have yet arisen holding provisions of the old statute inapplicable, and several decisions, construing other sections, have expressly or impliedly held otherwise: \textit{Ex parte Kawato, 317 U. S. 69 (1943), Markham v. Cabell, 325 U. S. 847 (1942); Draeger v. Crowley, 49 F. Supp. 215 (S. D. N. Y. 1943).} The way to test the question, of course, is for the lienor or other secured creditor to assert his rights under § 8 (a) and retain the property, thus requiring the Custodian to bring a § 17 proceeding. Rights under § 9 (a) also exist. \textit{Cf. Swiss Bank Corp. v. Markham, U. S. D. C., S. D. N. Y., Dec. 28, 1945, unreported, C. C. H. War Law Service, Statutes and Interpretations, par. 9274. Silesian American Corp. v. Alien Property Custodian, 156 F. (2d) 793 (C. C. A. 2nd, 1946), appears to hold, however, that foreign (non-enemy) nationals under § 5b have no rights under § 8a or 9a.
Custodian, might well deprive a pledgor of his security rights.\textsuperscript{76} In other cases, non-enemy interests in property vested might not come within the limits of Section 8 (a), yet should not be without protection. Enemy-owned corporate stock might be on deposit with a non-enemy agent or fiduciary, who may have acquired property rights of value in the stock by virtue of the instrument creating the relationship. The exculpatory provisions of the statute would protect the agent or fiduciary from liability for breach of his obligations in acceding to the demands of the Custodian, but the problem of his own rights remains. For example, the stock might constitute the corpus of a trust, as to which the trustees are given voting powers for the purpose of providing continuity to the management of the corporation, in addition to their normal rights to administer the trust and receive compensation therefor. The enemy interests might be those of contingent remaindermen, dependent for realization upon events (such as the pre-decease of life beneficiaries) which have not yet occurred. A direct vesting of all or part of the stock by the Custodian in such a case would appear not only to destroy the trust, but the rights of the trustees and the non-enemy beneficiaries as well.\textsuperscript{77} Where the trust is a relatively passive or inactive one, or all the beneficial interests are enemy-owned, its destruction by vesting action of the Custodian would seem less open to question.\textsuperscript{78} In cases of voting trusts, the Custodian quite properly vests the enemy-owned voting trust certificates, or the enemy-owned beneficial interests therein, as well as the underlying stock.\textsuperscript{79}


\textsuperscript{78} \textit{Cf.} Farmers Loan & Trust Co. v. Hicks, 9 F. (2d) 848 (C. C. A. 2d, 1925) \textit{cert. denied}, 269 U. S. 583 (1925); Stohr v. Wallace, 269 Fed. 827, 835 (S. D. N. Y. 1920) \textit{aff'd} 255 U. S. 239 (1921); \S\ 23, N. Y. Pers. Prop. Law, permitting the termination of a trust upon consent of all parties beneficially interested.

or he may disregard the trust agreement as a contract with an enemy, suspended or dissolved by war.\textsuperscript{80} Even if still effective, the trust and the action of the trustees are proper subjects of the Custodian's supervision.

Where vested corporate stock is subject to \textit{bona fide} prior restrictions on its sale, in the form of first purchase or first refusal or option rights embodied in the charter or by-laws, printed on the stock certificate, or by contract between the parties, it would seem that the Custodian's vesting would be subject to such rights, at least to the extent that they are held by non-enemies.\textsuperscript{81} In cases where corporate stock is subject to prior attachment,\textsuperscript{82} it would likewise seem that the Custodian's vesting is subject to the prior right of the attaching non-enemy creditor, whether or not the attachment is a "lien" within the provisions of Section 8 (a). In one case,\textsuperscript{83} however, the Custodian was successful in a motion to vacate the attachment. In the only other reported decision that has been found, the effect to be given to a prior attachment was not squarely decided.\textsuperscript{84} Both cases were ultimately
disposed of, however, by stipulations which in effect constituted recogni-
tion by the Custodian’s office of the validity of the attachments.

C. Partnerships

The partnership field85 shows perhaps more strikingly than elsewhere
among enemy business enterprises, the variety and flexibility of the
present Custodian’s powers, not only in vesting and supervising enemy
business enterprises, their property, and enemy interests therein, but
also in defining and determining the enterprises, persons and interests
subject thereto. Conceivably, an “enemy partnership” doing business
and having vestible property or interests in the United States might
consist of a partnership where one or more of the partners, 1) regardless
of citizenship, resides in enemy or enemy-occupied territory;86 2) re-
gardless of residence, is an enemy citizen or subject; 3) regardless of
citizenship or residence, is deemed for other reasons to be acting for
or on behalf of, controlled by (or a cloak for), an enemy country or
person within it; 4) regardless of citizenship, residence, agency, cloak
or control, is deemed an enemy national on still other grounds because
the “national interest” so requires.

Under the Trading with the Enemy Act, only partnerships resident
or doing business in enemy or enemy-occupied territory could be clas-
sified as “enemy”. Partnerships resident or doing business in the
United States, irrespective of whether all or some of the partners were
enemy citizens or subjects, were excluded; although individual partners
who were enemy citizens or subjects, wherever resident, could be clas-
sified as “enemy” by Presidential proclamation.87 At common law as

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85. As of June 30, 1945, the Custodian had vested interests in, or the assets of, a
total of 27 enterprises which had been doing business in this country in the partnership
form. Where all partners are determined to be enemy nationals by the Custodian, he may
vest the assets of the enterprise, the interests of all the partners, or both. Partnership assets
have been vested in thirteen such cases. In the remainder, where there were outstanding
interests of non-enemy partners, the Custodian vested only the enemy partners’ interests.
All but six of such vestings represented partnership interests of 50% or more in the
enterprise. CUSTODIAN’S 1944 REPORT, 26-27; 1945 REPORT 33.
86. See notes 39 and 40 supra.
87. Section 2 (1) (a), (c). Arguably, a partnership, wherever doing business, all of
well as under the World War I statute, a partnership, one of whose members was an enemy, was considered automatically dissolved, *eo instanti*, upon the declaration of war. The reasons generally given were twofold: 1) commercial intercourse with an enemy ("trading") became illegal, and, in most cases, impossible. Since the partners could not deal with one another, the carrying on of the partnership business was therefore prevented. 2) If communication or commercial relations with the enemy partner were possible, it nevertheless was illegal, since, presumably, benefit would be conferred on the enemy member by carrying on the partnership. The partnership was therefore deemed dissolved as a *going concern*; however, the necessity for liquidation of the enterprise, payment of liabilities and distribution of the remaining assets to the non-enemy partners according to their respective interests remained.

This doctrine was applied by the courts so as to delete the definition of enemy partnership from the statute. Since the partnership was automatically and instantaneously "dissolved" upon the outbreak of war, it could not be an "enemy". Only those individual members who otherwise satisfied the requirements of the "enemy" definition could be so considered. The World War I decisions, therefore, give little or no light on which of the categories listed above would be considered an "enemy partnership". They do, however, disclose that the Cus-

whose partners, wherever resident, were enemy citizens or subjects, could likewise be so proclaimed.


89. As for example, with an individual partner, a citizen or subject of an enemy country, but resident in the United States, or in non-enemy territory, and proclaimed an "enemy" by the President, under *Trading with the Enemy Act* § 2 (1) (e). See Sutherland v. Mayer, 271 U. S. 272 (1926) at p. 287.


odian there resorted to "interest" or "asset" vestings, depending on whether some or all of the partners were enemies. The partnerships of Reis & Co. and Rossie & Co. contained non-enemy partners, and asset vestings were there held to be improper.92 On the other hand, all of the partners of Froelich & Kuttner, a Philippine partnership, were enemies, and the Custodian's seizure of the assets was upheld.93 Asset seizure was similarly sustained in Sorenson v. Sutherland94 where two American partners had a share in the profits but not in the capital, under the partnership agreement. The question whether the partnership was an "entity" also preoccupied the courts to some extent in considering questions of liquidation, and suit against the Custodian under Section 9 (a).95

The Executive Order includes partnership within the definitions of "person" and "business enterprise".96 The present Custodian has found partnerships as well as individual partners to be "enemy nationals" thereunder, and has vested partnership assets, partners' interests therein, or both. In Stern v. Newton, he vested assets in this country presumptively belonging to a French partnership which did business and had its office in enemy-occupied Paris.97 After finding these facts, the Custodian "determined", in the language of the Executive Order, that the partnership was an enemy national. He was held entitled to immediate possession of the vested property, against the claim of the

92. Mayer v. Garvan, 270 Fed. 229 (D. Mass. 1920) aff'd, 278 Fed. 27 (C. C. A. 1st, 1922); Rossie v. Garvan, 274 Fed. 447 (D. Conn. 1921). Since the partnership was not an enemy, its assets could not be seized by the Custodian under § 7 (c), but only the interest of the enemy partner therein.


94. 27 F. Supp. 44 (S. D. N. Y. 1939), rev'd on other grounds, 109 F. (2d) 714 (C. C. A. 2d, 1940) aff'd sub nom., Jackson v. Irving Trust Co., 311 U. S. 494 (1941). In 1929, the American partners had successfully brought suit under § 9 (a) to recover a debt due the partnership from a German concern whose American assets had been seized by the Custodian. Ten years later, the Custodian sought to vacate the decree on the ground that, since the German partner owned all the assets, including the debt sued on, the court was without jurisdiction. The district court vacated the decree but the courts on appeal held that the issue should have been raised in the original proceeding, and, whether rightly or wrongly decided, the decree was now res judicata.


96. See notes 5 and 34 supra.

97. V. 0. 155, 7 Fed. Reg. 7764, 180 Misc. 241, 39 N. Y. S. (2d) 593 (Sup. Ct. 1943). Since the partnership had no office and did no business within the United States, it was not within the "business enterprise" definition. In view of the state court proceeding, the property was vestible, however, under § 2 (f) of the Executive Order. See note 8 supra.
plaintiff, a French citizen who had resided in this country since prior to the date of vesting but subsequent to the effective date of the freezing order, that the property was in fact beneficially owned by him. The plaintiff was remitted to his administrative remedy against the Custodian, where he was ultimately successful.98 In another case,99 the Custodian vested the interests of all the partners (enemy nationals residing in Hungary) in a partnership doing business in Massachusetts. The vesting order did not in terms assume supervision of the enterprise. A year later, the Custodian amended his order to vest the assets of the enterprise and formally undertake its supervision.100 In the case of Pass & Company,101 however, where the Custodian also vested all of the partnership assets, only one of the two partners was found an enemy national by reason of residence in Germany. The Custodian then found the partnership an enemy national on the ground that it was controlled by him, and the other partner an enemy national on the sole ground and to the extent that, as a partner, she was "acting directly or indirectly for the benefit of and on behalf of" the partner resident in Germany.102 Unless, perhaps, the vesting can be justified

98. A. P. C. Divesting Order No. 94, May 19, 1944, 9 Fed. Reg. 8084; “Final Determination of A. P. C. Vested Property Claims Committee,” May 3, 1944. Plaintiff had resided here since since December 1940. The effective date of Exec. Order 8389 as amended for France is June 17, 1940 § 3 (c). He was therefore a “foreign national” within the meaning of that order and of § 5 (b) of the Statute, although not an “enemy national” under the Executive Order 9095 as amended.


100. 8 Fed. Reg. 13350. The real estate on which the enterprise was located was vested in the same manner (V. O. 725, 8 Fed. Reg. 1696), except that the subsequent amendment (8 Fed. Reg. 8563) included no supervisory provisions. The real estate was apparently not included among the assets of the partnership, but was owned jointly by the same persons. See also Semmes (Kiyono) Nurseries, V. O. 93, 7 Fed. Reg. 6609, 9. Fed. Reg. 5613, and real estate, V. O. 1673, 8 Fed. Reg. 9080; and Southern Cotton Co. Ltd., V. O. 59, 143 and 394, 7 Fed. Reg. 5743, 7543, 9801, where the Custodian, by successive orders, vested all the interests of all the partners in, and all debts owing to them by, a Texas limited partnership, but did not directly vest the assets of the enterprise. By public notice, however, the Custodian announced that he had become the "sole owner" of all its assets, and that the partnership (in dissolution) would thereafter be operated as a "sole proprietorship" by the Custodian. Unless the partnership could be considered an "entity" under state law, his vesting of course had the effect claimed for it, without the necessity of directly vesting the partnership assets. See notes 93 and 95 supra; cf. Custodian’s 1945 Report 32.


102. Section 10 (a) (i) of the Executive Order. Domestic law makes the partner an agent of the partnership. Uniform Partnership Act, § 9. Compare the holding in Alexewicz v. General Aniline & Film Corp., 181 Misc. 181, 43 N. Y. S. (2d) 713 (Sup. Ct. 1943), discussed in Lourie, op. cit. supra note 40, 390 n., where the plaintiff was held to be "acting on behalf of" the corporation, an enemy national with whom he had
on the ground that all of the partnership capital was contributed by the partner residing in Germany, the Custodian's action seems questionable. If the Custodian can use his power to make determinations applying the definition of enemy nationality, thus to extend his vesting power, a way has been found around \textit{Mayer v. Garvan,} and little becomes of the statutory admonition to regulate property in which there is an enemy national interest, but to vest only the interest.\footnote{Use of the definitions in the two Executive Orders as the basis for a determination that a partnership is an enemy national, wisely disregards the dissolution doctrine of the earlier decisions. The \textit{World War I} rule that a partnership dissolved \textit{as a going concern}, was no longer an "entity" for purposes of the enemy definition, ignored reality as well as the language of the statute. And some further extension of the "agency" and "control" definitions in application has doubtless been necessary and advisable. Indiscriminate determinations of enemy nationality on "control" or "national interest" grounds, how-

\begin{itemize}
\item \textit{Sorenson v. Sutherland, note 94 supra.} The vesting order is silent on this point. Even if the other partner's interest were confined to the profits only, it would seem to be an interest entitled to the protection of § 9 (a), regardless of whether she had rights as a liquidating partner under § 8 (a).
\item \textit{Schutte v. Miller, (affirmed on other grounds,) 4 F. (2d) 288 (App. D. C. 1925) and refusing to follow Mayer v. Garvan.} The Custodian had vested all of the United States assets of a Bulgarian partnership, V. O. 1583, Batzouroff & Cie, 8 FED. \textit{REr. 076.} The unsuccessful claimant was one of the partners and a Bulgarian citizen, resident in Paris until 1939, in this country thereafter. Perhaps no "lien" existed, but no sufficient reason appears for substituting the Custodian as liquidator of the partnership, in place of the American resident partner, who was not even mentioned in the vesting order.
\item \textit{Trading with the Enemy Act, as amended,} § 5 (b). \textit{Cf., V. O.-164, Rikimaru Bros. & Co., 7 FED. REG. 8666,} wherein the Custodian vested all right, title and interest of both enemy national partners in a partnership which had made, prior to vesting, an assignment to a non-enemy for the benefit of creditors. The vesting order was made expressly subject to the right, title and interest of the assignee. The Custodian could, of course, supervise the activity of the assignée, although the vesting order did not undertake to do so.
\end{itemize}
ever, based solely on residence in enemy-occupied territory,\textsuperscript{107} or on enemy citizenship regardless of residence,\textsuperscript{108} or even on residence in enemy territory,\textsuperscript{109} as a basis of vesting, seem unwarranted by the necessities of the situation, when other measures are at hand. The broader powers given the Custodian in World War II make it unnecessary to go to this other extreme by jeopardizing non-enemy interests which can be subjected to supervision and control without the necessity of vesting.\textsuperscript{110}

(To Be Concluded)

\textsuperscript{107} Stern v. Newton, \textit{supra} note 97.
\textsuperscript{108} V. O. 764, Katsuji Onishi, 8 \textit{Fed. Reg.} 2452.
\textsuperscript{110} Cf., V. O. 2700, S. M. Iida 9 \textit{Fed. Reg.} 741, where the Custodian vested only the right, title and interest of the partner resident in Japan, although the other partner, resident in Hawaii, was also a subject of Japan, and had been interned. The Custodian also undertook supervision of the partnership. As it will be seen, disregard of the partnership as an “entity” in dissolution, either by vesting its assets, or the interest of all the partners, makes for significant differences in administration and liquidation of the partnership property.