UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20-2638

Minor Lee McNeil

Plaintiff – Appellant

v.

United States of America;
Department of Treasury

Defendants – Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas – Central (4:20-cv-00100-JM)

REVISED JUDGMENT

Before LOKEN, COLLOTON, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this

Court. The government's motion for sanctions in the amount of $8,000 is granted.

March 02, 2021

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 20-2638

Minor Lee McNeil

Plaintiff – Appellant

v.

United States of America;
Department of Treasury

Defendants – Appellees

Appeal from United States District Court
for the Eastern District of Arkansas – Central

Submitted: February 19, 2021
Filed: March 2, 2021
[Unpublished]

Before LOKEN, COLLOTON, and KOBES, Circuit Judges.

PER CURIAM.

Minor McNeil appeals the district court's[1] dismissal of his complaint regarding the issuance of a

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[1] The Honorable James M. Moody Jr., United States District Judge for the Eastern District of Arkansas.

summons to determine his federal income tax liability and the garnishing of his wages to pay past-due taxes. He argues that federal taxation of his wages is unconstitutional and he is a citizen of a "sovereign" state.

The district court determined that McNeil had not identified any applicable waiver of sovereign immunity or any basis for the court's jurisdiction over his claims. After careful review, we conclude that dismissal was proper for the reasons stated by the district court. See Hastings v. Wilson, 516 F.3d 1055, 1058 (8th Cir. 2008) (standard of review).

As to the government's motion for sanctions, we may award "just damages" and single or double costs if we determine that an appeal is frivolous. See 28 U.S.C. § 1912; Fed. R. App. P. 38. In this case, we conclude that sanctions are appropriate. See United States v. Gerads, 999 F.2d 1255, 1256-57 (8th Cir. 1993) (per curiam) (rejecting argument that "Free Citizens of the Republic of Minnesota" were not subject to taxation; granting government's motion for sanctions for frivolous appeal).

Accordingly, we affirm the judgment of the district court, see 8th Cir. R. 47B, and we grant the government's motion for sanctions in the amount of $8,000. We also deny McNeil's motion for remand.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

MINOR L. MCNEIL **PLAINTIFF**

V. **4:20CV00100 JM**

UNITED STATES; DEPARTMENT OF TREASURY **DEFENDANTS**

ORDER

(Filed Jun. 22, 2020)

Plaintiff McNeil filed his *pro se* complaint under 42 U.S.C. § 1983, asking this Court to quash a subpoena issued by the IRS, to issue an injunction preventing the IRS from further action against him, and to return property already seized. (Doc. 1) He has since filed an amended complaint, (Doc. 2), a supplemental motion to quash, (Doc. 3), and a motion for immediate judicial intervention. (Doc. 6) The Government has moved to dismiss for lack of jurisdiction. (Doc 8) McNeil has responded, (Doc. 11), and the motion is now ripe for review.

I. Background

McNeil contends that the federal government has no right to serve a subpoena on him or to tax him. (Doc. 1 & 2). McNeil provides an historical synopsis to support his position that, while the government illegally (and treasonously) gave itself jurisdiction to tax after

FDR's New Deal, the right ended when Congress enacted the National Emergency Act of 1977. (*Id.*)

Ignoring the Sixteenth Amendment to the Constitution, McNeil contends the United States has no authority to tax a "local territorial jurisdiction." (Doc. 1-1 at 4) (quoting *M'Culloch v. State of Maryland*, 17 U.S. 316 (1819)). He further argues that Congress unlawfully "extended federal wartime jurisdictions to control trading activity inside the . . . United States," (Doc. 1-1 at 2), and that, as a result, [a]lmost nine decades have gone by without the American population at large having 'caught on' to FDR's treason." (Doc. 1-1 at 8; Doc. 6 at 5). Nevertheless, McNeil argues that, by enacting the National Emergency Act of 1977, Congress unwittingly reverted federal jurisdictions back to the way they were before FDR's New Deal. (Doc. 1-1 at 9). As a consequence, McNeil contends that he cannot be subpoenaed because he is "not a citizen of the U.S; [and is] a nonresident alien with respect to the U.S." (Doc. 1 at 5).

McNeil interprets the Internal Revenue Code to provide that neither his Arkansas birth, his home in Alexander, Arkansas, nor his employment at the University of Arkansas for Medical Science (UAMS), make him a citizen of the United States subject to federal tax law. (Doc. 1-1 at 61-62). He argues his Arkansas home "is a foreign state" that "is not within the United States" and that UAMS is a "foreign corporation." (*Id.*). As a result, McNeil argues that an unauthorized levy has been laid on his earnings from UAMS which were not derived from a source within the U.S. (*Id.*) McNeil

states that he has filed "zero" federal income on tax returns since 2006, that the IRS has recognized that he is not required to pay federal income, and that the IRS has illegally levied taxes on his constitutionally protected earnings. (Doc. 1-1 at 6). He seeks injunctive relief, replevin for wrongfully levied sums, and a declaratory judgment that he cannot be taxed.

The Government has moved to dismiss explaining that subject-matter jurisdiction does not exist as it has not waived its immunity or McNeil has not demonstrated prerequisites to support federal jurisdiction. (Doc. 8). It also argues that McNeil has failed to state a claim for relief. (*Id*). The government asserts that McNeil's claims are nothing more than "misrepresentations, unsupported or incomplete allegations, and vague generalizations" and "an incoherent recitation of unsupported statements, purportedly pertaining to the government's 'war powers.'" (Doc. 8 at 4-5). The government contends that McNeil's claims are a "frivolous challenge to, and attempt to restrain collection of, [his] income tax liabilities," explaining that McNeil is attempting to "re-litigate tax liabilities previously adjudicated by the Tax Court and the Eighth Circuit[.]" (*Id.* at 5). Because the Court finds that subject-matter jurisdiction is lacking, the Court need not address the Government's additional grounds for dismissal.

II. Standard

In considering a motion to dismiss, the court views the complaint favorably to the plaintiff. *Bell v. Pfizer,*

Inc., 716 F.3d 1087, 1091 (8th Cir. 2013). The party claiming jurisdiction has the burden of proving subject matter jurisdiction by a preponderance of the evidence. *Moss v. United States*, 895 F.3d 1091, 1097 (8th Cir. 2018). Because a motion under Rule 12(b)(1) challenges the threshold question of the jurisdiction of the court, "the court may look outside the pleadings" to determine whether jurisdiction exists. *Id.*

A motion to dismiss for lack of jurisdiction under Rule 12(b)(1) is subject to the same standard as a motion brought under Rule 12(b)(6). *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 520-21 (8th Cir. 2007). To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell All. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a "sheer possibility." *Id.* It is not, however, a "probability requirement." *Id.* Thus, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

Generally, "jai district court lacks jurisdiction to hear a case against the United States unless its sovereign immunity has been waived[.]" *Kaffenberger v. United States*, 314 F.3d 944, 950 (8th Cir. 2003). Here, the United States has neither waived its immunity nor

has McNeil alleged any basis for federal jurisdiction. Therefore, this Court lacks jurisdiction to hear this case.

III. Analysis

A. Motion to Quash

In January 2020, the IRS issued a summons to McNeil seeking personal tax information for unpaid tax liabilities for 2006-2007 and 2009-2017. (Doc. 1-1 at 103-05, Doc. 8 at 3). McNeil has moved to have that summons quashed. (Doc. 1, 2, & 3).

A district court only has jurisdiction to address a taxpayer summons in limited circumstances – usually when the summons is served on a third-party record holder such as a bank or an attorney. 26 U.S.C. § 7609(b)(2), (f), or (g). None of these sections apply to McNeil. Rather, a taxpayer, like McNeil, who wants to challenge a personal summons may do so either before an IRS hearing officer or by refusing in good faith to comply, thus compelling the government to bring an enforcement action in district court where the taxpayer may then offer up a defense. 26 U.S. C. § 7604; *see United States v. Ritchie*, 15 F.3d 592, 597 (6th Cir. 1994) (noting general mechanism for taxpayer challenges); *see also In re Peter*, 322 F. Supp. 270, 271 (E.D. Ky. 1970) (dismissed motion to quash raised by taxpayer finding it was equivalent to injunction and remedy already existed). In short, if the summons had been issued to a third-party, McNeil may have standing to bring a motion to quash. As it stands, however,

the government has not waived its immunity; and, McNeil's attempt to circumvent the procedure does not create standing. 26 U.S.C § 7609(c)(2)(A); *see Tabar v. United States*, 142 F.R.D. 343, 344 (D. Utah 1992) (the right to quash a summons does not extend to a summons served on the person with respect to who liability the summons is issued).

Because the IRS has not pursued an enforcement proceeding in this matter, McNeil's has no standing to pursue a motion to quash. Accordingly, the motion is denied.

B. Remaining Claims

McNeil asserts that this Court has jurisdiction to hear his claims under 28 U.S.C. § 1331, § 1332(a)(2), § 1346(a)(1), § 1355, and § 1356. (Doc. 1-1 at 7). As will be explained below, jurisdiction does not exist.

"A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (internal citations omitted). Sections 1331, 1332(a)(2), and 1356 are general jurisdiction statutes and do no serve to waive sovereign immunity. *See In re Blunt*, 358 F. Supp. 2d 882, 888 (D.N.D. 2005) (§1331 does not waive sovereign immunity); *Nishibayashi v. England*, 360 F. Supp. 2d 1095, 1101 (D. Haw. 2005) ("[S]ection 1332 is not in itself a waiver of sovereign immunity[.]"); *Murray v. United States*, 686 F.2d 1320, 1324 (8th Cir. 1982) ("There is . . . no waiver of sovereign immunity to be found in 28

U.S.C. § 1356, which is merely another general provision vesting jurisdiction in the district courts over certain kinds of seizures."). And, § 1332(a)(2) governs diversity suits between state citizens and a foreign state. So, if McNeil's reliance on this section is based on his declaration that he is a sovereign not subject to the laws of the United States, then that allegation, too, does not waive immunity. *Lane*, 518 U.S. at 192.

Section 1346(a)(1) provides jurisdiction for tax refund suits. However, before a taxpayer may bring a claim for a refund of federal taxes, he must first have timely made an administrative claim and have paid the taxes for which the refund is sought. *See Barse v. United States*, 957 F.3d 883, 885 (8th Cir. 2020); *see also Ledford v. United States*, 297 F.3d 1378, 1382 (Fed. Cir. 2002) (quoting *Flora v. United States*, 362 U.S. 145, 177 (1960)).

In his prayer for relief in his initial complaint, McNeil asks the Court to "[a]dd up all the injuries done by the Department of the Treasury and provide a remedy sufficient to pay [him] for his monetary losses[.]" (Doc. 1-1 at 9). Presumably in support of the alleged losses, McNeil attaches his pay stubs from UAMS showing that, beginning in 2018, his paycheck was garnished to satisfy an unpaid tax levy. (Doc. 1-1 at 65-102). Then in his amended complaint, McNeil asks for "property withheld from 2006 to 2016 totaling $199,256.63" as well as the "[o]ngoing levy . . . totaling $13,580.66 and continuing." (Doc. 2 at 7) As previously laid out, McNeil's prayer for relief is based on his belief that the government has no right to tax him at all.

Even though McNeil appears to challenge all taxes, he has not met the threshold for jurisdiction by demonstrating that he has fully paid the challenged tax or that he made a timely administrative claim. In fact, he does the opposite and claims that he has "filed 'zero' federal income on tax returns with the IRS since 2006."[1] (Doc. 1-1 at 6). Accordingly, this Court lacks jurisdiction under § 1346(a)(1).

Finally, McNeil relies on §1355 for jurisdiction, noting that it provides for the recovery of fines or penalties illegally imposed. (Doc. 1-1 at 7) He contends the government has illegally "imposed constititutionally prohibited bills of attainder in the form of 'Civil Penalties' with accruing interest." (Doc. 1-1 at 6-7) Reading his complaint liberally, it appears that McNeil is making the novel argument that taxes, and any subsequent penalty or fine for nonpayment thereof, are the equivalent to a bill of attainder. The Court, however, cannot find any support for this argument. And, as argued by Defendant, Congress provided a means to challenge taxes through § 1346(a)(1). McNeil cannot circumvent the jurisdictional requirements of that provision by attempting to bring a suit under §1355. (Doc. 8 at 14); *Harkey v. United States*, 715 F. Supp. 259, 261 (D. Minn. 1989) (Full payment of any tax, penalty, or sum (such as interest) is necessary before a suit to recover any of these assessments may be maintained under § 1346(a)(1)).

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[1] Whether zero-tax claims, either generally or as pertain to McNeil, are valid returns need not be addressed at this time.

IV. Conclusion

Defendants' motion to dismiss (Doc. 8) is GRANTED. McNeil's complaint is DISMISSED without prejudice. The Clerk is directed to administratively terminate McNeil's motions. (Doc. 3 & 6).

IT IS SO ORDERED this 22nd day of June, 2020.

/s/ James Moody, Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

MINOR L. MCNEIL **PLAINTIFF**

V. **4:20CV00100 JM**

UNITED STATES; DEPARTMENT OF TREASURY **DEFENDANTS**

JUDGMENT

(Filed Jun. 22, 2020)

Consistent with the Order that was entered on this day, it is considered, ordered, and adjudged that this case is hereby DISMISSED without prejudice.

IT IS SO ORDERED this 22nd day of June, 2020.

/s/ James Moody, Jr.

TRADING WITH THE ENEMY ACT AS AMENDED.

[Public—No. 91—65th Congress.]

[H. R. 4960.]

AN ACT To define, regulate, and punish trading with the enemy, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in *Congress assembled*, That this Act shall be known as the "Trading with the enemy Act."

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality' resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of

the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words end of the war," as used herein, shall he deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

The words "bank or banks," as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

SEC. 3. That it shall be unlawful—

(a) For any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or 'for the benefit of, an enemy or ally of enemy.

(b) For any person, except with the license of the President, to transport or attempt to transport into or from the United States, or for any owner, master, or other person in charge of a vessel of American registry

to transport or attempt to transport from any place to any other place, any subject or citizen of an enemy or ally of enemy nation, with knowledge or reasonable cause to believe that the person transported or attempted to be transported is such subject or citizen.

(c) For any person (other than a person in the service of the United States Government or of the Government of any nation, except that of an enemy or all of enemy nation, and other than such persons or classes of persons as may be exempted hereunder by the President or by such person as he may direct), to send, or take out of, or bring into. or attempt t,) send, or take out of, or bring into the United States, any letter or other writing or tangible form of communication, except in the regular course of the mail; and it shall he unlawful for any person to send, take, or transmit, or attempt to send, take, or transmit out of the United States, any letter or other writing, hook, map. plan, or other paper, picture, or any telegram. cablegram. or wireless message. or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy: *Provided, however.* That any person may send, take, or transmit out of the United States anything herein forbidden if he shall first submit the same to the President, or to such officer as the President may direct, and shall obtain' the license or consent of the President, under such rules and regulations, and with such exemptions, as shall be prescribed by the President.

DEPARTMENT OF JUSTICE,
May 21, 1973.

MEMORANDUM FOR THE SPECIAL COMMITTEE ON THE TERMINATION OF THE NATIONAL EMERGENCY

RE: EMERGENCY POWER UNDER § 5(b) OF THE TRADING WITH THE ENEMY ACT

During the course of hearings held by the Committee frequent mention has been made of the Trading with the Enemy Act ("the Act"). Section 5(b) of the Act has been the statutory foundation for control of domestic as well as international financial transactions and is not restricted to "trading with the enemy." Its use over the years provides an interesting study in the evolution of a statute as a result of continuing interplay between the Executive and Congress. Of all the emergency statutes under study by the Committee, it has the most complex and varied history. This paper does not make any recommendations or draw any conclusions but presents a short legal chronology of § 5(b) to assist the Committee in understanding its background and present status.

I.

ORIGINAL ENACTMENT—WORLD WAR I

The Act was passed in 1917 to "define, regulate, and punish trading with the enemy." 40 Stat. 415. Section 5(b) gave the President power to regulate transactions in foreign exchange, the export or hoarding of gold or silver coin or bullion or currency and transfers of credit in any form "between the United States and

any foreign country, whether enemy, ally of enemy, or otherwise." 40 Stat. 415 (1917) as amended by 40 stat. 966 (1918). Section 5(b), at that time, exempted "transactions to be executed wholly within the United States," thus appearing to limit its use as a basis for domestic controls. It did not include a provision permitting use of the Act during periods of national emergency nor was its use restricted by its terms to the duration of the First World War or any specified term after the end of the War. A law passed in 1921 terminating certain war powers specifically exempted the Act from termination because of the large amount of property held under the Act by the Alien Property Custodian at that time. See Ellingwood, *The Legality of the National Bank Moratorium*, 27 Nw. U.L. Rev. 923, 925-26 (1933).

II.

Depression Banking Emergency

Upon taking office in March 1933 President Roosevelt was pressed to deal promptly with a nationwide panic that threatened to drain the liquid resources of most of the banks in the country. *The Public Papers and Addresses of Franklin D. Roosevelt*, pp. 24–29 (1933) [hereinafter "Roosevelt Papers"]. He therefor. invoked the "forgotten provisions" of § 5(b) on March 6, 1933 to declare a bank holiday and control the export of gold. Schlesinger, *The Coming of the New Deal* 4 (1959). The bank holiday proclamation noted that there had been "heavy and unwarranted withdrawals

of gold and currency from our banking institutions for the purpose of hoarding," and that increasing speculation abroad in foreign exchange had resulted in severe drain on domestic gold supplies, thus creating a "national emergency." Therefore it was "in the best interests of all bank depositors that a period of respite be provided with a view to preventing further hoarding of coin, bullion or currency or speculation in foreign exchange." In order to prevent export or hoarding of bullion or currency a bank holiday was therefore proclaimed from March 6 through March 9, 1933. Executive Proclamation No. 2039. March 6, 1933, 48 Stat. (Part 2) 1698.

By invoking § 5(b) as authority, President Roosevelt was, of course, using that provision for a different purpose than the one for which it was enacted in 1917. However, as one writer noted, closing the banks was "one of the surest and quickest ways" to prevent transactions in foreign exchange and the exportation of gold and silver coin, bullion and currency. Section 5(b) had, as noted, given the President power to regulate such matters. Ellingwood, *The Legality of the National Bank Moratorium*, 27 Nw. U.L. Rev. 923, 925 (1933).

Congress was called into session within days of the Proclamation. Roosevelt Papers 17. As soon as Congress was convened on March 9, 1933, it approved the bank holiday by passing the so-called Emergency Banking Act or Bank Conservation Act. 48 Stat. 1, That Act provided that the actions and proclamations "heretofore or hereafter taken . . . or issued by the President of the United States . . . since March 4, 1933, pursuant

to the authority conferred by subdivision (b) of section 5 of the Act of October 6, 1917, as amended, are hereby approved and confirmed." (48 Stat. 1; 12 U.S.C. 95b (1970)). Congress thus "spread its protective approval over executive acts the legality of which was uncertain." Ellingwood, *op. cit. supra* at 27 Nw. U.L. Rev. 929 (1933). Congress also amended Section 5(b). to provide, among other things, that "[d]uring time of war or during any other period of national emergency declared by the President, the President may . . . regulate, under such rules and regulations as he may prescribe . . . transfers of credit between or payments by bankings institutions as defined by the President. . . ." 48 Stat. 1. In the enactment clause Congress declared "that a serious emergency exists." 48 Stat. 1. The exclusion of domestic transactions, formerly found in the Act, was deleted from § 5(b) at this time.

The legislative history of the Emergency Banking Act is short; only eight hours elapsed from the time the bill was introduced until it was signed into law. There were no committee reports. Indeed, the bill was not even in print at the time it was passed. 77 Cong. Rec. 76, 80 (1933); Schlesinger, *The Coming of the New Deal* 8.

The abbreviated history shows Congress recognized that the powers conferred on the President by the Act were great. In the debate preceding the bill's passage those supporting it made such remarks as:

[Emphasis supplied.]

* * *

Subsequently in 1933–34, acting under § 5(b), President Roosevelt issued a series of orders which prohibited the hoarding of gold and directed that all gold bullion certificates be deposited with the Federal Reserve Banks and which regulated transactions in foreign exchange:

> (1) Executive Order 6073 of March 10, 1933, prohibited the export or removal of gold from the United States, except as authorized by the Secretary of the Treasury, and banks were prohibited from making transfers of foreign exchange except in connection with certain described transactions. This order did not specifically refer to a national emergency.
>
> (2) Executive Order 6102 of April 5, 1933, generally required holders of gold coin, gold bullion, and gold certificates to surrender their holdings to Federal Reserve Banks. This Order stated "By virtue of the authority vested in me by Section 5(b) . . . as amended by Section 2 of the Act of March 9, 1933, . . . in which amendatory Act Congress declared that a serious emergency exists, I . . . do declare that said national emergency still continues to exist."
>
> (3) Executive Order 6111 of April 20, 1933, authorized the Secretary of the Treasury to regulate transactions in foreign exchange and the export or withdrawal of currency from the United States. The emergency basis for E.O. 6111 was stated in the same language as the language of E.O. 6102, quoted immediately above.

(4) Executive Order 6260 of August 28, 1933, was issued to supplant Executive Orders 6102 and 6111. This order prohibited the holding or export of gold, except under license issued by the Secretary of the Treasury, and authorized the Secretary to regulate or prohibit transactions in foreign exchange. In E.O. 6260 the President stated "I . . . do declare that a period of national emergency exists." Executive Order 6260 was confirmed and amended by Presidents Eisenhower and Kennedy. 31 CFR Part 54. See 49 Op. A.G. No. 35, p. 9.

(5) Executive Order 6560 of January 15, 1934, authorized the Secretary of the Treasury to regulate transactions in foreign exchange, transfers of credit from American to foreign banks and export of currency or silver coin. This order is still on the books today. See 31 CFR Parts 127–128. In this Order, the President declared that "a period of national emergency continues to exist."

In January 1934 Congress ratified all acts which had been performed under the Emergency Banking Act. 48 Stat. 343 (1934); 12 U.S.C. 213 (1970).

III.

World War II Alien Property Freeze

Following the invasion of Norway and Denmark by Germany in April 1940 President Roosevelt acted to protect funds of residents of these countries in the United States from withdrawal under duress

* * *

FOREWORD

The Trading With the Enemy Act of 1917 has been on the books for nearly 60 years. As amended during that period, section 5(b) has provided the President with progressively broader authority to regulate the nation's international (and domestic) finance during periods of declared national emergency. This section has been construed over the years as providing statutory authority. for "emergency" actions as diverse as the "bank holiday" of 1933, an alien property freeze and consumer credit controls imposed during World War II, foreign direct investment controls imposed in 1968, and routine export controls in 1972, 1974, and 1976. It provides a major statutory basis for the trade embargoes currently in effect against North Korea, Vietnam, Cambodia, and Cuba.

But despite the obvious importance of section 5(b), its legislative history has never before been assembled and fully reviewed. The purpose of this committee print is to provide such a legislative history. It is designed to serve as a set of working documents for the use of the Subcommittee on International Trade and Commerce and of the full International Relations Committee. These documents should also be of interest and use to other Members of Congress working on related matters, and to the interested public.

In January 1973, Senate Resolution 9 established a bipartisan Senate Special Committee on the Termination of the National Emergency "to conduct a study

and investigation with respect to the matter of terminating the national emergency proclaimed by the President of the United States on December 16, 1950. * * *" This national emergency, proclaimed to aid in prosecuting the Korean war, had never been terminated. The Special Committee soon discovered that not one but four "national emergencies" continued in effect, including the national emergency declared by President Roosevelt on March 6, 1933, to meet the problems of the depression, and the national emergencies declared by President Nixon on March 23, 1970, because of a Post Office strike, and on August 15, 1971, to deal with balance of payments and other international problems.

The Special Committee also discovered that no inventory existed of the hundreds of statutes delegating powers to the President which were activated by these Presidential declarations. In the words of Senator Mathias, Special Committee cochairman, "a majority of the people of the United States have lived all of their lives under emergency government." The other cochairman, Senator Church, pointed out that the basic question before the Special Committee was "whether it is possible for a democratic government such as ours to exist under its present Constitution and system of three separate branches equal in power under a continued state of emergency."

An exhaustive 2-year study by the Special Committee, followed by extensive consideration by the appropriate legislative committees of each house, has produced the National Emergencies Act, which was signed into law by the President on September 14,

1976 (Public Law 94–412).[1] The act terminates all powers and authorities possessed by the executive branch as a result of any declaration of national emergency, and prescribes procedures governing the declaration, conduct, and termination of any future national emergency. Exempted, however, from the National Emergencies Act are certain laws deemed especially important to the functioning of the government. Among these is section 5(b) of the Trading With the Enemy Act.

Given the jurisdiction of the Committee on International Relations under the Rules of the House, it is the responsibility of the committee and its Subcommittee on International Trade and Commerce, pursuant to Section 502 of the National Emergencies Act, to conduct a thorough review of section 5(b) of the Trading With the Enemy Act and to recommend revisions to the House within 9 months.

Two problems arise in attempting to determine congressional intent with regard to section 5(b). The first is that the legislative history of 5(b) is short and sketchy. There was virtually no discussion of it at the time of the passage of the original Trading With the Enemy Act, and subsequent amendments generally occurred in times of crisis when apparently it was felt that there was no time for the luxury of extensive debate. The most striking example is that the 1933 amendment, which authorized the President to invoke the powers of 5(b) simply by declaring a national

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[1] The text of Public Law 94–412 appears on p. 437.

emergency, was debated and passed by both houses in 1 day, without hearings and before the bill was even in print. The second is that the relationship of 5(b) to the rest of the Trading With the Enemy Act was ambiguous from the beginning, in that there was no language in that section limiting its application to the "enemy" in time of "war" as defined in section 2 of the act.

In these circumstances, the subcommittee has sought to include in this volume all the legislative history which might conceivably be relevant. Part I includes the following: the text of the entire Trading With the Enemy Act as originally passed, and those portions of the floor debates, committee reports, and hearings which pertain to the general purposes of the bill or to 5 (b) ; the complete legislative history of all four subsequent amendments to section 5(b); the legislative his- tory of relevant sections of two others acts (the "Knox Resolution" of 1921 and the Gold Reserve Act of 1934) which pertain to 5(b) without actually amending it; and the current status of the entire Trading With the Enemy Act as it appears in the United States Code Annotated.

If the legislative history of section 5(b) is short, its "executive history" is extensive. The authority of 5(b) has been invoked in numerous Presidential proclamations and Executive orders. These are reprinted in part II of this volume. Finally, in part III, the current regulations governing financial transactions, issued under the authority of 5(b), are reprinted from Title 31 of the Code of Federal Regulations.[1]

This volume was edited by Victor C. Johnson, of the subcommittee staff. The subcommittee wishes to acknowledge the invaluable assistance of Messrs. Grover S. Williams and Walter S. Albano of the American Law Division, Congressional Research Service, Library of Congress, in compiling the documents.

JONATHAN B. BINGHAM,
Chairman, Subcommittee on
International Trade and Commerce.

EXCERPT OF ARMY FIELD MANUAL

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25. Enemy Status of Civilians

Under the law of the United States, one of the consequences of the existence of a condition of war between two States is that every national of the one State becomes an enemy of every national of the other. However, it is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them.

* * *

Cross, et al., v. Harrison
[Excerpt]

* * *

(a.) The wisdom, goodness, and power necessary for the protection of the general welfare and peace cf the people, are the only source from which is derived the authority to exercise the sovereignty of the nation. 1 Burlamaqui Nat. Law, c. 9, pp. 83, 89. And on these the power to reward and punish rests. Id. 93. The powers which the sovereign exercises, are those which relate to internal administration. 2 Burlamaqui, Pt. 3, c. 1, p. 152. And next, those which regulate foreign or external administrations. 2 Id. Pt. 4, c. 1, p. 220. Among this last class are the powers of making offensive or defensive war, of concluding treaties and alliances, of controlling the immigration of foreigners, and of regulating commerce. By the laws of war, the sovereign acquires the right to spoil, plunder, and destroy the goods of his enemy, and possess his lands. 2 Burlamaqui, Pt. 4, c. 7, p. 290, &c. In order to indemnify for the expenses of war out of his enemies' goods and lands, and while the conqueror continues in possession of the lands, he is sovereign over them, and of all within them; and may either admit the vanquished to the rights of subjects, or banish them as enemies from the country, for the sovereignty thus acquired is absolute. 2 Burlamaqui, Pt. 4, c. 8, § 12, p. 309. And from these rights of war flows the sovereign power of making treaties, equal or unequal, (2 Burlamaqui, Pt. 4, c. 9, pp. 314, 317, 319,) and whether in war or in peace—such treaties being unequal whenever they limit the powers of the foreign

sovereign; as by stipulating that the conqueror's consent shall be had before the foreign sovereign can act in any given way. Id. § 13, p. 319.

The power to regulate foreign commerce necessarily includes, as one of its incidents, the power to lay imposts on foreign goods, or even to prohibit them entry, (Vattel's Law of Nations, Bk. 1, c. 8, p. 39,) whenever the welfare of the State demands it: The right to trade with a foreign nation is therefore conventional, and the treaty-that cedes the right is the measure or limit thereof—dependent on the will of the foreign sovereign, and not a right of prescription. And a foreign nation may limit its foreign trade to itself, or to its own vessels, by treaty or otherwise. Vattel, Bk. 2, c. 2, p. 121.

During the flame of wax, a nation may sell or abandon part of its public property, (Vattel, Bk. 1, c. 21, p. 105,) though, if the sovereign be not absolute, this may require the concurrence of his coordinates, the people. The empire or sovereignty, and the domain or property, are not inseparable—for the nation may have its sovereignty but not its domain—which may be held in the possession of a foreign nation, either by war or treaty. Vattel, Bk. 1, c. 23, p. 118.

(b.) The sovereign who acquires a country by conquest or treaty, has the exclusive right to legislate in regard to it, and may impart this right to another; and

the country so acquired may be retained in a subject condition, or be erected into a colony.

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President Proclaims a Bank Holiday

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NOTE: Although this Proclamation was actually the second one issued, it was already prepared and ready for signature before the first Proclamation which called the Congress into extraordinary session. Because of the banking crisis, it had been prepared on March 5th, after continuous conference extending over several days between Secretary of the Treasury Woodin, Attorney General Cummings, the outgoing officials of the Treasury Department, and myself.

For nearly two months prior to my Inauguration I had discussed with a number of people the gloomy banking situation toward which the country had been drifting for some time. In order to meet it successfully, it was necessary to discover some constitutional method of obtaining jurisdiction over the entire banking system of the Nation—including not only the banks which were members of the Federal Reserve System but also the State nonmember banks.

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Calendar No. 397

86TH CONGRESS } SENATE { REPORT
1st Session } SENATE { No. 405

PROVIDING FOR ADJUSTMENT OF LEGISLATIVE JURISDICTION EXERCISED BY THE UNITED STATES OVER LAND IN THE SEVERAL STATES USED FOR FEDERAL PURPOSES

* * *

The bill specifically declares it to be the policy of the Congress that (1) the Federal Government shall receive or retain only such measure of legislative jurisdiction over federally owned or operated land areas within the States as may be necessary for the proper performance of Federal functions; and (2) to the extent consistent with the purposes for which the land is held by the United States, the Federal Government shall avoid receiving or retaining concurrent jurisdiction or any measure of exclusive legislative jurisdiction. An overall objective of the bill is to provide that, in any case, the Federal Government should not receive or retain any of the States' legislative jurisdiction with respect to qualifications for voting, education, public health and safety, taxation, marriage, divorce, descent and distribution of property, and a variety of other matters, which are ordinarily the subject of State control.

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