Occupation:
Military Bank of Issue

July 16, 1943

Re: Designation of Army Custodian for United States Army Funds in Allied-occupied Territory.

In an earlier memorandum the authority to deposit United States funds in a bank of issue established by the Allied Military Command in an occupied area was discussed, and the conclusion reached was that there was ample legal basis for the designation of such bank as a foreign depositary under U.S.C. title 31, sec. 475.

The further question has been raised with respect to whether the Army may place one of its officers in the bank of issue and assign to him certain responsibilities with respect to the funds so deposited. There would seem to be no serious difficulties attendant upon such procedure.

The bank of issue having been designated as a depositary for United States public funds would receive the funds deposited by the Army in accordance with and subject to the liabilities ordinarily incident to such deposit. The further question of the assignment by the Army of an officer to assume certain responsibilities in connection with such funds is a matter which can be dealt with by the Army and the Allied Military Command. It does not require nor involve any Treasury action other than the designation by the Secretary of the Treasury of the bank of issue as a depositary for United States funds.

The mechanics of the procedure that could be followed are relatively simple. After the bank has been designated as the depositary, the Army would deposit its funds in this bank either to its own account or in the name of the designated officer. Simultaneously with such deposit, or prior thereto, the Army would place its designated officer in this bank in a supervisory or directory capacity. The details of his duties could be determined in a manner which would be calculated to achieve the desired results. This might be accomplished by making the designated officer a member of the governing body of the bank or by assigning to such officer whatever duties and responsibilities are deemed to be consistent with the function he is intended to perform.

That such an appointment could be made is manifest from the conclusion reached in the earlier memorandum dealing with the authority of the Allied Military Command to create a bank of issue in an occupied area. An essential part of the creation of a bank of issue is the selection and appointment of personnel to operate it and the allocation of duties, powers, and responsibilities. In drawing up the charter for the bank, appropriate provisions could be included with respect to the type of person to be selected and the method of distributing functions and duties. The charter could easily provide for the appointment of one or more officers of the Army to positions of responsibility in the bank. Such a provision and an appointment under it would clearly fall within the legal authority of the Command.

An alternative method of reaching the same result, where the charter of the Allied Military Command bank of issue did not contain provisions of the type above referred to, would be the establishment of similar provisions by an agreement entered into between the Army and the bank of issue apart from and subsequent to the creation of the bank of issue.

In the event that either of the foregoing alternatives were not available and important governmental considerations were involved, a third procedure might be employed to attain the same objective. Pursuant to U.S.C. title 31, sec. 473, the Secretary of the Treasury may designate depositaries of public moneys in foreign countries "under such terms and conditions as to security and otherwise as he may from time to time prescribe." Under this section he could designate the bank of issue as a depositary for foreign funds with a proviso that a designated army officer be assigned to it and be given suitable functions and responsibilities. Also, under U.S.C. title 31, sec. 492, the Secretary of the Treasury may, when he deems it essential to the public interest, specially authorize the deposit of such funds to be made under such rules and regulations as he may deem most safe and effectual. Under this section the Army funds could be deposited in the bank of issue without making the bank of issue a depositary for foreign funds. Here again the rules and regulations could include a suitable provision for the designation of an army officer with specified responsibilities.

In any of the foregoing procedures the designated army officer would be accountable to the Army for the proper discharge of his duties and responsibilities and at the same time the bank of issue would not in any way be relieved of the liability normally incident to the acceptance of such deposits.

EEM:fiw 7/17.43

July 14, 1943

Re: Designation of Army Custodian for United States Army Funds in Allied-occupied Territory.

In an earlier memorandum the authority to deposit United States funds in a bank of issue established by the Allied Military Command in an occupied area was discussed, and the conclusion reached was that there was ample legal basis for the designation of such bank as a foreign depositary under U.S.C. title 31, sec. 473.

The further question has now been raised with respect to whether the Army may designate one of its officers as custodian of the funds so deposited for the purpose of making such officer accountable for the disposition of the funds, in addition to and apart from the normal responsibility of the depositary for the safekeeping of such funds. The following approach might be useful, depending upon the nature of the liability sought to be imposed upon the designated officer.

At the outset it may be noted that the mere use of the word "custodian" to describe the designated officer has no special legal significance and carries with it no definitive liability. A custodian of public funds is by definition a custodian only so long as he holds public funds. Once he has transferred such funds in accordance with the governing laws and regulations to other persons or institutions authorized to hold them, his custodial status terminates (U.S. v. Brendel, (1905) 136 F. 737, 20 Op. Atty. Gen. 24 (1891). The fact that an army officer had been designated as the person responsible for the funds would have little significance where such funds were deposited in the bank of issue as a foreign depositary. For example, if the bank of issue failed, such officer or custodian could probably not be held accountable in the absence of bad faith or negligence (Hobbs v. U.S., (1881) 17 Ct. Cl. 189).

It seems clear that, whether the funds in question were deposited directly in the bank of issue or were placed in the first instance in the actual custody of the designated army officer and subsequently deposited in the bank of issue, a chain of responsibilities would not be established which would make the bank of issue fully responsible to the designated army officer and would make the army officer in turn fully responsible to the Army. However, the desired result might be achieved by a procedure along the following lines. The Secretary of the Treasury would designate the bank of issue as a depositary for

United States funds. The Army would then deposit its funds in this bank either to its own account or in the name of the designated officer. Simultaneously with such deposit, or prior thereto, the Army would place its designated officer in the bank of issue in a supervisory or directory capacity. The details of his duties could be determined in a manner which would best be calculated to achieve the desired results. This could be accomplished by making the designated officer a member of the governing body of the bank of issue, in which case he would probably assume the liabilities normally associated with bank directors. In any event, the degree of his responsibility would, in that case, vary in direct proportion with the importance of the duties assigned to him.

That such an appointment could be made is manifest from the conclusion reached in the earlier memorandum dealing with the authority of the Allied Military Command to create a bank of issue in an occupied area. An essential part of the creation of a bank of issue is the selection and appointment of personnel to operate it and the allocation of duties, powers, and responsibilities. There would appear to be no restrictions upon the Command with respect to the type of persons selected or the method of distributing functions and duties. The appointment of one or more officers to positions of responsibility in the bank would be a prudent step and one clearly within the legal authority of the Command. The details could be decided upon at the time the bank of issue was established or could be arranged by agreement completely apart from and subsequent to the establishment of the bank of issue.

It is recognized that if the above procedure is adopted the position of the designated army officer will not be that of an intermediate party fully responsible for the funds in question. However, to the extent that such officer is given real control over the funds he can be held strictly accountable for their proper disposition.

EEM:fiw 7/14/43

DRAFT

7/13/43

In connection with the recent proposal that United States funds be deposited in a bank of issue to be established in an occupied area by the Allied Military Command, the army desires to work out a procedure whereby a designated army officer will be responsible to the army, as custodian of the funds, even though the funds are deposited in the bank of issue.

In an earlier memorandum the conclusion was reached that there is ample legal authority for the designation as a foreign depositary under U.S.C. title 31, sec. 473, of a bank of issue set up in an occupied area by the Allied Military Command. If the course of action ultimately followed calls for the designation of such a bank as a foreign depositary and an accompanying deposit of the United States funds, the new proposal could not be put into operation in simple and clear-cut fashion.

A custodian of public funds is, by definition, a custodian only so long as he holds public funds. Once he has transferred such funds, in accordance with the governing laws and regulations, to other persons or institutions authorized to hold them, his custodial status terminates. U.S. v. Brendel (1905) 136 F. 737, 20 Op. Atty. Gen. 24 (1891). The obligations and liabilities of the custodian, once he has properly disposed of the funds, either by disbursement or by an authorized deposit in a designated depositary, are of such a nature that the liability of an army officer designated as a person responsible for the funds in question would be of little significance after the funds are deposited in the bank of issue. Even in the event that the bank of issue failed, he would probably not be held accountable, at least in the absence of bad faith or negligence. Hobbs v. U.S. (1881) 17 Ct. Cl. 189. This would be

true whether the funds in question were deposited directly in the bank of issue or were first placed in the custody of the designated army officer and subsequently deposited in the bank of issue.

It seems clear, therefore, that a chain of responsibilities can not be established which would make the designated depositary (the bank of issue) fully responsible to a designated army officer who would be fully responsible, in turn, to the army. However, the desired result might be achieved indirectly by placing the army officer in the bank of issue in a supervisory or directory capacity. The details of his duties could be determined in a manner which would be best calculated to achieve the results desired. For example, he could be made a member of the governing body of the bank of issue, in which case he would probably assume the liabilities normally associated with bank directors. In any event, the degree of his responsibility will vary in direct proportion with the importance of his duties in the bank of issue.

That such an appointment could be made is manifest from the conclusion reached in the earlier memorandum dealing with the authority of the Allied Military Command to create a bank of issue in an occupied area. An essential part of the creation of a bank of issue will be the selection and appointment of personnel to operate it and, in this connection, therewould not appear to be any restrictions upon the Command with respect to the type of person selected. The appointment of one or more army officers to positions of responsibilitiein the bank would be a prudent step and one clearly within the legal authority of the Command.

It should be noted, however, that the above suggestion is not a direct solution of the problem raised. It is recognized that the army officer's position will not be that of an intermediate party fully responsible for the

funds in question but his liability will be part of, or a substitute for, the liability of the bank itself. In view of the difficulties involved, the suggestion has been made merely as a possible alternative procedure.

Thus far the discussion has been based upon the assumption that the bank of issue created by the Allied Military Command will be designated a depositary of public funds under U.S.C. title 31, sec. 473. If the advantages of the new proposal by the army outweigh the advantages which will be obtained by designating such bank as a foreign depositary, there appears to be clear authority for the contemplated arrangement under U.S.C. title 31, sec. 492, which provides as follows:

> "Except as otherwise provided by law it shall be the duty of every disbursing officer having any public money intrusted to him for disbursement, to deposit the same with the Treasurer or with one of the depositaries of the United States mentioned In section 475 of this title, and to draw for the same only as It may be required for payments to be made by him in pursuance of law and draw for the same only in favor of the persons to whom payment is made; and all transfers from the Treasurer of the United States to a disbursing officer shall be by draft or warrant on the Treasury. In places, however, where there is no treasurer or depositary, the Secretary of the Treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depositary, or, in writing, authorize the same to be kept in any other manner, and under such rules and regulations as he may deem most safe and effectual to facilitate the payments to public creditors." (Underscoring supplied.)

Pursuant to the authority contained in the underscored portion of the above-quoted statute, the Secretary could designate an army officer as the custodian of the public funds in question and authorise him to deposit them in the bank of issue subject to the terms and conditions of regulations to be issued simultaneously. These regulations could include, among other things, provisions requiring the army officer to remain responsible to the army for the funds at all times, and directing him to supervise the operations of the bank of issue, particularly with respect to the public funds deposited therein.

RBsec 7/13/43

July 6, 1943

Mr. D. W. Bell

Mr. Luxford

I am attaching a memorandum on the authority of the Allied Military Command to establish a bank of issue in the areas under its control and on the question of whether such bank may be used as a depositary of public funds of the United States. I think this memorandum covers the salient aspects of the problem and furnishes the broad basis on which the authority rests.

Attach.

RB:EEM:ec - 7/6/43
cc: Mr. Pehle, Mr. Taylor and Mr. DuBois

July 5, 1943

Mr. Luxford

Mr. Brenner
Mr. Minskoff

The question has been raised whether there is authority for the Allied Military Command to establish a bank of issue in an area which it occupies and controls and whether such bank of issue may be used as a depositary of public funds of the United States.

There is ample authority, under domestic and international law, to support both the establishment of such a bank and its use as a depositary of public funds.

It is well established that the military occupant of an area is governed by the law of nations as established by international agreement and the usage of the world, and not by the statutes or the constitution of the United States. The Military Commander has all the powers of a de facto government, subject of course, to the direction of the President as Commander-in-chief. Fleming v. Page (1850) 9 How. 603, Cross v. Harrison (1853) 16 How. 164, Thorington v. Smith (1868) 8 Wall. 1, The Grapeshot (1869) 9 Wall. 129, New Orleans v. Steamship Company (1874) 20 Wall. 387, Mechanics' Bank v. Union Bank (1874) 22 Wall 295, Dooley v. United States (1901) 182 U.S. 222, MacLeod v. United States (1913) 229 U.S. 416, (1901), 23 Op. Atty. Gen. 425.

The various textbooks, treatises, and digests on international law, which deal with the subject of military or belligerent occupation, are in substantial agreement with respect to the proper ambit of authority which may be exercised by the occupying force. (2 Lauterpacht, Oppenheim's International Law, secs. 165-172; Moore, International Law Digest, vol. 1, sec. 21, vol. 7, secs. 1143-1155; Higgins, Hall's International Law, secs. 153-161; 2 Hyde, International Law, secs. 688-699; Lawrence, Principles of International Law, secs. 171-180; Wilson, International Law, sec. 128-132.) It appears to be clear from these sources that the occupying force has the right to do whatever acts are necessary for the prosecution of the war and that the range of military necessity in particular cases can only be determined by the circumstances relative to each such case.

The authority is absolute but its exercise is limited to those actions which are necessary for safety and military success. Local laws affecting private rights and personal relations, those regulating moral order, and those guaranteeing certain personal liberties are not to be suspended or altered, at least so far as they do not affect the success of the occupying power's military activities. Moreover, all of these restrictions are subject to the necessity exception. However, the action under consideration would not come within any of these restricted fields even if the doctrine of necessity were not available.

Further, there is nothing in existing international agreements which militates against the action contemplated. The only pertinent agreement is the Second Hague Convention (No. IV), which provides in Article XLIII that:

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

This provision not only recognizes the scope of the occupant's authority as outlined above, but has been interpreted by the British High Court of Justice in a case which appears to be directly applicable to the question under consideration. That case, Bank of Ethiopia v. National Bank of Egypt and Liguori (1937) 53 Times L.R. 75, arose from a demand by the Ethiopian bank for a settlement of its accounts with the Egyptian bank. The defendant admitted that the accounts existed and were unsettled but claimed that Liguori, the Italian liquidator of the Bank of Ethiopia, was the proper party with whom to make settlement. On the other hand, the plaintiff contended that Italy was nothing more than a military occupant and, under Article XLIII of the Second Hague Convention (No. IV), its authority was limited to those acts necessary to maintain the safety of the army of occupation, but did not extend to the modification of local laws with respect to the status of established Ethiopian corporations.

The Court rejected the contention of the Bank of Ethiopia on the ground that by virtue of its political recognition by the British Government, Italy was the de facto government and had the power to liquidate the Ethiopian bank. The Court said that the plaintiff's contention had:

> " *** no relevance in principle to the case of a de facto government set up in an area from which the former Government has departed, and in which there is no Government authority except that of the de facto Government."

However, as Wright points out in (1937) 31 American Journal of International Law, 687, those conditions would necessarily exist in all cases of belligerent occupation. Thus, the case can be considered as authority for the proposition that Article XLIII does not prevent a military occupant from exercising the powers of a de facto sovereign.

Thus, the case holds directly that a de facto government may liquidate an existing bank of issue, and holds by necessary implication that a military occupant exercises the powers of a de facto government. In addition, the decision contains a clear indication that the occupant will find it necessary either to take control of the bank of issue or to liquidate it. In arriving at the conclusion that the Ethiopian bank could properly be liquidated, the Court said:

"* * * confusion (would ensue) if the only bank of issue in the country were allowed to continue its business under the control of persons who, until the last moment, seem to have been engaged in strenuous attempts to assist the displaced Government to resist the attacks of those who have since become the de facto Government."

Since the bank of issue may be liquidated it follows, as a matter of course, that the occupant not only may but must provide for the carrying on of the functions formerly performed by that agency. It is a well-recognized principle of international law that an occupying power has, in addition to its rights, certain duties to the inhabitants of the territory under its control. It must take whatever steps are necessary to secure public order. It is clear public order can not be maintained unless the continued operation of local trade and commerce is protected. This protection includes the establishment and maintenance of an adequate monetary system and an agency for the issuance of currency is, therefore, a basic requirement.

The procedure or administrative device adopted by the Commander in charge of the particular area as a means for providing the currency needs of the local community may be such as he deems most appropriate under the circumstances existing in the area. If it is found that currency needs can be adequately met through the establishment of an Allied Military Bank of Issue, it seems clear that there is authority to support the creation of such an agency.

As an illustration of similar action taken by other governments rather than as a legal precedent, it is interesting to observe how the Germans met the same problem. The military commander in charge of the particular area established a central bank in each area where quick action was necessary or expedient. On the other hand, where time was not of the essence they established central banks through the civilian administration under their control. In Belgium the bank was established one and one-half months after the attack and at a time when military operations were still in progress in France. Consequently, the military governor was responsible for the establishment of the new central banking institution. In Serbia a similar situation existed, but there the military commander authorized the plenipotentiary for economic affairs in Serbia to set up the central bank. In each case the new central bank was given the right to issue notes which were to be legal tender in the respective territory. In the case of Poland and Serbia the new bank had the exclusive right to issue notes, while in Belgium it was never necessary to exercise this right in view of the fact that the National Bank of Belgium resumed operations.

There is also clear authority with respect to the use of the new bank set up by the military command as a depositary of public funds of the United States. The Secretary of the Treasury is given the authority to designate foreign depositaries for such funds.

Section 473 of title 31, of the United States Code, provides:

> "The Secretary of the Treasury may designate such depositaries of public monies in foreign countries * * * as may be necessary for the transaction of the government's business, under such terms and conditions as to securities and otherwise as he may from time to time prescribe; Provided, That in designating such depositaries, American financial institutions shall be given preference wherever, in the judgment of the Secretary of the Treasury, such institution is safe and able to render the service required."

In section 492 of title 31, of the United States Code, there is further broad authority vested in the Secretary of the Treasury with respect to the designation of depositaries. That section provides inter alia:

> "In places, however, where there is no treasurer or depositary the Secretary of the Treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depositary, or, in writing authorize the same to be kept in any other manner, and under such rules or regulations as he may deem most safe and effectual to facilitate the payments to public creditors."

From the foregoing it seems evident that the Allied Comman would have ample authority under international law and the usage of nations to set up a bank of issue in territory occupied and controlled by it. Similarly, there is adequate authority derived from United States statutes to justify depositing public monies of the United States in such bank upon its designation by the Secretary of the Treasury as a proper depositary.

HB:EEM:ec 7/5/43
cc: Messrs. Pehle, Taylor, DuBois