The Universal Draft and Constitutional Limitations

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THE UNIVERSAL DRAFT AND CONSTITUTIONAL LIMITATIONS

JOSEPH M. CORMACK *

It is felt by many that it will be a step toward the attainment of permanent world peace if ways can be found to "take the profit out of war." A means which has been suggested to assist in this is the universal draft, i.e., conscription of material resources as well as man power. Also, it has been suggested that the universal draft would be an equitable method of distribution of the sacrifices due to war.

By a draft of material resources is meant something more than a commandeering to be followed by the payment of full compensation. A taking is envisaged in connection with which the government would not be legally bound to make any compensation. It is not to be supposed that the government would not make some payment to the owner, but its extent would be governed by considerations of public policy, and would have no necessary relation to the value of the property. This would be analogous to the existing situation in the conscription of man power, where the compensation of an individual in the military service has no necessary relation to the value of his services in civil life.

Most programs of social advance pass through two stages: first, the period of advocacy of the general principle; and, second, the working out of specific plans for putting the principle into operation. The suggestion of a universal draft has not yet passed beyond the first stage. It seems reasonable to suppose, however, that the drafting of property would be effected through the issuance of orders to owners of property to deal with the government at fixed scales of rents or other compensation. The valuations fixed would be designed to eliminate any hope of profit. The liberality of the government in dealing with different commodities would vary in so far as necessary to accomplish that purpose.

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United States Senator Clarence C. Dill, of the State of Washington, offered a resolution in the Senate January 25, 1930, proposing an amendment to the United States Constitution in the following terms: "Congress shall have power in time of war to take private property for public use and for purposes of national defense, and to fix the compensation by declaring the same to be necessary for purposes of national defense." S.J.Res. 128, Seventy-first Congress 2nd Session. 72 Cong.Rec. 2449.

On April 1, 1930, the House of Representatives passed H.J.Res. 251, To Promote Peace and to Equalize the Burdens and Minimize the Profits of War, providing for the appointment of a commission to make a complete study of the problem. 72 Cong.Rec. 6573. 6633. For some remarks by Senator Dill, against the proposal, consult: (April 3, 1930) 72 Cong.Rec. 6692.

The term "universal draft" is sometimes used in the sense of compulsory service of all adult persons, either generally or within certain age limits. Women may or may not be included.
Probably at the outset the progress of a draft of property would be marked not so much by the lowness of the valuations fixed as by the assurance of legality of the proceedings taken. The national necessities as hostilities progressed would determine the extent to which owners of property later might be called upon to sacrifice. As the country became accustomed to the new procedure it is likely that a public psychology would develop in support of the draft, insuring its success. The result should be an important step toward removing the profit motive from the whole war situation. The operation of the universal draft would also lessen the size of the war debt, if it did not eliminate the necessity for its creation.

A universal draft resembles taxation in that it is a method of providing resources for the prosecution of a war; it differs from taxation in that it departs from the fundamental principle of equality upon which taxation is based. The basic principle of taxation is that each citizen, or member of a class of citizens, is to do his share toward the support of the government in proportion to his means. Under a universal draft the owner of property is called upon to make a sacrifice, less than that of the citizen who bears arms, but nevertheless a sacrifice. The process resembles eminent domain rather than taxation. The fundamental difference between taxation and eminent domain is that under the former each does his share, while under the latter the citizen gives more than his share and receives compensation. If the requirement of compensation which accompanies the process of eminent domain is to be escaped in the present connection, it is upon the ground of war necessity. The method of approach to the legal problems relating to a universal draft must be, not from the standpoint of taxation, but from that of war necessity and the constitutional provisions relating to war, the taking of private property for public use, and due process of law. If the universal draft were to be considered a method of taxation, it would constitute a direct tax, and be subject to apportionment among the states in proportion to their population, and assuredly no effective draft of property could comply with that requirement.

The suggestion of a universal draft raises the question whether it could be effected by act of Congress, or whether an amendment to the United States Constitution would be required. The question arises because of the provision in the Fifth Amendment that private property shall not be taken for public use without just compensation, and also because of the more inclusive due-process-of-law clause in that amendment. A definite answer cannot be given, but the materials relating to the problem will be examined.

Vattel, in 1758, set forth the basic principles in the light of which the words used in this portion of the Constitution must be interpreted. Asking the

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23 This will be developed later.
25 U.S.Const. Art.I, §2, cl.3: “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers...”
26 U.S.Const. Amend. V: “No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”
question whether the state is bound to indemnify individuals for the damages they have sustained in war, he distinguished two classes of damage done by the state in time of war: that done deliberately and by way of precaution, as when land is taken so that fortifications may be erected upon it; and that done by reason of inevitable necessity—such as the destruction by artillery in retaking a town from the enemy. Damage of the first class, he said, should be made good to the individual, who should hear only his quota of the loss. Damage of the latter class is merely an accident, a misfortune which chance deals out to those upon whom it happens to fall. Here no action lies against the sovereign. Such damage is to be treated in the same way as that done by the enemy. All subjects are as much exposed to such damage as they are to risk of life itself. It would be utterly impracticable for the state to attempt strictly to indemnify all those whose property is thus damaged. The public finances would soon be exhausted, and every individual would be obliged to contribute his share in due proportion. There would arise a thousand abuses, and there would be no end of the particulars, i.e., there would be no limit to the claims presented.8

Whatever may be thought of the sufficiency of the reasons assigned by Vattel, the distinction suggested by him between damage to property in the course of active military operations and other damage done by the State in time of war has been observed universally under the common law, at least since 1660.9 The war powers of the nation have been thought to justify all damage in the course of active military operations,10 without compensation to the owner. Where property has otherwise been taken or injured, even though in time of war and for war purposes, full value has been paid. This has been done even where the urgency of the necessity has been felt to justify a summary taking

8Vattel, The Law of Nations, Bk.3, c.15, §232, Chitty-Ingraham trans., 402. Croftus, in a passage referred to by Vattel, said: “Nor do I admit, without distinction, what Vasquius says: that the state is not bound to acknowledge the damage which is inflicted by war, because the right of war permits such damage. For that right of war has regard to other peoples, as we have elsewhere explained; and, partly at least, affects enemies in their mutual relations, not citizens in theirs; for since these are socially bound together, it is just that they bear in common the losses which happen for the sake of society. It may however be established by the Civil Law, that a thing lost in war shall not give a citizen a right of recovery against the State; in order that each person may the more strenuously defend his own property.” Croftus, De Jure Belli et Pacis, Bk.3, c.20, §§ 3 Whewell’s trans. 327.

9This is covered at length in footnote #71 infra.

A dictum has gone further in permitting the taking of property in time of war, without compensation. Parham v. The Justices, etc., of Decatur County, 9 Ga. 341, 348 (1851). Other dicta have gone beyond the statement of the text in requiring compensation. Mitchell v. Harmony, 13 How. (U.S.) 115, 124, 14 L.Ed. 75, 84 (1851); Corbin v. Marsh, 2 Duv.(Ky.) 193, 200 (1865); Russell v. The Mayor, etc., of New York, 2 Denio (N.Y.) 461, 464 (1845); Mayor of New York v. Lord, 17 Wend.(N.Y.) 285, 292 (1837), aff’d, 18 Wend. (N.Y.) 126 (1837).

Campbell’s Case, 8 Ct.CI. 240 (1870), and Grant v. United States, 1 Ct.CI. 41 (1863), went beyond the text in granting compensation for property destroyed to prevent it from falling into the hands of the enemy.

without compliance with the requirements of eminent domain procedure and
without the payment of compensation in advance. The chief ground upon
which the distinction has been based has been the idea of choice. It has been
felt that the government, in collecting supplies throughout the country, deliber-
ately selects the individuals with whom it will deal, and should, therefore, com-
penate them, whereas it has been felt that what is done in the course of mili-
tary operations is governed entirely by the fortunes of war, over which the
government has no control, and for which it is not responsible.

With this background the Fifth Amendment was enacted, providing that
private property shall not be taken for public use without just compensation—
property destroyed or damaged, as well as that appropriated, being considered
"taken." In a Civil War Court of Claims case, shortly after the establishment
of that court, it was said, after quoting Vattel:

"The limitation imposed on the government of the United States
in the exercise of its right of eminent domain by the fifth article of
the amendments of the Constitution is a solemn recognition of this
settled and fundamental law of States. . . ."

In the course of American history various contentions have been made that
the war powers of the government, when called into play, are so broad that
all constitutional limitations which might operate as restrictions upon their
exercise are for the time being suspended. This doctrine, making the war
powers of the government unlimited, was vigorously denied by the majority of
the United States Supreme Court in the great case of Ex parte Milligan. That

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11 In emergencies arising out of war conditions, the requirements of eminent domain
procedure may be dispensed with in situations where compensation is nevertheless required.
The obligation to make payment is broader than the procedural requirements. United
States v. Russell, 13 Wall. (U.S.) 623, 20 L.Ed. 474 (1871), quoted in text, infra, at foot-
notes 9-31; see also, the celebrated dictum in Mitchell v. Harmony, 13 Hew. (U.S.)
115, 124, 14 L.Ed. 75, 84 (1881).

12 This is not always strictly accurate, as the location of the sphere of military opera-
tions may be determined by the authorities of the State in question and not by the enemy.
As for responsibility for the existence of the war, giving rise to the necessity that operations
be conducted somewhere, the only position which the governmental agencies of a country
can take is that the entire responsibility is upon the enemy.

13 Other reasons for the distinction have been suggested, such as the impracticability
of ascertaining damages due to military operations, the disastrous effect upon the public
treasury if such claims were paid, and that knowledge of such liability would discourage
war activities on behalf of the government. Consult: Report of the House Committee on
War-Claims, entitled: War-Claims and Claims of Aliens, by William Lawrence, March 26,


15 Grant v. United States, 1 Ct.Cl. 41, 44 (1863). In applying the distinction, this
case seems open to criticism. See footnote #9, supra. The distinction made by Vattel was
well expressed in Heftebover v. United States, 21 Ct.Cl. 228, 237 (1886).

16 The war powers of Congress are set forth in the Constitution in Art.I, §8, cl.1, 11,
12, 13, 14, 15 & 16. They must, of course, be interpreted in the light of the "necessary
and proper" provision of clause 18 of the same section. The war powers of the executive
department of the government are found in Art.I, §9, par.2, and Art.II, §2, par.1.

17 Such contentions will be found collected, and answered, in Black, The Theory of the
War Power under the Constitution, (1926) 60 Am.L.Rev. 91. He distinguishes, at page 37,
the internal and external aspects of the war powers.

184 Wall. (U.S.) 2, 18 L.Ed. 291 (1866). This case, with auxiliary material, including
the minutes of the proceedings of the military commission, has been printed as a volume in
the series of American Trials. American Trials, Ex Parte: In the Matter of Lambdin F.
Milligan, Samuel Klaus, editor.
decision held that President Lincoln’s proclamation of September 24, 1862, authorizing military trial of civilians throughout the country, was unconstitutional when applied to a case arising outside the theatre of military operations. Five members of the Court went further and said that Congress, as well as the President, was forbidden to establish military commissions in areas where the civil courts were open. Mr. Justice Davis, speaking for the majority, said, in a famous dictum:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

Since the World War, denial of the doctrine of the inefficacy of constitutional restrictions upon war powers has been reaffirmed, and given effect in actual decision, in United States v. L. Cohen Grocery Co. In that case the Court held unconstitutional a portion of the war-time Lever Act (known also as the National Defense Act, the Food Control Act, and the Food Conservation Act) upon the ground that it attempted to create a criminal offense without fixing an ascertainable standard of guilt, and without adequately informing accused persons of the nature and cause of the accusation against them. In the opinion, Mr. Chief Justice White stated that the decisions of the Court indisputably established that the mere existence of a state of war could neither suspend nor change the operation of the guaranties and limitations of the Fifth and Sixth Amendments upon the power of Congress to create criminal offenses, and that, in testing the operation of those provisions of the Constitution, the existence or non-existence of a state of war had no relevancy.

It is, therefore, necessary to draw the line somewhere between the war powers and the various constitutional limitations. That the just compensation clause of the Fifth Amendment does not protect enemy property either in this country or abroad, and has no application to the taking of property of our citizens by an enemy, may be dismissed with the statement. Before the Constitution went into effect the Supreme Court of Pennsylvania held that there was no obligation upon that Commonwealth to make compensation for a taking of property, made in the course of active military operations by the Pennsylvania Board of War in accordance with recommendations of Congress. Mr. Chief

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219 Stat. at L. 730.
204 Wall. (U.S.) 2, 120, 18 L.Ed. 281, 295 (1866).
22255 U.S. 81, 41 Sup.Ct. 298, 65 L.Ed. 516 (1920).
24United States v. L. Cohen Grocery Co., 255 U.S. 81, 88, 41 Sup.Ct. 298, 299, 65 L.Ed. 516, 520 (1920). Mr. Justice Day did not participate in the decision. Mr. Justice Pitney and Mr. Justice Brandeis concurred in a special opinion which avoided passing upon the constitutional question.
25Brown v. United States, 8 Cranch (U.S.) 110 (1814).
Justice McKean said that Congress was vested with the powers of peace and war, to which this action was a natural and necessary incident:

"The transaction, it must be remembered, happened flagrante bello; and many things are lawful in that season, which would not be permitted in a time of peace . . . . It is a rule . . . that it is better to suffer a private mischief, than a public inconvenience; and the rights of necessity, form a part of our law." 25

On the other hand, Mr. Justice Samuel Chase of the United States Supreme Court early indicated a belief that the just compensation clause did apply to some takings of private property in time of war for war purposes. This was in Ware v. Hylton, decided in 1796. 26 The suit was brought by a British subject against citizens of Virginia to collect a debt which the defendants previously had paid into the treasury of the Commonwealth of Virginia in 1780, pursuant to an act of the legislature confiscating all debts of its citizens to British subjects. The treaty of peace of 1783, which terminated the Revolutionary War, provided that creditors on either side should not meet with any impediments to the full recovery of all debts. 27 It was held that the treaty superseded the act of the Virginia legislature, and that the defendants must again pay the debt to the plaintiff. The facts of the case occurred too early to be subject to the Fifth Amendment, but Mr. Justice Chase said that, while Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, yet the immutable principles of justice, the public faith of the States and the rights of the debtors, all combined to prove that debtors who had been injured by the treaty for the benefit of the public ought to receive ample compensation, and that " . . . this principle is recognized by the Constitution, which declares, 'that private property shall not be taken for public use without just compensation.'" 28

In the famous case of Mitchell v. Harmony, 29 in the same Court, army officers, while in Mexico in the course of a campaign against that country, had impressed the property of a camp-following trader. It was held that, as neither the American forces nor the property of the plaintiff were in immediate danger at the time of the seizure, the taking was an unjustifiable trespass on the part of the officers. It was stated that there were, without doubt, occasions when a military officer might impress property for the public service without being liable as a trespasser, and yet the government would be bound to make full compensation to the owner. The basis of the obligation was not discussed.

In only one decision has the United States Supreme Court passed squarely upon the question whether the compensation clause of the Fifth Amendment applies to the present problem. The case is United States v. Russell, 30 decided shortly after the Civil War. During that struggle several steamships owned by the plaintiff, which were being used outside the area of active military opera-

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25 Republica v. Sparhawk, 1 Dall.(Pa.) 357, 362 (1788).
26 Dall.(U.S.) 199, 1 L.Ed. 568 (1796).
27 Treaty of Sept. 3, 1783, Art.IV, 8 Stat.at L. 80, 82, 1 Malloy’s Treaties, 586, 588.
28 Ware v. Hylton, 3 Dall.(U.S.) 199, 245, 1 L.Ed. 568, 588 (1796). The Justices delivered separate opinions.
29 13 How.(U.S.) 115, 14 L.Ed. 75 (1851).
30 13 Wall.(U.S.) 522, 20 L.Ed. 474 (1871).
tions, were impressed and used as transports. There was no express contract, but the Court held that the constitutional obligation to make just compensation raised an implied contract on the part of the government. Because of the outstanding importance of the decision in any future consideration of the problem, the unanimous opinion of the Court, delivered by Mr. Justice Clifford, is quoted from at some length:

"Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in cases of extreme necessity, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent. . . . Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized or appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably, such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply; and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner. . . .

"Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending; and
it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice. 81

A similar decision was made by the Confederate Supreme Court of Georgia under the corresponding provision of the Constitution of the Confederate States, 82 holding unconstitutional an act of the Confederate Congress which provided for the impressment of property for war purposes, and that, in certain cases, the compensation should be in accordance with a schedule of prices, to be fixed from time to time by commissioners appointed for each state—no schedule to operate for longer than sixty days without new action by the commissioners. 83 It was pointed out that market values cannot be ascertained in advance, and that, unless the government paid the prices which citizen consumers would pay, the result would be a levy upon one portion of the people from which others would escape.

United States v. Russell 34 is not as decisive of the question as it would seem to be, since it must be considered in connection with a dictum of the same court sixteen years later, suggesting that possibly the obligation of the government to make compensation in such cases exists, not because of any provision of the Constitution, but because of a general principle of law applied by the courts. If this is the correct position it is obvious that Congress can terminate the obligation at any time. Such a suggestion contemplates that the just compensation clause of the Fifth Amendment was not framed with a view to the historic distinction between damage in the course of active military operations and other damage done by the state either in times of peace or during a war. A holding such as that in United States v. Russell, 39 on the other hand, assumes that Vattel's distinction has been crystallized into the Fifth Amendment. The dictum referred to appears in the case of United States v. Pacific Railroad, 36 dealing with claims arising out of the destruction and rebuilding of

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81United States v. Russell, 13 Wall.(U.S.) 623, 20 L.Ed. 474 (1871). The decision upheld the jurisdiction of the Court of Claims, notwithstanding the provision of the Act of July 4, 1864, c.240, §1, 13 Stat.at L. 381, that the jurisdiction of that court should not extend to any claim for the appropriation of property by the military forces engaged in the suppression of the Rebellion. The court held, perhaps questionably, that the facts did not show an "appropriation," as the military officers did not intend to appropriate the steamboats to the United States, nor even their services, but only to compel the masters and crews, with the steamers, to perform the services needed, it being understood on both sides that the United States would pay a reasonable compensation. The validity of the implied agreement to pay was found in the constitutional provision, and the resulting obligation came within the jurisdiction of the Court of Claims as one based on implied contract.


33The case is weakened by the fact that it was conceded by the Government (33 Ga. 625, 630) that provision for compensation at some time was necessary in order to comply with the Constitution. It was argued that, nevertheless, the statute impressing the property did not need to provide compensation, as it could be supplied by subsequent legislation. This contention was denied and the plaintiff restored to possession of his property.

3413 Wall.(U.S.) 623, 20 L.Ed. 474 (1871).

3513 Wall.(U.S.) 623, 20 L.Ed. 474 (1871).

36120 U.S. 227, 7 Sup.Ct. 490, 30 L.Ed. 634 (1887).
railroad bridges in the course of active military operations in the State of Missouri during the Civil War. It was held that the railroad company was not entitled to compensation for the destruction of its bridges, and that the government was not entitled to charge against the company the costs of reconstruction of bridges which had been rebuilt by the army as an incident of military operations. In the course of the opinion, Mr. Justice Field said:

"In what we have said as to the exemption of Government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the Government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause...."

The dictum has not developed into decision. Other cases have indicated a belief in the applicability of the just compensation clause to war requirements. Such a statement by Mr. Justice Miller appears in a Civil War case. Mr. Justice Butler, Mr. Justice Sutherland and Mr. Justice McReynolds have so expressed themselves in delivering opinions of the court dealing with war-time requisitions. Mr. Justice Butler, in a passage quoted with approval by Mr.

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37 120 U.S. 227, 239, 7 Sup.Ct. 490, 495, 6 Ed. 634, 639 (1887).
38 In addition to cases cited elsewhere, consult: Mason v. United States, 14 Ct. Cl. 59, 70 (1878); Clark v. Mitchell, 64 Mo. 564, 572 (1877), rev'd on other grounds, 110 U.S. 633, 4 Sup.Ct. 170 and 328 L.Ed. 279 (1884); see United States v. New River Collieries Co., 270 Fed. 690 (C.C.A. 3rd Ct. 1921), aff'd, 262 U.S. 341, 343 Sup.Ct. 565, 67 L.Ed. 1016 (1925); Tyson v. Rogers, 53 Ga. 473 (Confederate, 1863); Ex parte Gardner, 84 Kan. 264, 113 Pac. 1054, 111 (1911); Sellards v. Zomes, 9 Bush.(Ky.) 90 (1869); Lajoie v. Milliken, 242 Mass. 300, 156 N.E. 419 (1922); American Print Works v. Lawrence, 2 23 N.J.L. 590 (1911); see also Russel v. Mayor, etc., of New York, 2 Denio (N.Y.) 461, 474 (1866); Mayor of New York v. Lord, 17 Wend.(N.Y.) 505, 508 (1823), 18 Wend.(N.Y.) 126 (1837).
Justice McReynolds, states that the ascertainment of war-time compensation is a judicial function, which cannot be exercised by any other department of the government. This is because the right to compensation is based upon the Constitution. Judges of the Court of Claims have expressed the view that the compensation clause is applicable. In delivering the opinion upholding the validity of the War-Time Prohibition Act, Mr. Justice Brandeis was careful to point out that this portion of the Fifth Amendment had not been violated. He said:

"The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations ... [citing Ex parte Milligan and other cases]; but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power."

Matthew Addy Co. v. United States, following the World War, involved the validity of convictions for violation of a Presidential order—made under the previously mentioned Lever, or Food Control, Act—fixing prices of coal on all sales throughout the country. The convictions were reversed by the United States Supreme Court upon the ground that the order was not retroactive, and did not apply to coal purchased before its issuance. In delivering the opinion, Mr. Justice McReynolds thought it a grave constitutional question, to be avoided if possible through the application of any canons of reasonable construction, whether Congress had the power to provide for the fixing of prices at which people then owning coal might sell it thereafter, without providing compensation for losses. This would, of course, be going farther than a


44Act of Aug. 10, 1917, c.53, 40 Stat.at L. 276; see, supra, footnote #22.
45Matthew Addy Co. v. United States, 264 U.S. 229, 265, 44 Sup.Ct. 300, 302, 68 L.Ed. 658, 661 (1924). In the decision of the Circuit Court of Appeals, the Presidential order, prohibiting more than 15 cents per ton profit, was interpreted to be retroactive, and yet
universal draft, as it would relate to property in use by the civilian population and never intended for war purposes.

The Supreme Court of Pennsylvania, in dealing with a war-time requisition of coal, after pointing out that the just compensation clause of the Fifth Amendment was applicable, said:

"Just compensation must be made for private property taken for war purposes. This is not only well settled but based on sound morals." 60

In a lengthy opinion, holding invalid certain regulations of the Wool Division of the War Industries Board, Mr. Circuit Judge Rose, of the Fourth Circuit Court of Appeals, said:

"The President, as Commander-in-Chief of the Army and the Navy, doubtless had the constitutional power in war time, in cases of immediate and pressing exigency, to appropriate private property to public uses; the government being bound to make just compensation therefor... The constitutional requirement that the government must pay just compensation for what it takes is one which war does not suspend."

held to be within the war powers. Ford v. United States, 281 Fed. 298, 303 (C.C.A. 6th Cir. 1922).

In overruling demurrers to indictments for excessive prices, a District Judge refused to consider an argument based upon the Fifth Amendment, upon the ground that any decision upon a constitutional question of such far-reaching importance should come from the court of last resort. United States v. Spokane Dry Goods Co., 264 Fed. 209, 211 (D.C. Wash. 1920).


Similar statements by Mr. Justice Kephart appear in Highland v. Russell Car & Snow Plow Co., 288 Pa. 230, 234, 238, 135 Atl. 759, 761, 762 (1927). This was a suit between private parties where the buyer of coal had refused to pay more than the price fixed by the Presidential order under §25 of the Lever Act. The suit was dismissed. The judgment was affirmed in the United States Supreme Court, upon the ground, as stated by Mr. Justice Butler, that the Presidential order had deprived the plaintiff "only of the right or opportunity by negotiation to obtain more than his coal was worth," and that such deprivation was within the war powers, notwithstanding the applicable constitutional limitations. It was pointed out also that it did not appear that the plaintiff would have been entitled to more if his coal had been requisitioned. Highland v. Russell Car & Snow Plow Co., 279 U.S. 253, 262, 49 Sup.Ct. 314, 317, 73 L.Ed. 688, 692 (1929).

This case departs from market value as the test of legal value, but wherever compensation for private property is required an inadequate price is considered a taking pro tanto. In fixing public utility rates, a return of 6.26 per cent. has been held "clearly inadequate." United Rys. & Elec. Co. of Baltimore v. West, 280 U.S. ..., 50 Sup.Ct. 123, 126, 74 L.Ed. (Adv. Op.) 158, 159 (1929).


The suit was brought to recover excess profits on wool during the year 1919. The regulations had purported to effect a forfeiture of the excess profits. This was held to be a penalty, and beyond the powers of the Board. A statement, similar to the one quoted in the text, appears in a case relating to a war-time requisition of coal. Knapp, Circuit Judge, in Dexter & Carpenter, Inc. v. Davis, 281 Fed. 385, 387, 25 A.L.R. 1173, 1175 (C.C.A. 4th Cir. 1922). Mr. Circuit Judge Waddill dissented upon another ground.

In the certiorari proceedings in United States v. McFarland, the government conceded that the wool regulations were invalid. See United States v. Smith, 38 Fed.(2d) 901 (D.C. Mass. 1929).
Mr. Judge Mayer, then on the District bench, expressed himself clearly on
the point:

"The Fifth Amendment to the Constitution of the United States
provides that private property shall not be taken for public use with­
out just compensation. Article 1, §8, cl. 11, of the Constitution of the
United States confers upon the Congress power to declare war. This
war power, however, does not abrogate the constitutional guaranty
contained in the Fifth Amendment, as has been recently reiterated by
the Supreme Court in the Lever Act cases. . . .

"To carry out the purpose of the [Lever] act, the President could
make regulations in the way, inter alia, of fixing prices in ordinary
trading or commercial transactions; but when the United States itself
took foods—i.e., property—it was bound to award just compensation,
and what is just compensation under the Constitution is determined by
the same legal principles in war as in peace. . . .

"To award only cost plus 5 per cent. profit, as contended by the
government, would not be just compensation, constitutionally
considered. In all litigations like this, principle must never be departed
from. In the long run, the Constitution remains a safe guide, although
worthy sentimental considerations, at times, offer temptations to go
astray."

Perhaps the best, certainly the most famous, treatment of the problem
appears in the celebrated Lawrence Committee Report of the House Committee
on War-Claims, on "War-Claims and Claims of Aliens," by William Lawrence,
March 26, 1874. The report traces the history of the distinction between
a taking of property in the course of active military operations and a taking for
war purposes not of that character, shows that the distinction antedates the
Constitution, and expresses the opinion that it has been embodied in the Fifth
Amendment. Secretary of War William W. Belknap stated that it was the
practice of the War Department to pay Civil War claims of the character under
consideration, without express statutory authority, upon the theory of implied
contract under the Fifth Amendment. The emancipation of the slaves might
well have furnished a conclusive decision upon the question, but failed to do
so. A committee report after the War of 1812 held that a claim arising out
of the use of property was not covered by the Fifth Amendment, for the reason

52National City Bank v. United States, 275 Fed. 855, 859–861 (D.C. N.Y. 1921), aff'd
on grounds not involving the merits, 281 Fed. 754 (C.C.A. 2nd Cir. 1922), appeal dismissed
by appellant, 263 U.S. 726, 44 Sup.Ct. 32, 68 L.Ed. 527 (1923). The case involved coffee
commandeered by the navy on Nov. 21, 1918. The suit was brought under §10 of the Lever
Act to recover the "just compensation" there provided for. The plaintiff was awarded the
market value instead of the cost plus five per cent. provided for by Presidential order. The
question being judicial, because constitutional, it was held that only the court could fix
the compensation.

54Letter to William Lawrence, Chairman of the Committee on War-Claims of the
House of Representatives, Feb. 24, 1874, attached as Exhibit A, to Report of Committee on
55This was primarily because of the enactment of the Thirteenth Amendment,
prohibiting slavery, and the fourth section of the Fourteenth Amendment, providing that neither
the United States nor any State should pay any claim for the loss or emancipation of any
slave. A Kentucky case held unconstitutional, upon the ground of the just compensation
clause, an act of Congress (Joint Res. of March 3, 1865, 13 Stat. at L. 571) granting freedom
to the wives and children of slaves who enlisted as soldiers. "It would be inexplicably
strange and inconsistent to admit, as all do, that Congress can not, in time of peace, take
that the Amendment "... seems to imply a voluntary act on the part of the Government, which in the present case could hardly be alleged." In international law, a distinction between a taking because of military necessity and a taking from deliberate choice is generally recognized in the adjustment between nations of claims arising out of injuries to property of individuals. In an address the present Chief Justice of the United States Supreme Court expressed the distinction thus:

"... with respect to the citizen's rights of property, a distinction may be taken between the unavoidable deprivations which take place where the conflict rages, and those takings, although for military purposes, which are deliberate appropriations for which compensation must be made." Mr. District Judge Henry A. M. Smith, in stating his reasons for referring to a jury the question of the amount of compensation to be paid for the taking of land during the war, after referring to the just compensation clause of the Fifth Amendment, said:

"Does the fact of the mere existence of a state of war between two countries abrogate all civil laws existing in either? It has never been so held. The mere statement that there is a condition of war loses entire sight of the circumstances under which the urgency of war may exist. Many matters are permissible on the field of battle, or in the face of the enemy, or in the territory directly subject to the incursions of warfare, which are not permissible in the country entirely removed from it, where the population is orderly and is pursuing its usual avocations. In the course of an armed conflict, it may be entirely proper that the troops of the country, defending the country, take refuge from the fire of the enemy in the private house of a citizen of the country, which may lead to its destruction; and in such cases the government would not be liable to condemnation, as that is an incident to the struggle itself.

"That would not mean, however, that 1,000 miles from the scene of conflict, in the midst of civil order and the enforcement of civil laws, the government could summarily take and destroy the house of a citizen without awarding him just compensation for the taking."
It seems not too much to say that it has been the generally accepted view that the just compensation clause of the Fifth Amendment applies to takings of property in time of war apart from active military operations. The question has not, however, received the precise analysis which would be given it if a nation-wide draft of material resources were to be attempted. To return to the dictum casting doubt upon the validity of the view expressed, Mr. Justice Field does not state that it is now the law that compensation need not be made under such circumstances. The extent of his suggestion is only that possibly the obligation to make compensation is outside the scope of the constitutional provision. If this is true, it becomes merely a principle of justice applied by the courts and customarily provided for in statutes, and is subject to repeal by act of Congress.

It is pertinent to inquire, therefore, whether it has been a principle of the common law that there is an obligation to make such compensation. If such a common law principle has existed, the actual decision in United States v. Russell can be supported upon that ground, and the holding that the Constitution requires compensation is the more readily open to attack. On the other hand, if there has been no such principle at common law, the decision upon the facts in United States v. Russell can be supported only upon the constitutional ground, and any later decision holding the Constitution inapplicable would be clearly a direct reversal of the result there reached.

"The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the executive, and in the extension of Parliamentary protection in favor of the subject..." and historical research carried sufficiently far would reach a period when all subjects and all their possessions were subject to the arbitrary power of the King. Under such circumstances there would, of course, be no compensation to the subject for something taken from him. The available historical materials, however, do not show any instance where the property of a private citizen has been taken for war purposes without compensation, except in the special case of saltpetre in the ground, to be used for the manufacture of gunpowder, and that only prior to 1660.

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60Quoted in full in text, supra, at footnote #37. The concluding portion is as follows: "In such cases, it has been the practice of the Government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause..." Mr. Justice Field, in United States v. Pacific R.R., 120 U.S. 227, 239, 7 Sup.Ct. 490, 496, 30 L.Ed. 634, 638 (1887).

6113 Wall.(U.S.) 623, 20 L.Ed. 474 (1871).
6213 Wall.(U.S.) 623, 20 L.Ed. 474 (1871).
64L. Scott and A. Hilderley, The Case of Requisition, 46. See also, footnote #71, infra.
The records also do not show that it has ever been decided definitely by the courts of England either that there is or that there is not a legal obligation upon the Crown to compensate a citizen for property taken for war purposes. It does not appear that prior to the World War the question was presented to the courts, either by the Crown or by a citizen, and during or following that war it was not decided. Whether the absence of adjudication has been "... because no subject ever had the temerity to put forward such a contention, or ... because the Crown never gave him occasion to do so, is a matter which remains unknown." The records do show is this: that throughout the historical period there has been the unbroken practice, with the single exception mentioned, of making compensation. In nearly all cases this has been provided for by Act of Parliament. It is difficult to overestimate the importance, from the present standpoint, of such a continuous custom extending over a period of hundreds of years. "... The foundations of constitutional law lie deeply imbedded in ground which is in the joint occupation of historians and lawyers," and the custom of one generation becomes the natural and the juristic law of the next. Because of the universal historical practice of making compensation, Sir John Simon has declared that it is the "true constitutional view" in England that prerogative powers of the Crown in time of war are not without limit, and that when the citizen's property is taken for war purposes he must be given compensation.

The available historical materials having any bearing upon the proposition under discussion, other than those showing the practice of payment, are meager, but the long continued custom, extending back long prior to the American Revolution, seems to justify the conclusion that it has been a principle of the common law that compensation must be made. All this, of course, has no reference to acts in active military operations.

69 Prerogative powers may be defined as those powers which historical development has failed to remove from the Crown. Like other powers of the Crown they are today exercised upon the responsibility of His Majesty's Prime Minister.
70 Sir John Simon, Introduction to L. Scott and A. Hildesley, The Case of Requisition, xvii; to same effect: L. Scott and A. Hildesley, The Case of Requisition, 72, 136; T. Baty and J. H. Morgan, War: Its Conduct and Legal Results, 9 et seq.; see, also, footnote #71, infra.
71 On this topic, the best source of material available in this country is an excellent work by L. Scott and A. Hildesley, The Case of Requisition (Oxford, 1920. pp. xxv, 304). This volume consists of a discussion of the problems presented in the case of Att'y-Gen'l v. De Keyser's Royal Hotel, which will be discussed subsequently in this footnote. In appendices are set forth records which were selected as the result of research at the Record Office and presented to the courts upon the various appeals of that case. The authors point out (pp. 15, 24, & 74-76) that resort was had to Parliament for statutes to authorize the taking of property during wars at times of great national peril, when it would seem certain that a prerogative power would have been used if it had been thought to exist. They show the universal practice to have been to make compensation (pp. 10-78 passim, and 136-157 passim), and deny the exception in regard to saltpetre (pp. 54 & 58) (also denying that saltpetre was taken without payment: Swinfen Eady, M.R., In In Re De Keyser's Hotel, [1919] 2 Ch. 197, 218, 88 L.J.Ch. 415, 120 L.T.Rep. 396, 63 S.J. 445, 35 T.L.R. 418 [1919]).
72 The Case of Saltpetre, 12 Co.Rep. 12, 77 Eng.Rep. 1294 (1606), like other cases in Coke's Reports, consists of resolutions of the justices upon questions submitted to them. In this case, they advise the King in regard to exercise of the prerogative right to "pur-
This conclusion means that an American court confronted with the necessity of passing upon the constitutionality of a universal draft law, and

veyance” of saltpetre. “Purveyance” is a prior right of the Crown to secure supplies, generally for the provisioning of the King’s household, and usually upon payment of compensation. With the increasing use of gunpowder in warfare, the securing of saltpetre had become an object of special concern, and the King had been given a special right to go upon the land of his subjects to take it. While the available records do not contain any express statement in regard to compensation for saltpetre, it seems that the only payment to be made was for the disturbance to the possession of the surface. In any event, purveyances were abolished in 1650 (see footnote #66, supra), and were never revived for this purpose. In a dictum in his dissenting opinion in Russell v. Mayor, etc., of New York, 2 Denio (N.Y.) 461, 486 (1845), Senator Hard cites the Saltpetre case as an illustration of the abuse in England of admitted rights conferred by necessity, and the habit of confusing those rights with the doctrines of prerogative, which, he says, probably led to the provision in the Constitution of the United States forbidding the taking of private property for public use without compensation.

Incorporated Society v. Queen, [1900] 1 I.R. 465 (1900), involved the question of payment of compensation for permanent injury to land taken during the war with Napoleon in 1803 and surrendered by the government in 1896. Scott & Hildesley (p. 29 note) criticize the case upon the ground that it decided that, under the act of Parliament under which the original inquisition proceedings for condemnation were held, there was no obligation upon the government to make compensation for such injury. If true, this would amount to a pro tanto taking of the land without compensation. In this, however, the effect of the decision has been misapprehended. The majority of the court felt that compensation for the injury could have been secured in the original inquisition, and that therefore the award then made was res adjudicata upon the point. Incorporated Society v. Queen, [1900] 1 I.R. 465, 475, 488 & 494 (1900). Lord FitzGibbon, who disagreed upon the question of res adjudicata, dissented on the ground that the landowner should still be able to recover.

The decision is, therefore, not against the right to compensation. Throughout history, ships especially have been subject to requisition, because of their ready adaptability to military purposes, and because of the unique value to them of naval protection. In early times it was considered imperative to protect seacoast towns from attack by enemy war vessels, and it was, therefore, thought to be only just that the Crown should require these towns to furnish the necessary ships and to man them. This was not a confiscation of private property without compensation, but a method whereby the Crown required the assessment of a tax upon the inhabitants by the local governing authorities. The ship-owner always received compensation. John Selden, The Dominion of the Seas (a republication in English in 1652 of Mare Clausum, 1635), 352; Holdsworth, The Power of the Crown to Requisition Ships in a National Emergency, (1919) 35 L.Q.Rev. 12, 24, 30; Scott & Hildesley, The Case of Requisition, 148-153, especially 150; see: Sir Michael Foster in Rex v. Broadfoot, Foster, Crown Cases, 154, 160 (1743); contra: Lord Duke, dissenting, in In re De Keyser’s Royal Hotel, [1919] 2 Ch. 197, 250, 88 L.J.Ch. 415, 120 L.T.Rep. 396, 63 S.J. 445, 35 T.L.R. 418 (1919) (intermediate appeal of Att’y-Gen’l v. De Keyser’s Royal Hotel, discussed infra in this note). Charles I devised the plan of extending the ship levies throughout the kingdom, thus further freeing himself from control by Parliament. The interesting history of this effort, and the controversy it provoked, terminating in the defeat of the Crown through the abolition by Parliament of all forms of ship-money in 1640, is to be found in 2 Rushworth’s Historical Collections of Private Passages of State (London, 1721), 257, 259, 323, 353, 355, 359 and 364, and in 8 Rushworth’s, etc., 991, 1182 and 1895. The Case of Ship-Money (Rex v. Hampden), 3 State Trials, 426, 3 Rushworth’s, etc., 480 (1677), wherein a majority of the judges upheld Charles I, has remained a landmark in English history, but nowhere in the constitutional struggle does there appear a suggestion that the property of the individual subject is to be taken from him without compensation. (It must be borne in mind continually that this discussion has no application to acts in the course of military operations.)

The Zamora, [1916] 2 A.C. 77, 85 L.J.P. 89, 2 P.Cas. 1, 114 L.T.Rep. 626, 60 S.J. 416, 32 T.L.R. 435 (1916), involved the right of angry, i.e., requisition of the property of a neutral, as applied to copper in the possession of the Prize Court. In the opinion there appears a rather inexplicable dictum by Lord Parker (p. 100): “The municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown.” This statement was approved in the dissenting opinion of Lord Duke in In re De Keyser’s Royal Hotel, [1920] 2 Ch. 197, 245, 88 L.J.Ch. 415, 120 L.T.Rep. 396, 63 S.J. 445, 35 T.L.R. 418 (1919). In Att’y-Gen’l v. De Keyser’s Royal Hotel, [1920] A.C. 506,
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89 L.J.Ch. 417, 122 L.T.Rep. 691, 64 S.J. 513, 36 T.L.R. 600 (1920), none of the judges passed upon the question, but Lord Sumner thought the dictum was not meant to be applied to the point now under consideration (pp. 564 & 565), and Lord Parmoor did not take it seriously (pp. 572 & 573).

Newcastle Breweries, Ltd. v. King, [1920] 1 K.B. 854, 89 L.J.K.B. 392, 123 L.T.Rep. 58, 84 J.P. 125, 18 L.G.R. 781, 36 T.L.R. 276 (1920), involved the validity of regulations issued by the naval authorities, under which they had requisitioned certain rum. Mr. Justice Salter, interpreting the legislation under which the regulations were issued, held that the government could not give the subject less than the present cash market value of his property, and could not deprive him of his right to a judicial ascertainment of the same. On the latter point, the decision was approved by Lord Dunedin in a dictum in Att'y-Gen'l v. De Keyser's Royal Hotel. On both points, a contrary decision was reached in Hudson's Bay Co. v. Maclay, [1920] W.N. 170, 36 T.L.R. 469 (1920), and in Robinson & Co. v. King, [1921] 3 K.B. 183, 90 L.J.K.B. 1177, 123 L.T.Rep. 675, 37 T.L.R. 698 (1921). This difference of opinion is only as to how compensation is to be ascertained. There is agreement that compensation is required, and it is assumed by the latter courts that an executive determination of the amount will be just. In the Hudson's Bay case, Mr. Justice Greer expressly recognizes that a regulation giving no award, or one at a negligible rate, would not be an honest and bona fide exercise of the administrative powers. War-time conditions affect market prices to such an extent that a different measure of value will may be thought to constitute just compensation. Cf.: Highland v. Russell Car & Snowplow Co., 279 U.S. 253, 279, 49 Sup.Ct. 314, 317, 73 L.Ed. 688, 692 (1929).

In re A Petition of Right (In re X's Petition of Right), [1915] 3 K.B. 469, 84 L.J.K.B. 1961, 113 L.T.Rep. 575, 59 S.J. 665, 31 T.L.R. 596 (1915), appeal to the House of Lords withdrawn by consent, [1916] W.N. 311 (1916), overruled, see infra, related to the taking of land for the Shoreham Aerodrome, which was used for the manufacture and storage of airplanes and other related articles. It was decided, both in the King's Bench Division and in the Court of Appeal (both opinions being reported in the citations given), that the government was not required to make compensation to the owners of the land, upon two grounds: first, that under modern conditions of warfare the taking was to be considered as made in the course of active military operations; and second, that Parliament had, by the Defence of the Realm (Consolidation) Act, 5 Geo.V, c.8, conferred the prerogative to take property throughout the kingdom for purposes without compensation, the nature of the prerogative being exclusively for the public defense had been established, and that it

Atty-Gen'l v. De Keyser's Royal Hotel, [1920] A.C. 508, 89 L.J.Ch. 417, 122 L.T.Rep. 691, 64 S.J. 513, 36 T.L.R. 600 (1920), will remain a leading case in this connection. While it does not pass upon the question of the existence of a Crown prerogative to take property for war purposes without compensation, the nature of the decision is such that the question probably will never be adjudicated by the English courts. The suit involved the question of compensation to the owners of a large hotel in the city of London, taken for headquarters of the Royal Flying Corps. In the trial court, 34 T.L.R. 329, the questions of law were not argued, and the petition was dismissed upon the authority of In re A Petition of Right, [1915] 3 K.B. 469, 84 L.J.K.B. 1961, 113 L.T.Rep. 575, 59 S.J. 665, 31 T.L.R. 596 (1915), supra. In the Court of Appeal, In re De Keyser's Royal Hotel, [1919] 2 Ch. 197, 38 L.J.Ch. 415, 120 L.T.Rep. 296, 63 S.J. 445, 35 T.L.R. 431 (1919), the decision was reversed. The majority distinguished In re A Petition of Right upon the ground that it related to a matter in the course of military operations. They felt that the existence of a Crown prerogative to take property throughout the kingdom for war purposes without compensation had not been established, but held that, in any event, where powers previously within the prerogative have been fully provided for by Parliamentary legislation the prerogative is suspended. As Parliament had done this by the enactment of the Defence Act, 1914, S & 6 Vict. c.94, and earlier statutes, it was not necessary to decide whether a prerogative had previously existed. It was also pointed out that, while the Act of 1914, 5 Geo.V, c.8, conferred authority to issue regulations removing restrictions upon the acquisition of land, the regulations were to be "for securing the public safety and the defence of the realm," and that it was not necessary for those purposes that the right of the subject to compensation be removed. The regulations did not attempt to do this expressly, and if they were to be so interpreted they would be ultra vires. Hence, compensation was payable in accordance with the terms of the Defence Act, 1914, S & 6 Vict. c.94. Lord Duke dissented upon the ground that the prerogative of the Crown to occupy land anywhere in the kingdom as long as necessary for the public defense had been established, and that it
desiring not to be bound by *United States v. Russell,* could explain the actual
decision in that case by attributing it to the common law principle rather than
to the Constitution. The more normal course of historical and constitutional
development, nevertheless, would be to hold that the just compensation clause
was adopted into the Constitution in accordance with the pre-existing common
law principle, and therefore to interpret it in accordance with the common law
distinction between takings of private property in time of war in the course of
active military operations and takings for war purposes not of that character,
holding the constitutional provision applicable to the latter but not to the
former.

But, as Mr. Justice Holmes has said, "Great cases like hard cases make
bad law." The pressure of war conditions on judges in passing upon ques-
tions of national policy makes impossible accurate prediction as to their action.
In connection with the present problem, the argument of necessity will always
he used: that if the government feels that a certain course of action is neces-
sary in time of war it must be constitutional. Although the contention based
had not been suspended by legislation. He felt that, since the current regulations under
which the land had been taken did not provide for compensation, it would be indulging in
a fiction against the Crown to say that the land was deemed to have been taken under the
act of 1842. The House of Lords agreed with the majority in the Court of Appeal, except
that it was not felt that *In re A Petition of Right* could be distinguished upon the ground
that it related to active military operations, and it was overruled.

The opinion in *In re A Petition of Right* does not fully set forth the facts involved,
and a more detailed statement of the facts would be required in order to determine where
the line as to what constitutes active military operations should have been drawn in that
case. *In Att'y-Gen'l v. De Keyser's Royal Hotel,* none of the law lords except Lord Dunedin
expressed an opinion as to whether a prerogative to take property for war purposes without
compensation still existed, subject to suspension by legislation, it being pointed out that
neither the affirmative nor the negative of the proposition could be established by reference
to records or prior decisions. Lord Dunedin thought that from the usage of payment there
could not be imposed on the Crown a customary obligation to pay (p. 525). Sir John Simon
has suggested that the real reason why the Court of Appeal declined to be bound by *In re
A Petition of Right* was not because of any difference in the facts, but because of the
historical research in the *De Keyser* case. *Simon, Introduction to Scott & Hildesley, The
Case of Repulication, xxx.*

In [Enye]'s Laws of England, 1, in an article entitled "Land Clauses Acts," Mr. W. F. Craies says: "In theory the Crown has the prerogative of expropriating the lands of subjects for the purpose of the defence of the realm." The only decision cited, *Att'y-Gen'l v. Tomline,* 12 Ch. 214 (1879), does not support the proposition.

One District Judge Smith, in *Beatty v. United States,* 203 Fed. 620, 624 (C.C.A. 4th Cir. 1913), certiorari denied, 232 U.S. 463, 467 Sup.Ct. 392, 58 L.Ed. 685 (1914), said: "By the constitution of England, Parliament was supreme. 1 Black. Comm. 160-162. It could do anything. ... It could therefore take private property for public use without compensation; but there had grown up a system of construction in England, so continuous and uniform as to become fundamental law, that Parliament would not take private prop-
erty for private uses, nor would it take private property for public uses without just com-
penation."

718 Wall. (U.S.) 623, 20 L.Ed. 474 (1871). Dissenting opinion in *Northern Securities Co. v. United States,* 193 U.S. 197, 200, 24 Sup.Ct. 465, 466, 48 L.Ed. 679, 702 (1909). Continuing: "For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some incident of immediate overwhelming interest which appeals to the feelings and dis-
torts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled prin-
ciples of law will bend."

Mr. Justice Strong, in *Knox v. Lee and Parker v. Davis (Legal Tender Cases),* 12 Wall. (U.S.) 457, 533-534, 20 L.Ed. 287, 305 (1871): "It certainly was intended to confer upon the government the power of self-preservation... That would appear, then, to be a
upon necessity has been repudiated definitively as an absolute proposition, it must always be of great force in dealing with novel specific situations.

A general system of taking private property for war purposes through a universal draft would present legal problems of a character differing from those involved in proceedings directed against isolated individuals; to date, only the latter type has been considered by the courts in this connection. It is possible to contend that, under the existing constitutional provisions, regardless of the language used in the decisions of the courts, the real objection to legality in taking property from individuals has been, not the just compensation clause, but the requirements of the due process of law clause. As long as only the property of isolated individuals is taken, it may be said that, under the due process of law provision, fairness to the individual requires that he be compensated. When Congress, by an act with provisions reasonably adapted to the purpose in view, has called upon citizens generally, or members of a class of citizens, to give up their property through a universal draft, then fairness to the individual does not require that he be compensated. The difficulty confronted in this line of thought is that it seems to lead to this dilemma: if the universal draft requires a special sacrifice from an individual, which would no doubt be the case, fairness to the individual still requires that he be compensated; if it is to be conceived that he is not being called upon for any special contribution, then the universal draft is being used as a method of direct taxation, and the Constitution requires that the tax be apportioned among the several states. (This, it may be assumed, would not be practicable.)

Also, it may be assumed that due process of law requires that any method of classification of property for purposes of a universal draft must be reasonable, that the draft must be conducted without depriving any person of the most unreasonable construction of the Constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties.

The just compensation clause may be considered only a specific aspect of the more general provision of the due process of law clauses.

"Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public." Mr. Justice Harlan, in Chicago, Burlington, etc., R.R. v. Chicago, 166 U.S. 226, 236, 17 Sup.Ct. 581, 584, 41 L.Ed. 979, 984 (1897).

"If the nature and conditions of a restriction upon the use or disposition of property is such that a State could, under the police power, impose it consistently with the Fourteenth Amendment without making compensation; ..." Mr. Justice Brandeis, in Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156, 40 Sup.Ct. 106, 108, 64 L.Ed. 194, 199 (1919), upholding the validity of war-time prohibition.

It is to be remembered that there is no just compensation clause in the federal Constitution relating to the States, and that both the due process of law and just compensation clauses appear in the Fifth Amendment, applicable to the federal government.

It has been suggested that there has been slightly greater liberality in favor of constitutionality under the Fifth than under the Fourteenth Amendment. Unsigned note, Dissimilarities in Content Between the Two Due Process Clauses of the Federal Constitution, (1929) 29 Col.L.Rev. 624.

77See footnote #6, supra.
equal protection of the laws.\textsuperscript{78} It has been necessary to satisfy this requirement in classifying human beings for purposes of conscription, and in doing so it has been held that individuals may be exempted from military service because of the value to the government in time of war of their continued activities in the civilian pursuits in which they already have been engaged. As to those remaining, a lottery system is fair and reasonable for the particular purpose.\textsuperscript{79} But in requiring a sacrifice of material resources a lottery system may not be practicable or necessary, and it may be doubted whether a distinction based upon value of property to the government for war purposes would be upheld. While the parallel suggested indicates that it might be, it does not necessarily follow that the same sort of distinction would be considered proper for a different purpose. It should be noted also that in selecting human beings the value of their services in civilian pursuits for war purposes is made the basis of exemption from war sacrifice, whereas in dealing with material resources the opposite would be the case—the value for war purposes would be used as the basis for requirement of sacrifice. One other parallel may be noted—that able-bodied citizens are taken for personal war service while the infirm are relieved. This is not due, however, to any principle of classification as such, but is forced upon the government as a matter of necessity in view of the nature of the service required.

Let it be supposed that the first case involving the validity of a universal draft is that of a corporation which has been manufacturing munitions. It has made special preparations to serve, and has habitually dealt with, the government in that particular capacity in time of peace. Might it not be felt that a selection of the property of the corporation for taking under a universal draft, because of its value for war purposes, would constitute a penalty for having dealt with the government? It is conceivable that the whole force of patriotic pressure might be against constitutionality.

In reply to the argument of necessity to uphold the universal draft, it is possible to point out that the past wars of this country have been waged successfully without resort to that expedient. If a universal draft were to be put into operation without change in the Constitution, and it were to be held unconstitutional by the courts, the only effect would be to benefit certain individuals, and proportionately increase the national debt. A national debt, except as to foreign flotations, represents only an indebtedness upon the part of one portion of the people of the country to another, and a court might be fearful that the new experiment would not call forth the energies of the people to the fullest extent. If conditions were such that it seemed possible that a substantial portion of the increase in the national debt could be floated in foreign countries, interference with that possibility by the universal draft might be regretted. When a military enterprise has once been undertaken, expense is a secondary

\textsuperscript{78}While there is no equal protection of the laws clause applicable to the federal government, the due process clause of the Fifth Amendment includes such requirement. Mr. Chief Justice Taft, in Truax v. Corrigan, 257 U.S. 312, 332, 42 Sup.Ct. 124, 129, 66 L.Ed. 254, 263 (1921).

consideration—witness the “cost plus” system during the World War,\(^\text{80}\) which was extravagant when measured by business standards, yet which was felt to be justified because of the immediate results obtained.

The concept of choice upon the part of the government has been the basic principle upon which, since long prior to Vattel, a solution of such problems as the present one has been sought. It has, perhaps, never been better expressed that in the famous Lawrence Committee Report:

“...the question arises whether there is a deliberate voluntary taking of property for public use requiring compensation, or whether those acts arise from and are governed by the law of overruling military necessity—mere accidents of war inevitably and unavoidably incidental to its operations—and which by international law impose no obligation to make recompense...”\(^\text{81}\)

“There is no reason why one citizen should furnish quartermaster's or commissary supplies rather than another. The Government can, as to these, exercise a discretion; it can buy from any who have to sell, or select those from whom it will impress. Here is a deliberate voluntary taking for public use.”\(^\text{81}\)

If the existing constitutional provisions are interpreted in the light of this distinction, an act of Congress providing for a draft of material resources in time of war will be held unconstitutional.

This discussion may be closed with illustrations of the contrasting points of view in regard to the effect of war-time necessity, a choice between which will have a great deal to do with a court's decision. There is a temptation to assume the attitude thus expressed by Mr. Judge Andrews of the New York Court of Appeals:

“On December 28, 1917, under authority of an act of congress, the president entered into 'possession, use, control and operation' of the New York Central railroad and later fixed a rate of fare upon that road, for all passengers, at three cents a mile. This action was not justified by any of the ordinary rules of law. It can be sustained solely as the exercise of the war powers of the United States. And these powers are not limited by these ordinary rules. They are not bounded by any specific grant of authority. They are not unlike what in the states we call the police power, but the police power raised to the highest degree. They are such powers as are essential to preserve the very life of the nation itself. When requisite to this end the liberty of the citizen—the protection of private property—the peace-time rights of the states must all yield to necessity.”\(^\text{82}\)

\(^{80}\)Under this system, the compensation of a contractor consisted of a stipulated percentage of all amounts spent for labor and materials, all of which were paid by the government. A system more productive of extravagance could scarcely be imagined.


On the other hand, Mr. Judge Jenkins, of the Confederate Supreme Court of Georgia, acting under the just compensation clause of the Confederate Constitution, held that war necessity could not justify the seizure of supplies throughout the Confederacy without compensation, and, in so holding, said:

"Much has been said, and eloquently said, of the imperiled condition of the country, and the fatal consequences likely to result from judicial interference with the war measures of the Government; but let it be remembered that by a provision of the instrument itself, Judges as well as legislators, are sworn 'to support the Constitution;' and this they are to do in war, as well as in peace. We yield to none in respect for the Congress of the Confederate States; we would at all times, and especially in times like the present, most reluctantly dissent from their construction of the Constitution; we would, in cases of doubtful meaning, incline to give them the benefit of the doubt, for the safety of the country. Beyond this point of concession, not even war, with its attendant horrors, may rightfully impel the judiciary. Positive conviction of constitutional obligation may not be yielded under any circumstances." 88

For a statement of the position of justices of the United States Supreme Court, we may return to Ex parte Milligan, 84 already quoted. 85 In another

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88 Cunningham v. Campbell, 23 Ga. 625, 633-634 (Confederate, 1863). Mr. Judge Jenkins also held (p. 626) that the securing of supplies for future military purposes did not constitute a case of absolute necessity:

"Much has been said of 'necessity,' of 'urgent necessity,' of a law older than and superior to the Constitution, styled the 'salus populi.' Labored efforts have been made to prove on the one hand that this is, and on the other hand that it is not, a case of urgent necessity; on the one hand that the seizure was, and on the other that it was not made in virtue of that unwritten 'suprema lex.' I remark, first, that inexorable necessity is the cornerstone of the supreme law, here characterized as above all written constitutions, recognized and obeyed, because without it there is no safety for the people. This necessity is everywhere, and at all times a creature of the present, never discovered by provision, but looms up and asserts itself in the inevitable now. It discloses present evil menacing the body politic, and demands a present and sure remedy. The procedure, of which the defendants in error complained in the Court below, is the result of forecast, intended to provide for the future foreseen wants...."

"It does not appear that the seizures in this case were made by order of any General commanding an army, a department, corps, division, brigade, or detached party or post. We are, therefore, unauthorized to assume that they were made to meet an immediate necessity. The order came from the Chief Commissary in the district of Georgia, who acts in direct subordination to the Commissary-General, under whose direction impressments to accumulate supplies are made. The correctness of this view appears, secondly, from the fact that these sugars were neither consumed nor removed in the interval between the seizure and the date of the warrants, a period of three months. This, then, was not a case of 'extreme necessity,' inducing and justifying action upon the principle 'salus populi, suprema lex.' It was a proceeding authorized by statute, for which conformity to a written Constitution is claimed.

"Again, I remark, that the word necessity does not occur in the clause of the Constitution conferring or recognizing the power of impressment. The 16th paragraph, 9th section, 1st article, after providing sundry safeguards to personal rights, concludes thus: 'nor shall private property be taken for public use, without just compensation.' It is not, 'nor shall private property be taken to meet a public necessity, but for public use,' etc."

The Confederacy had no Supreme Court. Constitution of the Confederate States of America; Nathaniel W. Stephenson, The Day of the Confederacy, 39. It is an interesting speculation whether the attitude of such a court would have been the same.

84 Wall.(U.S.) 2, 120, 18 L.Ed. 281, 295 (1866).

85 Supra, at footnote #20.
celebrated case, *United States v. Lee*, that Court was called upon to determine the title to the Arlington National Cemetery and other portions of the famous Arlington Estate. The property had been purchased by the government at a tax sale conducted by commissioners appointed under act of Congress to collect direct taxes in the insurrectionary districts during the Civil War. The sale was held to be without due process of law because of a rule of the tax commissioners that the taxes could be paid only by the owner in person. In the opinion, Mr. Justice Miller said:

"The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations, will be seen to be small indeed compared to this evil [unconstitutional action by the executive], and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations.

“One of these, of no little significance, is, that during the existence of the government for now nearly a century under the present Constitution, with this principle and the practice under it well established, no injury from it has come to that government. During this time at least two wars, so serious as to call into exercise all the powers and all the resources of the government, have been conducted to a successful issue."

Any statement as to what the law is on any point is merely a prediction as to the conduct of judges in the future under certain conditions. No one can predict accurately their reactions in regard to the constitutionality of a novel expedient such as a universal draft. It is to be expected that their mental processes will be affected by the stresses due to war conditions. Particularly is it impossible to predict the effect of this, when it cannot be foreseen whether, if the expedient is tried, it will come before the courts during the war, or afterwards in time of peace, nor whether the character of the war will be a desperate struggle for national existence or a minor conflict. This only can be said: if an attempt to take the profit out of war by a draft of material resources is to be made, the only certain way to insure legality is through constitutional amendment.

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87United States v. Lee, 106 U.S. 196, 221, 1 Sup.Ct. 240, 261, 27 L.Ed. 171, 182 (1882). Four members of the Court dissented upon the ground that the action was a suit against the United States.
88The following is suggested as a form of amendment: In time of war the Congress shall have power to take private property for public use, with complete or partial compensation, or without compensation. The method of selection of the property to be taken and of determination of the amount of compensation, if any, to be paid may be administrative or legislative, and shall not be subject to any provisions of the Constitution other than this amendment.