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Constitutional Law: The Destruction of Private Property During War by Military Forces as a Non-Compensible Loss

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Constitutional Law—The Destruction of Private Property During War by Military Forces as a Non-compensable Loss—After the attack on Pearl Harbor and the invasion of the Philippines by Japanese Forces the American military authorities decided to destroy the oil terminal facilities in Manila, including the facilities owned by the plaintiff company. The entire area was prepared for demolition December 26, 1941. On December 31, 1941, while Japanese troops were entering Manila, the military forces completed a successful demolition of all the oil facilities to prevent their falling into the hands of the Japanese. The plaintiff company brought suit in the U.S. Court of Claims for compensation for the destruction of the facilities. The Court of Claims granted the claim.[1] *Held:* Reversed. The Supreme Court ruled that as the facilities were not appropriated for use, but were taken over only to be destroyed, the demolition of the property was due to the fortunes of war and so not compensable. *United States v. Caltex (Philippines) et al., 73 S.Ct. 200 (1952).*

At the common law, it appears that private property could be destroyed where public necessity demanded without any compensation going to the person suffering the loss.[2] This view was recognized as the common law view in early decisions in the United States and followed as such.[3] However, not all of the early writers on the subject were convinced of this precept of noncompensability for the taking of private property, even though done only in instances of public necessity. Vattel, writing in the late eighteenth century, stated in effect that where there is a destruction of private property in time of war, the destruction is of two kinds; the one being destruction wrought by the enemy, which was a noncompensable loss, and the other being a destruction of private property deliberately done by the authorities as a precautionary measure, in which case the owner of the property destroyed should bear no more than his "quota of the loss."[4] These authorities show the conflict between the common law and some of the early writings, but the entire direct common law line clearly indicates that there was no compensation payable to one who suffered injury to property due to a public necessity.[5]

Since the earlier cases in the United States mentioned above, there had been a line of authority developing, mostly by way of dicta and broad language in some decided cases, in the vein that would appear to

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[1] 120 Ct.Cl. 518, 100 F.Supp. 970 (1951).
[2] Case of the King's Prerogative in Salt Peter, 12 Coke's Reports 12, 77 Eng. Rep. 1294 (1607).
[3] Bowditch v. City of Boston, 101 U.S. 16 (1879). See, also Respublica v. Sparhawk, 1 Dall. 357 (Pa. 1788).
[4] Vattel, *The Law of Nations* (Chitty's Transl. 1859).
[5] "At the common law everyone had the right to destroy real and personal property, in cases of actual necessity, . . . and there was no responsibility on the part of such destroyer, and no remedy for the owner." Bowditch v. City of Boston, 101 U.S. 16, 18 (1879).

agree with Vattel.[6] For example, in the case of *Mitchell v. Harmony*[7] the army had taken over certain equipment specifically for "use" by the armed forces. The court there said that there are occasions which will permit private property to be taken for public service, but adds that the "government is bound to make full compensation to the owner."[8] It appears from the language used that the military purpose in taking the property is of much importance. However, Chief Justice Vinson, in the instant case, specifically states that the language of the court in the *Mitchell* case goes well beyond the actual holding of the court therein, and that therefore the majority of the court refuses to follow that language.

Instead, the majority of the court in the case under consideration chose to follow the reasoning of the court in *United States v. Pacific Railroad Co.*[9] There, though again the problem was not directly before the court, the court held that where private property is destroyed through battle, bombardment, or in some other way directly due to war, there was no compensable taking of the property. It is required of the military that they do that which is necessary at the time to impede the advance of an enemy.[10] It is this view, namely that where property is taken for "destruction" as a public necessity there is no compensation available to the one who suffers the loss, that is adopted here.

The argument that this was a taking of property within the meaning of the Fifth Amendment was adopted by the Court of Claims and advanced by the dissenting opinion in the principal case. This approach was summarily dismissed by the majority with a terse statement to the effect that this was not a taking of property for future "use" by the military, but that it was a taking for "destruction." This difference in the military purpose involved in the taking of the property appears to be the decisive factor in the holding of the court in the instant case.

There can be little doubt of the logistic and strategic value of oil storage facilities in modern warfare. It seems rather certain that had these oil facilities not been destroyed before the Japanese temporarily acquired control of the area, it would have been necessary to destroy the facilities as soon as possible thereafter as a matter of strategy. All of the legal authorities seem to be in agreement that there is to be no compensation for property destroyed by the ravages of war, and, had

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[6] *Supra*, note 4.
[7] 13 How. 115 (U.S. 1851). See, also, U.S. v. Russell, 13 Wall. 623 (U.S. 1871).
[8] 13 How. 115 (U.S. 1851).
[9] 120 U.S. 227, (1887).
[10] ". . . Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this . . ." *Ibid.* at 234.

these oil facilities been destroyed after Japanese occupation, they would fit such description.

In the light of the authorities in this field, and on a close scrutiny of the situation involved in the instant case, it appears that the court's holding is both logical and based on the weight of authority as it exists today. This does not say that the military forces are free to go about destroying property at their whim in time of war, but rather it says that when the necessity of the destruction is clear, even by "hind sight," the destruction and resulting loss is due to the ravages and fortunes of war, and done at such a time when "The safety of the state . . . overrides all considerations of private loss."[11]

The present status of the law certainly necessitates the result here arrived at. However, should not some possible moves be made to change this for the future? Never before in history has continental America been almost assured of direct attack in the event of global conflict. As the industrial and production leader of the Americas, the United States will be the prime target. Both the wealth and strength of the United States depends to a great extent upon the physical production and storage facilities. Therefore should not some plan be devised in the form of insurance or emergency taxation, or a combination of the two, which would enable the losses due to any direct attack to be borne by all of the people rather than only by those who actually suffer the pecuniary loss?

The experiences of post World War II have clearly indicated that in order to reestablish homes, factories, and other necessities of economic life, which have been ravaged by war, the government and the entire populace must be willing to bear the burden together or economic recovery is severely crippled if not completely blocked. The correctness of the instant decision on legal grounds is not questioned. The political wisdom of such a policy in the future is doubtful.

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[11] *Supra*, note 9 at 234.