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DOES THE "PRIORITIES AND MATERIAL ALLOCATIONS ACT" OFFEND THE DUE PROCESS CLAUSE?

To the end that an ever-increasing military might be adequately and quickly supplied with modern arms and materiel of war, Congress recently passed the so-called "Priorities and Material Allocations Act."¹ This act has as its purpose the prevention of competition between production for civilian consumption and production for national defense. It is emergency legislation designed for the single paramount purpose of transforming a peacetime industrial economy to a wartime producing machine. As amended May 31, 1941, the Act provides in part:

" . . . all other naval contracts or orders and all Army contracts or orders shall, in the discretion of the President, take priority over all deliveries for private account or export² . . . Deliveries of material to which priority may be assigned . . . shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, delivery of materials under— . . . (B) contracts or orders which the President shall deem necessary or appropriate to the defense of the United States.—(C) . . . No person, firm, or corporation shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from his compliance with any rule, regulation, or order issued under this section."³

It is the purpose of this inquiry to consider and discuss problems of constitutional nature which this statute brings to the fore.

The Federal Constitution expressly prohibits the states from passing any law impairing the obligation of contracts.⁴ Does the Constitution impose any similar restriction on the Federal Government? Article V of the Amendments to the Constitution provides, "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." In *Continental Illinois National Bank & Trust Company v. Chicago, Rock Island & Pac. Ry.*,⁵ the United States Supreme Court said, "The Constitution . . . does not in terms prohibit Congress from impairing the obligation of contracts as it does the state. But as far back as *Calder v. Bull*, 3 Dall. 368, it was said that among other acts which Congress could not pass without exceeding its authority was 'a law that destroys or impairs the lawful private contracts of citizens'."

Contract rights are property rights.⁶ Valid contracts are property and as such protected from being taken without just compensation,

¹ 41 U.S.C.A., 1941 Supp., p. 144.

² 41 U.S.C.A., 1941 Supp., p. 144-5, § 2 (a) (1).

³ 41 U.S.C.A., 1941 Supp., p. 145, § 2 (a) (2).

⁴ U. S. Const., Art. I, § 10.

⁵ 294 U.S. 648, 79 L.ed. 1110 (1934).

⁶ *Lynch v. U. S.*, 292 U.S. 571, 54 Sup. Ct. 840, 78 L.ed. 1434 (1933); *Omnia Commercial Co. v. U. S.*, 261 U.S. 502, 43 Sup. Ct. 437, 67 L.ed. 773 (1923).

whether the obligor be a private individual, a municipality, a state or the United States.⁷ The Priorities Act by its terms takes away the damages remedy for breach of contract. Does the Act seek to impair the obligation of contracts, and as such take away "private property without due process of law or without just compensation" in contravention of the Constitutional provision?

Manifestly, the Act takes away a legal remedy which would otherwise be available to the party whose contract has been defaulted by a corporation or firm in giving government contracts priority. The statute thus in its terms and operation takes away the remedy or the means of enforcing the contract which the contractors relied upon if they entered into it before the Act was passed. In *White v. Hart*,⁸ the Supreme Court stated, "Nothing can be more material to the obligation than the means of enforcement."⁹ Without the remedy, the contract may indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties, which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable and both are parts of the obligation which is guaranteed by the constitution against invasion."

It is well to note that in order for the government to become liable for the payment of compensation for taking of private property for public use there must be a "taking" of the contract and not a mere requisition of the subject matter. This was so declared to be the law in *Omnia Commercial Co. v. United States*.¹⁰ The plaintiff in that case brought action against the Federal Government, claiming a right to compensation because the government, by requisitioning the steel output of the Allegheny Steel Co. for the year 1918, had prevented the fulfillment of plaintiff's contract with that company for steel plate. The Court, speaking through Justice Sutherland, said, "In exercising the power to requisition, the Government dealt only with the Steel Company, which thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful government action the performance of the contract was rendered impossible. It was not appropriated but ended."¹¹

⁷ *Lynch v. U. S.*, *supra*, note 6; *Union Pac. Ry. v. U. S.*, 99 U.S. 700, 25 L.ed. 496 (1878); *U. S. v. Northern Pac. Ry.*, 256 U.S. 51, 41 Sup. Ct. 439, 65 L.ed. 825 (1920); *Choate v. Trapp*, 224 U.S. 665, 32 Sup. Ct. 565, 56 L.ed. 941 (1911).

⁸ 13 Wall. 646 (U.S. 1871); See also, *Bank of Minden v. Clement*, 256 U.S. 126, 41 Sup. Ct. 408, L.ed. 857 (1920); *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 54 Sup. Ct. 231, 78 L.ed. 413, 88 A.L.R. 1481 (1934); *Lynch v. U. S.*, *supra*, note 6.

⁹ *Van Hoffman v. City of Quincy*, 4 Wall. 535, 552 (U.S. 1866).

¹⁰ *Supra*, note 6.

¹¹ *Omnia Commercial Co. v. U. S.*, 261 U.S. 502, 43 Sup. Ct. 437, 67 L.ed. 773 (1923).

The Court held that the subject matter of the contract was taken, and not the contract. Having the power to take the subject matter the government was not liable simply because its action rendered performance of the contract impossible.

The situation presented by the Priorities Act is different from that in the *Omnia* case. The Act does not seek to appropriate the physical property of the manufacturer contractor, but, by attaching priority to government contracts and by taking away the remedy of the party whose contract has thus been defaulted because of this priority, it strikes directly at the obligation of the contract itself.

In determining that there was no acquisition of the contract and hence no taking of private property for public use in the *Omnia* case,¹² the court stated, "What was here requisitioned was the future product of the Steel Company, and, since this product in the absence of governmental interference would have been delivered in fulfillment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former, *ipso facto*, took the latter. This, however is to confound the contract with its subject-matter. The essence of every executory contract is the obligation which the law imposes upon the parties to perform it. 'It (the contract) may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other.'"¹³ The court thus indicates that the test as to whether private property is being taken in the case of a contract is whether or not the obligation is sought to be extinguished or appropriated by the government through legislative fiat. Applying this criterion to the Priorities Act, it would seem that that is just what the statute attempts to accomplish. By taking away the remedy it is extinguishing the obligation of the contract and is taking the contract for public use. This would seem to be a clear contravention of the terms of the Constitution, and unless the Act can be justified on some general principle of government or sovereignty, it would seem to be unconstitutional.

Obviously the Act is emergency legislation. In an emergency the government may exercise powers which it does not exercise in tranquil times.¹⁴ This is not to say that the government can employ unconstitutional means to preserve constitutional government. But the government in order to defend itself from destruction by external foes may, it would seem, use the property of its citizens in a manner which in peaceful times it could not constitutionally do. In times of emergency the property of citizens, which under ordinary conditions is clothed

¹² *Idem*.

¹³ *Dartmouth College v. Woodward*, 4 Wheaton 518, 629, 656 (U.S. 1819).

¹⁴ *Home Bldg. & Loan Association v. Blaisdell*, *supra*, note 8.

with only a private interest takes on a public character. To prevent the spreading of fires, for instance, property may be destroyed without compensation to the owner.¹⁵ What justification can be advanced for this, other than that the property destroyed has assumed a public character because its continuance endangers the public safety? So in like manner may private contracts of citizens obstruct the effective promotion of national defense and endanger the public safety. In order for our country to compete successfully in war with totalitarian powers, it is necessary that the entire state be geared for war. This is impossible if private contracts for production of goods monopolize the major industrial facilities of the nation. Such contracts become an obstruction to the furtherance of national safety.

Every sovereign power, whether constitutionally enfranchised or otherwise, possesses what is sometimes called the police power.¹⁶ This power indeed is the latent power of sovereignty. It has been described as the law of necessity and as being coextensive with the necessities of the case and the safeguard of public interest.¹⁷ That the Federal Government has this power was decided as far back as *McCulloch v. Maryland*.¹⁸ The Federal government possesses whatever police power is appropriate to the exercise of any attribute of sovereignty specifically granted to it by the Constitution. The powers granted by the Constitution to the Federal government include the authority to wage war and provide for the common defense.¹⁹ In order to give effect to the exercise of these powers the Constitution grants Congress the right to pass any laws necessary and proper to carry them into effect.²⁰ Does this power extend to the government's condemning private property that hampers or frustrates the exercise of this sovereign right? Is the government's right of self-protection conditioned upon the necessity of conforming with the Fifth Amendment? In the words of the Supreme Court: "It is also settled beyond dispute that the Constitution is not self destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other . . ." ²¹ This was said of the taxing power. Having been granted in express terms, the Court held this power was not taken away by the due process clause of the Fifth Amendment. As the Supreme Court put it in another case, "The Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the

¹⁵ *Bowditch v. Boston*, 101 U.S. 16 (1879); See *Ferry v. Campbell*, 110 Ia. 290, 81 N.W. 604, 50 L.R.A. 92 (1900); In re *Jacobs*, 98 N.Y. 98, 50 Am. St. Rep. 636 (1885).

¹⁶ See 11 Am. Jur., Con. Law, § 245, and cases there cited.

¹⁷ *Camfield v. U. S.*, 167 U.S. 518 (1897).

¹⁸ 4 Wheat. 316, 4 L.ed. 579 (1819); See also 11 Am. Jur., Con. Law, § 257.

¹⁹ U. S. Const., Art. 1, § 8.

²⁰ *Idem.*

²¹ *Billings v. U. S.*, 232 U.S. 261, 282 (1914).

same power away on the other by the limitations of the due process clause."²²

Similarly, it may be said that since the power has been expressly given to Congress to prosecute war and provide for the common defense, Congress also has the power to pass all laws which shall be necessary and proper for carrying those express powers into execution. The due process clause does not take away this power.

There are many laws the wisdom and justice of which is little questioned, which injuriously affect the value of or destroy property, but for which no remedy is afforded, as for example restrictions on the height and character of buildings, destruction of diseased cattle, trees and the like. In these cases the fact that all property is held subject to the condition that it does not endanger the public welfare furnishes the justification. There can logically be little difference between destroying cattle and trees to prevent contagion and destroying private contracts to prevent conquest of the nation by foreign foes. *Salus populi suprema lex* is one of the foundation principles of all civil government. At present the safety of the nation is actively and perilously threatened by a combination of aggressive world powers. The safety of the people demands that every resource be mustered in defense of the realm. It is not a conjectural question whether or not complete organization of industry to war production is necessary; it is an indisputable fact. Success in modern warfare is dependent ultimately on the producing power of the countries involved. The peacetime industry of the country must be converted into wartime industry with the utmost dispatch. This would be an impossible achievement were the government forced to requisition every private contract which hampers the war effort and pay compensation for the destruction of it.

In *Louisville & Nat. R. R. v. Mottley*,²³ the court, quoting from the *Legal Tender Cases*, 12 Wall. 550 (U.S. 1870), said, "as, in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority." The government through the *Priorities Act* is exercising the authority granted to it by the Constitution in Art. 1, Sec. 8 to provide for the common defense. Having the authority the government must also have the means. That means is the property of its citizens.

An indication of the Supreme Court's attitude on a question such as that considered here may be gathered from a dictum statement in

²² *Brushaber v. Union Pac. Ry.*, 240 U.S. 1, 24 (1915).

²³ 219 U.S. 467, 55 L.ed. 297 (1910).

the recent case of *United States v. Bethlehem Steel Corporation*.²⁴ Justice Black, speaking for the Court said, "We cannot regard the government of the United States at war as so powerless that it must seek the organization of a private corporation as a helpless suppliant. The Constitution, Art. 1, Sec. 8 grants to Congress power 'to raise and support Armies,' 'to provide and maintain a Navy,' and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. . . . Its power to draft business organizations to support the fighting men who risk their lives can be no less."²⁵

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²⁴ 62 Sup. Ct. 581 (1942).

²⁵ 62 Sup. Ct. 581, 589, 590 (1942).