AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 6: Civil War and Reconstruction – Individual Rights/Property/Takings

**House Report on War Claims (1874)[[1]](#footnote-1)**

*After the Civil War, the House of Representatives established a committee on war claims to determine how the federal government should respond to the myriad complaints of property having been used or destroyed by Union troops during the course of the war. Some such claims potentially fell within the scope of the Fifth Amendment’s requirement that private property cannot be taken for public use without just compensation. Other claims were potentially outside the scope of the Fifth Amendment. The committee took as its starting point that the “expediency of providing compensation where no legal liability exits, involves questions which a powerful and just nation should be ever ready to consider.” On the one hand, justice dictated that individual property owners who had suffered significant losses due to the federal government’s actions should have their burden alleviated. On the other hand, the potential scope of the claims were staggering. Although such war claims were not unprecedented, the context of the Civil War in which two armies composed of American citizens fought on American soil raised a host of difficult constitutional and moral issues. The committee was chaired by Ohio Republican William Lawrence, a war veteran and former judge who was later appointed to be the first comptroller of the United States treasury.*

*The deliberations of Congress informed how the federal courts would think about constitutional claims of property owners and established a statutory framework for the judicial resolution of individual claims. Congress ultimately took the view that the nation bore some moral responsibilities to property owners in the North for the destructive war, even when claims did not fall within the technical boundaries of the constitutional mandate. The Union bore no responsibility, however, for the loss of property in the South.*

*A particularly touchy question was whether the government owed anything to loyal citizens whose property was used or destroyed in the theater of war. The committee emphasized that the Fifth Amendment was written against the background of an older principle of public necessity and of the customary laws of war. Whether in peacetime or wartime, if the government made use of or damaged property in the course of protecting the public from grave danger, the government bore no responsibility to the owners for their losses.*

. . . .

During the late rebellion, or civil war, property of immense value, of every kind, was taken, used, or destroyed, on sea and land, by rebel and Union civil authorities and military forces, without any compensation rendered. It is, of course, a duty of the Government to patiently and attentively hear every claimant for compensation or damages, and pass upon the merits of the claim in the light of reason and law.

. . . .

It may be stated . . . in comprehensive terms, that the usages and laws of nations, applicable in cases of war between independent nations, apply generally to civil wars, including the recent war of the rebellion and especially when as in the States proclaimed in insurrection the lawful State governments were entirely overthrown, and the courts and civil authority of the National Government equally disregarded and powerless.

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. . . . It may be proper to say first . . . that the power of a nation over its own rebel citizens is greater in a civil war than over alien enemies, because over the former “it may exercise both belligerent and sovereign rights” – that is, the belligerent rights of war, and the sovereign right to confiscate and punish for treason – while over alien enemies it can only exercise belligerent rights.

The inquiry also arises, within what boundaries are citizens to be regarded as enemies? Certainly not in Indiana, Ohio, or Pennsylvania, for there was no insurrection in those States. There was only invasion. In some portions of Kentucky, Missouri, and Maryland, and for limited times there was insurrection, but these States were not proclaimed as in insurrection, and, as States, they never were so in fact. These States are therefore to be deemed loyal, and the citizens thereof as having all the rights of loyal citizens, except so far as they were in fact disloyal, and subject only to the sovereign and belligerent rights of the Government.

. . . .

Harsh as the rule sometimes is in its application there are reasons of State policy on which it rests, or it would not exist as law. It may be proper to refer to some of them. It is a matter of history that secession was carried in the rebel Stats, with one or two exceptions, against the real wishes of a decided majority of the voters and people. They had power to avert it. If they had reflected that secession and rebellion would stamp them all as *enemies* of the lawful National Government, subject to have their property taken or destroyed, by or in aid of its military operations, or to weaken the power in revolt, without any compensation, it might have induced a vigilance which would have averted the calamity of civil war. The inaction or want of energy in resisting secession brought death and the woes of war. Even loyal men were not everywhere or in all cases guiltless. Their moral guilt was an omission of duty. In the transgression of active secessionists all in legal contemplation transgressed. If now, all loyal citizens should be compensated for all property taken or destroyed by the Union Armies the rebellion might be to some of them, with the opportunity which always exists to fabricate fraudulent claims, rather a profitable pastime, and future attempts at revolt would stimulate them to no earnest resistance to prevent it.

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There is a maxim, too, the force of which cannot be overlooked: *Salus populi suprema lex*.

It is a principle of law, applicable alike to nations and individuals, that there is no wrong without a remedy. A nation has its rights – its remedies.

Citizens have their rights and remedies as well when a right of person or property is invaded by a nation as by individuals. The Constitution recognizes all these, leaving details to common or statutory or international law.

The fifth article of amendments to the Constitution provides that – “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.” The phrase “due process of law,” in this connection means that:

The right of the citizen to his property, as well as life or liberty could only be taken away upon an open, public, and fair trial before a judicial tribunal, according to the forms prescribed by the laws of the land.

If there were no other provision in the Constitution on the subject of life or property, the life of a rebel citizen could never be lawfully taken by command of the Government, even in battle, and property for army supplies, hospitals, and other military purposes, could never be taken for the public use against the owner’s will, except by the tedious process of a judicial proceeding in court, in the exercise of the civil right of eminent domain.

In a foreign war the Government, of course, does not organize an army for the purpose of taking the life of our citizens, and it may be said that the constitutional provisions referred to may in such case be operative, and is not violated. But in a civil war the very object of organizing an army is to take the life of rebel citizens without any “process of law,” and the fifth article of amendments has no application to such case.

But if it be said that on some principle recognized among nations, justified by reason and necessity, rebels forfeit all constitutional rights, yet some of the provisions of the fifth amendment still cannot apply to a state of war, because a citizen who is conscripted against his will, arrested, and carried into the army, is deprived of his “liberty” without any “process of law.” The war power in such case is operating, and the fifth amendment so far yields to it and is not applicable to such case.

In what has been said no reference is intended to be made to the last clause of the fifth amendment, which requires compensation for private property taken for public use. That presents a separate inquiry as to what is a “public use,” and whether compensation is to be made by force of that clause or on general principles of international law.

Since war could not be carried on if all the provisions of the fifth amendment applied in time and on the theater of war, the Constitution in view of the fact war would or might exist, gives to Congress the power – “to define and punish offenses against the *law of nations*,” “to declare war, grant letters of marque and reprisal, and make rules concern captures on land and water,” “to raise and support armies,” “to provide for the common defense and general welfare of the United States,” and makes other equally emphatic provisions relative to a state of war.

The Constitution recognizes and, *for their appropriate uses*, *adopts* “the law of nations,” and these include the *laws of war*.

The *laws of war*, equally with the amendments to the Constitution, determine certain rights of person and property. Here, then, *in the Constitution* are two systems of law, each having a purpose. By well-known legal rules of construction they are to be construed *in pari materia*; effect is to be given to each, so that neither shall fail of having an object or be defeated in its application to that object exclusive, when necessary to accomplish it.

Both systems of law cannot have full or exclusive force, effect, and operation at the same time and place or over the same rights of person and property.

The laws of peace, and the amendments to the Constitution for the security of life and property, apply in time of peace and in time of war where no war or state of war exists.

But where war is actually flagrant, or a state of war and the exercise of military authority exist, the laws of war prevail; and, so far as clearly necessary for all purposes of the war, they are so far exclusive that no antagonistic law or exercise of jurisdiction can be allowed.

It is not to be inferred from this that there is no protection for life or property. The laws of peace, the ordinary tribunals, may be allowed, even on the theater of war, to be operative, so far as practicable. And in all cases the laws of nations, including the laws of war, promise protection to life and property, as clearly and as sacred as if written in plain terms in the Constitution. The *laws of war* are, therefore, *constitutional laws*, as obligatory for their purposes as any other.

Loyal men residing in loyal States during the rebellion but having property, real or personal, in States proclaimed in rebellion, held it not as enemies, but nevertheless subject to the laws of war as affecting loyal citizens in a theater of war.

. . . .

The citizens of the eleven seceded States, for the period of war and by strict law, can only claim those rights of property accorded by the law of nations under the principles of the Constitution.

Elsewhere where actual war existed, and during its legal continuance, the rights of person and property, so far as they were interrupted by warlike operations, are, in considering the liability of the Government, to be determined by the laws of war.

The laws of war affecting rights of person and property exist independent of legislative sanction back of the Constitution itself. It does not make but recognizes them as existing and known laws. This common law of war is liable to change by treaty stipulations, by circumstances, and for all internal purposes Congress may, and during the rebellion did, materially change it, and has since wisely ameliorated its rules and made concessions gratuitously in the interest of justice, humanity, or benevolence.

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Questions may arise in several classes of cases relating to compensation for property, *real* or *personal*, taken, used, destroyed, or damaged on land or sea:

1. By the enemy.

2. By the Government military forces in battle, or wantonly or unauthorized by troops.

3. By the temporary occupation of, injuries to, and destruction of property caused by actual and necessary Government military operations in flagrant war.

4. And as to property useful to the enemy, seized and destroyed, or damaged, to prevent it from falling into their hands.

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As to the eleven States proclaimed in rebellion during the period of flagrant war, it may be said in general terms that the United States, by the strict rules of international law, incurred no liability whatever for property taken, used, damaged, or destroyed therein by Government authority, so far as dictated by the necessary operations of the war, nor by the operations of the enemy. This is well settled by every writer on the laws of war.

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By modern usage there are, and ought to be, humane limitations on the ancient right of seizure, which restrict it to what is useful in the prosecution of the war or necessary to disable the enemy.

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While these are the rights which the Government *might* lawfully enforce against all the inhabitants of the seceded States during actual insurrection, yet in practice they were wisely and humanely modified by acts of Congress, and the military authorities in virtue of their general power in special cases advised departures from strict rules.

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When private property is destroyed by the unlawful acts of individuals, government seek to give redress by civil action or to punish for acts which are criminal. But they do no indemnify the parties who may lose by such depredations.

. . . .

Nations apply the same rule when their citizens suffer losses by a foreign or domestic enemy. They are no more bound to repair the losses of citizens by the ravages of war than to indemnify them against losses by arson or other individual crimes or the destruction of flocks by wolves.

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The American rule of international law was early adopted that the Government was under no obligation to compensate its citizens for property destroyed or damages done in battle or by necessary military operations in repelling an invading enemy.

. . . .]This is the general rule which is recognized now.

It has been said, again, that –

No government, but for a special favor, has ever paid for property even of its own citizens, destroyed in its own country, on attacking or defending itself against a common public enemy, must less is any government obliged to pay for property belonging to neutrals domiciled in the country of its enemy which may possibly be destroyed by its forces in their operations against such enemy. *Perrin v. United States* (Ct. Cl. 1868)

. . . .

By the principles of universal law recognized anterior to the Constitution, in force when it was adopted, and never abrogated, every civilized nation is in duty bound to pay for army supplies taken from its loyal citizens, and for all property voluntarily taken for or devoted to “public use.”

But there is a class of cases in which property, real or personal, of loyal citizens may be temporarily occupied or injured, or even destroyed, on the theater of and by military operations, either in a loyal State or in enemy’s country, in time of war, as a military necessity. The advance or retreat of an army may necessarily destroy roads, bridges, fences, and growing crops.

In self-defense an army may, of necessity, erect forts, construct embankments, and seize cotton-bales, timber, or stone, to make barricades.

In battle or immediately after, and when it may be impossible to procure property in any regular mode by contract or impressment, self-preservation and humanity may require the temporary occupancy of houses for hospitals for wounded soldiers, or for the shelter of troops, and for necessary military operations which admit of neither choice nor delay.

In these and similar cases the question arises whether there is a deliberate voluntary taking of property for public use requiring compensation, or whether these 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. It seems quite clear that they are of this latter class.

This is so upon reason, authority, and usage of nations.

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[A]n army advancing to meet an enemy has no discretion in selecting its route. The public safety compels it to pursue that which is most practicable.

If crops stand in the way, their destruction by the march may be inevitable and unavoidable, a mere accident and incident of military operations, as much so as the destruction caused by battle.

On principle, the Government cannot be liable to make restitution for the damage, unless it has assumed to do so by an implied contract or has been guilty of a wrong.

There is in such case no contract, for this implies consent, deliberation, choice. It implies that what is done is not done as of right or by lawful authority, but by consent of all parties in interest. . . .

. . . .

The Government has always paid loyal citizens for the use and occupation of buildings and grounds in loyal States when used for officers’ quarters, regular recruiting camps, and in cases where the occupation was voluntary and the result of choice superinduced by no overruling military necessity, and for this the law provides.

But a temporary occupancy of real estate imposed by overruling necessity – an occupancy continued during the actual existence of such impending necessity – or the application of materials to purposes of defense in an emergency, has not, by the usage of the Government been regarded as giving any claim for compensation.

. . . .

The question now to be considered is, whether the Government is liable to make compensation for the property of a loyal citizen in a loyal State, seized and destroyed or damaged by competent military authorities – *flagrante bello* – to prevent it from falling into the hands of the enemy, as an element of strength where warlike operations are in progress, or where the approach of the enemy is prospectively imminent.

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There are five modes in which the Government has a right to take or use private property:

1. By taxation.

2. As punishment for crime under judicial sentence, or by sentence of a court-martial.

3. In virtue of the right of *eminent domain* for public use, with just compensation.

4. By the law of “*overruling necessity*,” which Lord Hale calls the *lex temporis et loci*, and which is both a war and peace power.

5. By the war power on the theater of military operations, *flagrante bello* for military purposes.

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The right to take property in the first, second, and fourth class of cases named exists without any duty to make “just compensation” in money.

The question of the liability of the Government to make compensation for property taken and damaged, or destroyed to prevent it from falling into the hands of an enemy, must be determined by a consideration of the character of the power exercised, and the purpose or reason of the seizure.

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It has been said, with a force of reason which has not yet been answered, that where property is taken to prevent it from falling into the hands of the enemy, the *position* of the property so situated is the owner’s misfortune.

. . . .

To require the Government to pay where it is guilty of no wrong, no omission of duty, in the exercise of both a right recognized by the civilized world and enjoined by the highest duty and for the common good, would be the harshest rule that could be recognized. If the property of a citizen is in a position where it is reasonably certain he will lose it by the seizure of an enemy, he cannot be said to be in any worse position because it is seized by his own government.

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. . . . To say that a nation is not liable if it applies the match and blows up a house a moment after the enemy gets in it, but is liable for doing the same thing a moment before, would seem a very *reductio ad absurdum*.

. . . .

A rule which would hold the Government liable might sometimes furnish an excuse for treacherous officers to omit necessary destruction of property, or induce a nation financially embarrassed to desist from the only means of preserving its existence. These considerations, so immeasurably important, should never be left to turn the hesitating scale in a moment of peril.

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A government organized to insure domestic tranquility and the common defense is *ex necessitate* clothed with the power to employ the necessary means to secure the end. But it is not necessary to invoke the aid of this well-known rule. The Constitution, in recognizing the laws of nations and the war power, gives the government a right to employ the means which it may declare necessary, or which nations usually employ, to make the common defense. These laws give the *power* and *create* the *duty* to seize property in time of war to prevent it from falling into the hands of an enemy. Where a nation exercise a lawful power in a lawful mode in the performance of an absolute duty, it would reverse every precept of reason, justice, and the whole logic of the common law to hold it liable and guilty as a trespasser or a *tort feasor*. Nor is there any principle on which to rest an express or implied contract to pay in the class of cases under consideration. No act of Congress has created any such liability.

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There is no constitutional obligation to make compensation in this class of cases, unless it be found in the last clause of the fifth amendment to the Constitution. . . .

. . . .

This constitutional provision does relate to property in time of peace. It does relate to property not in the “enemy’s country,” and not in the immediate theater where armies are operating or war is flagrant, and battle in progress or imminent, in loyal territory. In such cases the laws of peace prevail. . . .

. . . .

But there is a law of “OVERRULING NECESSITY,” entirely distinct from the right of *eminent domain*.

. . . .

And, unlike the right of *eminent domain*, whatever power is exercised in virtue of the law of overruling necessity, does not generally create a claim for compensation or damages on the citizens or Government rightfully using it in a case proper for its exercise. It is law as sacred, valid, and operative as a statute or the Constitution itself.

The exercise of the right of *eminent domain* admits of a discretion – the choice to condemn in pursuance of a statute one or another location for a post office, “for the erection of forts, magazines, arsenals, dockyards, and other needful buildings,” roads and other works for “public use.” The law of necessity, the “*lex instantis*,” on the contrary, admits of neither delay nor choice. *Respublica v. Sparhawk* (PA 1788); *Russell v. Mayor of New York* (NY 1845); *American Print Works v. Lawrence* (NJ 1847); *Parham v. The Justices* (GA 1851).

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If the general principles or purpose of the foregoing pages shall be approved, it only remains:

*First. To reject the claims now before the Committee of War Claims for which the Government is not liable by any act of Congress or rule of international law.*

*Second. To provide for the payment of those which are just and clearly proved.*

*Third. To refer to the commissioners of claims those where this is, prima facie, a legal claim, where the facts are complicated or doubtful, or require an investigation which the committee cannot give; and*

*Fourth*. As soon as practicable, *when the public finances will admit, as an act of grace and favor*, consider the claims to some measure of recompense of strictly loyal and meritorious citizens, guilty of no omission of duty, whose necessities may commend them to sympathy, or for whom special merit may demand gratitude, and who have suffered losses from the enemy in consequence of their loyalty, or from the Government as an imperative military necessity.

But those who inaugurated and urged rebellion and continued disloyal including corporations and associations of whatever character controlled by disloyal men and in the interest of the rebellion have no claim to any mitigation of the rules of international law which exempt the Government from liability. Concessions in their favor would be a violation of law, would tax loyal men without reason or justice, would obliterate the distinctions between the demands of merit and the deserts of those who have no just right to expect rewards for duties violated. Humanity, reason, and justice will sanction free and full amnesty. The past of the rebellion should be forgiven, and it should be forgotten, save only as it may serve to preserve peace and secure duty in the future, and even its memories should be, “with malice toward none and charity for all.”

1. Excerpt taken from U.S. House of Representatives, Committee on War Claims, *War Claims and Claims of Aliens*, 43rd Cong., 1st Sess., H. Rep. 262 (March 26, 1874). [↑](#footnote-ref-1)