Supplementary Material

Chapter 6: The Civil War and Reconstruction—Individual Rights/Property/Takings/Confiscation

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Norris v. Doniphan, 4 Met. 385 (KY 1863)

In 1862, *Rebecca Doniphan demanded that Norris pay the $5,000 debt he had incurred in 1860. Norris claimed that Doniphan had no right to the money because she actively supported secession. The Second Confiscation Act, Norris asserted, authorized the president to seize the assets of any person who "shall hereafter assist and give aid and comfort" to the Confederacy. Doniphan replied that the Second Confiscation Act was unconstitutional. The trial court agreed that the federal law was unconstitutional and declared Doniphan had a right to the $5,000. Norris appealed that ruling to the Court of Appeals of Kentucky.*

The Court of Appeals held that the Confiscation Act of 1862 was unconstitutional. Judge Bullitt's opinion declared that civilian property during the Civil War could be confiscated only after a court of law found the property holder guilty of treason. How does Judge Bullitt distinguish between unconstitutional and constitutional confiscations? What reason does he give for claiming that the federal government could not confiscate Rebecca Doniphan's property?

JUDGE BULLITT delivered the opinion of the court:

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It is contended that this power can be exercised under that clause of the constitution which authorizes Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." That clause, however, has no bearing on this question, because it relates only to wars with foreign nations. . . .

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The usage of nations, if applicable to the case, does not sustain this effort to confiscate property here belonging to rebels, and debts owing to them, before the commencement of hostilities; for it is settled that the modern usage of nations does not sanction such confiscation of the property of even alien enemies.

It must be conceded, however, that the courts of a sovereign engaged in war cannot compel him to observe the usage of nations, nor treat as void any act of his because it violates that usage. The law of nations has no obligatory force upon him in dealing with his subjects. He may disregard it, and establish a different rule; and if he does so, those within his jurisdiction must observe the rule so established, however it may conflict with the usage of nations. In the absence of any positive law to the contrary, the usage of nations may furnish a rule for the guidance of courts of justice; but they cannot be governed by it in the presence of a positive conflicting law made by a sovereign who may choose to disregard it. . . .

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The constitution of the United States declares that the President "shall take care that the laws be faithfully executed," and that Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." It will be conceded, for the purposes of this case, not only that these provisions authorize the government to make war for the suppression of an insurrection, which takes the shape of war, as the present one has done, but that the army and navy may lawfully prosecute the war as if it were a war with alien enemies, and according to

the usages of public wars. Does it necessarily follow that the rebels may lawfully be treated as alien enemies by all the departments of the government? We believe not.

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[T]he fact that the army may fight rebels, as if they were alien enemies, does not prove that Congress can legislate against them as if they were alien enemies.

. . . We are not prepared to admit that Congress has the power to confiscate the property of persons residing in the rebellious States, who have given no aid to the rebellion, or who have given it no aid except upon compulsion, and who have given all the aid they could to the government of the United States, while receiving from it none of the protection to which they were entitled. . . .

. . . [T]he constitution alone governs the relations between the parties to this contest; that it governs the army as well as the President, the Congress, and the courts, with reference to the conduct of the war; and that it gives to the army, as an incident inseparable from the power to prosecute the war, the same right to treat rebels, taken in arms, as prisoners of war, which it gives to the courts, under other circumstances, to treat them as traitors.

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. . . The constitution was designed to be perpetual, and neither the President nor the Congress has power to suspend it in war or peace. Even if the law of nations applies to this contest, it can not confer upon the government any power, the exercise of which is prohibited by the constitution, or which is inconsistent with the nature of the government established thereby. The law of nations concedes to a sovereign, who has closed a war by conquest, the right to establish any form of government that he may choose over the conquered nation. Consistently with that law he may completely change their municipal laws and political regulations; he may convert a free commonwealth into a dependent province, and govern it despotically. Why may not similar powers be exercised by this government over the people of the Southern States? If it can deprive them of their rights of property, in the manner proposed by the act under consideration, why may it not, by a sweeping act of outlawry, deprive them of the right of suffrage, and of all other of their rights as citizens of the Union and of the States in which they reside? If it may adopt any policy it pleases for the purpose, or the avowed purpose of subduing them, why may it not adopt any policy it may please for the purpose, or the avowed purpose, of holding them in subjection after subduing them? Yet it seems clear that such powers can not be lawfully exercised over them if the rebellion should be subdued, because they are inconsistent with the nature of the government, and the exercise of them is prohibited by the constitution, which declares that "the United States shall guarantee to each State in this Union a republican form of government," and which contains many other provisions that are entirely incompatible with the exercise of the powers in question.

If Congress had the power to enact this statute, it can adopt such measures as may be necessary to carry it into effect. It is probable that, in order to carry its provision into effect, it will be necessary not only to defeat and disperse the Southern armies in the field, but to subjugate the people of the Southern States, and to hold them in a condition of permanent subjection to the government of a nominal Union, to be controlled by the people of the other States, unless they also should lose their liberties in an effort to subjugate others. It seems certain that the framers of the constitution did not mean to clothe Congress with the power thus to destroy the government.

The facts, that the constitution declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort;" that it prescribes the mode of trying citizens charged with levying war against the United States and the place of trial, and that it limits the punishment of them, proves that its framers did not contemplate a suspension of its provisions by civil war, nor a denial to traitors of its guaranties, nor the exercise over them of powers which it does not confer.

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It seems equally clear that the constitution does not authorize the confiscation of the property of a rebel, because of his crime, without a trial by jury of the offender and his conviction "by due process of law" (5th amendment), unless the power can be derived from those provisions of the constitution which authorize the government to suppress insurrections. Whether or not the power can be thus derived depends upon the question whether or not such confiscation is an act of war.

The right of the government of the United States, during either a public or civil war, to confiscate enemy's property taken upon the high seas is not denied. This is an act which is made lawful by the declaration or existence of war, and need not be authorized by Congress. The seizure, in such cases, is a purely military act, and its sanction, by a judicial condemnation of the property, does not deprive it of that character, but justifies it, as such, to foreign nations, whose citizens may have an interest in the property.

But the seizure and confiscation of enemy's property on land, which is not contraband of war, are not acts of war. If they were, they could be performed by the army, or be made lawful by an order of the commander-in-chief, without other authority than that conferred by the declaration or existence of war. . . .

. . . The restrictions in the constitution upon the powers of the government were designed to protect the people of the United States, and not aliens resident abroad. The protection received by aliens, residing abroad, with reference to their property here, is due to international comity, and not to the constitution of the United States. War may authorize the government to refuse comity to its enemies, but can not authorize it to suspend the constitution, by virtue of which alone it has a right to exist. And, moreover, as has been shown, the constitution contains a provision authorizing Congress "to make rules concerning captures on land and water," during public wars, which does not apply to civil wars. In our opinion, the existence of civil war does not confer upon this government any belligerent right whatever, except the right to perform acts of war for the suppression of the rebellion. . . .

Though the constitution declares that, "no person shall be deprived of life, liberty, or property, without due process of law," yet a rebel may lawfully be slain in battle and thus be deprived of life, or he may lawfully be captured in battle and thus be deprived of liberty; because, these being acts of war, are authorized by those other provisions of the constitution which authorize the prosecution of the war. But those provisions do not authorize the confiscation of his property in the manner proposed by the statute under consideration, because such confiscation is not an act of war. Nor is such confiscation authorized by any other provision of the constitution. On the contrary, it is prohibited.

The fifth amendment, declaring 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," prohibits the confiscation or forfeiture of the property of any citizen of the United States, unless it can be sustained as a purely military act, which, as has been shown, can not be done with reference to the property aimed at by the statute under consideration, or unless it can be sustained as a punishment for treason, or other crime, the punishment of which Congress is authorized to prescribe.

The confiscation aimed at by the statute under consideration can not be sustained as a punishment for treason, because the statute undertakes to authorize the condemnation of the property by a district court, in any district in which any of the property may be found, or into which, if movable, it may first be brought, without presentment or indictment by a grand jury, without the arrest or summons of the owner, and upon such evidence of his guilt as would be sufficient proof of any fact in admiralty or revenue cases; while the constitution declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger (fifth amendment); that the trial of all crimes, except in cases of impeachment, shall be by jury, and shall be held in the State where the said crime shall have been committed (article 3, section 2, sub. 3); and shall be by an impartial jury of the State and district wherein the said crime shall have been committed, and that the accused shall enjoy the right to be confronted with the witnesses against him (sixth amendment); and that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. (Art. 3, sec. 3, sub. 1.) And these provisions, except the last one, render it equally clear that this attempt at confiscation, or rather at forfeiture, can not be sustained as a punishment for any crime less than treason.

If, therefore, the act should be regarded, as we believe it must be, as an attempt to punish citizens for treason, or for aiding or abetting the rebellion, it is unconstitutional and void, because it authorizes a trial of those crimes in a mode different from that required by the constitution.

If it should be regarded as an attempt, not to punish those citizens for crime, but to support the army of the United States with the proceeds of their property, it is unconstitutional and void, because it makes no provision for compensation. The constitution does not recognize military necessity, nor any other necessity whatever, as an authority for "taking private property for public use," in peace or in war, without just compensation.

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JUDGE WILLIAMS delivered his separate opinion as follows:

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Although [the Confiscation Act] appropriates the proceeds of the property to be seized and condemned, to the support of the army, and for the purpose of suppressing the rebellion; yet, by its own provision, the title of the act, the previous and subsequent sections of the act, it is apparent that it was intended as a punishment—a forfeiture of rebel property for their treasonable acts.

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It is, then, a punishment for crime—treason—to be established before a court of the United States; not upon an indictment, arraignment, and trial by his peers, confronted by the witnesses, and the testimony of two witnesses to each overt act, the unanimous verdict of twelve impartial persons, which may be selected after the right of challenge by the accused shall have been exercised or waived, and the judgment of the court pronouncing sentence upon the verdict of guilty, after the accused shall be heard by himself and counsel; all of which are understood to be rights secured by the constitution; but it is by an *ex parte* proceeding *in rem,* in the absence of the party and without his knowledge; and, though the trial may be by jury, it is to be selected without the exercise of the right of challenge, without the testimony of two witnesses to each overt act, without being confronted by the witnesses, without being heard by himself or counsel; the accused is convicted, stripped of his estate, impoverished, his innocent offspring ruined, with the traitor's seal placed upon him, attaching disgrace to his posterity, by the solemn adjudication of the court.

After being thus punished by a proceeding *in rem,* he may return or be captured, indicted, put upon his trial, convicted, and sentence of death pronounced by the court. Or, he may be acquitted after a fair trial, by an impartial jury, being confronted by the witnesses, and the testimony of two witnesses to each overt act being required, and having been heard by himself and counsel; and thus, by the most solemn act and highest evidence known to the law, such as shall never be gainsayed by any subsequent proceedings, he may stand acquitted, his innocence of crime manifested. Still, by another proceeding *in rem,* he finds himself convicted, his property confiscated, himself and offspring ruined, for the very crime he now stands acquit of committing.

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Let us pause a moment to consider what is meant in the constitution, "by due process of law," without which *no person* is to be deprived of *life, liberty, or property.* . . . The words, by the law of the land, as used originally in *Magna Charta,* in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men. The better and larger definition of *due process of law* is, that it means law in its regular course of administration through courts of justice. . . .

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Are these solemn declarations of rights, these great safeguards to the security of the citizen, to be swept away by the furor of this rebellion? Are not the loyal citizens interested in the preservation of these great bulwarks of their liberty for themselves and posterity? These proceedings may to-day be the engines of punishment to the rebels, but in the future they may be the instruments of oppression, injustice, and tyranny to themselves or their posterity. If these are as valuable as we have been taught by our fathers to regard them, they are worth vastly more to us and our posterity than any amount of property the rebels may own, though it were a hundredfold more than it is, and though it were both desirable and certain that we should secure all they possess. Or, if viewed in the light of punishment alone, would it not be the height of madness and folly to throw away our own shield and safeguard, revolutionize our government, endanger our liberties, in order to punish our enemies?

The framers of the constitution, having closed the door against legislative attainder, both by the national and State legislatures, first, by section 9, subsection 3, article 1, United States constitution, which provides that " *no bill of attainder or ex post facto* law shall be passed" by Congress—second, by section 10, subsection 1, same article, which, among other things, provides that no State shall "pass any *bill of attainder* or *ex post facto* law," etc., it only remained to place the proper restriction on judicial attainder for treason, to get rid of the gross injustice, oppressions, and tyranny of the common law, British statutes, and the machinery of the English government, often invoked to crush and ruin those who had become obnoxious to the reigning dynasty, as well as the unjust and oppressive acts of the American States, passed under the deep and excited resentments of the Revolution. And this was most effectually done, by this section 3, article 3, declaring in what treason should consist, and limiting the consequences of attainder for treason to forfeiture for the life of the offender as to property.

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This act of Congress not only, in contravention of the United States constitution, forfeits absolutely the personal estate of the rebels, but also declares his slaves free, in contravention of the legitimate constitution and laws of the seceded States, and also in contravention of the constitution and laws of the loyal States; thus perpetrating the double violation of the United States constitution and State constitutions, and destroying an essential and integral part of its own government.

Is it possible that loyal States have forfeited any rights by this rebellion? Can it be that their constitution and laws, which existed previous to the rebellion, and were respected and observed by the Federal government, are any the less obligatory and sacred now than then? Is it possible that the loyal citizens, of the loyal States, have lost the right to enact their own laws, not inconsistent with the constitution of the United States and laws enacted in pursuance therewith, and have those laws observed by that government for which they have so freely poured out their blood and treasure? These are great and essential principles in our system of free government that should not be thrown away, merely for the gratification of punishing rebels; and, when once lost, may never be regained.

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In order to punish treason, the offender must be indicted, arraigned, convicted, and adjudged guilty, and then, if sentenced to death, no other punishment can be inflicted; but, if the death penalty is not prescribed, fine, imprisonment, and forfeiture for life, may be prescribed—but, to the war power, belongs no right of punishment for treason. No military court, no military tribunal, can, or dare attempt to punish for treason. The trial of this crime has been confided, by the constitution, to the civil courts of the country; the punishment is to be prescribed by the laws of the land, with the limitation that no attainder shall work corruption of blood or forfeiture, except for the life of the person attainted.

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The infinite wisdom of the constitution is made the more manifest by the magnitude of this rebellion. For, when it shall have been subdued, and the majesty of the constitution and laws of the United States shall be acknowledged throughout its broad confines, and when it shall have exhausted the measure of punishment it may prescribe, within constitutional limits, on the guilty, there the punishment must cease. The constitution does not permit the calamity to be visited on the unoffending offspring, and many millions of these reduced to a state of absolute and unmitigated pauperism.

If the principles herein announced be correct, it follows that the absolute forfeiture of the slaves, and freedom thereof of those convicted under the first and second sections of said act of Congress—although the conviction and judgment otherwise may be strictly in accordance with the constitution—is also unconstitutional and void, as being in conflict both with the constitution of the United States and of this State; for, whatever may be the embarrassments growing out of the repugnance of those who may administer the Federal government to its holding slaves, or the use to which they may desire to dedicate them, in the exercise of the right and power of the government to forfeit for the life of the offender, on judgment of treason against him, yet this cannot confer on the government power forbidden by the constitution of the United States and violative of the State constitutions.