

Michigan Law Review

Volume 48 | Issue 2

1949

CONSTITUTIONAL LAW-EMINENT DOMAIN-ELEMENTS OF FAIR VALUE

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Recommended Citation

Hugh B. Muir, *CONSTITUTIONAL LAW-EMINENT DOMAIN-ELEMENTS OF FAIR VALUE*, 48 MICH. L. REV. 226 (1949).

Available at: <https://repository.law.umich.edu/mlr/vol48/iss2/8>

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RECENT DECISIONS

CONSTITUTIONAL LAW—EMINENT DOMAIN—ELEMENTS OF FAIR VALUE—Respondent bought the tug *MacArthur* from the Coast Guard in March, 1942. Exclusive of his own labor, his outlay for purchase and repair of the tug totaled \$8,574.78. In October, 1942, the War Shipping Administration, acting under the Merchant Marine Act of 1936,¹ requisitioned the tug and awarded compensation of \$9,000. Respondent contested the award, and the Court of Claims found that the fair market value at the time of taking was \$15,500. This determination was made without deduction for enhancement of value due to the government's need of vessels, or previous taking of vessels of similar type.² The Court of Claims found that immediately prior to the time of requisition, there was no reasonable prospect that the *MacArthur* would be requisitioned³ and that respondent therefore should be paid the fair market value as determined. On certiorari, *held*, reversed, Justice Frankfurter dissenting in an opinion concurred in by Justices Jackson and Burton, and Chief Justice Vinson dissenting without opinion. The just compensation requirement of the Fifth Amendment need not include allowance for *any* enhancement of value resulting from the government's extraordinary or special demand for the property. *United States v. Cors*, 337 U.S. 325, 69 S.Ct. 1086 (1949).

When property is taken under eminent domain, the measure of just compensation is the fair market value of the property⁴ to be ascertained as of the date of the taking.⁵ So long as the market is free, existing prices measure market value even when inflated by a war.⁶ The measure of compensation may include value for all available uses of the property but not the value to the taker for the particular use sought to be made by the condemnor.⁷ Thus, the value

¹ 49 Stat. L. 2015, §902 (1936), as amended, 53 Stat. L. 1255 (1939), 46 U.S.C. (1940) §1242. Sec. 902(a) provides that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use."

² Rule 4 of the directions prescribed by the President's Advisory Board on Just Compensation, established by Exec. Order 9387, Oct. 15, 1943, 8 Fed. Reg. 14105, 3 C.F.R., 1943 Supp. 48-49, stipulated that deduction should be made for "...any enhancement due, to the government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable..."

³ *Cors v. United States*, 75 F. Supp. 235 at 239 (1948).

⁴ 1 NICHOLS, EMINENT DOMAIN, 2d ed., §217 (1917); ORGEL, VALUATION UNDER EMINENT DOMAIN, §16 (1936).

⁵ ORGEL, VALUATION UNDER EMINENT DOMAIN, §20 (1936).

⁶ *L. Vogelstein & Co., Inc. v. United States*, 262 U.S. 337, 43 S.Ct. 564 (1923); *Gulf Refining Co. v. United States*, 58 Ct. Cl. 559 (1923); *United States v. New River Collieries Co.*, 262 U.S. 341, 43 S.Ct. 565 (1923).

⁷ ORGEL, VALUATION UNDER EMINENT DOMAIN, §30 (1936); 1 NICHOLS, EMINENT DOMAIN, 2d ed., §220 (1917); *Boom Co. v. Patterson*, 98 U.S. 403 (1878); *Middleton S. Borland and James A. Emerson, Receivers of the Hudson Navigation Co. v. United States*, 57 Ct. Cl. 411 (1922); *C. G. Blake Co. v. United States*, 275 F. 861 (1921), *affd.*, 279 F. 71 (1922).

cannot be enhanced by speculation on what the government can be forced to pay, because the very purpose of eminent domain is to prevent the owner from taking advantage of the necessities of the condemnor.⁸ But, unless the property to be taken has been determined and is therefore within the scope of the project, a general price rise reflecting the probability of a taking for public use may be included in the measure of compensation.⁹ In the instant case, the lower court specifically found that there was no reasonable prospect that the *MacArthur* would be requisitioned—a fact which would seem to exclude any possibility of enhancement of value or hold-up price due to speculation on what the government would pay. But the Court placed its decision on the general principle that *all* enhancement of value due to the government's special need for the vessel should be excluded. By so doing, the respondent is left with two alternatives: (1) to forego claim to any enhancement of value on a wartime market or, (2) to submit proof of the extent to which government activity in the particular market resulted in an increment in value. The latter alternative is highly impracticable if not impossible. The majority decision alters the judicial standard of just compensation of earlier decided cases.¹⁰ In the principal case the Court failed to distinguish value enhanced by a shortage and an increased demand, from value enhanced by speculation on what the government could be forced to pay. Scarcity of supply and increased demand cannot be said to constitute an artificial enhancement.¹¹ Here the increase in value resulted from the intensified demand for the tugs which remained, a value which respondent could have realized by private sale had the government not exercised its power of requisition.¹² Implicit in the constitutional requirement of just compensation is indemnity to the owner¹³—compensation for his loss—which should at least be the price he could have obtained at a private sale where there is no reasonable probability of a prospective taking. The problem becomes especially acute in the present case

⁸ *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276 (1943). For a complete discussion of the analogous problem in land cases see 147 A.L.R. 66 (1943).

⁹ *United States v. Miller*, *supra*, note 8, at 377: "The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement."

¹⁰ *United States v. New River Collieries Co.*, *supra*, note 6; *Prince Line v. United States*, 283 F. 535 (1922).

¹¹ *C. G. Blake Co. v. United States*, *supra*, note 7; *National City Bank v. United States*, 275 F. 855 (1921), *affd.* 281 F. 754 (1922). Above arose under §10 of the National Defense (Lever) Act of August 10, 1917, and involved questions substantially the same as considered in the principal case.

¹² That respondent could have sold the tug to private parties for \$15,500 was not disputed by the government. *Cors v. United States*, *supra*, note 3.

¹³ 1 NICHOLS, *EMINENT DOMAIN*, 2d. ed., §208 (1917); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 33 S.Ct. 667 (1913).

because the activity of the government in the tug market undoubtedly had a direct bearing on the market price. But in view of the difficulty of proof of the effect which the government's activity in this particular market had on market value, the result reached by the Supreme Court appears to be an inequitable departure from previous judicial standards of just compensation.¹⁴

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¹⁴In view of the explicit finding the Court of Claims and conclusive evidence in the record in support thereof, the dissenting justices would have avoided the constitutional issue and used market value, since no other standard capable of being observed had been suggested. See dissenting opinion in principal case.