franchise must be held in practical operation to be a tax upon the income . . . This tax is equivalent to a tax upon relator's income' "; and then added, " it is primarily a tax levied for the privilege of doing business in the state." This amounts to nothing more than a repetition in brief of what Judge Cardozo, more at length, already had said, namely, that in practical operation the tax is one *upon* income *for* the privilege of doing business; and it leaves the conclusion set forth in the quotation we have made from the *Knapp* case wholly without modification.

These views, we submit, require a reversal of the judgment below.

---

## INTERNATIONAL PAPER COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 37. Argued January 7, 1931.—Decided January 19, 1931.

1. Section 120 of the National Defense Act of 1916, which empowered the President, in time of war, to place obligatory orders with corporations for any product or material required, of the kind usually produced by them, was sufficient authority for taking the right held by a lessee to make use of part of the water in a power canal, such taking being accomplished by requisitioning from the power company owning the canal all the electrical power capable of being produced by the use of all waters capable of being diverted through its intake for its plants and machinery connected therewith. P. 406.
2. A requisition by the Government upon a power company for the production of all the electrical power capable of being produced through the full use of the waters of its intake canal, including the use to which a lessee of the company was entitled under rights which by state law were a corporeal hereditament and real estate, *held* a taking for public use of the water rights of such lessee, and that the latter is entitled to compensation therefor, notwithstanding that, by an agreement made between the Government and the power company at the time of the requisition, the Government

waived delivery of the power on condition that it be distributed to certain designated private companies (of which the lessee was not one) for war uses, and the company waived all right to compensation if permitted to carry on its business and to sell its power consistently with the exigencies of the national security and defense. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, distinguished. P. 407.

3. Secretary of War, in making war-time requisition of electrical power generated by diversion of water from Niagara River, *held* not to have acted pursuant to powers in respect of navigation or under treaty, but to have exercised power of eminent domain. P. 407.

68 Ct. Cls. 414, reversed.

CERTIORARI, 281 U. S. 710, to review a judgment of the Court of Claims in favor of the United States in a suit against it to recover compensation for property rights in water alleged to have been taken for war purposes.

*Mr. John W. Davis,* with whom *Messrs. William C. Cannon, Montgomery B. Angell,* and *Porter R. Chandler* were on the brief, for petitioner.

The water rights of the petitioner were without doubt taken, and intentionally taken, during the ten months period in which the requisition order remained in effect. These water rights were of such a character that they constituted private property within the meaning of the Fifth Amendment, for which, if taken, compensation must be paid. *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166; *United States* v. *Lynah,* 188 U. S. 445; *United States* v. *Welch,* 217 U. S. 333; *United States* v. *Wayne County,* 252 U. S. 574; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *North American Transp. Co.* v. *United States,* 253 U. S. 330; *James* v. *Campbell,* 104 U. S. 356; *Central Trust Co.* v. *Hennen,* 90 Fed. 593; *Williams* v. *United States,* 104 Fed. 50. See especially *Duckett & Co.* v. *United States,* 266 U. S. 149. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, distinguished.

The taking was not accompanied by any revocation of the federal license, and the express promise to pay just compensation negatives any taking under a claim of right.

The Power Company's waiver of compensation cannot operate to deprive the petitioner of its rights to compensation in respect of its own property.

Neither the treaty with Great Britain nor the Federal Water Power Act has the effect of transferring proprietary rights under the laws of the State of New York to the Federal Government.

The taking of petitioner's water rights was pursuant to statute, and was not the mere private or tortious act of the Secretary of War. The extent of a statutory authorization is not to be narrowly or unnecessarily restricted, where the circumstances warrant giving to the words used a wider scope, in order fully to carry out the purpose of the legislation. This is particularly true of a war-time authorization granted to the President as commander-in-chief of the armed forces, or to an agency of the Government acting in the interests of the national defense. *Manufacturers' Land & Imp. Co.* v. *Emergency Fleet Corp.*, 264 U. S. 250, 255. Cf. *Maresca* v. *United States*, 277 Fed. 727, 735, certiorari denied 253 U. S. 498.

If there was any defect in authority under the National Defense Act, there was, we believe, ample authority for the taking under the Urgent Deficiency Appropriation Act of April 17, 1917, c. 3, 40 Stat. 28. Urgent Deficiency Act of December 15, 1917, c. 3, 40 Stat. 429.

When the requisition order was made, the Government had full knowledge of petitioner's rights—had, in fact, taken some pains to inquire as to the extent of those rights—and specifically intended to appropriate petitioner's property. The requisition order was a peremptory command,—an act of sovereignty and not an offer to negotiate. *Liggett & Myers* v. *United States*, 274 U. S. 215, 220. By its terms, the Secretary of War undertook

to make the requisition in the name of the President "and by reason of the exigencies of the national security and defense."

The Government attempts to argue that petitioner's only remedy is an action sounding in tort against the Power Company. Such an action would be met at the threshold with the answer that the shut-off of petitioner's water was not effected by the Power Company, but by the United States Government, acting pursuant to statutory authority.

The taking of petitioner's water was not a mere "regulation" but was a substantial deprivation of property, for which compensation must be paid.

Petitioner is entitled to interest as a part of the just compensation guaranteed to it by the Constitution.

*Mr. Claude R. Branch* argued the cause and *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Erwin N. Griswold* and *H. Brian Holland* filed a brief, for the United States.

It does not appear that the alleged taking of petitioner's water rights was, expressly or by necessary implication, authorized by legislative enactment, and in the absence of such authorization, petitioner is without recourse against the United States.

Several statutes, such as the National Defense Act, gave the President broad powers with respect to the appropriation of manufactured articles in time of war. It was doubtless under these that the Secretary of War assumed, in behalf of the President, to requisition the output of the power plant. But the grant of authority merely to requisition the product of a power plant does not authorize the taking of water power from a third party in order to increase the productive capacity of the plant.

It does not appear that the President or the Secretary of War was entitled to requisition anything other than

electric power which the Power Company could produce by means of facilities and materials over which it had control. *Duckett & Co.* v. *United States,* 266 U. S. 149, distinguished.

The *res* which was taken was "the total quantity and output of the electrical power," and not the use of waters diverted or capable of being diverted through the canal. The Government did not want water power, and did not take it. It did intend that use should be made by the Power Company of water theretofore used by the Paper Company. But it does not follow from this that the Government intended to expropriate the water. The petitioner was advised of the contents of the requisition order, but it was not directed or requested to relinquish its water rights either to the United States or to the Power Company. Thus there was no physical taking by the United States of any property belonging to the Paper Company, and the case is distinguishable from *Duckett & Co.* v. *United States, supra.*

The execution of the waiver precludes the idea of there having been any appropriation by the United States even of the power produced by the Power Company. Ultimately the Government took nothing, and assumed only to regulate the selection of the Power Company's sale of its product to essential industries. If, as petitioner argues, electrical power is the *alter ego* of water power, then since the Government did not take electricity it did not take water.

There can be no recovery under the Fifth Amendment unless property is actually taken and used by the sovereign for a public purpose, *Legal Tender Cases,* 12 Wall. 457; *Transportation Co.* v. *Chicago,* 99 U. S. 635; *Gibson* v. *United States,* 166 U. S. 269; *Scranton* v. *Wheeler,* 179 U. S. 141; *Wisconsin, M. & P. R. Co.* v. *Jacobson,* 179 U. S. 287; *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146.

The jurisdiction of the Court of Claims to enter judgment on a claim founded on expropriation of property

must rest on the receipt of a consideration moving to the United States. *Bothwell* v. *United States,* 254 U. S. 231; *Interocean Oil Co.* v. *United States,* 270 U. S. 65, 69.

This case, although not necessarily controlled by *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, is more closely comparable to it than to the *Duckett* case.

The interference with petitioner's property was, at most, a result of the exercise of the power of the United States to regulate industry and the use of natural resources in time of war, for which no compensation is payable. *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188; *Pine Hill Coal Co., Inc.* v. *United States,* 259 U. S. 191; *Atwater & Co.* v. *United States,* 275 U. S. 188.

This Court has repeatedly held that the sovereign may, in the exercise of governmental powers, promulgate regulations and impose restrictions amounting in substance to a deprivation or even complete destruction of property rights. *Louisville & N. R. Co.* v. *Mottley,* 219 U. S. 467; *United States* v. *Delaware & H. Co.,* 213 U. S. 366; *Morris* v. *Duby,* 224 U. S. 135; *Tagg Bros.* v. *United States,* 280 U. S. 420.

If the petitioner is entitled to recover for the taking, it is not entitled to interest.

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding by the petitioner to recover compensation for property rights in water of the Niagara River alleged to have been taken by the United States for war purposes. The Niagara Falls Power Company by private grant to it, Letters Patent from the State of New York and acts of the Legislature of that State, was the owner so far as the law of New York could make it owner of land and water rights on the American side of the River above the Falls. Included in them was a power canal through which the Power Company was authorized

to divert 10,000 cubic feet per second, at the time of the alleged taking. From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second,—a right that by the law of New York was a corporeal hereditament and real estate.

On December 28, 1917, the Secretary of War wrote to the Power Company that " The President of the United States by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defence, hereby places an order with you for and hereby requisitions the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal and/or your plants and machinery connected therewith." Immediate and continuous delivery of such power was directed and it was added " You will be paid fair and just compensation for power delivered hereunder." At the same time an agreement was made by the Secretary of War and the Power Company, (reciting that the President has requisitioned the power as above,) to the effect that the Secretary of War " acting for and in behalf of the United States " until further notice waives delivery of the power to the United States on the express condition that the Power Company shall distribute such power as provided in a schedule naming companies and amounts but not naming the petitioner, and on the other side the Power Company waives all right of compensation by reason of said requisition if permitted to carry on its business and to sell consistently with the exigencies of the national security and defence. On December 29, the representative of the Secretary of War wrote to the secretary of the Power Company " Please note that the requisition order covers also all of the water capable of being diverted through your intake canal. . . . This is intended to cut

off the water being taken by the International Paper Company and thereby increase your productive capacity," and on December 31 telegraphed to the counsel of the petitioner " Power Company has been directed to take water hitherto used by International Paper Co." The petitioner had been notified of what was to happen but was allowed time to run out its stock on hand. On February 7, 1918, its use of the water ceased and was not resumed until midnight November 30, 1918, when the order of December 28 was abrogated. The Court of Claims found that the shutting off of the water from the petitioner's mill cost it $304,685.36, direct overhead expense, but gave judgment that the petition be dismissed.

The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late. We shall accept as sufficient answer the reference of the petitioner to the National Defense Act of June 3, 1916, c. 134, § 120, 39 Stat. 166, 213; U. S. Code, Title 50, § 80, giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation.

Then it is said that there was no taking, but merely a making of arrangements by contract. But all the agreements were on the footing that the Government had made a requisition that the other party was bound to obey. *Liggett & Myers Tobacco Co.* v. *United States,* 274 U. S. 215, 220. It is said that the Power Company and the petitioner could withdraw water from the River only by license from the United States, under the Act of June 29, 1906, c. 3621, 34 Stat. 626, and that the license was revoked by what was done. But the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end. He proceeded on the footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish. There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use. It is true that the petitioner did not come within the scope of the Government's written promise to pay. But the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power. *Phelps* v. *United States,* 274 U. S. 341, 343. *Campbell* v. *United States,* 266 U. S. 368, 370, 371. *United States* v. *Great*

*Falls Manufacturing Co.*, 112 U. S. 645, 656. Of course it does not matter that by a subordinate arrangement it directed the use of the power to companies that would fulfil its purposes rather than to machinery of its own. That arrangement it was able to make only because it took the power.

We perceive no difficulty arising from the case of *Omnia Commercial Co.* v. *United States*, 261 U. S. 502. There the taking of the whole product of a company went no further than to make it practically impossible for that company to keep a collateral contract to deliver a certain amount of steel to the appellant. But here the Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power in the canal. Our conclusion upon the whole matter is that the Government intended to take and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power, and that it did not make the taking any less a taking for public use by its logically subsequent direction that the power should be delivered to private companies for work deemed more useful than the manufacture of paper for the exigencies of the national security and defence. See *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30.

*Judgment reversed.*

Mr. JUSTICE MCREYNOLDS, Mr. JUSTICE STONE and Mr. JUSTICE ROBERTS are of opinion that the judgment of the Court of Claims should be affirmed.