

113/69

## Supreme Court of the United States

October Term, 1968

In the Matter of:

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THE NATIONAL BOARD OF THE YOUNG MEN'S  
CHRISTIAN ASSOCIATIONS, et al.,

Petitioner,

vs.

UNITED STATES OF AMERICA  
-----X

Docket No. 517

Office-Sup. Court, U.S.  
FILED

MAR 13 1969

JOHN F. DAVIS, CLERK

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C O N T E N T S

ORAL ARGUMENT OF:

P A G E

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on behalf of Petitioner . . . . . 2

Peter L. Strauss, Esq.  
on behalf of The United States . . . . . 18

REBUTTAL ARGUMENT OF:

Roanld A. Jacks, Esq.  
on behalf of Petitioners . . . . . 40

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -x  
4 The National Board of the Young Men's :  
Christian Associations, et al., :

5 Petitioners, :  
6 :

7 v. :  
8 :

No. 517

9 United States of America :  
10 - - - - -x

11 Washington, D. C.  
12 March 3, 1969.

13 The above-entitled matter came on for argument at  
14 12:48 p.m.

15 BEFORE:

16 EARL WARREN, Chief Justice  
17 HUGO L. BLACK, Associate Justice  
18 WILLIAM O. DOUGLAS, Associate Justice  
19 JOHN M. HARLAN, Associate Justice  
20 WILLIAM J. BRENNAN, JR., Associate Justice  
21 POTTER STEWART, Associate Justice  
22 BYRON R. WHITE, Associate Justice  
23 ABE FORTAS, Associate Justice  
24 THURGOOD MARSHALL, Associate Justice

25 APPEARANCES:

26 RONALD A. JACKS, Esq.  
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28 Washington, D. C.  
29 (Counsel for Petitioners)

30 PETER L. STRAUSS, Esq.  
31 Assistant to the Solicitor General  
32 Department of Justice  
33 Washington, D. C. 20530

1                                P R O C E E D I N G S

2                MR. CHIEF JUSTICE WARREN:    No. 517, The National  
3 Board of the Young Men's Christian Associations, et al.,  
4 Petitioners versus the United States.

5                THE CLERK:    Counsel are present.

6                MR. CHIEF JUSTICE WARREN:    Mr. Jacks.

7                        ORAL ARGUMENT OF RONALD A. JACKS, ESQ.

8                                ON BEHALF OF PETITIONERS

9                MR. JACKS:    Mr. Chief Justice, may it please the  
10 Court.

11                I believe we have made arrangements, the petitioner  
12 in the Solicitor General's office, for the use of a diagram,  
13 if we may, that the Marshal is bringing in at this moment.

14                I may just in advance say that this is an action for  
15 just compensation under the Fifth Amendment to the United  
16 States Constitution.    It arises out of the United States Army's  
17 seizure and use of private property, in this case buildings,  
18 belonging to the Petitioners, during the Panamanian riots of  
19 1962.

20                The issue before this Court, as we view it, is whether  
21 the Court of Claims correctly held that U. S. military forces  
22 may seize and use private property without incurring a duty to  
23 provide compensation under the Fifth Amendment whenever they  
24 are faced with a "immediate necessity."

25                The facts are as follows:    If I may briefly refer to



1 it. This is a chart that was prepared by the United States  
2 Government for presentation in the organization of American  
3 states following the Panamanian riots in the course of a  
4 charge that the United States was the aggressor in these riots.

5 Its accuracy has been stipulated to.

6 The buildings that are here (indicating) are the real  
7 property in question. This is the Masonic Temple and this is  
8 the YMCA, belonging to the petitioners here.

9 This is Cristobal and Colon on the Atlantic or Northern  
10 end of the Zone. This is the Canal Zone and this is the Republic  
11 of Panama and the boundary runs down the middle of this street,  
12 11th Street, and down Bolivar Avenue.

13 On the evening in question, January 9, 1964, the  
14 United States Military Forces were called to this end of the  
15 zone in response to a request from the Civilian Command and  
16 ordered to clear the Zone of rioters.

17 The United States Army troops, starting here on Front  
18 Street, moved down 11th Street, cleared the Zone of rioters  
19 moved behind the YMCA and Masonic Temple, had brief scuffles  
20 with rioters who were then in both of those buildings, evicted  
21 them, moved them out to the streets, and took up position,  
22 stationed troops on the boundaries in the middle of the street  
23 just inside the Border on the boundary line.

24 This is approximately from 10 to midnight on the  
25 night of January 4. Shortly after midnight they began to

1 receive sniper fire directed at the troops stationed in front  
2 of the building.

3 Q Directed at what station?

4 A Pardon me, Mr. Chief Justice. Directed at the  
5 United States Army troops stationed in the street along 11th  
6 Street and Bolivar Avenue. They were actually out in the  
7 street at that point.

8 Q Will you point out where your building is again?

9 A Yes, this is the YMCA and this is the Masonic  
10 Temple.

11 Q Right next to it?

12 A Right next to it. The Masonic Temple forms the  
13 building inside the right angle at that point.

14 Q Is that involved in the litigation?

15 A Yes, it is, Mr. Chief Justice, both the Masonic  
16 Temple and the YMCA are petitioners in this action. The troops  
17 were stationed along Bolivar and 11th Street and began to  
18 receive sniper fire and at that point the local commander  
19 ordered them to withdraw into the YMCA, the Masonic Temple and  
20 the Old Commissary.

21 Throughout the night snipers continued to harass the  
22 Army troops inside the building. In the morning of the 10th  
23 the mob began to form over here on Bolivar Avenue and directed  
24 a concentrated Molotov cocktail attack first at the YMCA where  
25 a Company of 140 men of troops were housed.

1           They finally about two o'clock in the afternoon of  
2 the 10th succeeded in setting it on fire, forcing the troops  
3 to evacuate at which point they moved down the street and began  
4 to concentrate on the Masonic Temple in which the Army not  
5 only had troops but it had established a Command Post and an  
6 Observation Post.

7           There is a photograph in the back of the Appendix  
8 which shows the Masonic Temple, it shows the roof as being  
9 higher than the other buildings in the area and having a  
10 parapet and it was from that position tht the Army was able to  
11 command this entire area, both from observation and later in  
12 attempts to quell the rioters.

13           The mob was unable to set the Masonic Temple on fire  
14 due to the difference in construction. Although they did start  
15 some fires in the interior. Thereupon, they moved down to the  
16 Old Commissary, not owned by the Petitioners, owned by the  
17 Government, and finally succeeded in setting that on fire with  
18 Molotov cocktails the next day.

19           On the basis of these facts Petitioners made claim  
20 first to the Department of the Army and then the Court of  
21 Claims, contending that there was liability where the Army had  
22 seized and used Petitioners' buildings as sources of refuge  
23 and defense.

24           The Court of Claims held ---

25           Q     May I ask first, what if any damage was done to

1 those blocks that were in that area where you have your pointer  
2 right now?

3 A Yes, Mr. Chief Justice. If you will see the  
4 shaded area indicates those which were damaged. There was no  
5 damage to these buildings here, no damage to these buildings  
6 down here. These buildings were never occupied by U.S. Army  
7 troops.

8 The damage was done to buildings occupied by United  
9 States Army troops during this course of the conflict.

10 Q How about those other blocks that you have got  
11 in there, over to the right a little?

12 A Over here?

13 Q No, those cross lines.

14 A These are the buildings in question.

15 Q Well, I know but they weren't all the Masonic  
16 Temple.

17 A That is the Masonic Temple.

18 Q Was there general destruction done in that whole  
19 area?

20 A As to these buildings, Mr. Chief Justice, this  
21 building that I am pointing to right now is owned by the  
22 Government. That was destroyed.

23 Q No, what I want to know is this: You have got  
24 certain blocks that are right there in the area of these two  
25 buildings. You have them marked with the diagonal lines

1 across them, like that. Do you see what I mean?

2 A Yes, your Honor.

3 Q Now, what damage was done to those blocks, not  
4 any particular building but those blocks other than in those  
5 two buildings?

6 A In these three buildings?

7 Q No, I am not talking about three buildings. I  
8 am talking about the general area that has those diagonal lines.

9 A There was no damage other than to the building,  
10 your Honor. These shaded areas indicate buildings, not blocks.

11 Q Just those three?

12 A Yes, your Honor.

13 Q All right.

14 Q The hatch lines going down Bolivar Avenue mark  
15 the boundary line, don't they?

16 A That is correct.

17 Q Those are not buildings or any area despite  
18 anything else?

19 A No, they are just indicating the boundary line  
20 in this case. There is no damage here and no damage here.

21 Q I can't read your legend from here but what does  
22 that mean, those diagonal lines?

23 A That says buildings looted and damaged or burned.  
24 This is attached to the Appendix, Mr. Chief Justice. It is  
25 the last page of the Appendix.



1           On the basis of these facts the Court of Claims held  
2 that there was no liability for the seizure and use of these  
3 buildings; that is, the YMCA and the Masonic Temple, holding  
4 that there was no liability for occupancy of private property  
5 which is immediately necessary for the safety of troops or to  
6 meet an emergency threatening great public danger.

7           Judge Davis dissented. Judge Davis said that on his  
8 basis of the applicable case law he thought it clear that the  
9 Government is liable where it first takes the property for its  
10 own military use and then exposes the place to enemy attack or  
11 evokes it leading to injury or destruction.

12           In this connection, Judge Davis said, and we should  
13 emphasize this, there is no exception from liability as I  
14 read the materials for temporary seizures for military use in  
15 the face of eminent hostility or to meet an emergency.

16           Once the property is taken for a military use the  
17 Government is responsible for its subsequent injury no matter  
18 how quickly that follows upon seizure.

19           Thus, in our view the issue here between the majority  
20 and the dissent below centers on the all important question of  
21 whether the immediate necessity or eminent hostility creates  
22 an exception in the general duty to provide compensation.

23           We think it does not and cannot, that the Court of  
24 Claims' decision if allowed to stand creates a grave and  
25 unwarranted threat to the citizen's right of compensation.

1           For if an immediate necessity is sufficient to confer  
2 absolute immunity upon the Government whenever it seizes and  
3 use private property, then we are indeed faced with a new era  
4 of governmental power.

5           Q     Is your question here, or at least one of the  
6 questions here whether this indeed constituted a seizure by the  
7 Government followed by the damage or whether it was damage  
8 incurred in the course of a military or quasi-military operation?

9           A     No, Mr. Justice, I would characterize the  
10 factual element of the issue as to whether there was a seizure  
11 and a use for a military purpose and we take the position as  
12 that expressed by Judge Davis below that once there is a  
13 seizure and use by the U.S. Armed Forces for military purpose  
14 there is liability no matter how the damage occurs.

15          Q     Let us see if I can get to it this way.

16                Let us suppose that the United States troops had been  
17 drawn up in the street outside of these two buildings but the  
18 mob then attacked, throwing Molotov cocktails and doing whatever  
19 they did.

20                The troops then retired into these two buildings, the  
21 conflict continued. Damage resulted to the buildings. Would  
22 you still contend that the United States must pay you for the  
23 damage done?

24           A     Yes, your Honor, although that is not the facts  
25 in this case.

1 Q I understand that.

2 A But I would contend that there would be.

3 Q Well, now tell me why?

4 A Because in that case, your Honor, the Army, once  
5 it took those buildings ---

6 Q Well, the question ---

7 A I am saying taking but not in the constitutional  
8 sense, Mr. Justice.

9 Q Well, then don't say it.

10 Once the Army retired into those buildings as part of  
11 its protective operation.

12 A I would say there would be liability because by  
13 so doing under the established case law it then exposes those  
14 buildings to special response on the part of the opposing  
15 forces.

16 Q What you are saying then amounts to the propo-  
17 sition that in any riot situation any building to which is  
18 physically occupied, which is physically occupied by the  
19 military forces of the United States falls within this category;  
20 that is to say, that the United States is liable for the  
21 damage inflicted upon that building by the attacking mob.

22 A I would say, Mr. Justice, may I qualify that.  
23 I don't think that I would make quite that broad a statement.

24 Q Now this to me is a critical area.

25 A Right.

1 Q What do you think constitutes a compensible  
2 taking in a riot situation and which you don't?

3 A I would say the criteria would be as follows,  
4 Mr. Justice.

5 First of all, there must be a necessity which justi-  
6 fies the seizure, not going to whether duty of compensation is  
7 available but whether there is authority to take it. Then the  
8 use must be actual and not constructive or passive. By that  
9 I mean the Army has to withdraw into the building, use it as  
10 a Command Post, a defense fortress, an observation post, as  
11 opposed to merely standing in front of the building or passing  
12 through for 30 seconds.

13 Then the use that the Army, thirdly, gets out of that  
14 building, must have some benefit to the Government, as was  
15 present in this case. It can also have a benefit to the owner  
16 but it must have a benefit to the Government.

17 Then I should suggest fourthly that that benefit  
18 should relate to the specific mission that the Army is involved  
19 in in that particular case, as it was here.

20 And then finally, that use should be of sufficient  
21 scope and duration. Now this will depend upon the facts in  
22 each case but to make it clear that it was more than fleeting  
23 or merely consequential; in this case the Masonic Temple was  
24 occupied for a period of 7 days, the YMCA for a substantial  
25 period of time until the troops were forced to evacuate.

1 Q These are not simple standards?

2 A No, your Honor.

3 Q Now let me just put this to you very simply  
4 because we are not engaged in what is entirely an academic  
5 exchange of verbal dialogue here. Let us take one of these  
6 riot situations that the country witnessed the summer before  
7 last or so and let us suppose that the United States troops are  
8 there and they are in the street and the mob is throwing  
9 Molotov cocktails and stones and shooting and doing whatever  
10 they did.

11 Let us then suppose that the troops retire into or  
12 take refuge in or go into, go into let us say, a building, and  
13 from that building they take defense, they observe the mob and  
14 take defensive action or whatever you want to call shooting guns  
15 at people in those circumstances.

16 Now in your submission to the Court is that a com-  
17 pensible taking and if it is not a compensible taking, what  
18 are the elements which distinguish that case from your case?

19 A I would say that is a compensible taking,  
20 Mr. Justice, and that the elements are substantially similar  
21 to those involved here.

22 Q And if we should disagree with you on the case  
23 that I put to you then we would have to disagree with you on  
24 the case submitted to us by adjudication?

25 A Not necessarily, Mr. Justice, because I think



1 this is a stronger case. Here we are involved with buildings  
2 that were held for a substantial period of time in which there  
3 was a substantial number of men involved, which were used  
4 throughout the riots and here we have, although we don't think  
5 it is necessary to make out liability, here we have a fairly  
6 strong evidence of a causal connection between the seizure and  
7 the resulting destruction, the point being that just the  
8 buildings occupied by the troops as indicated by the hash marks  
9 are the ones that were substantially destroyed.

10 Q Well I may be wrong on this but my recollection  
11 of reading the documents here is that the damage to the Masonic  
12 Building occurred after the troops had retired into that,  
13 after the YMCA building was set on fire?

14 A No, your Honor, if I may correct you on the  
15 record. The facts are that the Masonic Temple -- there were  
16 rioters in the Masonic Temple and the YMCA that were looting  
17 and somewhat destroying the interior when the Army first  
18 arrived.

19 They moved those rioters out of the buildings. We  
20 don't make any claim for that damage. The Army then took up  
21 positions in the streets and they were subsequently forced to  
22 retire into both buildings at once. That is, the Masonic Temple  
23 and the YMCA and the damage to those structures by Molotov  
24 cocktail occurred the day and the second day.

25 Q Why don't you make a claim for that part of the

1 damage inflicted in the initial phases of the operation that  
2 was inflicted by the Army, let us say, or by the exchange of  
3 civilities between the Army and the mob?

4 A Well, because, your Honor, that damage, to be  
5 precise if I may, on the basis of the record, that initial  
6 damage was all done by the rioters. They had got in and they  
7 were looting the interiors of the buildings and the Army moved  
8 them out.

9 And so there is no damage really done by the Army.

10 Q Let me ask you one more question, and then I  
11 will leave you alone.

12 Do I understand from your last statement then that  
13 if the rioters had been in the building, and the Army had moved  
14 in troops to roust them, and the Army had inflicted damage on  
15 the building in the course of that operation, by shooting with  
16 less than television western movie accuracy, for example, that  
17 in your submission the Army would have been liable for the  
18 resulting damage?

19 A It would not have been liable, your Honor,  
20 because ---

21 Q It would not?

22 A It would not because there was no use made of  
23 that building, your Honor. That building is really in that case  
24 a random consequence of battle. That just happened to be in  
25 the way of the exchange. But the Army never seized and used

1 that building.

2 I think the key is the Army has to take and retire to  
3 and use, and at that point as Judge Davis said liability  
4 attaches.

5 Q Do I understand that the Army went there to  
6 protect these two buildings?

7 A It went there, Mr. Justice, for the purposes of  
8 clearing the rioters from the Zone and protecting the Zone in  
9 general.

10 Q Including those two buildings?

11 A Including those two buildings; yes.

12 Q And the use of that building was for the same  
13 purpose?

14 A The use of the building, we contend, Mr. Justice,  
15 was primarily to protect the troops. That is spelled out on  
16 the record, which is stipulated to. That is the reason the Army  
17 withdrew into the building, to protect the troops.

18 Q Well, if they had withdrawn the troops from  
19 around the building and back down that street, what would  
20 happen to those two buildings?

21 A If they had been destroyed there would be no  
22 claim here.

23 Q Would they have been destroyed?

24 A It is not clear. It is not clear.

25 Q Well, did either the Masonic Temple or the YMCA

1 have troops?

2 A Did either of them?

3 Q Yes.

4 A Yes, they did, your Honor.

5 Q They had troops?

6 A Inside the buildings. Oh, you mean privately.

7 Q No, I mean did they hire troops?

8 A No.

9 Q Obviously they didn't. They needed the Army to  
10 protect those buildings or they wouldn't be protected, and if  
11 they had stayed outside the buildings to protect the buildings  
12 you would have no claim, but if they go inside the building  
13 for the same purpose of protecting it you do have a claim.

14 A May I rephrase my answer to that question,  
15 Mr. Justice.

16 Q It would help.

17 A I think that they withdrew into the building to  
18 protect the troops primarily. If they had not gone into the  
19 buildings and the buildings had been lost there would be no  
20 claim.

21 For example, there were troops stationed all behind  
22 here but never in these two buildings here. Yet these buildings  
23 were never destroyed. We don't contend that it is necessary  
24 to show that the mob moved just against the buildings the Army  
25 occupied to make out our test, because once there is seizure

1 and use there is liability. But we think that is an important  
2 point.

3 Q What if they had retired behind the building  
4 so to keep the building between them and the rioters in the  
5 process of trying to shell or shoot the troops had destroyed  
6 the building?

7 A Then I would not be making a claim here today,  
8 Mr. Justice. I would contend, although that is a close question  
9 that that falls within the true battle damage situation.

10 Q But they were still using the building for  
11 protection?

12 A In the facts of this case I think that could be  
13 argued both ways. If you could show that they put the buildings  
14 up as a buffer, that they in effect deliberately sacrificed  
15 them to protect the troops, then I think we would have Caltex  
16 and we would be prepared to argue as we do in Point No. 2 of  
17 our brief, that Caltex should be overruled.

18 Q As long as it stands you couldn't recover it?

19 A Not without overruling Caltex I believe in that  
20 case, if they sacrificed the buildings to protect the troops.  
21 But, of course, we contend that is not the fact.

22 If I may I should like to use my remaining time in  
23 rebuttal.

24 Thank you.

25 MR. CHIEF JUSTICE WARREN: You may.



1 Mr. Strauss.

2 ORAL ARGUMENT OF PETER L. STRAUSS, ESQ.

3 ON BEHALF OF THE UNITED STATES

4 MR. STRAUSS: Mr. Chief Justice and may it please the  
5 Court.

6 Petitioners seek to recover from the United States in  
7 this case the value not of the use of their buildings but of  
8 the damage which rioters inflicted on those buildings during  
9 the course of general anti-American riots in the Canal Zone.

10 The President, the Congress and this Court have  
11 unanimously agreed on the legal principle which ought to apply  
12 in that situation. And I should like to quote it.

13 It is a general principle of both international and  
14 municipal law that all property is held subject not only to  
15 be taken by the Government for public use, in which case under  
16 the Constitution of the United States, the owner is entitled  
17 to just compensation, but also subject to be temporarily  
18 occupied, which is this case, or even actually destroyed,  
19 which is perhaps Caltex and is not involved here. In times of  
20 great public danger and when the public safety demands it.

21 In this latter case governments do not admit a legal  
22 obligation on their part to compensate the owner.

23 That statement as the Court may recognize from the  
24 Court of Claims' opinion in this case originated in the veto  
25 message from President Grant to the Congress. It was then

1 quoted with approval in the Lawrence Report, House Report 134  
2 of the 43rd Congress, Second Session, which is the most thorough  
3 congressional study ever undertaken of Government liability for  
4 damage claims and which has acquired independent stature as a  
5 source book on international law in this area.

6 This Court then adopted this in the Pacific Railroad  
7 case, page 238 of Volume 120, as its own test of constitutional  
8 taking. It remains the Government's contention today that the  
9 temporary occupancy of premises under the immediate compulsion  
10 of the public emergency and for the purpose of dealing with  
11 that emergency is not a constitutional taking for which com-  
12 pensation is required.

13 Now I think counsel has fairly stated most of the  
14 relevant facts but there are a few additional things which I  
15 would like to emphasize.

16 First, it is quite clear from the record these riots  
17 started well before the troops arrived, two or three hours  
18 earlier. The troops arrived down in this area and at the time  
19 they arrived there were rioters throughout this general area.  
20 There were no rioters down here.

21 The troops came and they found the rioters at the  
22 buildings for which Petitioners are now claiming compensation.  
23 Then when the sniper firing started and it wasn't only sniper  
24 firing, the Court of Claims is quite clear, the record is quite  
25 clear that Molotov cocktails were being thrown while the troops

1 were on the streets, the Army fell back from its positions and  
2 it did not do so only along Bolivar Avenue, into these two  
3 buildings, it was forced to fall back into the Commissary  
4 Building, it was forced to fall back here where you can see ---

5 Q I can't see. You are between me and the chart.

6 A It was forced to fall back here where you can  
7 see there are not many buildings, in general along the boundary,  
8 behind the railroad tracks, and there are photographs in the  
9 exhibits of record in the court, not reproduced in the joint  
10 appendix, which shows the bunker positions built with sand bags  
11 behind these railroad tracks.

12 That left the troops behind the sanitation building  
13 here. There were no troops in the sanitation building. That  
14 did not stop the rioters from burning the sanitation building.  
15 During the course of the riots the sanitation building was  
16 completely destroyed.

17 So it seems to us that this indicates the negative  
18 of the Petitioners' theory, that there would have been no  
19 burnings had the troops not been in their building.

20 It certainly also indicates the negative of the  
21 theory that it was to these two buildings particularly that the  
22 presence of the troops drew the rioters' attack. The rioters  
23 were all along the boundary line although from the start they  
24 were concentrated principally in what we call the salient.

25 They didn't favor any buildings particularly with

1 their attack. They made their attack throughout.

2 Q Suppose the Army, a month in advance of this  
3 trouble, had said we foresee that there is going to be trouble  
4 and we, therefore, will occupy these two buildings.

5 A Well, I think we would have a much different  
6 case.

7 Q I know it would be different. And I appreciate  
8 your agreeing with me but would that be a compensable taking  
9 in the constitutional sense?

10 A I think it would be.

11 Q And that compensate and the payment for that would  
12 have to cover the consequential damages, wouldn't it, or would  
13 it?

14 A It is not clear the extent to which it would.  
15 I may say that the damage issue, how much ought to be paid if  
16 there was a taking in this case is not settled on this record  
17 and there would be required some further proceedings to settle  
18 that question.

19 And we do concede that the rioters did the amount  
20 of damage the petitioners claim they did.

21 Q If the Army a month in advance had occupied  
22 these buildings and the riots had occurred and the rioters  
23 had destroyed the buildings. Do you think it is an open  
24 question as to whether the Government would have to pay the  
25 total cost of the building as distinguished from just

1 compensation for use and occupancy without taking into account  
2 the damage done by the rioters?

3 A The Government would be liable. And if the  
4 Court concludes that there is a taking in this case, of course,  
5 the Government would be liable.

6 Q No, no, no. That is not my question.

7 A Yes, sir. I agree.

8 Q Wait a minute. Wait a minute.

9 The critical question is whether the Government would  
10 be liable in that situation for the destruction of the  
11 building which was brought about as a result of the conflict  
12 between the rioters and the troops.

13 A It seems to me there would be a difficult  
14 factual question but one which might possibly be resolved as  
15 to what damage would have occurred had the troops not been  
16 there and that if it could be determined that some damage  
17 would have occurred had the troops not been there that damage  
18 would be subtracted.

19 But otherwise I would agree with the proposition  
20 that the Government would be liable.

21 Q I am not sure that I would, but you say that  
22 the Government would be liable for the damage that occurred  
23 in the course of the riot, less such part of that damage as  
24 could be shown to be not attributable to Government occupancy?

25 A If I may explain the basis on which I do that



1 it seems to me ---

2 Q Well, that is what you are saying, isn't it?

3 A That is what I am saying and I am saying it  
4 because it seems to me you have your finger on the distinction  
5 which is crucial to the so-called target doctrine on which  
6 petitioners may rely.

7 Under that doctrine as petitioners have already  
8 argued, if the Government makes a target of a particular  
9 building by turning it into a fortification, then in principles  
10 of international law, at least, although it has not been held  
11 in the domestic contacts, the Government is liable for the  
12 damages done.

13 But it is quite clear that in this case no such  
14 target was made. For as Professor Borchard points out in the  
15 work petitioners cite, the State is responsible for the use  
16 and occupation of buildings and real property only if they  
17 are being used in more than a temporary way and the use is not  
18 impelled by military necessity, thus he says,

19 "The target doctrine extends only to property  
20 occupied in advance of actual fighting, rather  
21 than such as is occupied during an attack or  
22 retreat."

23 So that even conceding as I have, the answer to your  
24 question, the established principles applicable in this case  
25 require that no compensation be paid. There is nothing in the

1 record to suggest that there was any previous use of these  
2 buildings.

3         There were riots in the Canal Zone in 1959. I have  
4 looked into them and so far as I can determine there was no  
5 use made of these buildings at that time.

6         It seems to me that the principal task I have to  
7 carry out here is to make a case for what we have called the  
8 public emergency statute for what President Grant referred to  
9 as this exception for temporary use during and under the com-  
10 pulsion of war.

11         And to do that I have to start at some distance from  
12 ordinary Fifth Amendment concepts.

13         In particular, I want to look at the body of law  
14 which would ordinarily govern the riot situation. That is to  
15 say, municipal liability for tort.

16         If a person's property were destroyed because the  
17 police failed to protect it at all or withdrew from the area  
18 when the rioters seemed to be getting the upper hand he might  
19 file a claim on the theory the police hadn't given him adequate  
20 protection, or he might make the same claim if he thought that  
21 because police used tear gas or Billie clubs, instead of rifles  
22 or machineguns on looters looting went unchecked and indeed  
23 there are many such claims which had been filed in New York  
24 and in other cities which were the subject of urban riots.

25         Those claims are tort claims. And it is apparent

1 that in the absence of statutory liability for riot damage  
2 generally those claims could not succeed.

3 The decisions made whether to use guns or not, where  
4 is the most effective place from which to fight a riot, how  
5 is the most effective way to deal with it are quite plainly  
6 discretionary functions of Government for which no Government  
7 concedes tort or other liability.

8 Under Federal law for example any such liability  
9 would be foreclosed under the Tort Claims Act. And the reasons  
10 for denying liability and not that no loss has occurred, it  
11 is rather the desire to avoid any interference with official  
12 action, but even the prospect of the litigation or liability  
13 might bring.

14 It is to permit the officers to concentrate ex-  
15 clusively on the most efficient way of dealing with the danger.  
16 The public necessity exception can be viewed as an extension  
17 of this discretionary function reasoning.

18 By excusing policemen or troops from eminent domain  
19 liability from entering buildings in the heat of emergency  
20 and for emergency purposes it, too, protects their decisions  
21 from unwanted influence.

22 Had the troops in this case simply left the buildings  
23 to the mob there would have been no liability; had they used  
24 weapons which kept the mob away from the buildings there would  
25 have been no liability.

1           Indeed it is significant to what the real charac-  
2     terization of this case ought to be, the petitioners make no  
3     claim for the value of the use of their premises for what  
4     would be the ordinary Fifth Amendment measure of relief.

5           They say the troops had a right to be there. They  
6     seek only to recover the damage done by the rioting mob, when  
7     the troops were unable to control them with the weapons their  
8     commander allowed them to use.

9           Thus, petitioners seek the damage which New York  
10    Merchants will be unable to obtain and should be unable to  
11    obtain because of the discretionary function.

12          We believe it is as important to foreclose the possi-  
13    bility of liability here. There have been riots such as the  
14    Harlem riots of 1943.

15          Q     Excuse me, do you imply if there were a com-  
16    pensible taking its measure here would be the use?

17          A     I think that certainly would be the primary  
18    measure.

19          Q     What I am asking, is it your position that were  
20    there any at all, were they entitled to any compensation it  
21    would have to be measured by the value of the use of those  
22    seven days of the building and not at all by the value of  
23    the damage that was done?

24          A     The closest cases this court -- the closest  
25    this Court's case has come to that question were the leasehold

1 cases that arose out of World War II, such as the General Motors  
2 case, and in those cases the Court seemed to be saying that  
3 you didn't simply get the amount of money that could be valued  
4 for the time that the Government was there, it was also the  
5 inconvenience to the petitioner and he was entitled among other  
6 things to get the premises back in the condition in which he  
7 gave them to the Government.

8 We cannot see any particular reason for avoiding that  
9 liability except to the extent we would argue that the Govern-  
10 ment would not be responsible if it had a leasehold for the  
11 damage done by an earthquake.

12 Similarly it might not be responsible for the damage  
13 done by a rioting mob, only to the extent that the Government  
14 could be said to have brought that damage onto the buildings  
15 was the basis behind my answer to Mr. Justice Fortas, could  
16 the Government be held liable for the rioting mobs down there.

17 Q But your claim is they aren't liable at all?

18 A No liability here at all. And I make reference  
19 to the failure to claim rent value only to show that this  
20 really isn't a Fifth Amendment claim.

21 It seems to us it is in everything but name a tort  
22 claim. This is for tort damages and it looks exactly like  
23 the claims that are arising out of the urban riots today  
24 except for this particular characterization that petitioners  
25 can make and argue because troops were forced by the rioters



1 back into their buildings in order to be able to carry out  
2 their function of protecting the Zone and still staying alive.

3 Q If that is what it is in fact, the equivalent  
4 of a tort claim against a municipal authority, then your war  
5 cases aren't very helpful, are they?

6 A I am trying to explain. The war case doctrine ---

7 Q That is not very relevant if this is the kind  
8 of case you told us it is.

9 A I think it is in the sense that I think the  
10 law has always had ---

11 Q This wasn't a war. These were not enemy troops;  
12 they were civilian rioters, weren't they?

13 A They were civilian rioters.

14 Q There was no war.

15 A It was close enough to being a war.

16 Q Congress hadn't even voted on it, had they?

17 A No, they had not.

18 There have been riots such as the Harlem Riots of  
19 1943 and the Cambridge, Maryland Riots two summers ago, for  
20 what they considered to be good reasons the police did not go  
21 into the riot zone but simply tried to contain the riot in  
22 the area where it was occurring by protecting the fringes.

23 It seems to us that there is no apparent justice  
24 in giving the protected people at the fringes of the riot area  
25 a better shot at compensation for whatever damage they suffered

1 despite the presence of police or troops than those in the  
2 riot zone who received no protection.

3 Since urban violence and hostility to the police go  
4 hand in hand it is not going to be difficult for the future  
5 riot situation for plaintiffs to make the claim that the  
6 presence of police in their area drew a rioters' attack.

7 When the Government is responding to the emergency  
8 situation, in other words, as under the discretionary function  
9 generally, whether it is an emergency situation of war or of  
10 riot, it ought not to be subjected to the pressures and dis-  
11 tortions that a preferential rule of liability can bring.

12 Moreover, it should be clear that petitioners are not  
13 the only ones who suffered losses at the mob's hands. In the  
14 ordinary Fifth Amendment case you have a very clear sort of  
15 question to be resolved, a real question, social question to  
16 be resolved.

17 You have on the one hand a man who owns a piece of  
18 property and that property is taken from him. You have on the  
19 other hand society as a whole which benefits from the taking  
20 and the general question is who is going to bear that loss?

21 The riot situation, the war situation, it seems to  
22 us is quite different. Total property damage done is immense.  
23 In the Canal Zone it was about 10 times as great as petitioner's  
24 claim here. Lives are lost, many are injured. Only a few of  
25 the citizens damaged in such a catastrophe will have troops or

1 police or firemen on their premises.

2 If only they are compensated the other injured,  
3 through their taxes, have to bear two burdens of loss. Nor  
4 can it be said what the community has gained it ought to pay  
5 for. If you gain from a riot or war or major crime, the  
6 community should be free to deal with the losses it suffers as  
7 a whole and not required to give some citizens preferential  
8 treatment.

9 There is an enormous difficulty in basic unfairness  
10 in determining whether such calamity losses occur because the  
11 Government is present and how much of a loss would otherwise  
12 have occurred and hence need not be compensated.

13 The rule that petitioners seek might be just as  
14 arbitrary as the law's present rule of letting such losses lie  
15 where they fall. The problem of distributing them is too  
16 complex to be solved by compensating those who received the  
17 most direct effort in protection by the Government.

18 No case we have discovered in this or any other  
19 court has required the Government to pay on Fifth Amendment  
20 grounds or any other grounds for the damage that rioters or  
21 fires or other instruments of catastrophe do during Government  
22 efforts to contain them.

23 No case we have discovered characterizes Government  
24 entry onto private property. Under the compulsion of such an  
25 emergency as a taking, as shown in our brief the law and

1 practice since the founding of the nation has been entirely to  
2 the contrary.

3 Even destruction which the Government itself deliber-  
4 ately brings about need not be compensated. Indeed other cases  
5 of such entry are generally treated as court matters.

6 If, for example, a fireman damages a hedge in bringing  
7 a hose to fight a neighbor's fire or a policeman must break down  
8 the door to arrest someone hiding behind it, those claims are  
9 not ordinarily brought as Fifth Amendment claims. The claims  
10 are brought as matters of tort. The fireman was negligent or  
11 the policeman had no necessity or legal basis to make his  
12 arrest. And this is no failure of analysis.

13 This is entirely consistent with the line this court  
14 has followed in determining whether or not a taking has occurred.  
15 Under that approach conduct which is basically tortious or  
16 would be if it occurred between private citizens is insufficient  
17 in itself to be a taking in the constitutional sense.

18 Thus in the three Portsmouth Harbor cases in Volumes  
19 231, 250 and 260 of the reports, the court twice found the  
20 firing of harbor guns over petitioners' lands not to have been  
21 taking. When the third complaint was filed the court concluded  
22 that that showed sufficient duration of use and sufficient  
23 intensity of use to show that a servitude had been imposed.

24 Similarly in *Crusby* and in *Griggs versus Allegheny*  
25 County this court stressed the number of times airplanes were

1 flown low over petitioners' houses in discussing the taking  
2 issue.

3 In United States versus Dickinson in 331 U.S. the  
4 court said that property is taken in the constitutional sense  
5 when inroads are made on an owner's use of it to an extent that  
6 as between private parties a servitude has been acquired either  
7 by agreement or in the course of time.

8 There was no agreement in this case. If the servitude  
9 did not already exist the one brief occupancy of petitioner's  
10 buildings was insufficient to impress one in itself. Like the  
11 result of the first firings of the guns over Portsmouth Harbor  
12 and the first flights of planes over Mr. Causby's chicken farm,  
13 the damage in this case would be answerable only in tort if it  
14 were answerable at all.

15 Q Do you think it makes any difference in this  
16 case that this happened in the Canal Zone?

17 A I would not think so. Because this court is  
18 being called upon to decide a constitutional matter generally  
19 and no distinction occurs to me that would respond to the fact  
20 that it happened in the Canal Zone.

21 Q The Canal Zone has what, a Governor appointed by  
22 the President of the United States?

23 A It is an unusual situation. I am not entirely  
24 sure I understand it myself. There is the Panama Canal Zone  
25 Company and then there is also the Canal Zone Government. The



1 Canal Zone Company, which is ostensibly a corporation, but  
2 under Government charter and owned entirely by the Government,  
3 is responsible for most fiscal affairs and owns most of the  
4 property in the area.

5 The Canal Zone Government supplies what a city Govern-  
6 ment would ordinarily supply, municipal protection, fire  
7 protection, police protection and in addition there are large  
8 Army bases down there such as the one from which these troops  
9 came. These were not Canal Zone troops. These were Government  
10 troops, the same as Government troop on any other ---

11 Q What do you mean they were not Canal Zone troops?

12 A In the sense that they weren't Canal Zone police-  
13 men or Canal Zone firemen. They were not employees of the  
14 Canal Zone.

15 Q Are there Canal Zone policemen and firemen?

16 A There are Canal Zone policemen and firemen. And  
17 as in Detroit they were the first to attempt to quell the dis-  
18 turbance and they failed to do so and the troops were then  
19 called in.

20 Q By whom?

21 A As I recall the facts the Lieutenant Government  
22 of the Canal Zone asked the military to take over, which is  
23 perhaps a unique situation in the Canal Zone, and the military  
24 on assuming control then brought in the troops to help control  
25 the riots.

1 We do not believe that the Mitchell case, the Russell  
2 case for the reasons I have already discussed or any of the  
3 cases in International law applying the so-called target  
4 doctrine require any different conclusion.

5 This court itself showed the way past Mitchell and  
6 Russell in the Pacific Railroad case and in Caltex. Mitchell  
7 the trader was forced to accompany the Army some 300 miles to  
8 the place where his goods were destroyed. Russell involved  
9 steamboats which the Army commandeered to haul Government  
10 freight on the Western Front.

11 Thus, both of those cases are like the case which  
12 Justice Fortas put in which under international law compensation  
13 would be required. They were both cases in which the Army took  
14 the property involved in advance of fighting and for its own  
15 use whether for defensive purposes or from any other and not  
16 cases like this one in which the Army was forced into the  
17 building, by fighting, without advance plan or arrangement to  
18 do so.

19 Q Suppose they had known the Commanding General of  
20 the Army or whatever else he was and at 12 o'clock noon he  
21 looked it over and decided the best place to conduct a fight  
22 would be from the YMCA and they fought then within 30 minutes?

23 A I think that would be a difficult case.

24 Q That would what?

25 A I think that would be a difficult case. I think

1 its the sort of case where if it occurred by itself, if it were  
2 one incident of that war with that battle were the only occasion  
3 on which damage had occurred there might be a strong tendency  
4 to say that there was liability in those circumstances.

5 But, if on the other hand, it was one out of 10,000  
6 operations in a huge conflict, the Court might find that his  
7 visit to the cite at 12 o'clock was in itself a product of an  
8 emergency that was developing at the other side of town and  
9 consequently compensation need not be paid.

10 Q What is the difference except in point of time?

11 A As I understand the rationale of the doctrine,  
12 I should say that I am perhaps giving too much credence to  
13 these international cases involving the target doctrine. Maybe  
14 I am following it too far.

15 Those cases arose in a special situation where you  
16 have neutrals, foreigners living in one country which was at war  
17 with insurgence or some other country, and the troops of the  
18 country in which these neutrals live had to fight a battle  
19 with their opponents and chose -- and the choosing is really  
20 the important part -- and chose the place where the neutrals  
21 lived as the place to fight their battle.

22 And international cases have held that in those  
23 circumstances compensation is to be paid. Now there is a notion  
24 in that that the choice is an invidious one, that when the  
25 Commander of the Government troops is thinking where shall I

1 fight, he may make the decision I would rather fight where it  
2 is not my people's property being damaged; I would rather fight  
3 on the land of the Imperialist Sugar Company or something to  
4 that fashion.

5 And this rule of compensation was fashioned and  
6 applied entirely in cases which might be considered Imperialist  
7 cases. They involved Latin American Government on the one hand  
8 resisting liability, and European and American Governments on  
9 the other -- North American Governments on the other hand  
10 insisting upon liability.

11 As we cited in our brief there are a number of other  
12 cases which refused to apply the doctrine and refused to apply  
13 it because the property of the natives was equally exposed to  
14 the risk of harm. There wasn't any discrimination in this case,  
15 in other words.

16 So that is a doctrine which arises not only out of  
17 the fact of choice but also out of the existence of discrimi-  
18 nation. Perhaps I should insist that the possibility of dis-  
19 crimination should be there as well as the factor of choice.

20 But the thing which distinguishes the question you  
21 put to me, Mr. Justice Black, in this case is the factor of  
22 choice. That at least in that case one could say that the  
23 General had visited the area, had looked it over, and had  
24 said, "Here we fight."

25 Whereas in this case there is no such factor. The

1 troops went to where the rioters were. They had no choice  
2 about it. The rioters were there when the troops arrived.  
3 They went to where the rioters were and they fought them there  
4 and they stayed there no longer than there were rioters in the  
5 vicinity.

6 Q Where the rioters were and then got in the  
7 building?

8 A They were driven into the buildings. They first  
9 took up positions here along the street and then after one  
10 soldier was killed, several were wounded, sniper fire was going  
11 at them and Molotov cocktails were being thrown at them, they  
12 decided they could no longer stand in the street.

13 Q Do I understand also, Mr. Strauss, the troops  
14 went in there they had to put rioters out.

15 A That is right.

16 Q Rioters were already in the building.

17 A Rioters in the case of the YMCA were already  
18 burning the building.

19 Q They were already in the building and they had  
20 to put them out in order to defend the building as well as to  
21 protect their own lives.

22 A That is right, but they did not stay in the  
23 building at that time so far as the record shows.

24 Q The border between the Zone and the Republic is  
25 that street, Bolivar?



1           A     Yes, in part.

2           Q     Right there where the YMCA building is, Bolivar  
3 Street. Right down the middle of the street?

4           A     Down the middle of the street.

5           Q     Or is one side or the other of the street?

6           A     It is a very free access. Part of the reason  
7 for that which doesn't show on this map, is that Colon, which  
8 shows here as the Republic of Panama is on the peninsula.  
9 This is its only land border here. So that this corridor down  
10 here is the only access which the citizens of Colon have to  
11 other parts of Panama. It is Panamanian.

12           The map continues more or less like my hand with sea  
13 around it on those sides and then this is the border which you  
14 see here.

15           Q     And the rioters, they did more than just throw  
16 things across or shoot across, they came across themselves did  
17 they?

18           A     They were trying to come across, yes. They were  
19 in the Zone and they repeatedly tried to attack the Zone, and  
20 they also attacked although they did not succeed in burning,  
21 they attacked a small building down here, they attacked some-  
22 thing which you will find referred to as the Old Fire House  
23 which is this building here.

24           They were burning railroad ties along here.

25           Q     Now they did so by throwing Molotov cocktails

1 across or by coming across themselves?

2 A Well, they would run up. There was at one point  
3 an effort to push a burning car across the boundary here. The  
4 difficulty was that the tear gas that the troops were using  
5 couldn't keep the rioters far enough from the building to  
6 keep them out of the reach of the Molotov cocktails.

7 I think one can put it that way. Had they been using  
8 something with a little longer reach, a 30-30, they might have  
9 been able to keep them away.

10 Q Mr. Strauss, is there anything in the record to  
11 show that when the troops went there they intended to use the  
12 YMCA building or the Masonic Temple as a rendezvous for the  
13 troops?

14 A No, not that I am aware of. There is one other  
15 matter that I should point out about the facts, as long as  
16 counsel has mentioned it, I would just like to stress it. The  
17 YMCA and the Masonic Temple are separate entities.

18 They are represented by one counsel. But they are  
19 otherwise separate and this business of observation post and  
20 command post applies only to the Masonic Temple. Troops were  
21 in the YMCA for only 12 hours and there is no indication that  
22 during the 12 hours they were there that any command function  
23 or similar function was performed.

24 In conclusion, I would just like to state again ---

25 Q You say they were there 12 hours?

1           A     At the YMCA building for only 12 hours from  
2 midnight until about noon on Friday.

3           Q     Both are parties here, litigants here, aren't  
4 they?

5           A     Both litigants here. That is right.

6           Q     How long were the troops in the Masonic Temple?

7           A     Counsel says a week. I wasn't aware that it  
8 was that long but it was at least until the 13th.

9           Q     And there was an observation post set up?

10          A     And there was an observation post set up in the  
11 Temple after the troops were driven into it and as part of  
12 their efforts to continue to maintain the Zone boundary. There  
13 is no indication it was set up in advance.

14               Thank you.

15           MR. CHIEF JUSTICE WARREN: Very well.

16           Mr. Jacks, you may proceed.

17           REBUTTAL ORAL ARGUMENT OF RONALD A. JACKS, ESQ.

18                   ON BEHALF OF PETITIONERS

19           MR. JACKS: Thank you, Mr. Chief Justice.

20           I should only like to comment, I believe, Mr. Justice  
21 Black, you asked how long were the troops in the YMCA and it  
22 was until about 2 o'clock on the afternoon of the 10th or 14  
23 hours and they left only because the fire started by the  
24 Molotov cocktails drove them out. They had to abandon the  
25 building. They could no longer inhabit it.

1 Q What is your idea about how they decided to get  
2 there?

3 A How the troops decided to take over these  
4 buildings?

5 Q That is right.

6 A The record is not clear as to when that choice  
7 occurred but it seems to me that it is a fair inference to say  
8 that when the troops in the street in front of these buildings  
9 began to receive sniper fire that it was a prudent decision to  
10 withdraw into these buildings, one.

11 Two, the Masonic Temple as I alluded to earlier is  
12 particularly well suited for a command and observation post  
13 because it is the highest building in that area and if the  
14 court will forgive a personal reference, you will see that you  
15 can see the entire Zone at that point and command whatever  
16 action you wanted to take.

17 Q Is there a fact finding?

18 A The facts ---

19 Q That would state the reason why they withdrew  
20 into the buildings?

21 A Yes, Mr. Justice Brennan, the facts, as developed  
22 in three documents, one, the formal presentation before the  
23 OAS, by written form two, the statement of facts from the  
24 General Counsel of the Army to me, and three the oral presen-  
25 tation, all indicate as we point out in our brief that the

1 troops moved into the building to protect the troops. Those  
2 were the statements that the United States Government has  
3 given assigned as the reason for the seizure of these buildings.

4 Q So there is nothing in the way of a fact finding  
5 that they took these buildings in order to establish a command  
6 post?

7 A The facts in this case are stipulated, your  
8 Honor, on the basis of these formal presentations by the  
9 Government and those facts clearly show, that is the Government's  
10 own version of the facts show they admit that the buildings were  
11 taken as command posts, observation posts and initially seized  
12 to protect the troops.

13 Q How did the troops get in that position where  
14 they needed protection. They got in that position because they  
15 were there to protect the buildings, am I right?

16 A I would say that that was one purpose, Mr.  
17 Justice Marshall, but the paramount purpose was to protect the  
18 Zone, not to protect these particular buildings. To protect  
19 the Zone.

20 Q Am I correct that they went into the buildings  
21 and threw the Molotov cocktail people out?

22 A The record doesn't indicate that there were  
23 Molotov cocktails, I believe, on the part of the rioters in the  
24 building at the time the troops first entered and cleared them  
25 out. There may have been some they found there but that it not



1 in dispute here.

2 Q Weren't there fires in the buildings when they  
3 first got there?

4 A In the YMCA, yes, and no claim is made for those.

5 Q Well, there were fires there. The troops didn't  
6 start the fires; somebody else started them.

7 A That is correct and they were quickly put out.

8 Q And can there be any question that a major part  
9 of their job as witness of fact that they were lined up in  
10 front of the YMCA building, was that they were there to protect  
11 the building?

12 A I would say not that building, again, Mr. Justice  
13 Marshall. They were lined up all along the boundary line for  
14 blocks in either direction.

15 Q Well, would you suggest that in the future in a  
16 situation like that the Army just let the building burn up?

17 A No, your Honor. I am suggesting that where the  
18 Army takes a building, seizes it, retires into it ---

19 Q Well, do you see a difference between going and  
20 seizing a building and being driven into a building?

21 A I am not so sure that they were driven into the  
22 building but I think that in this case it is the use of the  
23 building that is the crux of the matter.

24 Q One soldier was killed right there?

25 A In front of the building.

1 Q Right there? And others were wounded?

2 A Yes, your Honor.

3 Q And there was sniper fire?

4 A Yes, your Honor.

5 Q Now uncontrolled sniper fire is coming this way  
6 toward me and I back up into the building. I am not seizing  
7 the building am I? Am I? I mean speaking only of myself.  
8 I am not speaking about the Army.

9 A Mr. Justice Fortas indicated we could call that  
10 retiring into.

11 Q Yes.

12 Q As I understand it your claim is they were there  
13 to protect the whole Zone and in protecting the whole Zone they  
14 chose this place as the best place to protect the whole Zone,  
15 and that they whereby subjected the Government to pay for it  
16 because for the purposes of compensation zone to equally  
17 distribute the costs of warfare or whatever that is among those  
18 who ---

19 A Yes, Mr. Justice Black, you have stated it.

20 Q You are not claiming are you that they would be  
21 liable just because of a battle where they injured some property?

22 A No. It is the seizure and use of these buildings  
23 to protect the entire Zone.

24 Q Would it have to be an actual seizure with the  
25 hands or what do you mean by seizure?

1           A     Well, as I indicated to Mr. Justice Fortas when  
2 we were discussing factual criteria, I think there has to be  
3 an actual use, going into the building, establishing a defense  
4 fortification, a command post ---

5           Q     Wouldn't that depend on whether the Government  
6 took charge of these to make these people the target, what was  
7 bound to be a tremendous personal loss of the YMCA for the  
8 protection of the Zone. Is that your claim?

9           A     Yes, your Honor. That once the Government de-  
10 cides that the YMCA and the Masonic Temples buildings are to  
11 be sacrificed if they are to be sacrificed for the common good  
12 then the public purse must make good and that we can't and it  
13 seems to me that the central issue here is we can't deny  
14 liability on this ground of immediate necessity.

15          Q     What would have happened if the troops hadn't  
16 gone ---

17          A     Pardon me, Mr. Justice.

18          Q     What would have happened if the troops hadn't  
19 rallied around or gone into the YMCA?

20          A     And it had been subsequently destroyed?

21          Q     What would have happened in this particular  
22 situation?

23          A     The record is not clear, your Honor. I can't  
24 speculate.

25          Q     Well, there were rioters in the building, weren't

1 there?

2 A There were rioters there. I am sorry but this  
3 point is unclear.

4 Q Well I mean to say it isn't very reasonable to  
5 suppose that if the Army hadn't come the rioters would have  
6 said, "We beg your pardon and backed out of there?"

7 A The troops cleared out the rioters out of the  
8 YMCA initially.

9 Q Right, that is the point, isn't it?

10 A Yes.

11 And then they took up positions without occupancy  
12 in the buildings in front of that.

13 Q You don't contend, do you, that when the troops  
14 went there they selected by premeditation these two structures  
15 saying these are the places where we will defend this whole  
16 area. Now just let me finish please.

17 But, isn't it the fact that on the contrary, as far  
18 as this record shows, they made no decision to go into the  
19 buildings, either of them, until they went in under extremist  
20 with one soldier having been killed, others having been wounded  
21 and the rioters were in the buildings and it was under those  
22 compulsions that they went into the building.

23 Am I correct on that?

24 A Mr. Chief Justice, I frankly cannot tell what  
25 was in the Army's mind when they first entered the Zone.

1 Q Well, no, but have you any right to assume  
2 under what is in the record that they did go there with the  
3 premeditated intention of using those two places as a rendezvous  
4 or as a defense point for that area?

5 A No, your Honor, I can't assume one way or the  
6 other on that.

7 Q And on the contrary, one soldier was killed right  
8 at the entrance to the building before they went in, others  
9 were wounded, the rioters were in the building and they went  
10 in both for protection of themselves and I assume for the  
11 protection of the building.

12 Now is there anything wrong with those facts?

13 A I think the sequence is important, Mr. Chief  
14 Justice.

15 The rioters were in the building initially when the  
16 troops arrived. The troops cleared them out, took positions  
17 in front. They had not taken over the buildings yet at that  
18 point.

19 Q What would you expect them to do, go out into  
20 the line of fire and get some more killed?

21 A No, your Honor, we have no quarrel with the  
22 Army's decision to use these buildings and we have no quarrel  
23 with the Army's decision not to effectively defend them.

24 Q Well, I think you do because you claim they were  
25 doing it for a purpose other than to defend the area and defend



1 the people in it.

2 A No, I am sorry if I created that misimpression,  
3 Mr. Chief Justice. I contend that the Army seized the buildings  
4 as Mr. Justice Black indicated for the defense of the entire  
5 Zone. It was a prudent decision to withdraw in there.

6 But our point is when our buildings are seized and  
7 used for a governmental purpose the Government as a whole  
8 should pay.

9 Q Were there any others destroyed?

10 Q Is there anything in the record to show if the  
11 Army hadn't shown up they would have been destroyed or blown up?

12 A Yes, there is.

13 Q What is there in the record to substantiate that?

14 A I think again it is the causal relationship  
15 between the buildings and the Army were in and the Army was  
16 not when read as a whole.

17 Q Am I correct that when the Army arrived the  
18 buildings already burning a little bit?

19 A There was a small fire in the YMCA, alone, and  
20 that was quickly extinguished and that is no part of the total  
21 loss by the Army.

22 Q What would have happened if the Army hadn't put  
23 it out, with the rioters in there?

24 A If the Army hadn't cleared that building?

25 Q Yes, if the Army hadn't gone in there as you say

1 to defend themselves, what would have happened to that building  
2 if they hadn't gone in there and done that?

3 A I don't know, Mr. Chief Justice, except that is  
4 not the portion of the YMCA that was destroyed, because it was  
5 a brick construction primarily whereas the portion that was  
6 destroyed was wooden. So it is not clear that the building  
7 would have been necessarily lost.

8 Q Were any other buildings destroyed like that?

9 A Yes, the buildings by the hash marks, the YMCA,  
10 the Masonic Temple and the Old Commissary building, which is  
11 here owned by the Government and the sequence of the mob was  
12 first at this and then the Masonic Temple and then later at  
13 this.

14 Q There were no troops in the Commissary building?

15 A Yes. There were troops in the Commissary  
16 building.

17 Q Were there troops in the Sanitation building?

18 A The record is unclear on that and I do yield  
19 to the Solicitor General in pointing out that was burned and I  
20 am not sure whether it was surrendered or not.

21 Q Those were Government buildings were they?

22 A Yes. I refer the Court to the Appendix in our  
23 brief where we shown on page 220 Exhibit E-10, in the back of  
24 the Appendix.

25 Mr. Chief Justice, may I?

1 MR. CHIEF JUSTICE WARREN: Yes.

2 MR. JACKS: E-10 on page 220-A, the building, the  
3 tall building on the left is the Masonic Temple and the obser-  
4 vation point was on top of it, and the building on the right  
5 is the YMCA and you can see off to the right the damaged portion.

6 This was taken shortly after the destruction of the  
7 YMCA.

8 Q That is the picture, E-10?

9 A Yes, Mr. Chief Justice, E-10. And on the preceding  
10 page, 219, shows those are pictures of the troops inside the  
11 YMCA before they were driven out by the fire.

12 Q What in a general nature was the damage to this  
13 building, to either of them?

14 A The YMCA lost a total wing which was in the  
15 nature of an auditorium which was primarily of a wood construc-  
16 tion. The main building where the initial fire was, Mr. Justice,  
17 was not substantially destroyed. It was the wing to the YMCA  
18 that was lost, and the Masonic Temple it was a second and third  
19 floor fire damage to the interior. The Masonic Temple was made  
20 of brick and mortar construction so it really didn't go despite  
21 continued efforts to set it afire.

22 Q Was that from Molotov cocktails?

23 A Yes. The record is clear on that, being thrown  
24 in to the second floor over a long period of time.

25 (Whereupon, at 1:55 p.m. the oral argument in the  
above-entitled matter was concluded.)