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International Conflict and Property Rights: Fifth Amendment "Takings" Issues

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Summary

The terrorist attack on the World Trade Center and Pentagon has raised the possibility of responses by the United States that impinge on private property, and, in turn, the possibility of claims under the Fifth Amendment Takings Clause. In the past, the existence of war or other national emergency has prompted courts to extend an extra degree of deference to responsive government measures when analyzing regulatory takings claims. Thus, when the United States has temporarily closed mines, imposed rent controls, frozen assets of hostile foreign nations subject to U.S. jurisdiction, suspended judicial process initiated by U.S. nationals against such assets, or settled claims of U.S. nationals against foreign sovereigns and their assets, courts universally have rejected takings suits. On the other hand, takings claims based on physical takings or appropriations on the homefront have succeeded – wartime notwithstanding. The property of enemy aliens receives no Takings Clause protection, at least in the context of traditional wars.

The recent terrorist attacks on the World Trade Center and Pentagon have prompted U.S. countermeasures, including economic and military ones. In the past, such responses to international threats often impinged on private interests that had, or were claimed to have, the status of property – financial assets, corporate facilities, contract rights, attachments on assets, causes of action against foreign governments, etc. As a result, holders of such interests asserted that their property was "taken." The Takings Clause of the Fifth Amendment states: [N]or shall private property be taken for public use, without just compensation."

This report summarizes the case law adjudicating such "takings claims."

Heightened Judicial Deference

As an initial matter, the existence of war or other national emergency does not suspend operation of the Takings Clause. It has, however, consistently prompted courts to extend extra deference to responsive government measures when analyzing *regulatory*

takings claims. "Regulatory takings claims" are those based on the government's restriction of a property's *use*, rather than physical invasion or outright expropriation.

Explicit statements of such deference are found in cases rejecting regulatory takings claims against (1) the government's temporary wartime shutdown of non-essential gold mines to free up needed mine workers and mining equipment, *United States v. Central Eureka Mining* Co., 357 U.S. 155, 168 (1958) ("In the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income."); (2) wartime rent controls, *Block v. Hirsh*, 256 U.S. 135, 157 (1920) ("[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change"), and *Bowles v. Willingham*, 321 U.S. 503, 519 (1944) ("A nation which can demand the lives of its men and women in ... war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a fair return ...."); (3) a federal order during the Arab oil embargo that an oil production company sell oil to a particular refiner, *Condor Operating Co. v. Sawhill*, 514 F.2d 351 (Temp. Emer. Ct. App.) (citing *Block v. Hirsh* quote, *supra*), *cert. denied*, 421 U.S. 976 (1975); and (4) a federal prohibition on the exercise of stock options in a U.S. company by a foreign national with ties to Libya, a nation accused of sponsoring terrorism, *Paradissiotis v. United States*, 49 Fed. Cl. 16, 23 (2001) ("It is unfortunate that plaintiff lost his property outright. The preservation of the national security interest of the United States nevertheless greatly outweighs plaintiff's loss.").

The *Condor Operating Co*. and *Paradissiotis* decisions demonstrate that heightened judicial deference is not restricted to emergencies of the traditional-war variety.

Freezing/Vesting of Assets, Suspending Judicial Process, Settling Claims

When the United States has moved to freeze or vest assets of hostile foreign nations subject to U.S. jurisdiction, suspend judicial process initiated by U.S. nationals against such assets, or settle claims of U.S. nationals against foreign sovereigns and their assets, courts have universally rejected takings attacks, though with an occasional caution.

The *freezing of assets* of hostile nations and their nationals during time of declared war has been accomplished under the Trading with the Enemy Act (TWEA).[1] Section 5(b)(1)(B) authorizes the President to "void, prevent or prohibit ... exercising any right ... with respect to ... any property in which any foreign country or a national thereof has any interest."[2] Courts are clear that there is no taking when the United States freezes foreign assets here in order to satisfy present or future claims of U.S. citizens, or to use as leverage in negotiations with the hostile nation. *Tole S.A. v. Miller*, 530 F. Supp. 999 (S.D.N.Y. 1981) (discussing cases). "There is no reason," said the Supreme Court, "why [the United States] may not ... make itself and its nationals whole from assets here before it permits such assets to go abroad in satisfaction of claims of aliens made elsewhere ...." *United States v. Pink*, 315 U.S. 203, 228 (1942).

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[1] 50 U.S.C. App. §§ 1-6, 7-39, 41-44.

[2] 50 U.S.C. App. § 5(b)(1)(B).

Moreover, it has been judicially noted that blocking of assets is merely temporary and not equivalent to vesting of title in the United States. *Tran Qui Than v. Regan*, 658 F.2d 1296, 1304 (9th Cir.1981). Even the passage of considerable time since imposition of the freeze, however, may not raise the taking spectre, if hostile relations are equally longstanding. *See, e.g., Tole S.A.* (blockage of assets of Cuban corporation for 18 years effected no taking). *But see Nielsen v. Sec'y of the Treasury*, 424 F.2d 833, 843-844 (D.C. Cir. 1970) (blocking of foreign assets raises taking issue if continued indefinitely).

Quite recently, a taking case arose when the United States, invoking its authority under the International Emergency Economic Powers Act (IEEPA),[3] prohibited a Cypriot citizen with ties to Libya from exercising stock options in a U.S. company – owing to that country's support of terrorism. *Paradissiotis v. United States*, 49 Fed. Cl. 16 (2001) (also noted above). The options subsequently expired, resulting in a total loss to the plaintiff. In finding no taking of the option contract, the court relied particularly on the contingent nature of foreign commerce: "Claimants who deal in foreign commerce most often have knowledge at the time of contracting that foreign relations between this country and a foreign country might sour, and that the government might intervene and interfere with contractual rights." *Id.* at 22.

The *vesting of assets* also has been accomplished under TWEA.[4] In contrast with the freezing of assets, vesting has the United States actually taking ownership of the property, so that it may be "held, used, administered, liquidated, sold, or otherwise dealt with" by the U.S.[5] The Supreme Court has cautioned that "this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and [Takings] Clauses ... only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure." *Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958).

Suspension of judicial process and *executive settlement of claims* received considerable judicial scrutiny for possible takings in the aftermath of the Iranian hostage crisis.[6] The key documents are the IEEPA, under which President Carter blocked removal or transfer of Iranian assets in the U.S. except by license, and the "Algerian Accords," under which the United States later agreed to substitute binding arbitration for private litigation against Iran in U.S. courts.[7]

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[3] 50 U.S.C. §§ 1701-1706. *See generally* David M. Meezan, Note, *Forgotten Rights: Taking Claims and the International Emergency Economic Powers Act*, 21 Vt. L. Rev. 591 (1996).

[4] 50 U.S.C. App. § 5(b)(1).

[5] *Id.*

[6] *See generally* Peter W. Adler, Note, *The Iran-U.S. Accords and the Taking Clause of the Fifth Amendment*, 68 Va. L. Rev. 1537 (1982); Lawrence W. Newman, *A Personal History of Claims Arising Out of the Iranian Revolution*, 27 N.Y.U. J. Int'l L. & Pol'y 631 (1995).

[7] Declaration of the Government of the Democratic and Popular Republic of Algeria relating to the Commitments Made by Iran and the United States, 20 Int'l Legal Mat. 224 (1981).

The U.S. Claims Court[8] disagreed with itself in the Iran cases on whether the President's lawful conduct of foreign policy is amenable to taking analysis at all. *Compare Belk v. United States*, 12 Cl. Ct. 732 (1987) (judicial inquiry would interfere with President's ability to manage international relations) *with E-Systems, Inc. v. United States*, 2 Cl. Ct. 271 (1983) (settlement of claims subject to Takings Clause). Where takings analysis seemed appropriate, courts held that the President's suspension of private claims against Iran presented no *ripe* taking issue – since plaintiffs might recover in full following arbitration before the Iran-U.S. Claims Tribunal. *See, e.g., American In'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (D.C. Cir. 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water and Power Auth.*, 651 F.2d 800 (1st Cir. 1981).

On the merits, the Claims Court has stated or implied that in a proper case it would consider executive cancellation of private claims by settlement to be a taking, *see, e.g., American Int'l Group*, 657 F.2d at 446, though never in fact finding one. Thus, no taking was found when the President, under the Algerian Accords, extinguished various causes of action asserted by the former hostages against the government of Iran. *Belk v. United States*, 12 Cl. Ct. 732 (1987). *Belk* pointed out that the hostage-plaintiffs were the chief *beneficiaries* of the Algerian Accords, noting that government action intended to help a property owner is rarely found a taking.[9] Similarly, no taking resulted when the President vacated pre-judgment attachments of Iranian assets made pursuant to revocable license. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

Most recently, holders of small claims against Iran asserted a taking based on the United States' espousal and settlement of their claims. *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997). The $50 million available to the successful claimants was enough that each claimant received the full amount of principal awarded, but only a third of the interest accrued. No taking of that interest resulted, said the court, because as in *Belk*, the settlement here sought to benefit the claimants, whose claims had languished many years. Moreover, it said, "those who engage in international commerce must be aware that international relations sometimes become strained ...." *Id.* at 1468 (*see also* concurring opinion at 1469).

International Contracts

In general, the United States has wide latitude to frustrate performance under existing private contracts without having to compensate the parties – wartime/emergency or not.[10] In addition, the Federal Circuit has invoked the contingent expectations in the international arena already noted. Expectations of performance pursuant to international contracts and transactions are seen as being inherently contingent on the continuation of friendly relations between the United States and the foreign country. Should those relations deteriorate, the United States can respond appropriately without having to pay the

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[8] Since renamed the U.S. Court of Federal Claims. Appeals from this court are to the U.S. Court of Appeals for the Federal Circuit.

[9] *See esp.* YMCA v. United States, 394 U.S. 85 (1969) (no taking where U.S. troops occupied buildings to protect them from Panamanian rioters).

[10] Though the leading case for this principle, Omnia Commercial Co. v. United States, 261 U.S. 502 (1923), arose during wartime, the principle has not been restricted to that context.

disappointed contract parties. *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988); *767 Third Avenue Assocs. v. United States*, 48 F.3d 1575 (Fed. Cir. 1995).

Like *Paradissiotis*, *Chang* involved the United States' response to Libya's support of terrorism. In *Chang*, plaintiffs, U.S. nationals or resident aliens, had been working in Libya under private employment contracts with a Libyan corporation. The IEEPA sanction at issue was one providing that "no U.S. person may perform any contract in support of an industrial or other commercial or governmental project in Libya." Plaintiffs' claim that the United States had thereby "taken" their employment contracts was rejected for a variety of reasons, including prominently the contingent nature of international commercial dealings, mentioned several times earlier.

Law Enforcement

In the course of their duties, law enforcement personnel may damage private property – as by breaking down doors or using tear gas. In general, a taking action does not lie to recover damages for such injury. *See, e.g., Customer Co. v. City of Sacramento*, 895 P.2d 900 (Cal. 1995) (collecting cases), *cert. denied*, 516 U.S. 1116 (1996).

A note of caution, however, was sounded by *Janowsky v. United States*, 133 F.3d 888 (Fed. Cir. 1998), where a business was turned over to the FBI for its use in investigating police corruption. The owner's taking claim, based on the resulting harm to the business, was rejected by the trial court on the ground that the turnover to the FBI had been voluntary. On appeal, the Federal Circuit asked whether FBI statements to the owner rendered his participation coerced, and remanded to the trial court.

Physical Takings and Appropriations

The courts have long regarded physical occupations of private property by the government, and outright expropriations thereof, as the most serious sort of interference with property rights. Small wonder, then, that takings claims based on physical takings or expropriations, as opposed to regulation, have succeeded despite the existence of war – at least when the property was located on the homefront. *See, e.g., United States v. Causby*, 328 U.S. 256 (1946) (taking resulted from low and frequent flights of military aircraft, during wartime, over chicken farm); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (taking effected by government's seizure and operation of coal mine during wartime, to avert strike).[11]

Nearer the thick of battle, however, even physical seizure and deliberate destruction of property may be noncompensable. For example, the wartime destruction of private property by the United States, to prevent its capture by an advancing enemy, is a well-settled exception to the Takings Clause. *United States v. Caltex*, 344 U.S. 149 (1952); *United States v. Pacific Railroad*, 120 U.S. 227, 234 (1887). *See also Juragua Iron Co.*

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[11] The decision in *Pewee Coal Co.* is often juxtaposed with that in *United States v. Central Eureka Mining* Co., 357 U.S. 155, 168 (1958). In the former the United States actually took over and ran the mines; in the latter, it closed the mines by regulatory action but asserted no dominion over them. This difference was dispositive in leading the Supreme Court to find a taking in *Pewee Coal Co.*, but not in *Central Eureka Mining Co.*

v. United States, 212 U.S. 297 (1909) (wartime destruction of U.S. company's property in enemy territory by U.S., to prevent spread of yellow fever, is not a taking). Not surprisingly, property damage caused by battlefield operations are noncompensable. *Pacific Railroad*, 120 U.S. at 234.

U.S. Citizens, Friendly Aliens, and Enemy Aliens

The Takings Clause protects the property of U.S. citizens wherever in the world it may be located.

The property of friendly aliens (whether resident in the United States or not) has long been held to be protected by the Takings Clause to the same extent as that of U.S. citizens – locational constraints on the property unstated. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489, 491-492 (1931).[12] Nor is this protection dependent on the standards for compensation of confiscated property used by the alien's government. *Id.* at 491-492. (Some tension exists, however, between this constitutional nonreciprocity and 28 U.S.C. section 2502, under which foreign citizens may sue the United States in the Court of Federal Claims only if their governments accord U.S. citizens the same right.)

Russian Volunteer Fleet has since been clarified as extending only to friendly aliens having "substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). According to newer case law, an alien plaintiff having *neither* resident alien status *nor* property located within the United States generally lacks such a "substantial connection," and thus cannot maintain a taking claim. *Hoffmann v. United States*, 2001 Westlaw 931588 (Fed. Cir. Aug. 16, 2001) (unpublished); *Ashkir v. United States*, 46 Fed. Cl. 438 (2000). This defense is currently being asserted by the government, and rejected by the plaintiff, in yet another terrorism-related takings case. *El-Shifa Pharmaceutical Indus. Co. v. United States*, No. 00-443L (Fed. Cl. filed July 27, 2000) (Sudanese corporation claims taking based on destruction of its plant in Sudan by cruise missiles launched by U.S. pursuant to allegedly erroneous U.S. finding that plant was supporting terrorists).

In contrast to friendly aliens, the property of enemy aliens receives no Takings Clause protection, wherever the property may be found. *Cummings v. Deutsche Bank*, 300 U.S. 115, 120 (1937).

These cases, and the others in this report, generally deal with clearly defined enemies and non-enemies. It will be interesting to see how courts address Takings Clause issues in the blurrier context of combating international terrorism.[13]

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[12] *But see* note 13 *infra*.

[13] For another "blurrier context," see Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 111-112 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966), a due process challenge to the TWEA-authorized freezing of a Cuban national's assets in New York. The court noted that while the United States was not formally at war with Cuba, qualifying plaintiff as a friendly alien, a court did not have to ignore the fact that that nation "has launched a campaign of subversion throughout the Western Hemisphere."