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FEDERAL LIABILITY FOR TAKINGS AND TORTS: AN ANOMALOUS RELATIONSHIP

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The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure. . . .[1]

I. TAKINGS, TORTS AND THE TUCKER ACT

IN THE First Judiciary Act,[2] there was no provision conferring jurisdiction for suits against the United States, nor was there any provision for suits against federal officers. In 1855, the Court of Claims was created with authorization to hear and determine all claims against the Government "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States. . . ."[3]

This jurisdiction was broadened in 1887 with the adoption of the Tucker Act,[4] which extended the Court's authority to include all

> claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. . . .[5]

The Tucker Act also gave district courts concurrent jurisdiction with the Court of Claims in all cases involving certain amounts.[6]

Prior to the enactment of the Tucker Act, any claim brought against the Government for damages to private property had to allege a contractual relationship, either express or implied, with the Government. In other words, the burden was placed on the claimant to show that the property was "taken" in such a way as to give rise to some sort of promise by the Government that it intended to pay compensation for any benefit it acquired. Therefore, if the Government denied that it was, in fact, taking *private* property, there could be no contractual relationship, since the Government could not have intended to enter a contract to acquire something it already felt it owned. Further, the courts

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1. United States v. Dickinson, 331 U.S. 745, 748 (1947).
2. 1 Stat. 73 (1789).
3. 10 Stat. 612 (1855).
4. 24 Stat. 505 (1887) (codified in scattered sections of 28 U.S.C.).
5. 24 Stat. 505 (1887).
6. Originally, concurrent jurisdiction of all claims not exceeding $1,000 was given to the district courts. 24 Stat. 505 (1887). The present limitation is $10,000. 28 U.S.C. § 1346(a)(2) (1958).

demanded that the actions by the agents or officials of the Government, in "taking" the claimant's property, be clearly within their statutory authority, since if they were not acting within such, they could not bind the Government to a promise to pay. Their acts could only amount to torts, for which the Government had not consented to be sued.

Therefore, in *Langford v. United States*,[7] the Government asserted that its possession of the property was by virtue of its own title, and therefore necessarily hostile to plaintiff's title claim. The Supreme Court refused to find an implied contract to pay where the Government had asserted that it was using its own property and had taken the property under such claim of title, but instead found that, if the property was *private*, the Government's seizure of it was tortious, and the Government was not amenable to suits sounding in tort.[8] The Court avoided the effect of a seizure of *private* property by authorized agents where there is no adverse claim of title asserted by the Government, stating:

> [W]e are not called on to decide that when the government, acting by the forms which are sufficient to bind it, recognizes the fact that *it is* taking *private* property for public use, the compensation may not be recovered in the Court of Claims. On this point we decide nothing.[9]

A few years later, in *United States v. Great Falls Mfg. Co.*,[10] plaintiff's property was appropriated by the Government without formal proceedings for the purpose of constructing a dam, in accord with a congressional plan for improvement of the Washington water supply. The Court cited its decision in *Langford*, and stated that the question reserved for decision there was now presented, since the Government did not deny that the property was owned by the plaintiff. Therefore, the Court held that the cause of action arose out of an *implied contract*, within the meaning of the Court of Claims Act of 1855.[11] It is interesting to note that although the Court based the plaintiff's recovery on the theory of an implied contract to pay compensation, it did assert that where property is so acquired by the Government the fifth amendment alone might be a sufficient basis for recovery.[12]

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7. 101 U.S. 341 (1879).

8. "In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property. . . . For such acts, however high the position of the officer . . . of the government who did or commanded them, Congress did not intend to subject the government to the results of a suit. . . ." Id. at 344-45.

9. Id. at 343-44.

10. 112 U.S. 645 (1884).

11. Id. at 657. See also note 3 supra and accompanying text.

12. "[T]here is no sound reason why the claimant might not . . . regard the action of the government as a taking under its sovereign right of eminent domain, [and] demand just compensation. . . . [W]e are of opinion that the United States, having by its agents . . . taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation." Id. at 656.

As the ensuing discussion will illustrate, the theory of claims standing alone on the Constitution gradually gained strength, while the necessity for finding an implied contract slowly and stubbornly subsided. This would seem to have been the natural result of the enactment of the Tucker Act, due to its creation of jurisdiction over claims "founded on the Constitution." The statute was enacted some three years after the *Great Falls* decision, and the purpose of the broadened jurisdiction, as pointed out in *Stovall v. United States*,[13] appeared to be to enable owners of property who, like Langford, had been deprived of their property by the United States Government or its agents, whether claiming title or not, to recover in the Court of Claims the compensation to which the Constitution seemed to entitle them. The Supreme Court, however, vacillated and showed great uncertainty during the years following the amendment as to whether fifth amendment cases could be founded on the Constitution alone, or whether it was still necessary to find some type of contractual relationship between the claimant and the Government. Almost forty years after the passing of the Tucker Act, Edwin Borchard felt that the addition of the constitutional clause added nothing to the limited jurisdiction theretofore exercised. In his opinion, the Court, up to that time:

> [A]wed by the inhibition against claims "sounding in tort" and by the traditional view that the government's consent to be sued is to be construed as narrowly as possible . . . has given an exceedingly technical construction to the terms "taking" and "implied contract" and a very wide interpretation to the clause "sounding in tort." Thus the physical act of "taking" must so greatly interfere with the private use that the injury and deprivation are permanent and substantial, hence implying a contractual obligation to pay, and not merely temporary, or consequential, and therefore tortious.[14]

Therefore, in Borchard's opinion, whenever there was a denial of the owner's right to the property, either by an adverse claim of title, a constitutional claim or the denial of an intent to pay, recovery by the claimant would be precluded, since the taking would be merely the result of a tortious act, for which the Government had not made itself liable. This latter view is emphasized by the Court's decision in *Hill v. United States*,[15] handed down some six years after the passing of the Tucker Act. There, the claimant sued the United States for the taking of certain tracts of property for the erection of a lighthouse. The plaintiff claimed ownership in fee simple. The Government defended on a claim of title based upon its right as to all land below high tide, so that it had " 'under the law, for the purpose of a light-house . . . a paramount right to its

13. 26 Ct. Cl. 226, 239-40 (1891).
14. Borchard, Government Liability in Tort, 34 Yale L.J. 1, 30 (1924).
15. 149 U.S. 593 (1893).

use as against the plaintiff or any other person.' "[16] The Supreme Court refused to imply a contract to pay the value of the property, since although the claimant had shown lack of consent and lack of compensation paid, the United States had refused to acknowledge any right of property in him. The "whole effect" of the Tucker Act was characterized by the Court as giving jurisdiction solely over suits against the United States "not sounding in tort."

Mr. Justice Shiras dissented, however, arguing that: (1) the fifth amendment imposes a serious contractual obligation upon the Government; (2) the issue of plaintiff's title is to be determined by the Court, not the Government; and (3) private property may never be taken for public use without making just compensation.[17] Thus, the Justice felt that it was only necessary to prove title in the claimant and deprivation thereof by the Government in order to recover for a "taking" under the terms of the fifth amendment. It seems clear that if his opinion had been accepted by the majority of the Court, the artificial distinctions utilized for many years in these cases would have been rendered unnecessary. It would seem that when the Supreme Court did render a decision concluding that the facts constituted a "taking" in violation of the terms of the fifth amendment, it was merely stating a conclusion, not really determining whether or not a contract, express or implied, actually existed. Where the Court held that the property in question was taken under a claim of right by the Government, and therefore refused to allow recovery, it actually was informing the plaintiff that his claim was one in tort, for which no recovery could be allowed.[18] Consequently, it appeared that the more flagrant and unjustifiable the Government's acts, the less the tendency of the courts to hold it liable. Needless to say, this was often criticized as a less than commendable principle of law.[19]

Thus, for a number of years after the adoption of the Tucker Act, the Supreme Court not only clung to the idea that the right of recovery arose out of implied contract and not from the Constitution, but also maintained that the words in the statute, "not sounding in tort," related back to all the categories of claims for which the Government could be sued. Under this concept, no suit could be brought against the Government based on the fifth amendment, if the cause of action appeared to be tortious.[20] However, slowly but surely the Court moved towards the idea

16. Id. at 599.

17. Id. at 600, 604.

18. See Note, Grounds for Recognition of Implied Contracts Under the Tucker Act, 43 Yale L.J. 674 (1934).

19. Borchard, supra note 14, at 31.

20. Hooe v. United States, 218 U.S. 322 (1910); Schillinger v. United States, 155 U.S. 163 (1894); United States v. Jones, 131 U.S. 1 (1889).

that suits could be "founded on the Constitution" without regard to whether or not they sounded in tort. In *Dooley v. United States*,[21] the Court concluded that four distinct classes of cases were contemplated by the statute, so that the words "not sounding in tort" were referable only to the class of cases which were for "damages, liquidated or unliquidated." In a subsequent decision,[22] Mr. Justice Brown, in a concurring opinion, stated that he felt it would be going too far to hold that the words "not sounding in tort" should be a limitation on claims based upon the Constitution, and concluded that "claims founded upon the Constitution may be prosecuted in the Court of Claims, whether sounding in contract or in tort. . . ."[23]

However, the idea of the necessity for an implied contract in order to find jurisdiction under the statute lingered on. In *United States v. North Am. Transp. & Trading Co.*,[24] the Court held that the right to bring suit for an alleged taking of a mining claim in the Court of Claims was not based upon the fifth amendment, but "upon the existence of an implied contract entered into by the United States . . . and the contract which is implied is to pay the value of property as of the date of the taking."[25]

Two years later the Court again reaffirmed the contract theory in *Portsmouth Co. v. United States*,[26] where the claimants asserted a taking of property by the Government due to the erection of a fort, the guns of which had "a range over the whole sea front of the claimants' property."[27] The Court, through Mr. Justice Holmes, concluded that the facts warranted a finding that a servitude had been imposed on the property. Hence, the case was remanded to the Court of Claims so that evidence could be heard as to whether the acts amounted to a "taking," in which case an implied contract would exist, whether or not this was within the contemplation of the parties.[28]

It is interesting to note that not only did the Court reaffirm the necessity of finding some sort of contractual relationship between the parties in that decision, but also inferred that if there were a claim of superior title by the United States, there could be no contractual relationship, in line with the theory expressed in *Langford* and other early cases.

Subsequently, Chief Justice Hughes, in *Jacobs v. United States*,[29]

21. 182 U.S. 222 (1901).
22. United States v. Lynah, 188 U.S. 445 (1903).
23. Id. at 475.
24. 253 U.S. 330 (1920).
25. Id. at 335.
26. 260 U.S. 327 (1922).
27. Id. at 328.
28. Id. at 330.
29. 290 U.S. 13 (1933).

denied the necessity for finding any form of contractual relationship between the claimant and the Government in order to allow recovery in a case based upon the Constitution. In his opinion, the claim "rested upon the Fifth Amendment. Statutory recognition was not necessary. . . . Such a promise was implied because of the duty . . . imposed by the Amendment."[30]

It should be noted that in *Jacobs* government officers had proceeded by direct action, believing that their conduct would in no way constitute a "taking" under the fifth amendment. The Court, therefore, overlooked the possible illegality of the procedures used, since the project in which they were engaged was authorized by Congress.

The requirement for a contractual relationship between the parties finally came to an end in the historic case of *United States v. Causby*.[31] There, plaintiffs owned just under three acres of land near Greensboro, North Carolina, on which there was a house and a number of smaller structures which were used for raising chickens. The United States leased the use of an airport near the plaintiff's farm, so near, in fact, that the end of the northwest-southeast runway was less than one-half mile from either the barn or the house. The glide path of the runway passed directly over the farm, only some sixty-three feet above the barn. The facts disclosed that the planes often passed over the plaintiff's property in considerable numbers and close together, resulting in a "startling" amount of noise. As a result of this noise, some 150 chickens were killed, and the Court of Claims found that the final result was the destruction of the use of the property as a commercial chicken farm. The Court of Claims held that the property was "taken" within the meaning of the fifth amendment. The Supreme Court upheld the jurisdiction of the Court of Claims and, in so doing, rejected the argument that there was no taking of the property, since the enjoyment and use of the land was not completely destroyed:

> The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.[32]

The Court, in reaching the above conclusion, stated that such was the philosophy of the *Portsmouth* decision.[33] As in that case, the Court felt that the damages were "not merely consequential. They were the product of a direct invasion of respondents' domain."[34] Thus, it concluded that

30. Id. at 16.
31. 328 U.S. 256 (1946).
32. Id. at 262.
33. See note 26 supra and accompanying text.
34. United States v. Causby, 328 U.S. 256, 265 (1946).

the character of the invasion determines liability, not the amount of damage caused thereby, so long as "substantial" injury is shown.

On the question of the necessity of finding a contractual relationship between the claimants and the Government, the Court held that:

> We need not decide whether repeated trespasses might give rise to an implied contract. . . . [Citing *Portsmouth.*] *If there is a taking, the claim is "founded upon the Constitution" and within the jurisdiction of the Court of Claims to hear and determine. . . .* Thus, the jurisdiction of the Court of Claims in this case is clear.[35]

The Court thereby established the principle that claims which are "founded upon the Constitution" were no longer to be hedged in by the requirement that an implied contract be established on which recovery might be based. The question of whether the acts in question were tortious in nature was not even discussed, although Mr. Justice Black dissented on the ground that

> the allegation of noise and glare resulting in damages, constitutes at best an action in tort . . . but the Government has not consented to be sued in the Court of Claims except in actions based on express or implied contract.[36]

Therefore, Mr. Justice Black, with whom Mr. Justice Burton concurred, concluded that the case should have been reversed on the ground that "there has been no 'taking' in the constitutional sense."[37]

One year later the Court handed down another important decision in *United States v. Dickinson.*[38] Two suits were brought under the Tucker Act to recover for property allegedly taken by the Government pursuant to a project to improve navigability on a river in West Virginia. As a consequence of the raising of the river level, the plaintiffs' lands were permanently flooded, resulting in a great deal of erosion.

The Supreme Court, in affirming a decision for the plaintiffs, rejected any need for finding a contractual relationship between the parties in order to allow recovery, since suits such as this "are authorized by the Tucker Act either as claims 'founded upon the Constitution . . .' *or* as arising upon implied contracts with the Government."[39] The Court emphasized that it was "immaterial" on which theory the cause of action was based, because in any event "the claim traces back to the prohibition of the Fifth Amendment . . . ."[40] Thus, the mere fact that the Government had not formally taken proceedings to condemn the property was not sufficient to throw the burden on the plaintiffs to establish either the contractual relationship or the exact moment when the property was

35. Id. at 267. (Emphasis added.)
36. Id. at 269-70.
37. Id. at 275.
38. 331 U.S. 745 (1947).
39. Id. at 748. (Emphasis added.)
40. Ibid.

actually appropriated. The Supreme Court rejected the possibility of deciding the case based on the "shifting meanings" of a "cause of action," choosing instead to avoid procedural rigidities, and emphasizing that the claim was not based on a single trespass, but rather on "inroads" that were continuous in nature.[41] Therefore, as in *Causby*,[42] it was not alleged that the Government should be held liable for a "taking" on a single occurrence, but rather only where such acts are repeated or permanent enough in nature to deprive the claimant materially of his enjoyment of the property. The mere failure of the Government to institute formal condemnation proceedings was not to be utilized as a means of defeating the recovery for such "taking."

Subsequent decisions by the Court of Claims have accepted *Causby* and *Dickinson* as making it unnecessary to find that the agents of the Government were aware that they were engaged in a "taking," so as to imply a contractual relationship,[43] since suits upon the Constitution are independent of any circumstances giving rise to a contract implied in fact.[44] It has been asserted that the doctrine of the earlier cases, requiring that the circumstances of the "taking" be such as to imply a contract, "read out" of the Tucker Act the provision giving the Court of Claims jurisdiction over claims "founded upon the Constitution."[45] However, *Causby* and *Dickinson* have been accepted as giving that provision "full effect."[46] Thus, the Court of Claims has accepted these decisions as clearly establishing the principle that:

> The statute by which the Government waives its sovereign immunity from suit in certain situations, does not limit our jurisdiction to cases of contracts. Indeed, the first named ground of our jurisdiction is upon claims . . . founded upon the Constitution. . . . [I]n its recent decisions *the Supreme Court has recognized that claims "founded upon the Constitution" may be sued upon, whether or not the circumstances also give rise to a contract implied in fact.*[47]

In allowing recovery in such "taking" cases, the courts have formulated the theory that if a tortious act by the Government is repeated and consistent enough to deprive the owner of the beneficial use of his property, and the Government derives a benefit in some way, then there has been a "taking" in the constitutional sense, for which the claimant can sue under the Tucker Act. The *Causby* decision and those which follow it espouse what can be termed an "expansive concept" of a

41. Ibid.
42. See note 31 supra and accompanying text.
43. Cotton Land Co. v. United States, 75 F. Supp. 232 (Ct. Cl. 1948).
44. West Va. Pulp & Paper Co. v. United States, 109 F. Supp. 724 (Ct. Cl. 1953).
45. Fonalledas v. United States, 107 F. Supp. 1019, 1022 (Ct. Cl. 1952).
46. Id. at 1022.
47. Foster v. United States, 98 F. Supp. 349, 351 (Ct. Cl. 1951). (Emphasis added.)

"taking." It would appear that where the courts have reached a decision in such cases that there has not been a "taking," they have really said that there has been a valid exercise of regulatory power, the consequences of which are "damnum absque injuria."[48] The question persists, however, as to whether, under the spirit of the fifth amendment, there should ever be a loss of private property, because of a public purpose, which is not compensable.

As illustrated, the courts gradually eliminated two major obstacles in the path of claimants seeking to base a claim on the fifth amendment, casting aside the implied contract requirement, and allowing a claim to be litigated under Tucker Act jurisdiction even though it may sound in tort. However, still another hurdle may block jurisdiction, since there may well be a question in any such case whether the agents or government officials who inflicted the damage were acting within their authority. The Supreme Court has not clearly answered the question of whether or not there can be recovery as a "taking" where the act done by the agent was arbitrary. The early cases were explicit in requiring that the agents of the Government had to be acting within their express authority in order to impose liability upon the United States.[49] However, in the *Causby* decision the Supreme Court evaded this question, and the Government did not take the opportunity for questioning the agents' authority for accomplishing the unintentional direct action taken. Similarly, in *United States v. Peewee Coal Co.*,[50] no challenge to the authority of the President was alleged in regard to the coal mine seizure during World War II, although the Government's brief disclosed a lack of specific statutory authority. Again, the Court ignored the problem.

The question remains, due to these decisions and others, how far the theory of *Causby* can be extended. The Court of Claims has stated that "if the Government . . . took the lands of the plaintiffs, the absence of statutory authority to do so would not put the citizen thus imposed upon beyond reach of relief."[51] It would appear that the *Causby* and *Peewee Coal Co.* decisions may be accepted as inferring the principle that when a suit is brought against the United States for the "taking" of private property in violation of the fifth amendment, recovery may be allowed merely on the establishment of the facts that a "taking" did occur and that the Government did in fact retain the property thus acquired. Under this approach to the question, the authority of the taking official would seem immaterial to the question of jurisdiction under the Tucker Act.

48. Hart & Wechsler, The Federal Courts and the Federal System 1224 (1953).

49. E.g., Sutton v. United States, 256 U.S. 575, 580 (1921); Hooe v. United States, 218 U.S. 322, 335 (1910).

50. 341 U.S. 114 (1951).

51. Fonalledas v. United States, supra note 45, at 1022.

Due to the adoption of the Tort Claims Act[52] soon after the *Causby* decision, however, there has been relatively little judicial pronouncement in this area during the past fifteen years.

In *United States v. Caltex, Inc.*,[53] certain property in the Philippines was deliberately ordered destroyed in order to prevent it from falling into the hands of the Japanese. This was clearly not a case of incidental damages due to general regulation, nor was there any assertion that the Government had not taken possession of the property. But, the majority of the Supreme Court held that no compensation need be paid by the Government to the owners, stating:

> The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. . . . No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts.[54]

The holding of the majority in that decision appears to be a sensible one. However, in an extremely interesting dissent, Mr. Justice Douglas, joined by Mr. Justice Black, asserted that whenever property is appropriated by the Government as essential for the "common good," the fifth amendment requires compensation.[55]

Thus, it is possible to perceive from this dissent means by which the *Causby* decision could be extended.[56] Nevertheless, the value, if any, to be obtained from this theory would appear to be severely limited due to the decision in *Youngstown Sheet & Tube Co. v. Sawyer*.[57]

The question involved in that monumental case was whether the President had acted within his constitutional power in the issuance of an order directing the Secretary of Commerce to take over and operate the steel mills. The seizure had been ordered for the purpose of averting a strike during the Korean War. The district court issued a preliminary injunction, restraining the Secretary from "continuing the seizure and possession of the plants."[58] In the district court, counsel for the Secretary of

52. 60 Stat. 842 (1946), as amended, 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2670-80 (1958) (Supp. III, 1959-1961).

53. 344 U.S. 149 (1952).

54. Id. at 155-56.

55. "[T]he guiding principle should be this: Whenever the Government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss." Id. at 156.

56. It is interesting to note that Mr. Justice Black, who dissented here on the basis that there was a "taking," had also dissented in the Causby case and asserted that the acts merely amounted to tortious conduct and not to a compensable "taking." See note 36 supra and accompanying text.

57. 343 U.S. 579 (1952).

58. Id. at 584.

Commerce had argued that the plaintiff companies would have an adequate remedy at law under the Tort Claims Act, should the seizure subsequently be found illegal. This suggestion, being of doubtful quality,[59] however, was dropped in the Supreme Court, and the government counsel emphasized instead 28 U.S.C. Section 1491, allowing jurisdiction in the Court of Claims "upon any claim against the United States founded . . . upon . . . any regulation of an executive department . . . ."[60] It was argued that no injunction should have been issued, since plaintiffs could sue the Government in the Court of Claims for an illegal "taking," if the seizure were finally held unlawful.

At first glance this defense has merit, since, as discussed previously, suits against the Government may be brought in the Court of Claims based exclusively on a claim "founded on the Constitution."[61] Further, it has been held that it is the deprivation of a right or interest of the former owner rather than the accretion thereof to the sovereign that constitutes a "taking."[62] For this reason, "governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."[63] A "taking," therefore, need not be permanent to give rise to a claim against the Government.

The Court was in doubt as to whether suit might be brought in the Court of Claims for a "taking" under the Tucker Act if the seizure were accomplished outside the President's authority. The old *Langford* argument,[64] as to acts not within statutory authority, appeared in Mr. Justice Black's opinion to the effect that injunctive relief should be granted, since it is doubtful that damages could be recovered in the Court of Claims for the tortious seizure of property by government officials.[65] This view primarily relied on two decisions: *Hooe v. United States*,[66] and *United States v. North Am. Co.*[67] In *Hooe*, the Court, via Mr. Justice Harlan, stated that unless a claim be authorized by Congress, either "expressly or by necessary implication," it is not a claim "founded upon

59. See 28 U.S.C. §§ 1346(b), 2680 (1958).

60. The Steel Seizure Case, H.R. Doc. No. 534, pt. II, 83d Cong., 2d Sess., 777-78 (1952).

61. 28 U.S.C. § 1491 (1958).

62. United States v. General Motors Corp., 323 U.S. 373, 378 (1945). The Supreme Court emphasized that "taking" had been given a liberal interpretation by the courts, since "in its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow." Ibid.

63. Ibid.

64. Langford v. United States, 101 U.S. 341 (1879).

65. Youngstown Sheet & Tube Co. v. Sawyer, supra note 57, at 584-85.

66. 218 U.S. 322 (1910).

67. 253 U.S. 330 (1920).

the Constitution," and the officers involved cannot be said to represent the United States.[68]

In the *North Am. Co.* decision, the Court stated that the problem of the claimant in the *Hooe* case did not present itself, since express statutory authority did exist for the "taking" of the property. The Court was of the opinion that "when the Government without instituting condemnation proceedings appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefore." However, Mr. Justice Brandeis, speaking for the Court, emphasized that:

> [A]lthough Congress may have conferred upon the Executive Department power to take land for a given purpose, the Government will not be deemed to have so appropriated private property, merely because some officer thereafter takes possession of it with a view to effectuating the general purpose of Congress. . . . *In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.*[69]

It is to be lamented that the Supreme Court did not take the opportunity, since the issue was raised in the steel case, to resolve the doubts about whether, where a "taking" is without authority, there can be a suit based on the fifth amendment. Its failure to do so, along with its reliance on two cases of doubtful relevance,[70] leaves the issue still in doubt.

A statement in *United States v. Central Eureka Mining Co.*,[71] apparently gives support to Mr. Justice Black's views in the *Youngstown* case. In *Eureka*, the plaintiffs claimed that an order of the War Production Board[72] was arbitrary and without any rational connection to the war effort. They asserted that if such regulation were arbitrary, there would be no difference between such a case and one where the Government

68. 218 U.S. at 335.

69. 253 U.S. at 333. (Emphasis added.)

70. The Hooe case involved a contract for rent made with the Civil Service Commission, such contract being in violation of statutes forbidding such until proper appropriations had been made. Due to the commercial aspects of the case, the decision is of doubtful value even in its own realm, much less in its application to the situation presented in the steel case. In the North Am. Co. decision, the claim against the Government was treated as necessarily based on an implied contract with the Government to pay compensation. This approach, due to Causby and subsequent decisions, is no longer utilized. Further, under the liberal trend evidenced by Causby, it would seem reasonable to conclude that the taking officer's authority has also become irrelevant where the Government has retained the property. Authorization decreases in importance when a contractual relationship is not necessary. Certainly retention of the benefits would seem to imply ratification in any agency relationship.

71. 357 U.S. 155 (1958).

72. War Production Board Limitation Order L-208, 7 Fed. Reg. 7992-93 (1942).

consciously exercised its power of eminent domain to take for the public use. Mr. Justice Burton stated that due to the Court's view of the case,[73] there was no need to decide that question. Nevertheless, he added that "ordinarily the remedy for arbitrary governmental action is an injunction, rather than an action for just compensation,"[74] citing the *Youngstown* decision as the basis for this dictum. This statement apparently coincides with Mr. Justice Black's views in *Youngstown*, but the use of the word "ordinarily" again seems to have left the door open to a conclusion that a claimant might recover, under some circumstances, for an arbitrary "taking" in an action under the Tucker Act.

The question of whether the Government can preclude a suit by a claimant "founded on the Constitution" by denying that the claimant has title to the property involved also remains unsettled. It would appear that the approach taken by Mr. Justice Shiras in his dissenting opinion in the *Hill* case is the more reasonable and realistic one,[75] since the question of title should not, in all fairness, preclude the wronged party from coming into court merely because the defendant alleges superior title in itself. As has been stated by Mr. Justice Harlan:

> [T]he claim to have just compensation for . . . an appropriation of private property to the public use is "founded upon the Constitution of the United States." It is none the less a claim of that character, even if the appropriation had its origin in tort. . . . *The questions of title and appropriation are for judicial determination. These being decided in favor of the claimant, the Constitution requires a judgment in his favor.*[76]

As long as the courts followed the theory that a suit against the Government, based on a violation of the fifth amendment, had to be grounded on a contractual relationship between the parties, there was some basis for holding that if the Government contested title, it was not entering into such relationship in taking the property. But under more recent cases such as *Causby* and *Jacobs* it has been established that a claim founded upon the Constitution can stand on its own, without the aid of a hypothetical contract conceived by the courts in order to save the claimant's case.

Since it has been established that claims based on the Constitution are independent of any contract, and that recovery may be had whether the Government proceeds by informal means or through formal proceedings or requisition, it seems that the issue of title should be left up to the court in each particular case. It is no longer relevant in such constitutional

73. The Court found that the order was a proper exercise of the Government's regulatory power. United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

74. 357 U.S. at 166 n.12.

75. See note 17 supra and accompanying text.

76. Schillinger v. United States, 155 U.S. 163, 179 (1894) (dissenting opinion). (Emphasis added.) Mr. Justice Shiras also joined with Mr. Justice Harlan in this dissent.

cases whether or not the Government claims that it is dealing with its own property in regard to the jurisdictional question, for it is now unnecessary to find a contractual basis for the suit. Such claim of superior title is merely a question to be judicially determined in the course of the case.

One thing is clear from the preceding discussion of suits against the Government based on the Constitution: Regardless of whether or not Congress originally intended to allow such suits arising due to the tortious conduct of government agents under the Tucker Act,[77] suits will be entertained in many cases where such acts amount to a "taking" of private property. Thus, it would seem erroneous to conclude, as some observers have done, that the Tucker Act provided no remedy for claims sounding in tort, and that the Government did not subject itself thereby to liability for the torts or wrongful acts of its officers.[78]

The passage in 1946 of the Tort Claims Act would appear to have helped resolve this problem. This is especially true if the Tucker Act and the Tort Claims Act are viewed as "mutually inconsistent and repugnant."[79] However, the vast amount of interplay between the statutes and the remedies they provide tends to belie any clear-cut definition as to their coverage. Where the courts attempt to deal with claims "founded upon the Constitution," they are obviously dealing with a concept which belongs to the vague category of constitutional law. It is not an easy task to reconcile this concept with our traditional categories of "tort" and "contract" law.

II. The Federal Tort Claims Act and the Tucker Act

On August 2, 1946, Congress approved Title IV of the Legislative Reorganization Act, thereby adopting what is known as the Federal Tort Claims Act.[80] This statute subjects the Government to liability for the tortious conduct of its agents while acting within the scope of their employment. Thus, a general policy was laid down whereby the Government would be held responsible for torts by its employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[81] This action by the Seventy-Ninth Congress was "in accord with the recommendations of many outstanding persons in the past and contemporary political life of the United States."[82]

77. See 18 Cong. Rec. 622, 2676-78 (1887).

78. See Gottlieb, The Tort Claims Act Revisited, 49 Geo. L.J. 539, 573 (1961).

79. Id. at 574.

80. See note 52 supra.

81. 28 U.S.C. § 1346(b) (1958).

82. Gottlieb, The Federal Tort Claims Act—A Statutory Interpretation, 35 Geo. L.J. 1 (1946).

The statute is saddled with a number of exceptions,[83] and jurisdiction to entertain suits brought thereunder is bestowed exclusively on the district courts, although review may be had in the Court of Claims if all appellees consent thereto in writing.[84] Due to the numerous exceptions, jurisdiction is denied under the statute to a number of common-law torts, as well as claims arising from the "assessment or collection of any tax" or the "detention of any goods . . . by . . . law-enforcement officer[s]."[85] Therefore, the anomalous situation has been created whereby the Tucker Act, in allowing recovery for "takings" under the Constitution, can at times give more relief for tortious conduct on the part of government agents than can be obtained under the Tort Claims Act.

Where an injured claimant seeks redress against the Government for an amount not exceeding ten thousand dollars and such suit is brought in a district court, it is possible for the plaintiff to lose on his tort cause of action (due to an exception in the Tort Claims Act) and still remain in the court on the allegation that there had been a constitutional "taking" of the property involved. The amount cannot exceed ten thousand dollars, since that is the maximum for which a suit may be brought in a district court under the Tucker Act.[86] But even where the claimant seeks an amount in excess of the jurisdictional maximum under the Tucker Act, he may, if precluded from recovery in the district court under the Tort Claims Act, bring his action in the Court of Claims framed as a "taking," since there is no monetary limit on such actions in that court. An example of this course of action is *Coates v. United States*,[87] in which the claimants brought an action against the United States under the Tort Claims Act in a district court, seeking damages totaling $179,540. The suit was based on damages allegedly caused to the plaintiffs' lands through the continuing negligent acts of defendant while changing the course of the Missouri River. Specifically, the complaint alleged that the " 'action arises under the Fifth Amendment to the Constitution . . . and also under the Federal Tort Claims Act.' "[88] The district court dismissed the complaint, since the acts alleged fell within the "discretionary function" exception of the Tort Claims Act.[89] The court of appeals affirmed, but implied that the plaintiffs might have been able to succeed had the complaint been framed so as to charge negligence in regard to the actual labor involved in carrying out the project, and not as to

83. 28 U.S.C. § 2680 (1958) (Supp. III, 1959-1961).
84. 28 U.S.C. § 1504 (1958).
85. 28 U.S.C. § 2680(c) (1958).
86. 28 U.S.C. § 1346(a)(2) (1958).
87. 181 F.2d 816 (8th Cir. 1950).
88. Ibid.
89. 28 U.S.C. § 2680(a) (1958).

the executive functions which sanctioned it nor the performance of discretionary functions which controlled it.[90]

The plaintiffs then brought the case before the Court of Claims under the Tucker Act,[91] realizing that the statute, in granting jurisdiction for "takings" under the Constitution, can give relief for some torts precluded by the exceptions under the Tort Claims Act. The petition alleged that, in building structures to improve the navigability of the Missouri River, the Government had caused erosion of plaintiffs' farm land and had deposited thereon a heavy layer of sand, resulting in *permanent destruction* of the productivity of the land. They asked for the identical damages claimed in the earlier case—$179,540. The Court of Claims accepted jurisdiction of the action and stated that the Government's acts were

> an invasion of a permanent and continuous character constituting a taking of private property for a public purpose for which there is an implied promise to pay just compensation as required by the Fifth Amendment.[92]

Since the claim was "of the character of a taking" and not merely a tort claim, the court rejected the Government's contention that it was a cause of action "sounding in tort" and therefore not within the jurisdiction of the Court of Claims.[93]

A decision such as this supports the theory that the liberal trend of the courts in determining "takings" in violation of the Constitution has not been materially altered by the advent of the Tort Claims Act. Rather, regardless of congressional intent, a claimant can have "two-bites-at-the-pie" merely by a clever framing of his pleadings: first, as a tort under the Tort Claims Act, and should this prove unsuccessful, as a "taking" under the Tucker Act. As previously mentioned, if the claim is for less than the ten thousand dollar limitation on Tucker Act suits in a district court, then the plaintiff may claim either that the act was a tort or that it amounted to a "taking." If the claim is for more than the jurisdictional maximum, the claimant may first claim a tort in a district court suit, and should he fail there, due to the exceptions under the Tort Claims Act, remove his action to the Court of Claims, claiming that his

90. "It would be difficult if not impossible to point to any example of exercising and performing discretionary functions and duties on the part of federal agencies more clearly within the exception of the Federal Tort Claims Act than the changing of the Missouri River under legislative and executive sanction pursuant to political and discretionary decisions of the highest governmental order on which the plaintiffs have chosen to base their claim of negligence in this case." 181 F.2d at 817.

91. Coates v. United States, 93 F. Supp. 637 (Ct. Cl. 1950).

92. Id. at 639.

93. "We attach no value to the oblique suggestion that this case may sound in tort and thus not be within our jurisdiction. Clearly, if this is a tort claim we would not have jurisdiction of it per se, but defendant does not assert that it is such a claim. The claim is of the character of a taking and should be heard on its merits." Id. at 640. (Emphasis omitted.)

property was taken through acts of government agents. This course of action, as well as a showing that the two statutes may well provide alternative remedies which do not require an election by the plaintiff before suit is brought under either, is well illustrated by *Coates*.

In *Sickman v. United States*,[94] actions were brought under the Federal Tort Claims Act to recover $26,500 for damages to plaintiff's crops of corn and soybeans alleged to have been destroyed by migratory waterfowl. Plaintiff's complaint stated some eleven counts on which the defendant might be held liable for plaintiff's injury, but the district court sustained a government motion to dismiss the amended complaint.[95] In affirming the decision below, the court of appeals stated that the district court was without jurisdiction to hear the case, since what the plaintiff actually alleged was the negligence of the United States through congressional action, rather than any lack of due care on the part of a government employee. The court concluded that since "no allegation of negligence was charged to any particular employee of the federal government . . . the discretionary function exception in Sec. 2680(a) was applicable."[96]

Therefore, once again, a plaintiff found himself unable to proceed in prosecuting a tort claim against the Government due to the exceptions of the Tort Claims Act. The same cause of action, however, reframed as a "taking" in violation of the Constitution, subsequently appeared before the Court of Claims in *Bishop v. United States*.[97] Plaintiffs alleged that due to the proclamation denying permission to hunt wild geese on their land, their hunting facilities were in effect "taken." Further, the allegation was made that as a natural result of the proclamation the crops were destroyed, thus constituting a "taking" thereof.

The court had little difficulty in dismissing the first allegation, holding no cause of action since there is no right to hunt such wild fowl except as permitted by the state. In regard to the damage to plaintiffs' crops, the court refused to find a "taking," stating:

> Defendant has not invaded plaintiffs' property, it has asserted no proprietary right in it. The gist of the whole matter is that Congress has passed an Act . . . which prohibited the hunting of wild geese except as permitted by the Secretary of the Interior, and the Secretary of the Interior has refused to give the required permission . . . . For this . . . the Government is not liable as for a taking.[98]

The court thereupon refused to find that under these facts the plaintiffs had suffered a sufficient deprivation of property so as to constitute

94. 184 F.2d 616 (7th Cir. 1950).
95. Id. at 617.
96. Id. at 620.
97. 126 F. Supp. 449 (Ct. Cl. 1954).
98. Id. at 452.

a violation of the fifth amendment amounting to a "taking." But Judge Madden, in a vigorous dissent, stated that in effect the Government had converted plaintiffs' farm into a "game preserve," and that whenever "the accomplishment of the public purpose . . . results in the destruction of a private owner's use of his land" the fifth amendment requires that the Government compensate the owner.[99]

In *Harris v. United States*,[100] plaintiff brought an action for crop damages sustained due to herbicide spraying on adjoining government land. Drifting herbicide damaged plaintiff's cotton and peanut crops, and the suit against the Government was based on the Tort Claims Act, or, *in the alternative*, as a "taking" under the Tucker Act.

In regard to the allegation of negligence, seeking to impose a liability on the Government under the Tort Claims Act, the court held that, even though the "operational details" might be considered a nondiscretionary function, the Government was not liable for resultant damages to plaintiff's crops under the Tort Claims Act, since the trial court found that the spraying had not been done negligently.[101]

In addition, the court also refused to consider that the claimant's property had been "taken" in violation of the Constitution merely through a "single isolated and unintentional act of the United States."[102] The court felt that this was rather a tortious act for which the Government may only be held liable on a consensual basis. In concluding that this could only be a tort, and not a "taking," the court emphasized that it was a *single destructive act without any attempt to acquire a proprietary interest*, therefore falling short of a violation of the fifth amendment,[103] admitting, however, that the cases have never drawn a clear and certain distinction between torts and "takings."[104]

The court recognized that this decision would leave an injurious wrong by the Government uncompensated, but felt that, if so, "the deficiency lies in the limited scope of the government's tort liability."[105] Due to this limited liability of the Government as to suits for torts, a claimant who can build a case for a "taking" out of repeated tortious

99. Id. at 453.

100. 205 F.2d 765 (10th Cir. 1953).

101. Id. at 766-67.

102. Id. at 768.

103. Id. at 767.

104. "A compensable taking under the federal constitution . . . is not capable of precise definition. And the adjudicated cases have steered a rather uneven course between a tortious act for which the sovereign is immune except insofar as it has expressly consented to be liable, and those acts amounting to an imposition of a servitude for which the constitution implies a promise to justly compensate." Ibid.

105. Id. at 768.

conduct finds himself free of the exceptions, since his claim may then be founded on the Constitution. This is the primary reason why the Tucker Act, in regard to tortious conduct which adds up to a possible "taking," has remained important despite the adoption of the Tort Claims Act. The essential problem which seems to cause the courts the most difficulty is posed by the question of when a tort (or torts) may amount to a "taking." In the *Causby* decision, the Court looked for a deliberate, continuous or repeated act (or acts). In addition, it would seem that the Government must derive some benefit from the transaction in order to find that a constitutional "taking" has occurred. If these elements are present, then it would appear to be to the claimant's advantage to bring his suit under the Tucker Act, rather than under the Tort Claims Act. In all probability, if *Causby* arose now, after the adoption of the Tort Claims Act, the result would be the same, and a "taking" would again be found to have occurred. Again, the Supreme Court would most likely avoid the issue as to whether there had been a tort involved, once a permanent servitude was found to have been imposed on the property.

In a recent district court case[106] under the Tort Claims Act, the plaintiff alleged that he was injured by a team of horses frightened by a low level flight made by Civil Aeronautics Administration pilots who were obtaining data in order to establish an approach pattern for an airport. The district court held that this was a compensable claim under the Tort Claims Act, but it was barred by an exception to the statute.[107] Its decision was reversed by the court of appeals, and the case was remanded so that the lower court could make a specific finding as to whether or not there was negligence involved.

The question arises, in viewing such a ruling, of whether or not the plaintiff might have brought the suit as a "taking" under the *Causby* theory, thereby avoiding the dangers of losing the suit due to the exceptions under the Tort Claims Act. The answer would appear to be a negative one since, although there might have been a benefit to the Government, there clearly was not a *permanent* servitude imposed on the property. Thus, this type of injury must be compensated for under the Tort Claims Act, or not at all. The Tucker Act, even under the *Causby* theory, cannot be extended this far. At least that much appears to be clear at this time.

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105. Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956).

107. See 28 U.S.C. § 2680(a), prohibiting suits based upon "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

III. Conclusions and Recommendations

There would seem to be little basis on which to dispute the conclusion that

> it was not the purpose or intent of the [Federal Tort Claims Act] . . . to usurp or displace the previously existing remedy in contract nor to give the plaintiff having a contract claim against the Government an alternative right of suit in tort.[108]

However, the fact must be kept in mind that a suit against the Government for a "taking" is no longer considered contractual in nature, but rather stands on its own as a claim "founded on the Constitution." Therefore, it would seem that the general conclusion that "the contractual responsibility of the United States under the Tucker Act excludes tort liability"[109] is greatly oversimplified.

As evidenced by the materials presented above, the interplay of the two statutes in the area of torts and "takings" is quite extensive, and the mere fact that Congress may not have so planned their application is not sufficient grounds for ignoring the problem. Not only are the courts allowing a claimant with a tortious claim against the Government to waive such tort and proceed under the Tucker Act in some cases, but will, in others, allow the same cause of action to appear both in the Court of Claims, for a "taking," and in a district court, for a tort. As illustrated by the *Coates* case,[110] a plaintiff who has lost his suit in a district court due to an exception under the Tort Claims Act was able to move over to the Court of Claims and win on the same cause of action for a "taking" as a claim "founded on the Constitution." It appears superfluous to add that this much neglected area of the law needs attention.

One possible remedy would be a repeal of the exceptions to the Tort Claims Act. It seems obvious that had the Government been properly suable in tort over the last one hundred years, the need for deviously concocted causes of action in order to gain jurisdiction under the Tucker Act would not have been necessary, at least in the vast majority of cases. Since there are, however, a number of ramifications in any such proposal which are beyond the scope of this discussion, this point will not be stressed in detail. It is merely pointed out here that it is largely due to these exceptions[111] that the Tucker Act has continued to play such an important role in regard to cases against the Government which seem clearly tortious in nature. To those who have reservations about the wisdom of subjecting the Government to such general liability in tort, reference should be made to the New York approach to the problem.[112]

108. Gottlieb, supra note 78, at 574.

109. Ibid.

110. See note 87 supra and accompanying text.

111. 28 U.S.C. § 2680 (1958) (Supp. III, 1959-1961).

112. "The state . . . waives its immunity from liability and action and . . . assumes

There should be no instance where private property has been appropriated for public use, to any degree, for which the owner is not properly compensated. To achieve this purpose, a new general statute should be adopted, the guiding principle of which should be that whenever a person has been deprived of the full enjoyment of his property by the Government, then compensation should be made, regardless of how the cause of action is framed. The essential question should be whether or not the owner has been deprived of a right or interest in his property, not the accretion of a right or interest to the United States. There should be no exceptions to the Government's liability under such statute, for the spirit, if not the letter, of the fifth amendment is clear. No injured citizen should see his rightful recovery dashed on the rocks of "sovereign immunity" because of his inability to cope with the "shifting meanings" of a "cause of action." The Constitution was intended to "preserve practical and substantial rights, not to maintain theories."[113] No proper claim should fail because it must find a niche somewhere within the sphere of the traditional concept of tort and contract and, in addition, the applicable statute.

Under the terms of the new legislation, no claim founded on the fifth amendment should have to depend, in order to succeed, on the fact that the government agent was acting within his express authority. This issue should be immaterial to such claims. The only important issues should be whether the plaintiff can prove title to the property, and whether the evidence discloses that a benefit was retained by the United States. The question of retention of such benefit should be liberally construed, so that it relies primarily on whether or not the servitude imposed is permanent in nature, *e.g.*, flooding, as opposed to merely temporary, *e.g.*, a single airplane flight. If a permanent "taking" is found to exist, then a benefit should be implied and compensation should be paid to the owner. Where an officer of the United States has exceeded his authority, causing a "taking" of private property, it is the public at large that receives the benefit, not the individual agent, and therefore, it is the public at large, through the government treasury, that should bear the cost. The question of authorized activities may play a necessary role in tort law, but it has no place in reference to "takings" under the fifth amendment.

Furthermore, it should be irrelevant whether or not a claim brought for a "taking" in violation of the fifth amendment sounds in tort. The basis for such suits should be neither tort nor contract, but rather a separate cause of action, created expressly to carry out the principle

liability and consents to have the same determined in accordance with the same rules of law as applied to actions . . . against individuals or corporations . . . ." N.Y. Ct. Cl. Act § 8.

113. United States v. Dickinson, 331 U.S. 745, 748 (1947).

embodied in the fifth amendment. If the claim, in the opinion of the court, appears *merely* to be based on a tortious act by a government official, *and not sufficient* to create a constitutional "taking," then the claimant should be compelled to seek his redress under the Federal Tort Claims Act. But no case should be dismissed, where there has been a benefit to the United States and a diminution of the owner's enjoyment of his property, merely because an agent of the Government was acting tortiously or beyond his authority. It is the Government's gain, not the agent's acts, which should control jurisdiction.

Finally, no suit should be dismissed for lack of jurisdiction because the Government sets up a claim of adverse title against a claimant. Title should be one of the essential questions for judicial determination in any "taking" case, and not a defense by which the Government can prevent a suit from being heard on its merits.

The principle to be followed was clearly established by the fifth amendment: "[N]or shall private property be taken for public use, without just compensation." Unfortunately, the amendment established a principle only, without providing the remedy by which an injured claimant could seek his "just compensation." Because it is not self-executing, the onus of finding a means by which to base a claim on the amendment has fallen on the injured claimant. The fifth amendment should be interpreted as a consent, in itself, in suits brought against the Government for any "taking" of property privately owned. Proper procedures should be adopted so that an injured citizen can pursue his remedy swiftly and surely. As stated by Mr. Justice Brewer,

> all [questions] . . . which run along the line of the extent of the protection the individual has under the Constitution against the . . . government . . . [are] of importance; for in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.[114]

The right is clear; the time has arrived to make the remedy equally lucid.

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114. Monongahela Nav. Co. v. United States, 148 U.S. 312, 324 (1893).