

THE FIFTH AMENDMENT REQUIRES THE GOVERNMENT  
TO PAY AN OWNER INTEREST EQUAL TO WHAT THE  
OWNER COULD HAVE EARNED HAD THE GOVERNMENT  
PAID THE OWNER THE FAIR-MARKET VALUE OF THEIR  
PROPERTY ON THE DATE THE GOVERNMENT TOOK  
THE OWNER'S PROPERTY

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#### SUMMARY

In this article, we review how the Fifth Amendment, and the Supreme Court’s jurisprudence applying the Fifth Amendment, require the government to pay a property owner the full fair-market value of property the government has taken, together with interest in an amount sufficient to fairly and fully compensate the owner for the government’s delay in rendering the owner payment for that property which the government took.

The government must pay interest equal to the return an owner would have earned on the fair-market value of the property taken had the government actually paid the owner this money on the date the government took the owner's property. The appropriate interest rate—just like the value of the property taken—must be established by reference to the market at the time of the taking.

The Constitution does not give the legislative or executive branch authority to statutorily limit the amount of interest (or any other component of “just compensation”) which the Fifth Amendment requires the government to pay an owner when the government takes private property. And the interest an owner is due cannot be established by reference to government bonds which, by definition, are a measure of the government's cost of borrowing money—not a measure of the owners' loss of use of the funds over the relevant period.

Some courts, including the Federal Circuit, have sought to establish a uniform and efficient method to determine the appropriate rate of interest an owner is due. These courts have established a rebuttable presumption that the Moody's Composite Index is a reasonable measure of the appropriate rate of interest to compensate an owner for the government's delay in rendering payment. By taking judicial notice of the Moody's Index, courts spare property owners the burden of having to prove the appropriate interest rate in each case.

## INTRODUCTION

The Fifth Amendment to the United States Constitution declares: “[N]or shall private property be taken for public use, without just compensation.” But the government does not always comply with the Constitution. In many cases, the government takes private property and yet seeks to avoid its obligation to pay the owner. In other cases, the government takes an owner's property but only offers to pay a small percentage of what the owner would have been paid had the owner sold their property on the open market.

When the government refuses to honor its constitutional obligation to pay “just compensation” for property the government has taken, the owner's only recourse is to file a lawsuit<sup>1</sup> asking a judge

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1. See The Federal Eminent Domain Procedure Act of August 1, 1888, 25 Stat. 357 (current version at 40 U.S.C. §3113 (2002)); Declaration of Taking Act of February 26, 1931,

to order the government to pay the owner “just compensation” for what the government took.

But litigation is costly and takes years to resolve. It typically takes the better part of a decade to finally resolve a Fifth Amendment inverse condemnation lawsuit. Throughout the pendency of an inverse condemnation lawsuit—from the date it took the owner’s property until it finally renders payment—the government has had the use of *both* the property and the money it should have paid the owner on the date it took the property.

When the government takes property, the Fifth Amendment requires that it pay the fair-market value of the property on the date of the taking. The Fifth Amendment also requires the government to pay compensation for the delay between the date of the taking and the date that compensation is paid.

This article addresses two questions. First, who decides what rate of interest is sufficient to compensate the owner for the government’s delay in rendering the constitutionally mandated payment for that property which the government took? And, second, what principles establish the metric by which to determine whether an award of interest is sufficient to satisfy the constitutional mandate that the government must pay an owner “just compensation”?

#### *A. The Task of Deciding What Amount of Money Is Sufficient to Provide “Just Compensation” Falls Exclusively to the Judiciary*

It is exclusively the province of the judicial branch to determine the “just compensation” which an owner is due under the Fifth

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46 Stat. 1421 (current version at 40 U.S.C. §3114 (2002)). These statutes apply to direct takings by the government.

In inverse condemnation cases—such as takings pursuant to the National Trails System Act, 16 U.S.C. § 1241 *et seq.*—the government does not provide the owner any notice the government has taken the owner’s property. And the owner frequently does not learn the government has taken their land until years later when the trail developer shows up with bulldozers to construct a public rail-trail corridor across the owner’s land. *See* Mark F. (Thor) Hearne, II *et al.*, *The Trails Act: Railroading Property Owners and Taxpayers for More Than a Quarter Century*, 45 REAL PROP., TR. & EST. L.J., 115 (2010). In the Trails Act and other federal “inverse condemnation” cases, the owner’s only recourse is to pursue an inverse condemnation claim in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. §1491 (2011).

In a “direct taking,” the government initiates the lawsuit and acknowledges its liability to compensate the owner. But, when (as is frequently the case) the government only offers to pay a portion of the value of the property the government has taken, the owner bears the burden of having to defend the owner’s right to be paid compensation equal to the value of that property the government took.

Amendment. This principle applies with equal force to a determination of compensation the government owes for the value of the property taken and the compensation the government owes because the owner lost use of these funds during the government's delay in honoring its constitutional obligation to pay the owner.

Congress has no constitutional authority to pass any law inconsistent with the Fifth Amendment's "just compensation" mandate. Similarly, the executive branch has been granted no constitutional authority to determine the compensation a property owner is due under the Fifth Amendment.

It follows from these principles that any rate of interest established by a statute passed by the legislature or an edict of an executive branch can only provide a "floor" and not a "ceiling" on the amount of interest an owner is due as compensation for the government's delay in paying the owner.

Thus, statutory interest rates, such as those in the Declaration of Taking Act and the Contract Disputes Act ("CDA"), are of no authority to a court. The Declaration of Taking Act ("DTA") rate—which is currently 0.09%—is also a woefully inadequate rate of interest by which to establish the compensation an owner is owed for the many years the owner lost the property and also lost use of the money the government should have paid him the day the government took the property.

This first issue has been settled since the very earliest Fifth Amendment cases when the Supreme Court declared it was exclusively the role of the judiciary to decide how much compensation an owner must be paid for property the government had taken. A declaration by the legislative or the executive branch seeking to limit the amount of compensation (whether interest or property value) to be paid the owner is not binding on the court making this determination.

And, when you think about it, this just makes sense. It would thoroughly undermine the Fifth Amendment if the legislature, as the body exercising the government's power of eminent domain to take a citizen's private property, could also set the compensation the owner would be paid. If this were so, Congress<sup>2</sup> could pass a statute

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2. The constitutional principles discussed in this article apply equally to federal, state and local government. But, it is unwieldy to refer to "Congress, the relevant state legislative body and the local government equivalent of the legislative body." So, to lighten the reader's

declaring, “We condemn a designated owner’s property, and we authorize payment of one thousand dollars for acquisition of this property.” Should Congress’s declaration bind the court determining the just compensation which the Fifth Amendment requires, it would become no more than a matter of legislative grace. This is not what the Constitution provides. Nor is it consistent with the fundamental principle that the Fifth Amendment is “self-executing” and not dependent upon Congress’s legislative compensation.

*B. The Compensation Owed an Owner for the Government’s Delay Is to Be Determined by Reference to an Appropriate Market-Rate That Measures the Likely Income an Owner Could Have Earned on These Funds Between the Date of Taking and the Date of Payment*

The Supreme Court has declared that “just compensation” due an owner for a Fifth Amendment taking should be determined by reference to the objective market-based measure of the owner’s loss. “[W]e have recognized the need for a relatively objective working rule.”<sup>3</sup> The Court therefore has employed the concept of fair-market value to determine the condemnee’s loss. Under this standard, the owner is entitled to receive “what a willing buyer would pay in cash to a willing seller at the time of the taking.”<sup>4</sup>

Determining what an owner is due for the government’s delay in compensation is not substantially different from the manner in which courts determine the fair-market value of the property taken.

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task, we refer to the “government” by reference to the federal structure. Unless the context dictates otherwise, we intend our discussion to apply with equal force to Fifth Amendment litigation involving state and local governments.

3. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979). The Court then quoted Justice Frankfurter’s opinion in *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) in which the Court earlier held:

The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.

4. *Id.*

As noted above, the value of the property is determined by what a hypothetical willing buyer would pay in cash to a willing seller for the property at the time the property is taken. This amount is determined by looking to the market at the time of the taking to provide, as Justice Frankfurter explained, “external validity.” The owner’s loss of use of this principal amount should be similarly determined by reference to a market-based measure to determine the owner’s loss of the “time value” of the money the owner was due on the date of taking.

A number of courts have looked to the “prudent investor” rule as a guide to determine the return an owner would have realized had a reasonably prudent investor invested these funds on the date of the taking.

The Federal Circuit (and its predecessor Court of Claims) sought to avoid the burden of expense and litigating the proper rate of interest in each individual takings case. To avoid relitigating interest in each case, the Federal Circuit adopted a rebuttable presumption that the Moody’s Composite Index provides a reasonable measure of the interest an owner would have earned on the funds were they prudently invested during the relevant period.

Finally, the courts are in essentially unanimous agreement that when the delay between the date of taking and the date of payment is greater than one year, interest must be compounded to justly compensate the owner for losing the use of these funds.

#### I. THE FIFTH AMENDMENT IS A SELF-EXECUTING CONSTITUTIONAL GUARANTEE THAT PROPERTY OWNERS BE JUSTLY COMPENSATED FOR PROPERTY TAKEN BY THE GOVERNMENT

*As soon as private property has been taken . . . the landowner has already suffered a constitutional violation, and “the self-executing character of the constitutional provision with respect to compensation,” is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a “taking,” compensation must be awarded.*<sup>5</sup>

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5. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) (emphasis in original) (quoting United States v. Clarke, 445 U.S. 253, 257

In 1790, John Adams declared, “Property must be secured, or liberty cannot exist.”<sup>6</sup> This principle underlies the Fifth Amendment’s Takings Clause, which provides that “private property [cannot] be taken for public use without just compensation.”<sup>7</sup>

Though this provision of the Fifth Amendment is often said to protect “property rights,” that is something of a misnomer. The Supreme Court noted:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a “personal” right, whether the “property” in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.<sup>8</sup>

The Fifth Amendment’s guarantee that a property owner will be justly compensated does not exist by legislative grace. Rather, an owner’s right to “just compensation” after a taking (and the corollary obligation of the government to fully and justly compensate the owner for what it has taken) is a self-executing constitutional principle.

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(1980)). Justice Brennan’s *San Diego* dissent was subsequently adopted by a majority of the Court. See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

6. John Adams, *Discourses on Davila*, reprinted in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851); see also James Madison, *Property*, reprinted in 6 THE WRITINGS OF JAMES MADISON 101 (Gaillard Hunt ed. 1906) (“[Property] in its particular application means ‘that domination which one man claims and exercise over the external things of the world, in exclusion of every other individual.’”); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 42–43 (3d ed. 2008) (noting John Adams’s statement on this point); RICHARD A. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). Professor Epstein observed, “The prohibition against the taking of private property has ancient and powerful roots in all legal systems.” *Id.* at 35; see also David A. Thomas, *Why the Public Plundering of Private Property Rights Is Still a Very Bad Idea*, 41 REAL PROP., PROB. & TR. J. 25 (2000). Professor Thomas is the author and editor of *Thompson on Real Property*.

7. U.S. CONST. amend. V.

8. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citing John Locke, OF CIVIL GOVERNMENT 82–85); John Adams, *A Defense of the Constitutions of Government of the United States of America*, in DEMOCRACY, LIBERTY, AND PROPERTY 121–32 (Francis William Coker ed. 1942); 1 WILLIAM BLACKSTONE, COMMENTARIES, \*138–40.



[Inverse condemnation] suits [are] based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.<sup>9</sup>

The government takes property when it directly appropriates title and possession of an owner's property or when the government redefines the owner's right to use and possess their property.<sup>10</sup> The Supreme Court has "traditionally recognized the special need for certainty and predictability where land titles are concerned,"

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9. *Jacobs v. United States*, 290 U.S. 13, 16 (1933). In *First English*, the Court held: We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of "the self-executing character of the constitutional provision with respect to compensation" . . . . As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, it has been established at least since *Jacobs* that claims for just compensation are grounded in the Constitution itself . . . . *Jacobs v. United States*, moreover, does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution.

*First English*, 482 U.S. at 315–16 (numerous citations omitted).

The Court similarly held that "[w]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321; see also *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991) (citing *Jacobs*, 290 U.S. 13) ("Since the suit was based upon the constitutional provision protecting property rights, and the provision was considered to be self-executing with respect to compensation, it escaped the problems of sovereign immunity.").

10. See, e.g., *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990) (declaring that the National Trails System Act gives rise to a compensable *per se* taking by destroying the owner's "reversionary" right to regain unencumbered use, title, and possession of their land); see also *Louisiana v. Garfield*, 211 U.S. 70, 76 (1908); *Iron Silver Mining Co. v. Elgin Mining & Smelting Co.*, 118 U.S. 196, 207–08 (1886); *Doolittle's Lessee v. Bryan*, 55 U.S. 563, 567 (1852). Following *Preseault*, the Federal Circuit has declared the National Trails System Act to be a *per se* taking in this manner. See, e.g., *Preseault v. United States*, 100 F.3d 1525, 1531 (Fed. Cir. 1996); *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010); *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005); *Ellamae Phillips Co. v. United States*, 564 F.3d 1367 (Fed. Cir. 2009).

and said it is unwilling “to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.”<sup>11</sup>

Whenever the government takes private property, it is doing so by an exercise of its sovereign power of eminent domain. Only the government possesses the ability to force an unwilling property owner to surrender title to their property.<sup>12</sup> Many owners would rather keep their property and would not sell at any price. A celebrated example is Susette Kelo, the eponymous landowner whose home was taken by the government for the benefit of a private corporation, giving rise to *Kelo v. City of New London, Connecticut*.<sup>13</sup>

When the government acts by eminent domain, an owner’s only recourse is “just compensation” as guaranteed by the Fifth Amendment. Because the government’s obligation to justly compensate the owner is the only limitation upon its power of eminent domain, that obligation must be meaningfully enforced. The principles vindicated by the constitutional guarantee of “just compensation” are of fundamental importance not just to the owners whose land has been taken, but to every citizen.

## II. THE FIFTH AMENDMENT GUARANTEES A PROPERTY OWNER COMPENSATION THAT “MUST BE A FULL AND PERFECT EQUIVALENT” OF THE VALUE OF THE TAKEN PROPERTY

*The concept of just compensation is comprehensive, and includes all elements, “and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.” The owner is not limited to the value of the property at the time of the taking; “he is entitled to such addition as will*

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11. *Leo Sheep Co. v. United States*, 440 U.S. 668, 687–88 (1979); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) (“If Congress can ‘pre-empt’ state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. . . . [A] sovereign, ‘by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent”); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (“[A] State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court.”).

12. The government has the ability to exercise its eminent domain authority on behalf of the private interests. The extent to which the government should delegate its extraordinary eminent domain power to private interests remains a highly controversial issue.

13. *Kelo*, 545 U.S. 469 (2005).

*produce the full equivalent of that value paid contemporaneously with the taking.” Interest at a proper rate “is a good measure by which to ascertain the amount so to be added.”*<sup>14</sup>

The Supreme Court explained that:

[T]he language used in the Fifth Amendment . . . is happily chosen. . . . The noun “compensation,” standing by itself, carries the idea of an equivalent. . . . [I]f the adjective “just” had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective “just.” There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken.<sup>15</sup>

A landowner has been justly compensated only when the government pays the owner an amount sufficient to put him in “as good position pecuniarily as he would have occupied if his property had not been taken.”<sup>16</sup>

In *Monongahela*, the federal government instituted proceedings to acquire an “upper lock and dam” previously owned by the Monongahela Navigation Company. The parties disputed the value of the dam, and the federal government argued that it should not be required to compensate Monongahela for the value of the tolls that it collected when it owned the dam.<sup>17</sup> The Supreme Court disagreed, holding that private property should not be appropriated “unless a full and exact equivalent for it be returned to the owner.”<sup>18</sup> Only after the owner has been compensated for the “true value” of his property can “it be said that just compensation for the property has been made.”<sup>19</sup> This was true even if the United States had been

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14. *Jacobs*, 290 U.S. at 16–17 (quoting *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299 (1923)).

15. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 325–26 (1893).

16. *United States v. Miller*, 317 U.S. 369, 373 (1943); *see also Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984) (holding that courts should “ensure that [the property owner] is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation.”).

17. *Monongahela*, 148 U.S. at 314–15.

18. *Id.* at 326.

19. *Id.* at 337.

empowered under the Commerce Clause to perform the taking, because “the power to regulate commerce is subject to all the limitations imposed by [the Constitution] . . . and among them is that of the fifth amendment.”<sup>20</sup>

The government must also compensate a property owner for any delay in the payment of “just compensation.”<sup>21</sup>

In *Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299 (1923), the federal government took possession of 2.6 acres of land in South Carolina owned by the Seaboard Railway Line. Seaboard filed suit against the government, and succeeded, including an award of interest on its compensation claim. The court of appeals overturned the interest award, holding that it was improper because the statute authorizing the taking made no provision for interest. The Fourth Circuit denied interest because, in its view, interest cannot be recovered against the federal government absent an express waiver of sovereign immunity.<sup>22</sup>

The Supreme Court disagreed. Instead, it held, citing *Monongahela*, that a landowner is “entitled [to] the full and perfect equivalent of the property taken.”<sup>23</sup> Just compensation must put the property owner “in as good position pecuniarily as he would have been if his property had not been taken.”<sup>24</sup> As such, just compensation is “comprehensive and includes all elements and no specific command to include interest

20. *Id.* at 336.

21. See *Jacobs*, 290 U.S. at 16–17 (“The concept of just compensation is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.”); see also *Miller*, 317 U.S. at 381 (holding that the government’s failure to render immediate compensation requires the government to pay “interest on a larger sum from date of taking to final award”); *Seaboard Air Line*, 261 U.S. at 306 (holding that interest is “necessary in order that the owner shall not suffer loss and shall have ‘just compensation’ to which he is entitled”); *Schneider v. County of San Diego*, 285 F.3d 784, 791 (9th Cir. 2002) (“[J]ust compensation’ in the constitutional sense, has been held, absent a settlement between the parties, to be fair market value at the time of the taking plus ‘interest’ from that date to the date of the payment.”).

22. See *Seaboard Air Line*, 261 U.S. at 304; see also *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (superseded by statute on other grounds); *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 260 (1888) (holding that interest is not generally allowed on claims against United States based on sovereign immunity); *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951) (calling this the “traditional rule”).

23. *Seaboard Air Line*, 261 U.S. at 304.

24. *Id.*; see also *Kirby Forest*, 467 U.S. at 10 (holding that courts should “ensure that [the property owner] is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation”); *Miller*, 317 U.S. at 373; *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 52 (1928); *United States v. New River Collieries Co.*, 262 U.S. 341, 344 (1923).

is necessary when interest or its equivalent is a part of such compensation.”<sup>25</sup> An owner is “not limited to the value of the property at the time of the taking,” but instead is “entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.”<sup>26</sup> A fair rate of interest for the period between taking and payment, said the Court, “is a good measure by which to ascertain the amount so to be added.”<sup>27</sup> Thus, a fair rate of interest must be paid to render “just compensation” to the owner, and because this obligation is inherent in the Fifth Amendment, Congress need not expressly waive sovereign immunity for payment to be made.

In *Jacobs*, the federal government built a dam that flooded the Jacobs’s property.<sup>28</sup> The Fifth Circuit held the government owed compensation, but overruled the trial court’s decision awarding interest. The Fifth Circuit reasoned that since a Fifth Amendment taking case was founded upon an implied contract with the United States, interest could not be awarded because Congress had not waived sovereign immunity.<sup>29</sup>

The Supreme Court rejected the Fifth Circuit’s reasoning and reversed its holding. Instead, it declared that the Fifth Amendment entitles property owners to “just compensation, not inadequate compensation.”<sup>30</sup> This right is not founded on a theory of implied contract, but instead, upon the Constitution and, in particular, the Fifth Amendment.<sup>31</sup> The Court found the Fifth Amendment’s guarantee of

25. *Seaboard Air Line*, 261 U.S. at 306; *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 367 (1936) (quoting *Seaboard Air Line*, 261 U.S. 299).

26. *Seaboard Air Line*, 261 U.S. at 304; *Boston Sand & Gravel*, 278 U.S. at 52; *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 123 (1924); *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938) (“The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.”); *Blackfeet & Gros Ventre Tribes of Indians v. United States*, 119 F. Supp. 161, 164 (Ct. Cl. 1954).

When the taking precedes the payment of compensation, the right to interest as an element of just compensation under the Fifth Amendment is inseparable from the claim for the principal value of the land—they arise at the same time—from the same source—each being a component part of just compensation.

27. *Id.* The Supreme Court allowed the trial court’s award of interest at the rate set by the state of South Carolina to stand. *Id.* The rate of interest was not specifically challenged in *Jacobs*.

28. *See Jacobs*, 290 U.S. at 15.

29. *Id.* at 16 (citing *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330 (1920)).

30. *Id.*

31. *Id.*

“just compensation” “comprehensive,” encompassing “all elements” of compensation, including interest.<sup>32</sup> As in *Seaboard*, the Supreme Court overturned the court of appeals and restored the award of interest to the property owners in *Jacobs*.

*Monongahela*, *Seaboard*, and *Jacobs* conclusively establish that an appropriate and adequate amount of interest is not added to “just compensation,” but is instead an essential component of “just compensation” in itself. Lower courts have been following the guidance laid down in these cases ever since.<sup>33</sup>

Courts have increasingly held that awarding compound interest is appropriate in inverse condemnation claims. The first reason for this is that courts recognize the long delay required to determine liability in inverse condemnation cases. Direct condemnation proceedings—where the government openly declares its intention to take land—are distinguishable from inverse condemnation proceedings, where a plaintiff must file a lawsuit to “recover the value of property which has been taken in fact” by the government.<sup>34</sup> The Supreme Court has recognized “important legal and practical differences between an inverse condemnation suit and a condemnation proceeding.”<sup>35</sup> A direct condemnation proceeding is “commonly understood to be an action brought by a condemning authority such as the Government in the exercise of its power of eminent domain.”<sup>36</sup> It requires “affirmative action on the part of the condemning authority.”<sup>37</sup> Thus, compensation in a direct taking is based on a relatively current valuation of the

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32. *Id.* at 16–17.

33. *See, e.g.*, *Tulare Lake Basin Water Storage Dist. v. United States*, 61 Fed. Cl. 624, 627 (2004) (“Just compensation . . . requires that the owner of the property be compensated not only for the value of the property on the date of the taking, but also for any delay in payment of that amount.”) (citing *NRG Co. v. United States*, 31 Fed. Cl. 659, 664 (1994)); *see also* *Shosone Tribe of Indians v. United States*, 299 U.S. at 497 (“Given such a taking, the right of interest or a fair equivalent, attaches itself automatically to the right to an award of damages.”); *United States v. 429.59 Acres of Land*, 612 F.2d 459, 464 (9th Cir. 1980) (holding that “[t]he payment of interest on deficiency awards in condemnation cases is designed to satisfy the constitutional standard of just compensation”); *Formanek v. United States*, 26 Cl. Ct. 332, 341 n.11 (1992) (“It is well established that plaintiff, as an owner of property taken by the Government pursuant to the Fifth Amendment, is entitled to interest computed from the date of the taking to the date of payment by defendant.”).

34. *See Clarke*, 445 U.S. at 257 (quoting D. Hagman, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 328 (1971)).

35. *Id.* at 255.

36. *Id.*

37. *Id.* at 257.

affected property.<sup>38</sup> Moreover, a direct condemnation is less expensive to litigate, and the owner is paid more promptly than an inverse condemnation taking.

On the other hand, if the government refuses to compensate a property owner who must bring an inverse condemnation case for redress, the government necessarily shifts the burden to the landowner to “discover the encroachment and to take affirmative action to recover just compensation.”<sup>39</sup> Because a taking is no less a taking simply because the government denies it occurred, a landowner “is entitled to bring [] an [inverse condemnation] action as a result of ‘the self-executing character of the constitutional provision with respect to compensation. . . .’”<sup>40</sup> Inverse condemnation lawsuits are substantially more costly and burdensome than direct condemnation action.

For example, in *Pete v. United States*, one court explained the complexity of inverse condemnation proceedings.<sup>41</sup> First, a successful plaintiff must “institute an action and establish the fact of a taking” over the government’s objection.<sup>42</sup> It is only after a taking is successfully established that the “plaintiff can advance to the quantum stage to determine the value of the property for purposes of compensation.”<sup>43</sup> As such, it is “inevitable that the successful plaintiff in the two-step inverse condemnation action will be forced to pay greater litigation expenses than would have been necessary if the federal agency had properly performed its function and condemned the property in question.”<sup>44</sup> The length and burden of this procedure further justify compensating property owners for the loss of the value of their property.

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38. *See id.* at 258.

39. *Clarke*, 445 U.S. at 257; *United States v. Dickinson*, 331 U.S. 745, 747–48 (1947) (“The Government could, of course, have taken appropriate proceedings, to condemn as early as it chose, both land and flowage easements. . . . The Government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition . . . when the fact of taking could no longer be in controversy.”).

40. *Clarke*, 445 U.S. at 257 (quoting 6 P. Nichols, *EMINENT DOMAIN* 25.41 (3d rev. ed. 1972)); *see also Kirby Forest*, 467 U.S. at 5 (owners have a right to bring an “inverse condemnation” suit); and *First English*, 482 U.S. at 304 (“[W]here the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”).

41. *Pete v. United States*, 569 F.2d 565, 568–69 (Ct. Cl. 1978).

42. *Id.* at 568.

43. *Id.*

44. *Id.*

### III. THE LEGISLATURE HAS NO AUTHORITY TO LIMIT THE RATE OR AMOUNT OF INTEREST TO BE PAID AN OWNER

*The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard.*<sup>45</sup>

Congress cannot limit the rate of interest necessary to provide a property owner full and just compensation. Instead, it is the courts' exclusive province to determine the amount of interest necessary to "produce the full equivalent of that value paid contemporaneously with the taking."<sup>46</sup>

From the earliest days of its Fifth Amendment jurisprudence, the Supreme Court has declared that determining the appropriate amount of "just compensation," including interest, to be the exclusive task of a court—and not the executive or legislative branch. In *Monongahela*, the Supreme Court explained that "[t]he right of the legislature of the state by law to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to determine what is the 'just compensation' it ought to pay therefor . . . cannot for a moment be admitted or tolerated under our constitution."<sup>47</sup> This is a foundational tenet of Fifth Amendment jurisprudence:

[C]ongress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. ***It does not rest with the public, taking the property through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation.*** The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.<sup>48</sup>

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45. *New River Collieries*, 262 U.S. at 343–44.

46. *Seaboard Air Line*, 261 U.S. at 306.

47. *Monongahela*, 148 U.S. at 327–28 (quoting *Isom v. Miss. Cent. R. Co.*, 36 Miss. 300 (1858)).

48. *Id.* at 327 (emphasis added).



In *Jacobs*, the Court later emphasized that “the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such allowance was appropriate in order to make the compensation adequate.”<sup>49</sup> As a result, it is clear that “[i]t does not rest with Congress to say what compensation shall be paid or even what shall be the rule of compensation.”<sup>50</sup>

Modern courts adhere to this principle. For example, the Federal and Ninth Circuits have both recently confirmed that “[c]onsideration of land taking claims is clearly the role of the judiciary according to the Constitution . . . [and] ascertainment of ‘just compensation’ is a judicial function.”<sup>51</sup>

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49. *Jacobs*, 290 U.S. at 17; *see also* *Phelps v. United States*, 274 U.S. 341 (1927) (holding that judgment in 1926 for the value of the use of property in 1918, without more, was not sufficient to constitute just compensation); *Langenegger v. United States*, 756 F.2d 1565, 1569 (Fed. Cir. 1985) (citing *New River Collieries* (“Consideration of land taking claims is clearly the role of the judiciary according to the Constitution, Amendment V, and ascertainment of ‘just compensation’ is a judicial function.”)); *Tektronix, Inc. v. United States*, 552 F.2d 343, 354 (Ct. Cl. 1977) (citing *Ark. Valley Ry. v. United States*, 68 F. Supp. 727, 730 (Ct. Cl. 1946) (confirming that “determination of fifth amendment compensation is exclusively a judicial function”)); *Verrochi v. Commonwealth*, 477 N.E.2d 366, 369 (Mass. 1985) (citing *Miller* for the proposition that determination of the proper rate of interest is a judicial function).

50. *Miller v. United States*, 620 F.2d 812, 839 (Ct. Cl. 1980); *see also Jacobs*, 290 U.S. at 17 (citing *Monongahela*, 148 U.S. at 327 (“It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.”)); *Seaboard Air Line*, 261 U.S. at 306 (“It is obvious that the owner’s right to just compensation cannot be made to depend upon state statutory provisions.”); *Schneider*, 285 F.3d at 794 (“We conclude, therefore, that because the just compensation remedy for a taking is constitutional in nature and thus a matter of judicial—not legislative—function, the statutory vehicle for providing that remedy is not determinative of the remedy itself.”); *Tektronix*, 552 F.2d at 353 (“Though Congress has from time to time established by statute the rate of interest for delayed compensation in certain situations and geographic areas, the norm is for the court to be without explicit statutory guidance in setting the interest rate.”) (Bennett, J., concurring); *United States v. United Drill & Tool Corp.*, 81 F. Supp. 171, 172 (D. D.C. 1948) (“The Court of Claims was correct in reaching the conclusion that an approach to the market rate of interest was the proper measure of damages rather than using the analogy of statutory interest.”); *Ark. Valley*, 68 F. Supp. at 730 (refusing to adopt legal rate of interest established by the State of Kansas because “determination of just compensation under the Fifth Amendment is exclusively a judicial function” and thus “it is for the court to fix upon the rate that it will allow”); *United States v. 677.50 Acres of Land in Marion Cnty., Kan.*, 239 F. Supp. 318, 322 (D. Kan. 1965) (“The landowner is entitled to his day in court, and the ascertainment of the amount to satisfy the constitutional requirement of just compensation is established by judicial inquiry under judicially determined rules of compensation.”).

51. *Langenegger*, 756 F.2d at 1569; *Schneider*, 285 F.3d at 794.

Because it is the exclusive role of the Court—and not the legislature—to determine the correct amount of just compensation, statutory interest rates can only set a “floor” on the amount of interest to be paid, and certainly cannot limit the government’s interest obligation. This is true even in direct taking cases.<sup>52</sup> The rule is consistent with a long line of cases providing that a statutory enactment “prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise.”<sup>53</sup> Thus, even if Congress adopts a statutory rate of interest, that rate must be independently reviewed to ensure that for any specific case, it is “reasonable and judicially acceptable” as one that fully compensates the owner.<sup>54</sup>

#### IV. USING A STATUTORY INTEREST RATE TO ACHIEVE AN EFFICIENT AND UNIFORM RESOLUTION IS SUBORDINATE TO THE CONSTITUTIONAL REQUIREMENT OF JUSTLY COMPENSATING THE OWNER

The constitutional mandate in any Fifth Amendment taking case is that the owner be paid the fair-market value of that property which the government took, together with “such addition as will produce the full equivalent of that value paid contemporaneously with the taking.”<sup>55</sup> Some courts have also expressed a “strong judicial policy

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52. See *Miller v. United States*, 620 F.2d 812, 839 (Ct. Cl. 1980) (explaining that the Declaration of Taking Act sets a “[six] percent as a floor on the rate of interest, and the rate of interest actually awarded may rise depending on the economic conditions occurring after the taking”); *United States v. 50.50 Acres of Land*, 931 F.2d 1349, 1355 (9th Cir. 1991), citing *Blankinship*, 543 F.2d at 1275 (holding that the interest rate employed by Congress “cannot be viewed as a ceiling on the rate of interest allowable” but instead as a “floor”); *Kirby Forest*, 467 U.S. at 11 (noting that the federal government previously “acquiesced” in several decisions by the federal courts of appeal holding that the six percent rate of interest prescribed by Declaration of Taking Act was not a “ceiling” on the amount that “can and must be paid by the Government”); *Wash. Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cnty., Md.*, 706 F.2d 1312, 1322 (4th Cir. 1983) (United States “conceding” that Declaration of Taking Act sets a floor in compensation cases); *United States v. 329.73 Acres of Land, Situated in Grenada and Yalobusha Counties, Miss.*, 704 F.2d 800, 812 (5th Cir. 1983) (“We agree with the decisions of other federal appellate courts that the 6% delay damages provided by the Declaration of Taking Act [citation omitted], and by other federal condemnation statutes, sets a floor, rather than a ceiling, on the rate of interest payable on the deficiency.”); and *Verrochi*, 477 N.E.2d at 370 (collecting cases).

53. *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990).

54. See *Miller*, 620 F.2d at 837. Because this is the case, the statutory rate must be independently reviewed even in cases where the DTA is specifically invoked, because there may be factual circumstances under which the statutory rate does not fully compensate plaintiffs.

55. See *Tulare Lake Basin Water Storage Dist. v. United States*, 61 Fed. Cl. 624, 627 (2004) (citing *Seaboard*, 261 U.S. at 306); see also *supra* Part II.

in favor of the establishment of a uniform rate of interest . . . to avoid discrimination among litigants.”<sup>56</sup> But, the desire for uniformity is subordinate to the primary obligation to provide the owner a full measure of compensation.<sup>57</sup>

Establishing a “uniform rate of interest,” however, has been a challenge easier said than done. Courts have adopted a myriad of “uniform” interest rates in pursuit of “uniform” results, including: statutory pre-judgment interest rates; the prime rate; the Internal Revenue Code’s tax-overpayment rate;<sup>58</sup> the Contracts Disputes Act rate;<sup>59</sup> the Declaration of Takings Act rate (which was originally 6% and is now indexed to the 52-week United States Treasury Bill)<sup>60</sup> and the Moody’s Index of Long-Term Corporate Bonds. While each of these rates is a readily available benchmark interest rate, taken together they demonstrate just how difficult uniformity has been to achieve.

#### A. Statutory Pre-Judgment Interest Rates

For instance, the United States Supreme Court has upheld interest awards calculated at rates equal to those adopted by the state where the taking occurred for pre-judgment interest. In *Seaboard*, the Supreme Court reinstated and endorsed the trial court’s decision to award interest at South Carolina’s statutory pre-judgment interest rate, calling it a “palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain . . . .”<sup>61</sup> The advantage of the South Carolina statutory interest rate was not challenged or considered in *Seaboard*. The use of a state’s statutory pre-judgment interest rate continues to find favor in many state courts.<sup>62</sup> Compensating owners by a statutory rate,

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56. See *Tulare Lake*, 61 Fed. Cl. at 627 (citing *Miller*, 620 F.2d at 838); *Brunswick Corp. v. United States*, 36 Fed. Cl. 204 (1996).

57. See *ITT Corp. v. United States*, 17 Cl. Ct. 199, 236 (1989) (citing *Georgia-Pacific Corp. v. United States*, 226 Ct. Cl. 95 (1980)) (“This court is of the opinion that the goal of establishing a uniform policy regarding delay compensation in eminent domain cases, although desirable, must give way to the established law that there is no fixed formula for establishing compensation for fifth amendment takings. Courts have stepped outside the uniform policy when the requirements of justice so dictated.”).

58. See 26 U.S.C. § 6621 (2012).

59. See 41 U.S.C. § 611 (2012).

60. See 40 U.S.C. § 3114 (2012).

61. *Seaboard Air Line*, 261 U.S. at 306.

62. See *Tucson Airport Auth. v. Freilich*, 665 P.2d 1002, 1006 (Ariz. 1983) (refusing to adopt prudent investor rule because “[i]f each trial court were obligated to receive evidence,

however, seems to run counter to the Supreme Court's teaching that it is for the courts, not legislatures, to determine just compensation.

### *B. The Tax-Overpayment Rate*

The Federal Circuit has upheld at least one interest award based on the tax overpayment rate set forth in 26 U.S.C. § 6621(b).<sup>63</sup> The use of the tax overpayment rate has not been widely adopted, and was recently criticized by one judge because, in some cases (in particular, those years where the investment climate is positive), it may “understate[] somewhat the interest owed.”<sup>64</sup>

### *C. The Contract Disputes Rate*

Some courts have used the interest rate provided in the federal Contract Disputes Act to compensate inverse condemnation claims, on the theory that inverse condemnation takings are akin to an implied lease or similar contract.<sup>65</sup> During the early 1980s, the Court of Federal Claims more commonly used the Contract Disputes Act rate to calculate interest in a number of cases, but its application appeared to have fallen off in recent years.<sup>66</sup> The court's articulated

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determine and apply its own version of the reasonable economic rate, the results in each case would differ depending upon the evidence put forward by each party and the conclusions of each individual trier of fact”); *State ex rel. Dept. of Transp. v. Penn Cent. Corp.*, 511 A.2d 382, 384 (Del. Super. 1986) (In Delaware, “[a]wards in condemnation proceedings carry the same rate which applies to judgments generally.”); *Waukegan Port Dist. v. Kyritsis*, 471 N.E.2d 217, 219 (Ill. App. 1984) (holding that Illinois claimant was entitled to statutory rate of interest in most eminent domain proceedings); *Herman v. City of Wichita*, 612 P.2d 588, 593 (Kan. 1980) (concluding that in inverse condemnation cases, courts should award legal rate of six percent under Kansas law); *see also Struble v. Elkhart Cnty. Park and Recreation Bd.*, 373 N.E.2d 906, 909 (Ind. App. 1978) (legal rate of interest satisfies constitution so long as it is “not so unreasonably low as to deprive the landowner of just compensation”). These cases intimate a rebuttable presumption that use of a statutory pre-judgment interest rate is reasonable unless the owner can prove it is “unreasonably low.”

63. *See Dynamics Corp. of Am. v. United States*, 766 F.2d 518, 519 (Fed. Cir. 1985); *Bendix Corp. v. United States*, 676 F.2d 606, 616 (Ct. Cl. 1982); *see also E. Minerals Int'l, Inc. v. United States*, 39 Fed. Cl. 621, 631 n.13 (1997), *rev'd and remanded on other grounds*, *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001).

64. *See The Boeing Co. v. United States*, 86 Fed. Cl. 303, 323–24 (2009).

65. None of the courts that have applied the Contract Disputes Act rate have analyzed the question in light of the Supreme Court's decision in *Jacobs* in which it determined that a Fifth Amendment taking should not be equated to an implied contract. *See infra* Part IV.C.

66. *See Whitney Benefits, Inc. v. United States*, 30 Fed. Cl. 411, 411 (1994) (without comment, upholding judgment of compound interest based on rate set forth in Contract Disputes

policy for using this rate was that it was “uniform” and fostered “judicial efficiency.” Then, in 2010, the Court of Federal Claims revived the Contract Dispute Act rate in a case involving the federal government’s use of certain private property near the U.S.–Mexico border.<sup>67</sup> In *Otay Mesa*, the federal government had placed several seismic sensors on the plaintiffs’ property that were designed to assist policing the border. Finding that a taking had occurred and that interest was owed, the court concluded that the Contract Dispute Act rate best compensated the plaintiffs because “[i]f the Border Patrol originally had entered into a lease with Plaintiffs for the placement of sensors on the five parcels, such a lease would have been a binding contract.”<sup>68</sup> From this, the court concluded the Contract Dispute Act rate of interest was “best suited to compensate Plaintiffs . . . on what should have been a contractual arrangement.”<sup>69</sup>

#### *D. The Prime Rate*

A few cases in the Court of Federal Claims have adopted the prime rate, the lowest short-term interest rate set by the Federal Reserve on financial depositories’ borrowing and lending funds overnight.<sup>70</sup> No court has meaningfully analyzed the use of this rate as the basis to calculate “just compensation” for a Fifth Amendment taking. This rate appears to be inadequate as a measure of “just compensation,” however, because the “prime rate” does not reflect a true market-based rate determined from the perspective of an owner who has waited years for compensation. Indeed, we explain more fully below why *any* rate tied to a treasury instrument understates the proper rate of interest because, by definition, such a rate is a measure of *the federal government’s* cost to borrow money over the relevant term. As such, it does not measure the owner’s use of the principal during this period.

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Act); *Formanek*, 26 Cl. Ct. at 341 n.11; *see also* *Econ. Development and Indus. Corp. of Boston v. United States*, 13 Cl. Ct. 590, 605 (1987) (holding that CDA rate has the “approval of Congress”); *Hedstrom Lumber Co., Inc. v. United States*, 7 Cl. Ct. 16, 34 (1984) (citing *Foster v. United States*, 3 Cl. Ct. 738 (1983)) (holding that use of the Contract Disputes Act rate provides for “uniformity of compensation, notice to the public, and judicial efficiency” in takings cases).

67. *See Otay Mesa*, 93 Fed. Cl. at 491.

68. *Id.*

69. *Id.*

70. *Brunswick*, 36 Fed. Cl. at 219; *see also Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 939 F.2d 1540, 1545 (1991) (upholding special master’s decision that plaintiff should obtain interest at the prime rate as not clearly erroneous).

*E. The Declaration of Takings Act Rate*

Some courts have calculated interest using the statutory interest rate provided in the Declaration of Takings Act, a statute enacted by Congress to apply in direct condemnation cases.<sup>71</sup> When passed, the Declaration of Takings Act provided for interest at a fixed annual rate of 6%, but since Congress amended the DTA, it now provides for interest at the 52-Week T-Bill rate.<sup>72</sup>

Use of this rate has been justified on the basis that Congress “considered [the issue of just compensation] in an analogous context” and thus “the court, when determining how to meet its own obligations, certainly cannot be barred from considering and applying the lessons that Congress has learned from its own study of the just compensation issue.”<sup>73</sup>

But using the Declaration of Takings Act rate to establish compensation seems particularly inappropriate to compensate property owners who have been forced to pursue compensation through inverse condemnation. By its own terms and legislative history, the Declaration of Taking Act was expressly intended to apply only to direct takings<sup>74</sup> where “payment is expected to follow quickly from the taking, rather than in situations where, as here, a significant amount of time has elapsed between the taking of the property and the payment of just compensation.”<sup>75</sup> Congress simply never contemplated that the Declaration of Taking Act would apply in situations where “a significant amount of time has elapsed between the taking of the property and the payment of just compensation.”<sup>76</sup>

The implied assumption for applying the Declaration of Takings Act rate to inverse condemnation claims is that the landowner, on the day of the taking, would have invested the fair-market value of

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71. See *Textainer Equip. Mgmt. Ltd. v. United States*, 99 Fed. Cl. 211 (2011); *NRG Co. v. United States*, 31 Fed. Cl. 659, 664–65 (1994).

72. The Board of Governors of the Federal Reserve System changed the name of the “52-Week T-Bill” to the “average one-year constant maturity Treasury yield.” For convenience, we use the historical “52-Week T-Bill” designation.

73. *Id.* at 669.

74. There are substantial differences between a “direct taking” and inverse condemnation actions. See *Pete v. United States*, 569 F.2d 565, 568–69 (Ct. Cl. 1978); *United States v. Clarke*, 445 U.S. 253, 257. These differences mean owners are bringing protracted litigation before they are fully compensated.

75. *Tulare Lake*, 61 Fed. Cl. at 629–30.

76. *Id.*

his property in exclusively 52-Week T-bills, then rolled them over on the anniversary of the taking each year. In doing so, the owner (a) receives little interest, (b) no access to the principal; and, (c) zero diversification<sup>77</sup> in one of the lowest possible yielding investments.

Such an “investment” strategy is contrary to every known tenet of the Prudent Investor Rule and Modern Portfolio Theory, discussed further below. Indeed, if a fiduciary for an Employee Retirement Income Security Act (“ERISA”) fund managed funds by investing them in a portfolio exclusively in 52-Week T-bills for eight years, that fiduciary may have violated federal law, and be subject to federal civil and criminal prosecution.<sup>78</sup>

Moreover, the Declaration of Takings Act rate is flawed because it “contemplates an award of just compensation from the perspective of the government’s cost of borrowing rather than from the perspective of the claimant’s rate of return.”<sup>79</sup> Using the government’s cost of borrowing money to establish the compensation due an owner violates Justice Holmes’s admonition that when determining the appropriate “just compensation” the government owes an owner, “the question is, What has the owner lost? not, What has the taker gained?”<sup>80</sup>

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77. The lack of diversification alone disqualifies the 52-Week T-bill as a valid proxy for the return a prudent investor would have obtained over eight years. The Library of Congress Federal Research Division prepared a study at the request of the federal Security and Exchange Commission which concluded, “Inadequate portfolio diversification, for example, violates the principles of best practice set out in Modern Portfolio Theory, which Nobel Prize-winning economist Harry Markowitz developed in the 1950s.” See LIBRARY OF CONGRESS FEDERAL RESEARCH DIVISION, BEHAVIORAL PATTERNS AND PITFALLS OF U.S. INVESTORS (2010), available at <http://www.sec.gov/investor/locinvestorbehaviorreport.pdf>.

78. The Uniform Prudent Investor Act (“UPIA”) expressly incorporates the concept of diversification in prudent investing. As a comment to the UPIA explains:

The 1992 Restatement of Trusts takes the significant step of integrating the diversification requirement into the concept of prudent investing. Section 227(b) of the 1992 Restatement treats diversification as one of the fundamental elements of prudent investing, replacing the separate section 228 of the Restatement of Trusts 2d. The message of the 1992 Restatement . . . is that prudent investing ordinarily requires diversification.

Unif. Prudent Investor Act § 3 cmt. 7B U.L.A. 29–30 (2006).

Congress has also adopted the prudent investor rule to govern investment advisors that run pension funds governed by ERISA. See 29 U.S.C. §§ 1104(a)(1)(b) and (c).

79. *Tulare Lake*, 61 Fed. Cl. at 629–30.

80. *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910); see also *United States v. Causby*, 328 U.S. 256, 261 (1946) (“It is the owner’s loss, not the taker’s gain, which is the measure of the value of the property taken.”); *Pitcairn v. United States*, 547 F.2d 1106, 1122 (“The yield on a series of hypothetical Government bonds is not relevant in

From the owner's perspective—the only perspective that constitutionally counts—an unliquidated inverse condemnation claim against the federal government is quite different from an investment in a government bond. This is so because “[y]ou can hold a bill until it matures or sell it before it matures” and “[w]hen the bill matures, you would be paid its face value. . . . Your interest is the face value minus the purchase price.”<sup>81</sup>

On the other hand, a landowner with a Fifth Amendment claim against the government earns no interest during the pendency of the litigation and cannot sell their right to compensation.<sup>82</sup> The landowner is an unwilling captive creditor, whose damages are compounded by the risk of either not succeeding on his claim, or having to wait up to a decade to do so.<sup>83</sup> As such, the 52-Week T-bill inadequately compensates an owner for being “an involuntary lender to a debtor he would often prefer not to have.”<sup>84</sup>

The 52-Week T-bill rate also fails to compensate a property owner for his loss of liquidity. The Ninth Circuit noted this point explicitly: “[T]he marketability of a claim against the United States for a deficiency under the Declaration of Taking Act is considerably less than that of a marketable public debt security of the United States. Some allowance for this feature by the trier of fact is not unreasonable.”<sup>85</sup>

Nevertheless, the ease of applying the Declaration of Takings Act rate remains a strong enticement for its adoption in inverse condemnation actions. Judge Firestone, a highly respected member of the

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ascertaining the injury plaintiff has suffered. It measures compensation only according to the point of view of the taker without reference to that of the owner since he is hardly likely to be able to borrow money at the rates the Government can.”); *Miller*, 620 F.2d at 839 (“The Government, not the unwilling condemnee, should be the one to bear the risk of any fluctuations in interest rates.”).

81. *Treasury Bills in Depth*, U.S. DEP'T OF THE TREASURY, TREASURYDIRECT, [http://www.treasurydirect.gov/indiv/research/indepth/tbills/res\\_tbill.htm](http://www.treasurydirect.gov/indiv/research/indepth/tbills/res_tbill.htm) (last visited Aug. 6, 2012).

82. See 31 U.S.C. § 3727, which prohibits the holder of a claim against the government from selling this claim.

83. [O]ne whose land was forcibly taken by a public agency on the basis of a deficient cash deposit is no “prudent investor” who has evaluated the risk and benefits of extending credit to the government for the balance due. Rather, he is an involuntary lender to a debtor he would often prefer not to have. For this reason, the risk of any difference between the rates the government would normally pay, and those the condemnee could have achieved by prudent participation in the broader market, should fall on the former.

*Redevelopment Agency of the City of Burbank v. Gilmore*, 700 P.2d 794, 806 (Cal. 1985).

84. *Tulare Lake*, 61 Fed. Cl. at 630.

85. *Blankinship*, 543 F.2d at 1277.



Court of Federal Claims, recently considered this issue in *Textainer*, involving the owner of shipping containers that were leased to the U.S. Army by a third party. The owner brought an action seeking compensation for a Fifth Amendment taking, alleging that the Army lost some of those shipping containers.<sup>86</sup> Judge Firestone considered the “measure of interest” the government would owe should it be found liable for the taking. The owner asked Judge Firestone to “measure the ‘the actual economic harm’ . . . by calculating the estimated income that the [container owner] would have earned by leasing the containers during the relevant period.”<sup>87</sup> It argued that the compensation for the Army’s delay should be “[c]alculat[ed by] the estimated income earned by an owner/operator of a 20’ container during the time period 2005 to 2010.”<sup>88</sup> This method, it was claimed, justified “an effective interest rate of 10.39%.”<sup>89</sup>

On this record, Judge Firestone concluded that “the plaintiff’s theory of interest is not based on the prudent investor rule, but is based on a misconception regarding the purpose of interest as part of just compensation in a takings case.”<sup>90</sup> She continued, and correctly explained, “interest is compensation for the lost use of the *takings award* between the date of the taking and the date of the payment. The plaintiffs’ theory of interest, however, seeks compensation, in effect, for the lost use of the *taken property* during the period. In essence, the plaintiffs seek rental payment for the containers in addition to the [buyout value of the containers].” This Court concluded such a rate would be “an impermissible windfall for the plaintiffs.”<sup>91</sup>

The property owner having provided Judge Firestone with no meaningful alternative means for calculating interest, and having offered no evidence showing why the Declaration of Takings rate (or any other rate) would not provide just compensation, Judge Firestone concluded that “absent special proof, the statutorily-set rate in the DTA shall apply.”<sup>92</sup>

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86. *Id.* at 213.

87. *Id.* at 221.

88. See Pl. Textainer’s Supplemental Mot. Summ. J., *Textainer Equip. Mgmt. Ltd. v. United States*, 99 Fed. Cl. 211 (2011) (No. 08-610C), available at 2011 WL 443816.

89. *Id.* at 221.

90. *Id.* at 222.

91. *Id.* (emphasis in original).

92. In reaching this holding, Judge Firestone held that “the plaintiffs have presented no evidence supporting the application of the Moody’s Corporate Bond Index rate in this case.” The Moody’s rate—discussed further below—was adopted by several Federal Circuit cases

Notwithstanding the *Textainer* plaintiff's failure of proof, courts that employ the Declaration of Taking Act rate to determine just compensation in inverse condemnation cases are using a standard that inherently fails to provide inverse condemnation claimants with just compensation. Inverse condemnation claims initiated by property owners are, by their very nature, a different animal than direct condemnation claims initiated by the government. In short, judicial adoption of the Declaration of Taking Act rate converts Congress's more defensible intention to justly compensate property owners subject to direct condemnations into a constitutionally suspect effort to minimize its obligation to justly compensate inverse condemnation complainants as well. As such, the Declaration of Takings Act rate, if applied as a ceiling on "just compensation," violates the Fifth Amendment and is no more constitutionally defensible than if Congress had passed a law declaring that it would pay no more than ten dollars an acre for land it has taken.

For most of the past decade the 52-Week Treasury bond rate has been dropping to essentially zero. This is an essentially nugatory rate which, as a factual matter, fails to satisfy the constitutional standard of providing "just compensation." The *Wall Street Journal* recently noted, "the 10-year Treasury yield is low and unattractive as it runs below the US inflation rate."<sup>93</sup> This is a "negative yield" in which the yield on the bond is less than the rate of inflation. As such, an investor acquiring and holding such an investment to term is actually paying the government to take their money. The current 10-Year Treasury yield is at a historic low last seen in February 1946.<sup>94</sup> The yield on a 52-Week Treasury bond is much lower than the 10-Year Treasury bond. The present 52-week Treasury rate is 0.17%.<sup>95</sup> By

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prior to Judge Firestone's ruling. Nevertheless, the plaintiff did not mention the Moody's Composite Rate until its response brief, and only then in arguing that the Moody's rate was inadequate. While Judge Firestone's use of the Declaration of Takings Act rate appears contrary to the Federal Circuit's previous direction (discussed further below), she correctly noted that the plaintiff failed to present the issue to the Court, and calculated their proposed interest rate based on future use of the property after the taking—a fundamental error. *Id.*

93. Min Zeng, *Treasury Yields Near Historic Lows, and Still Attractive, BMO Says*, WALL ST. J., June 15, 2012 (Marketbeat section), <http://blogs.wsj.com/marketbeat/2012/05/15/treasury-yields-near-historic-lows-and-still-attractive-bmo-says/?KEYWORDS=Historically+low+treasury+rates+10-year> (last visited Aug. 6, 2012).

94. *Id.*

95. *Daily Treasury Bill Rates Data*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=billrates> (last visited Aug. 6, 2012).

comparison, the current Moody's AAA rate is 3.67%.<sup>96</sup> And, there is no indication that interest rates of essentially zero will not continue for the immediate future. Again, the *Wall Street Journal* reports, "The Fed has said since January that it plans to keep short-term interest rates at 'exceptionally low levels' at least through late 2014 and it didn't alter that language. The central bank has held short-term rates near zero since December 2008 . . . ."<sup>97</sup>

To determine "just compensation" using such essentially nominal interest rates when the owner could have earned a substantially higher rate of return on equally secure corporate bonds is to deny the owner compensation equal to what the owner could have reasonably received on the funds had the government paid him the money it owed him on the date the government took his property.

V. SEVERAL MODERN COURTS USE THE "PRUDENT INVESTOR RULE" TO DETERMINE A SUFFICIENT RATE OF INTEREST TO ASSURE THE OWNER IS PAID A "FULL EQUIVALENT" OF THE VALUE OF THE PROPERTY

*Because a reasonably prudent investor would diversify his risk, it is proper to consider the rate of interest paid on different types of securities with different maturities.*<sup>98</sup>

No doubt reacting to the concerns with statutory ceilings discussed above, several courts have professed dissatisfaction with statutory rates of interest altogether, and instead follow a market-based approach using the prudent investor rule. In one such example, *Tulare Lake Basin Water Storage District v. United States*, various California water agencies challenged the taking of their contractual water rights.<sup>99</sup> The government was found liable for the taking, and assessed damages with interest based on the 52-Week Treasury bond rate provided for in the Declaration of Taking Act.<sup>100</sup> The *Tulare Lake*

96. *Selected Interest Rates (Daily)—H.15*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE, <http://www.federalreserve.gov/releases/H15/data.htm> (last visited Aug. 6, 2012).

97. Kristina Peterson et al., *FOMC: Fed Extends Operation Twist Through 2012*, WALL ST. J., June 20, 2012, available at <http://www.4-traders.com/news/FOMC-Fed-Extends-Operation-Twist-Through-2012--14379163/>.

98. See *429.59 Acres of Land*, 612 F.2d at 465.

99. 61 Fed. Cl. at 626–27.

100. See 40 U.S.C. § 3116(a)(1) (2002).

plaintiffs asked the court to reconsider, arguing that they were not justly compensated by its ruling.<sup>101</sup> They asked, instead, for the Court to grant them interest based on the rates of return achieved on a diversified investment portfolio maintained during the relevant time frame.<sup>102</sup>

On reconsideration, the *Tulare Lake* court agreed that it had inappropriately calculated delay compensation using the Declaration of Taking Act rate, concluding that rate offered no guidance in the context of an inverse condemnation action.<sup>103</sup> It agreed that the Declaration of Taking Act requires *immediate* payment upon the issuance of a formal declaration of taking—and thus does not “in any way affect legislative takings.”<sup>104</sup> Instead, Congress adopted a uniform, short-term interest rate for those cases where, having affirmatively declared that a taking had occurred, little or no time had elapsed between the time of condemnation and the payment of just compensation.<sup>105</sup>

The *Tulare Lake* court went further, determining that calculating an interest award at *any* government bond rate—short or long term—impermissibly “contemplates an award of just compensation from the perspective of the government’s cost of borrowing rather than from the perspective of the claimant’s rate of return.”<sup>106</sup> It found that the interest due was instead best measured by the “prudent investor” standard.<sup>107</sup> That standard requires that a prudent investor protect

101. 61 Fed. Cl. at 626.

102. *Id.*

103. *Id.*

104. *See id.* at 629 (citing 132 Cong. Rec. S16844 (Oct. 16, 1986)):

MR. GORTON: Would this bill have any effect in situations where the Federal Government acquires land pursuant to a legislative taking?

MR. THURMOND: The bill does not in any way affect legislative takings. It is an amendment to the Declaration of Taking Act.

MR. GORTON: I understand that the Department of Justice asked for this bill. Does the Department agree that this bill has no impact whatsoever on a legislative taking?

MR. THURMOND: The committee has talked with the Department about your point, and the Department has given its complete assurance that the bill concerns only takings under the Declaration of Taking Act, and that neither the bill nor the Act have any effect on legislative takings.

105. *See id.*; *see also Miller*, 317 U.S. at 381 (holding that the DTA’s purpose is to “give the former owner . . . immediate cash compensation to the extent of the Government’s estimate of the value of the property.”).

106. *Tulare Lake*, 61 Fed. Cl. at 630.

107. *Id.* at 627.

the invested capital while considering both the potential for current income and the need for growth in excess of inflation. U.S. Treasury bond rates fall short of that standard, because they consider “compensation only according to the point of view of the taker [the government] without reference to that of the owner since he is hardly likely to be able to borrow money at the rates the Government can.”<sup>108</sup> In turn, this is consistent with the rule that whether a rate of return is reasonable must be determined from the perspective of the property owner, not the property taker.<sup>109</sup>

Based on these factors, the *Tulare Lake* court concluded “the prudent investor rule requires a rate of return that more accurately reflects a diversified investment” than the government’s cost of borrowing funds, and concluded that the award should be made at the rate at which “a reasonably prudent person would have invested the funds to produce a reasonable return while maintaining safety of principal.”<sup>110</sup>

Other courts have similarly used the Prudent Investor Rule to calculate interest owed in Fifth Amendment taking cases.<sup>111</sup> In *Redevelopment Agency of the City of Burbank v. Gilmore*, the California Supreme Court reviewed a trial court’s award for a taking executed by a local government agency. California law, at the time, provided for a statutory rate of interest on all judgments, and the relevant eminent domain statute limited the interest rate to this statutory rate.<sup>112</sup> The owners challenged the trial court’s ruling fixing their

108. *Id.* at 628 (citing *Pitcairn*, 547 F.2d at 1124).

109. This is true even in cases of direct condemnation under the Declaration of Takings Act. The Fifth Amendment allows a property owner to obtain whatever relief is appropriate upon demonstrating that a statutory rate does not reflect a reasonable market rate. A direct condemnation claimant’s proof that the Declaration of Takings Act fails to justly compensate him, for whatever reason, would presumably trump the statutory requirement.

110. *Tulare Lake*, 61 Fed. Cl. at 630, 627 (citing *429.59 Acres of Land*, 612 F.2d at 464–65 (9th Cir. 1980)) (internal citations and quotations omitted); *Gilmore*, 700 P.2d at 805 (adopting prudent investor principle as a “sound basis for calculation of interest as just compensation”); *United States v. 125.2 Acres of Land Situated in Town & Cnty. Of Nantucket, Mass.*, 732 F.2d 239 (1st Cir. 1984).

111. *Gilmore*, 700 P.2d at 804; *Lea Co. v. N. Car. Bd. of Transp.*, 345 S.E.2d 355, 358 (N.C. 1986) (holding that statutory interest rate set floor for just compensation, but that plaintiffs could demonstrate through evidence that prevailing market rates are higher than the statutory rate); *M.B. Claff, Inc. v. Mass. Bay Transp. Auth.*, 797 N.E.2d 426, 429 (Mass. App. 2003) (holding that statutory rate purporting to award “substantially lower than market rates . . . deprives [a] property owner of just compensation” but putting burden of proof on claimant to demonstrate market rates).

112. 700 P.2d at 798.

pre-judgment interest at the statutory rate, arguing that it did not offer just compensation under the facts of their case.<sup>113</sup>

The *Gilmore* court agreed that “a statutory interest ceiling cannot prevail” where it falls short of the “just compensation” mandated by the Fifth Amendment.<sup>114</sup> An adequate rate must instead “reflect conditions in the usual interest markets.”<sup>115</sup> It held that the relevant interest market is not one that is “geared exclusively to that at which the condemning agency could have borrowed the unpaid funds in its usual financial markets,”—i.e., government bond rates.<sup>116</sup>

The California Supreme Court reminded that after a taking, the former landowner becomes “an involuntary lender to a debtor he would often prefer not to have.”<sup>117</sup> Thus, the “risk of any difference between the rates that the government would normally pay”—i.e., bond rates, and those that could have been achieved by “prudent participation in the broader market, should fall on the [government].”<sup>118</sup> The prudent investor rule was the proper benchmark by which to appropriately compensate a property owner for his loss.<sup>119</sup>

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113. *Id.*

114. *Id.* at 800.

115. *Id.* (citing *Miller, 429.59 Acres of Land, Blankinship*, and other cases holding similarly).

116. *Id.*; see also *Independence Park Apartments v. United States*, 61 Fed. Cl. 692, 717 (2004) (“[T]he prudent-investor rule does not require that a reference be made only to a rate of interest on Treasury securities where the United States is the defendant. . . .”), *rev’d on other grounds*, *Independence Park Apartments v. United States*, 449 F.3d 1235 (Fed. Cir. 2006).

117. *Gilmore*, 700 P.2d at 806.

118. *Id.* (explaining that eminent domain is not “intended to make condemnees the unwilling financiers of public acquisitions”); see also *A&S Council Oil Co., Inc. v. Saiki*, Civ. A. No. 87-1969-OG, 1993 WL 787241, at \*5 (D. D.C. Mar. 26, 1993) (“[I]f anyone should bear the risk of fluctuation in interest rates over time it should be the government, who has taken the property, not the unwilling owner.”); *Pitcairn*, 547 F.2d at 1122 (“The yield on a series of hypothetical Government bonds is not relevant in ascertaining the injury plaintiff has suffered. It measures compensation only according to the point of view of the taker without reference to that of the owner since he is hardly likely to be able to borrow money at the rates the Government can.”); *Miller*, 620 F.2d at 839 (“The Government, not the unwilling condemnee, should be the one to bear the risk of any fluctuations in interest rates.”). See also *supra* note 83.

119. *Gilmore*, 700 P.2d at 807; see also *Concrete Machinery Co., Inc. v. City of Hickory*, 517 S.E.2d 155, 159 (N.C. Ct. App. 1999) (explaining that trial court must consider evidence that “prevailing rates” are higher than an applicable statutory rate, as well as “investments of varying lengths and risk [which] typically [include] short, medium, and long-term government and corporate obligations”); *Portland Nat. Gas Transmission Sys. v. 19.2 Acres of Land*, 195 F. Supp. 2d 314, 327–28 (D. Mass. 2002) (applying rate of seven percent because “that was the prevailing money market rate”).

VI. THE FEDERAL CIRCUIT HAS ADOPTED THE  
MOODY COMPOSITE CORPORATE BOND RATE AS A  
PRESUMPTIVELY APPROPRIATE RATE OF INTEREST

*[Moody's Composite Index rate] should be applied (from now on) to just compensation cases without need of proof in the individual instance.*<sup>120</sup>

Some courts—most prominently the Court of Appeals for the Federal Circuit<sup>121</sup>—have attempted to bridge the gap between the search for a “uniform” rate of interest that obviates the need for proof of the interest rate applicable in each individual case and the search for a market-based rate that may more fairly compensate an owner, but may commensurately require more evidentiary proof. In a series of decisions, the Federal Circuit’s predecessor court—the Court of Claims—adopted the Moody’s Composite Index of Long-Term Bonds as a presumptively appropriate interest rate that balanced the advantage of uniformity with the constitutional imperative of a market-based rate.

In *United States v. Pitcairn*, the Court of Claims held that “long-term corporate bond yields are an indicator of broad trends and relative levels of investment yields or interest rates. They cover the broadest segment of the interest rate spectrum.”<sup>122</sup> In contrast, it rejected government bond rates for the same reason that they were rejected in *Tulare Lake* and *Gilmore*, holding that “just compensation in the constitutional sense is what the owner has lost, and not what the condemnor has gained.”<sup>123</sup>

For this reason, *Pitcairn* rejected the government’s contention that interest should be established based on “a series of hypothetical long term Government bonds.” The court found these government bond rates to be subjectively constructed by the government to

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120. *Tektronix v. United States*, 552 F.2d 343, 352–53 (Cl. Ct. 1977).

121. Prior to 1982, what is now the Federal Circuit was called the United States Court of Claims. The decisions of the Court of Claims are binding precedent in the Federal Circuit. See *South Corp. v. United States*, 690 F.2d 1368 (1982).

122. 547 F.2d at 1124.

123. *Id.* at 1122 (citing 3 NICHOLS, EMINENT DOMAIN § 8.61 (3d ed. rev. 1975)). *Pitcairn* has been cited favorably in the D.C. circuit as well. See *Bebchick v. Wash. Metro. Area Transit Comm’n*, 645 F.2d 1086, 1093–94 (D.C. Cir. 1981), *appealed after remand*, 805 F.2d 396 (1986); *Littlewolf v. Hodel*, 681 F. Supp. 929, 947 n.14 (D.D.C. 1988), *aff’d*, 877 F.2d 1058 (D.C. Cir. 1989).

minimize potential returns. The court went on to hold that the government's use of government bond rates "ignore[d] any relationship" between the rate of interest and the constitutional principle of just compensation.<sup>124</sup> Holding that the ultimate test was to ensure that "the plaintiff . . . receive just compensation," the *Pitcairn* court adopted the Moody's Composite Index.<sup>125</sup>

Likewise, in *Tektronix v. United States*, the Court of Claims affirmed the *Pitcairn* standard, holding that *Pitcairn's* rates "should be applied (from now on) to just compensation cases, without need of proof in the individual instance."<sup>126</sup> The court concluded that otherwise "it [was] too burdensome to require parties to make specific proof in every case as to the appropriate interest rate."<sup>127</sup> Instead, it would "further the goal of equal justice, reduce the costs and complexity of litigation, and facilitate decision (as well as settlement) to accept and establish the *Pitcairn* rates and method."<sup>128</sup>

And in *Miller v. United States*, the Court of Claims again found that the Moody's Composite Index provided uniformity and resolved inequities among individual claimants, reiterating the "strong judicial policy in favor of the establishment of a uniform rate of interest applicable to condemnation cases in order to avoid discrimination among litigants."<sup>129</sup>

Other courts have also used the Moody's Composite Index to establish compensation.<sup>130</sup> In 1996, the Federal Circuit adopted *Pitcairn's* endorsement of the Moody's Composite Bond Index in *Hughes Aircraft Co. v. United States*, 86 F.3d 1566, 1572 (Fed. Cir. 1996), though its opinion was later reversed and remanded by the United States Supreme Court for other reasons.<sup>131</sup>

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124. *Pitcairn*, 547 F.2d at 1122, 1124.

125. *Id.* at 1121.

126. 552 F.2d at 352-53.

127. *Id.*

128. *Id.*

129. 620 F.2d at 838 and 840 ("Plaintiffs, without objection from defendant, have requested this court to take judicial notice of [the Moody's Composite Index] for the years 1976-79.")

130. See *A & S Council*, 1993 WL 787241, at \*5 ("[T]he delayed compensation interest will be determined based upon the yield produced by good quality, long-term corporate bonds, as set forth in Moody's Composite Index."); *Georgia-Pacific*, 640 F.2d at 366 (citing *Tektronix* and *Miller*) ("We likewise take judicial notice of [the Moody's Composite Index]."); *Leesona Corp. v. United States*, No. 130-70, 1978 WL 14862, at \*24, \*25 (Ct. Cl. May 1, 1978) (holding that interest should be awarded at "those rates set down by the court in *Pitcairn*" and stating that interest at corporate bond rates was appropriate where "competitively marketed AAA corporate bonds were available at higher yields" than government bonds).

131. See 520 U.S. 1183 (1997).



The Court of Federal Claims has followed the Claims Court and Federal Circuit and has calculated the appropriate interest using the Moody's Composite Index.<sup>132</sup> In an unrelated case also called *Miller v. United States*, Judge Bruggink of the Court of Federal Claims considered and rejected the Declaration of Taking Act rate, finding it insufficient to “place [owners] in as good a position as they would have occupied if payment had coincided with the taking.”<sup>133</sup> Instead, he concluded that “a rate based on [the Moody's Composite Index for Moody's AAA-rated bonds] more closely approximates what a prudent investor would have done” because it “produces a reasonable return and maintains safety of capital.”<sup>134</sup>

Using the Moody's Composite Index of corporate bonds—or a similar market-based rate of return consistent with the return that would have been generated as a presumptively appropriate interest rate—addresses the concern that litigation of the interest rate in each case would prove too costly for individual litigants. The Moody's rate also represents a low-risk investment diversified by a portfolio of AAA-rated bonds, the highest available rating. Adoption of this benchmark rate allows individual claimants to obtain a rate of return that balances conservative investing principles with a potential for growth that government bonds do not offer.

#### VII. THE FIFTH AMENDMENT REQUIRES THAT INTEREST BE COMPOUNDED

*Simple interest cannot put the property owner in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation, because it undervalues the worth of the [property].*<sup>135</sup>

Albert Einstein has been apocryphally quoted as saying that “the greatest invention of all time was compound interest.”<sup>136</sup> Even if this

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132. See *Miller v. United States*, No. 03-2489L, at \*3 (Fed. Cl. Aug. 22, 2006) (holding that a rate based on the Moody's composite index “more closely approximates what a prudent investor would have done” than the proposed [52-Week] Treasury bond rate).

133. *Id.* at \*2.

134. *Id.*

135. *Whitney Benefits*, 30 Fed. Cl. at 415.

136. There is no credible source validating this quote as really having been said by Einstein.

attribution is incorrect, the observation captures Benjamin Franklin's advice to:

[R]emember that time is Money. . . . Remember that credit is Money. If a Man lets his Money lie in my Hands after it is due, he gives me the Interest, or so much as I can make of it during that Time. . . . Money is of a prolific generating Nature. Money can beget Money, and its Offspring can beget more, and so on. Five Shillings turn'd, is Six: Turn'd again, 'tis Seven and Three Pence; and so on 'til it becomes a Hundred Pound. The more there is of it, the more it produces every Turning, so that the Profits rise quicker and quicker.<sup>137</sup>

Judge Learned Hand likewise noted, "Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong."<sup>138</sup> Courts must assume that if "the full value of just compensation had been [paid when the taking occurred], the landowner would have been able to earn compound interest."<sup>139</sup> This is because "the government delays its payment for 'taken' property" for a substantially longer period of time than in direct condemnation claims.<sup>140</sup> Denial of compound interest after a long delay "would effectively undercut the protections of the fifth amendment to our Constitution," precisely because it would provide property owners with less than if they had been compensated at the time of the taking.<sup>141</sup> Thus, the

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137. BENJAMIN FRANKLIN, *Advice to a Young Tradesman, Written by an Old One*, in THE WRITINGS OF BENJAMIN FRANKLIN: PHILADELPHIA, 1726–1757 PHILADELPHIA (Benjamin Franklin & D. Hall, eds. 1748), available at <http://www.historycarper.com/resources/twobf2/advice.htm>. Franklin's advice also establishes that compounding interest was understood and practiced in Colonial America at the time the Fifth Amendment was adopted.

138. *Procter & Gamble Dist. Co. v. Sherman*, 2 F.2d 165 (2nd Cir., 1924).

139. *Whitney Benefits*, 30 Fed. Cl. at 415; *Brunswick*, 36 Fed. Cl. at 219 ("[I]nterest rates shall be compounded annually since no prudent, commercially reasonable investor would invest at simple interest.").

140. *Whitney Benefits*, 30 Fed. Cl. at 414 (citing *Fla. Rock Indus. v. United States*, 23 Cl. Ct. 653, 658 (1991)); see *Otay Mesa*, 93 Fed. Cl. at 491 (citing *Vaizburd v. United States*, 67 Fed. Cl. 499, 504 (2005)) (granting compound interest based on United States' "decade-long delay in compensating Plaintiffs for their easement").

141. *Whitney Benefits*, 30 Fed. Cl. at 415; see also *Dynamics Corp.*, 766 F.2d at 520 (quoting *Waite v. United States*, 282 U.S. 508 (1931)) ("We are persuaded that, based on the facts and

usual “prohibition on [compound] interest against the government does not apply in fifth amendment takings cases.”<sup>142</sup>

CONCLUSION: THE “JUST COMPENSATION” PROVISION OF THE FIFTH AMENDMENT REQUIRES THE OWNER TO BE PAID A FAIR-MARKET RATE OF INTEREST COMPARABLE TO WHAT THE OWNER COULD HAVE EARNED HAD HE BEEN PAID THIS MONEY ON THE DATE THE GOVERNMENT TOOK HIS PROPERTY

While it is easy to understand the appeal of statutory interest rates as a shorthand for determining just compensation, using statutory interest rates (like, for instance, the 52-Week T-bill rate found in the Declaration of Takings Act) sacrifices constitutional principle for purported simplicity and uniformity.<sup>143</sup> Courts have adopted various rates as “reasonable,” but virtually every decision along these lines begs the question—reasonable compared to what? Most courts take the reasonableness of one or more of these rates for granted, but reasonableness generally depends on a host of factual issues—foremost of which are prevailing market conditions. For a court to

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circumstances in a particular case, compound interest may more nearly fit with the policy ‘to accomplish complete justice as between the plaintiff and the United States’ under the just compensation clause of the Fifth Amendment.”); *N.M. LLC v. United States*, 55 Fed. Cl. 63, 81 (2002) (awarding compounded pre-judgment interest “from the date of the taking until the date of the judgment”); *Innovair Aviation, Ltd. v. United States*, 83 Fed. Cl. 498, 507 (2008) (quoting *Shelden v. United States*, 34 Fed. Cl. 355, 378 (1995)) (“This Court has awarded compound interest where there has been ‘a substantial time period between appropriation and compensation.”); *Cement Div., Nat’l Gypsum Co. v. City of Milwaukee*, 144 F.3d 1111, 1116 (7th Cir. 1998) (“It is, of course, settled in the case law that compounding of prejudgment interest is acceptable.”); *Mekuria v. Wash. Metro. Area Transit Auth.*, 45 F. Supp. 2d 19, 30–31 (D. D.C. 1999) (holding that obligation to pay compounded interest arises from a taking to “fully compensate Plaintiffs’ losses”); *Osprey Pac. Corp. v. United States*, 41 Fed. Cl. 150, 160 (1998) (awarding compound interest on takings award); *Shelden*, 34 Fed. Cl. at 377–78 (citing *Whitney Benefits*) (awarding compound interest where “a substantial time period [passed] between appropriation and compensation”).

142. See *Bowles v. United States*, 31 Fed. Cl. 37, 52 (1994) (“Simple interest cannot put the property owner in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation, because it undervalues the worth of the property.”); *Whitney Benefits*, 30 Fed. Cl. at 414–15.

143. See *Fuentes v. Shevin*, 407 U.S. 67, 91 n.22 (1972) (citing *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)) (“[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general . . . that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.”); *Kovacs v. Cooper*, 336 U.S. 77, 96 (1949) (“[I]t was Mr. Justice Holmes who admonished us that ‘To rest upon a formula is a slumber that, prolonged, means death.’”).

adopt a statutory rate of interest in a Fifth Amendment case without independently establishing that it matches a market rate of return the owner would have earned risks unconstitutionally delegating the determination of “just compensation” to Congress—a danger the Supreme Court has repeatedly warned against.

Any effort to determine just compensation must be governed by the fundamental principle that the condemnee, if compensated at the specified rate, will be “place[d] in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation.”<sup>144</sup> As various courts over time have pointed out, none of the congressionally established rates of interest bear any relationship to the proper constitutional consideration of compensating an owner for what the owner lost, not what the government took. These statutory rates—by definition—do not measure the owner’s lost opportunity to obtain a market-based rate of return. Indeed, a court seeking to apply a statutory rate would presumably have to test that rate against market conditions—thus undermining the very uniformity for which that rate was selected in the first place.

Meanwhile, as demonstrated above, the courts have emphasized uniformity in their decisions on interest rates, but have been undisputedly unable to achieve it. To the contrary, existing legal precedent supports various outcomes, depending on the arguments of the parties and the presiding court’s predilections. Even in the past twenty years, courts have measured interest (or delay compensation) in no less than six separate ways—all of which yield different results. As such, the oft-stated goal of uniformity remains aspirational, at best.

Thus, for all the purported effort courts have put into a unified theory of delay compensation in inverse condemnation litigation, the case law is littered with detours and false starts. Neither property owners nor the government can predict the value of their claims. The result is repeated litigation over the applicable interest standard—a legal battle that, at this point, threatens to further confuse rather than clarify the issues.

To remedy this situation, we recommend going back to the basic constitutional principles underlying just compensation. First, courts should apply the constitutional standard requiring that property owners be put in as good a position as they would have been had the

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144. *See supra* note 24.

taking not occurred. This requires courts to consider rates from the perspective of what is available to the property owner, leading them to the broad market-based approach reflected in the prudent investor rule. Indeed, market-based rates are, by definition, the only rates to which potential claimants have access, not being able to borrow money at the favorable rate at which the federal government borrows money. Once a reasonable market-rate of interest has been established for a certain time period, courts may take judicial notice of those decisions in the interest of efficiency and consistency.<sup>145</sup>

The Federal Circuit's predecessor court sought to accomplish something like this when it adopted a reasonable presumption in favor of the Moody's Composite Index. While an owner remains free to introduce evidence that the Moody's Composite Index unfairly minimizes his return, absent such a showing, the Moody's Composite Index is a market-based index balancing growth against a conservative investment strategy. Its use would also seem to reflect a reasonable, market-based, rate of return consistent with constitutional principles.

On the other hand, it is never appropriate for a court in an inverse condemnation action to blindly defer to a statutory interest rate. Doing so is simply inconsistent with the courts' constitutional responsibility. The amount of delay compensation derived from a taking is simply another question of valuation on which evidence must be taken and decided. No maxim of judicial convenience can, nor should, override the constitutional imperative of providing the owner "just compensation."

This is of no small import. Courts that allow the government to pay compensation at an interest rate that is less than a fair-market-based rate for the relevant term create a perverse incentive for the government to further protract resolution of these claims. As the California Supreme Court observed, when the government takes private property from an owner by eminent domain, the owner becomes an unwilling, and now captive, creditor lending to a borrower he would prefer not to have as a debtor. It adds insult to injury to then deny that "captive creditor" a less than full market-based rate of return, even as the owner also is now financing the government's acquisition of his property. Just compensation not only deters

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145. *Textronix*, 575 F.2d at 353 (taking judicial notice of adoption of Moody's rates in *Pitcairn*); *Miller*, 620 F.2d at 840 (same).

takings, it deters the government from needlessly protracting litigation to take advantage of cheap financing for its takings forays.

Though well-meaning, the courts' patchwork adoption of varying "uniform" interest rates—all done in the name of uniformity—has had quite the opposite effect. Adopting market-based rates of interest will allow both the government and individuals to predictably assess their entitlement to just compensation, provide a consistent method (if not a uniform rate) for establishing the amount of compensation owed, and encourage the resolution of Fifth Amendment claims.