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## Time to Overturn Turney

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# TIME TO OVERTURN *TURNEY*

Paul A. LaFata\*

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## INTRODUCTION: *EL-SHIFA* ATTEMPTS TO REINVIGORATE A TIRED DOCTRINE

In the summer of 2000, the Sudanese owner of a pharmaceutical plant in Sudan filed suit in the United States Court of Federal Claims<sup>1</sup> asserting a right to just

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<sup>1</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 751, 754 (2003), *aff'd*, 378



compensation under the Fifth Amendment.<sup>2</sup> President Clinton declared the plant enemy property and launched a military strike against it<sup>3</sup> based on military intelligence claims that the plant abetted Osama bin Laden<sup>4</sup> and manufactured weapons of mass destruction.<sup>5</sup> The suit amounted to a foreign enemy seeking just compensation for property destroyed in military action.<sup>6</sup> The court dismissed the complaint with a persuasive summary of the prior jurisprudence concerning the extraterritorial scope of the Takings Clause.<sup>7</sup> It also strongly urged the United States Court of Appeals for the Federal Circuit to clearly cut the root of extraterritorial takings jurisprudence<sup>8</sup>: *Turney v. United States*.<sup>9</sup>

The assertion *El-Shifa* presented was a critical opportunity to define the extraterritorial scope of the Takings Clause. This Note urges that at the next opportunity, the United States Court for the Federal Circuit or the Supreme Court of the United States should clearly overrule extraterritorial Fifth Amendment protection for alien property located and seized abroad. Either court should marginalize *Turney* as an aberration rather than use it as a basis for a near universal right to just compensation. Ultimately, the Takings Clause must be justly defined to reduce the United States' exposure to collateral attack on its military activity.

This inquiry will first explore the legal stakes at hand in overruling *Turney*'s innovation, including legal grounds for reversing *Turney*. Secondly, the inquiry will proceed to the undercurrents of this debate. At its base, this debate reflects another struggle over the underlying theories of constitutional rights: whether constitutional rights are bound by physical territory, limited by government-actor relationships, or inalienably every person's entitlement. If a court were to overrule *Turney*, it could not help but base the reversal in this theoretical debate. Finally, the inquiry will proceed

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F.3d 1346 (Fed. Cir. 2004). Salah El Din Ahmed Mohammed Idris, the owner of El-Shifa Pharmaceutical Industries Company, initially filed a complaint under the Federal Tort Claims Act in the United States District Court for the District of Columbia. *Id.* at 754.

<sup>2</sup> *Id.* at 754. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

<sup>3</sup> See Bill Gertz, *Bombing Scenario Matches August's; Reminder to Some of 'Wag the Dog'*, WASH. TIMES, Dec. 17, 1998, at A11; see also Colum Lynch, *Allied Doubts Grow About the US Strike on Sudanese Plant*, B. GLOBE, Sept. 24, 1998, at A2 (describing critiques by U.S. allies of the U.S. strikes against Sudan).

<sup>4</sup> Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460, 1460-61 (Aug. 20, 1998).

<sup>5</sup> *Id.*; see also Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559 (1999) (reviewing Sudanese connections with al-Qaeda including mixing peaceful with military pharmaceutical operations).

<sup>6</sup> 28 U.S.C. § 1346(a)(2) (2000) (waiving sovereign immunity for this purpose).

<sup>7</sup> See *El-Shifa Pharm. Indus.*, 55 Fed. Cl. at 764-74, *aff'd*, 378 F.3d 1346 (Fed. Cir. 2004), *cert. denied*, 125 S. Ct. 2963 (2005).

<sup>8</sup> *Id.* at 762-64.

<sup>9</sup> 115 F. Supp. 457 (Ct. Cl. 1953). Two of five judges dissented in part: agreeing with the court's disposition but not the rationale. See *id.* at 465 (Jones, C.J., dissenting in part).



to a deeper political undercurrent: attempts to siphon power from the Executive in particular and the United States in general. The political stakes will emerge and amplify the gravity of foreign takings entitlements in an age of terror.

#### A. *Turney* Authors an Extension of the Takings Clause

In *Turney*, the United States Court of Claims ruled that a Philippine seizure of foreign property from a foreign corporation<sup>10</sup> constituted a valid claim for just compensation against the United States. The United States sold surplus property to the Philippine government, which allocated it to businessmen operating from China.<sup>11</sup> After the purchasers transferred ownership of the property to a foreign corporation they formed,<sup>12</sup> corporate employees discovered classified United States Air Force equipment among the surplus property.<sup>13</sup> When the Philippine government learned of this fact, it seized the classified property.<sup>14</sup> The foreign corporation's receiver filed for just compensation from the United States and won.<sup>15</sup>

The court seemed persuaded by several unique factors: the Philippine government was so dependent upon the United States that its actions were essentially actions of the United States;<sup>16</sup> the owners formed the corporation for the sole purpose of selling the property to the Chinese military;<sup>17</sup> the United States military classified the property to

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<sup>10</sup> The corporation was Filipino. *Turney v. United States*, 126 Ct. Cl. 202, 218 (1953); see also *Seery v. United States*, 127 F. Supp. 601, 603 (Ct. Cl. 1955) (referencing the court's very recent decision in *Turney* concerning "an alien corporation").

<sup>11</sup> *Turney*, 115 F. Supp. at 458–59. In the contract of sale, the United States disclaimed liability for the condition of the property even though the Philippine government owned the property by act of Congress. See *id.* at 459. Hong Kong residents paid more than half the purchase price. See *id.* at 458–59.

<sup>12</sup> *Id.* at 459. The court concluded, "We have no doubt that title to the radar equipment passed to [plaintiffs]." *Id.* at 463. This point was in tight dispute. See *id.*

<sup>13</sup> *Id.* at 459.

<sup>14</sup> "[A]n officer or enlisted man of the [United States] Army would be designated . . . as an agent of the Philippine Government in supervising the segregation and security of the radar." *Id.* at 460 (emphasis added). The court held that the subsequent segregation was the moment the property was taken. *Id.* at 464.

<sup>15</sup> *Id.* at 464.

<sup>16</sup> See *id.* at 463. The army personnel who physically "segregated the radar" acted as "agent[s] of the Philippine Government." *Id.* at 460. Additionally, when the United States asked for an embargo on the property, the court held the Philippine government "naturally, readily complied," as if the government did not act of its own volition. *Id.* at 463.

<sup>17</sup> *Id.* at 458–59. This seemed to lower the threshold for piercing the corporate veil through the corporation's foreign allegiance to the founders' American association. Curiously, the corporation relied only upon judicial relief from Philippine tribunals rather than United States judicial relief. See *id.* at 463 ("The minutes [of the meeting authorizing corporate dissolution] . . . specifically authorized the plaintiff . . . to prosecute and defend suits in Philippine tribunals, but made no mention of a suit in this court . . . . We do not know the reason for the omission.").



protect national security,<sup>18</sup> and, most importantly, a grant of judicial relief would not present "inconvenience or practical difficulty."<sup>19</sup>

The court had *ample* alternative bases for reaching the same conclusion aside from finding a Fifth Amendment taking. Chief Judge Jones's partial dissent succinctly explored these points.<sup>20</sup> Military regulations in force at the time prohibited declaring classified military property as surplus, which *precluded* the officials' authority to sell the equipment.<sup>21</sup> Alternatively, the court could have rescinded the contract as a mutual mistake of fact because neither the buyer nor seller knew of or intended to exercise a transfer of classified technology.<sup>22</sup> Instead, the court pioneered an expansion of the Fifth Amendment to supply just compensation to aliens whose foreign property was seized by a foreign government.<sup>23</sup>

### *B. The Turney Court Reinforces its Error*

One year after *Turney*, the same court decided *Seery v. United States*<sup>24</sup> and permitted another claim for Fifth Amendment just compensation—this time for a citizen's land seized by the United States military in Austria.<sup>25</sup> The court referred to *Turney* and confessed, "We recognized that there were no precedents upon the question, but it seemed to us that, since the Constitutional provision could be applied, *without inconvenience*, to *such a situation*, it ought to be so applied."<sup>26</sup> Of all the possible distinctions between *Seery* and *Turney*, the court highlighted convenience. Because

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<sup>18</sup> *Id.* at 459.

<sup>19</sup> *Id.* at 464. Note the United States Air Force offered to demilitarize or replace the property before seizing it. *Id.* at 459. Perhaps the court should have employed safer judicial grounding by ordering the contract rescinded due to mutual mistake of fact. Chief Judge Jones offered this point in his partial dissent. *Id.* at 465 (Jones, C.J., dissenting in part).

<sup>20</sup> *See id.* at 465.

<sup>21</sup> "[P]acific Air Service Command had issued a directive relative to surplus declarations which said: '(6) Under *no* condition will any radar equipment be declared to the disposal agency.'" *Id.* at 459 (majority opinion). See also Chief Judge Jones's conclusion that the regulation meant "the officials in charge had no authority to make a declaration of surplus that would include such equipment." *Id.* at 465 (Jones, C.J., dissenting in part). *But see id.* at 463 (majority opinion) ("We have no doubt that title to the radar equipment passed to [plaintiffs].").

<sup>22</sup> *See, e.g., id.* at 459 ("Neither the buyers nor those who made the sale for the Government were aware, when the sale was made, that there was radar equipment among the supplies at the depot."); *id.* at 465 (Jones, C.J., dissenting in part) ("There was therefore a mutual mistake of fact."). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 154(b) (1981) (A party assumes the risk of a mistake when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient . . .").

<sup>23</sup> *Turney*, 115 F. Supp. at 465.

<sup>24</sup> 127 F. Supp. 601 (Ct. Cl. 1955).

<sup>25</sup> *Id.* at 602–03.

<sup>26</sup> *Id.* at 603 (emphasis added).



the court recently permitted just compensation for an alien whose foreign property was seized by a foreign nation, it would not be extraordinary to authorize the same for a citizen's foreign land the United States seized directly.<sup>27</sup> Once the outer limit of *Turney* seemed "convenient," the jurisprudence had much room to grow.

The unfortunate juxtaposition of a peacetime foreign taking in *Turney* with a military foreign taking in *Seery* clouded the scope of *Turney*'s exceptional accommodation. At the time the court decided *Turney*, it was exceptional because many other controversies involving military takings explicitly denied just compensation.<sup>28</sup> *Turney* formally considered a taking by the Philippine government that the United States military executed,<sup>29</sup> but *Seery*'s reinforcement may have clouded that critical distinction. *El-Shifa* illustrated the potential harm of blurring this distinction.

From *Turney* to *El-Shifa*, the time has come to reexamine alien extraterritorial claims for just compensation. These claims have become "inconvenient," and arguments like those in *El-Shifa* may portend more inconvenience, particularly in a climate of asymmetrical, global combat against terror.<sup>30</sup>

### C. A Modern Court Repeats *Turney*'s Error

Although *El-Shifa*'s argument that a foreign military enemy should succeed in a cause for just compensation is striking, the appellate court's grounds for affirming the dismissal are even more surprising. The United States Court of Appeals for the Federal Circuit expressly considered the lower court's well-wrought plea to reverse the tired doctrine of *Turney*,<sup>31</sup> but it parried the issue. It chose to dismiss the matter as a non-justiciable political question.<sup>32</sup> By allowing *El-Shifa* to reach justiciability,

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<sup>27</sup> *Id.* ("In the *Turney* case . . . the plaintiff was an alien corporation, whereas the instant plaintiff is an American citizen. If that fact is material, it is to her advantage."). In *Seery*, the government argued against the plaintiff's claim for just compensation merely because the property was located abroad. *Id.*

<sup>28</sup> See, e.g., *Mrs. Perrin's Case*, 4 Ct. Cl. 543 (1868) (denying just compensation for military action abroad destroying American-owned property), *aff'd*, 79 U.S. 315 (1871).

<sup>29</sup> *Turney v. United States*, 115 F. Supp. 457, 460 (Ct. Cl. 1953).

<sup>30</sup> See Kurt M. Campbell, Senior Vice President & Director, Center for Strategic and International Studies, Testimony before the House Committee on Armed Services: Foreign Policy and National Security Just Became Twice as Hard (Sept. 27, 2005), <http://www.csis.org/media/csis/congress/ts050928campbell.pdf> (congressional testimony noting the special difficulties of global, asymmetrical combat involving arms, propaganda, and theocratic fascism).

<sup>31</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1352 (Fed. Cir. 2004) ("We are hesitant to accept this invitation to the extent that it asks us to expressly overrule *Turney*."), *cert. denied*, 125 S. Ct. 2963 (2005). The court stated it must review *Turney* en banc to overrule it. *Id.* Then, the court denied a rehearing en banc. See *El-Shifa Pharm. Indus. Co. v. United States*, 2004 U.S. App. LEXIS 27982 (Fed. Cir. 2004).

<sup>32</sup> *El-Shifa*, 378 F.3d at 1352. ("[B]ecause we think the appellants' takings claim at bottom presents a nonjusticiable political question, we are not required to explore whether *Turney* enjoys any continuing vitality . . ."). By allowing the controversy to penetrate to the



the court of opened the door to separation of powers issues rather than stopping the advance at standing. The court passed a ripe opportunity to overrule *Turney*, thereby perpetuating future causes of actions for extraterritorial takings.

Consequently, El-Shifa pursued its end of resurrecting *Turney*'s narrow holding. In El-Shifa's petition for certiorari,<sup>33</sup> the company argued that war powers of the President, including designations of enemy property, are justiciable after *Hamdi v. Rumsfeld*,<sup>34</sup> in which the Supreme Court authorized judicial review of executive designations of enemy combatants.<sup>35</sup> If the courts may review executive declarations of enemy combatants, they ought to review executive declarations of enemy property. If a petitioner like El-Shifa succeeds in tapping into territorial expansions of other constitutional rights, this success would advance a glacial shift in Takings Clause jurisprudence by generalizing the *Turney* exception.<sup>36</sup> Such arguments blur the distinction between foreign military takings and other foreign takings. Presently, there is still "no simple rule in the Federal Circuit that excludes foreign-owned, foreign-situated property"<sup>37</sup> from sustaining a valid takings claim. After fifty years, there should be.

### I. THE LEGAL STAKES

There are three classes of takings claims in this debate: American-owned property located abroad,<sup>38</sup> alien-owned property located within the United

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political question doctrine, a court would entertain argument on several factors:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962). Justiciability questions *what* may be heard, but it is still logically subsidiary in a particular controversy to *who* may argue it.

<sup>33</sup> Petition for Writ of Certiorari at 6–7, *El-Shifa Pharm. Indus. Co. v. United States*, 125 S. Ct. 2963 (2005) (No. 04–1291).

<sup>34</sup> 542 U.S. 507 (2004).

<sup>35</sup> *Id.* at 533.

<sup>36</sup> See Petition for Writ of Certiorari at 8, *El-Shifa Pharm. Indus. Co. v. United States*, 125 S. Ct. 2963 (2005) (No. 04–1291) (placing the controversy in context of internationalizing other constitutional rights).

<sup>37</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 762 (2003), *cert. denied*, 125 S. Ct. 2963 (2005); see also *Turney v. United States*, 115 F. Supp. 457, 464 (Ct. Cl. 1953) ("There is no decision directly in point.").

<sup>38</sup> See, e.g., *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952) (denying just compensation for destruction of American property in the Philippines); *Langenegger v. United*



States,<sup>39</sup> and alien-owned property located abroad.<sup>40</sup> For simplicity, these classes are collectively referred to as foreign takings. Courts have created different doctrines for these general classes, but the military necessity doctrine overarches foreign takings and usually precludes a claim.<sup>41</sup> This section explains this overarching doctrine and then explores foreign takings doctrine for each general class.

#### *A. Military Necessity Usually Precludes a Foreign Takings Claim*

The international scope of the Takings Clause arises in a few classes of controversies, most of which involve the military,<sup>42</sup> so the military necessity doctrine pervades

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States, 756 F.2d 1565 (Fed. Cir. 1985) (regarding taking American coffee plantation in El Salvador), *cert. denied*, 474 U.S. 824 (1985); *Am. Mfrs. Mut. Ins. Co. v. United States*, 453 F.2d 1380 (Ct. Cl. 1972) (denying that seizure of American property in the Dominican Republic was a taking); *Nat'l Bd. of Young Men's Christian Ass'n v. United States*, 396 F.2d 467 (Ct. Cl. 1968) (holding that seizure of American property in Panama was not a taking), *aff'd*, 395 U.S. 85 (1969); *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955) (holding that American property seized in Austria was a taking); *Juragua Iron Co. v. United States*, 42 Ct. Cl. 99 (1907) (holding that American property destroyed in Cuba was not a taking), *aff'd*, 212 U.S. 297 (1909); *Green v. United States (Green's Case)*, 10 Ct. Cl. 466 (1874) (holding that property in Tennessee seized by the Union during the Civil War was not a taking); *Mrs. Perrin's Case*, 4 Ct. Cl. 543 (1868) (holding that American property destroyed in Nicaragua was not a taking), *aff'd*, 79 U.S. 315 (1871).

<sup>39</sup> See, e.g., *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480 (1947) (holding that a Swiss owner of property seized in America may maintain suit); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (holding that plaintiff suing over Russian contract seized in United States may maintain suit); *Casa de Cambio Comdiv S.A. v. United States*, 291 F.3d 1356 (Fed. Cir. 2002) (holding that Mexican property seized in the United States was not a taking), *cert. denied*, 538 U.S. 921 (2003).

<sup>40</sup> See, e.g., *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191 (1815) (regarding Danish property in British custody); *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004) (holding that suit over Sudanese property in Sudan was precluded), *cert. denied*, 125 S. Ct. 2963 (2005); *Turney*, 115 F. Supp. 457 (holding that Chinese property seized in the Philippines was a taking); *Hoffman v. United States*, 53 F. Supp. 2d 483 (D.D.C. 1999) (denying suit over German property seized from Nazis), *vacated on other grounds*, 17 F. App'x 980 (2001), *cert. denied*, 535 U.S. 1112 (2002).

<sup>41</sup> Logically, standing precedes inquiry into military necessity, which acts like an affirmative defense. Courts seem to prefer dismissing the cause of action for military necessity because it reaches the substance of the claim whether or not the petitioner has standing. See generally *Thirty Hogsheads of Sugar*, 13 U.S. (9 Cranch) at 199 (bypassing standing issues to preclude cause of action by military necessity). This Note necessarily argues standing ought to precede substance.

<sup>42</sup> The minority of controversies concern takings not directly associated with the military. See *Russian Volunteer Fleet*, 282 U.S. at 481 (holding that Executive Order effected the taking); *Gasser v. United States*, 14 Cl. Ct. 476 (1988) (considering Mexican property flooded by Hoover Dam construction), *withdrawn*, 22 Cl. Ct. 165 (1990) (parties settled for compensation); *Turney*, 115 F. Supp. at 460 (holding that Philippine government effected a peacetime



foreign takings claims. This doctrine generally insulates the United States against takings conducted by the military under sudden, extreme emergency.<sup>43</sup> According to this doctrine, courts deny claims for just compensation when the taking seeks to defeat an enemy or protect troops.<sup>44</sup> Necessity does not immunize the United States from a claim for just compensation, however, when the taking seeks to affirmatively promote United States military activity, except for destruction.<sup>45</sup>

This exception is probably grounded in the power an English sovereign retained: seizing private property in defense of the realm.<sup>46</sup> Just compensation did not accompany a king's taking but did accompany a Parliament's taking, which was more often to advance public welfare.<sup>47</sup> This historical distinction is useful for understanding modern common law distinctions along the same divide.

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taking although United States military agents were used).

<sup>43</sup> See *CalTex*, 344 U.S. at 154 ("[T]he common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few . . ."); *United States v. Russell*, 80 U.S. (13 Wall.) 623, 629 (1871) ("Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger . . . is impending."). For an outstanding review of the historical origin of takings, see generally Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 8–13 (1980) (distinguishing the King's inherent power to protect the realm from Parliament's inherent power to improve the realm; only the latter gave rise to just compensation).

<sup>44</sup> See *Caltex*, 344 U.S. at 153–54 ("The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. . . . [I]t was his imperative duty to direct their destruction. The necessities of the war called for and justified this." (quoting *United States v. Pacific R.R.*, 120 U.S. 227, 234 (1887))); *Juragua Iron Co. v. United States*, 42 Ct. Cl. 99, 101 (1907) (destroying plaintiff's foreign property was "necessary for the preservation of the health of the troops . . . [and] was a necessary incident to the military operations of the troops").

<sup>45</sup> See *Caltex*, 344 U.S. at 155 ("[The property taken] was destroyed, not appropriated for subsequent use."); *Pacific R.R.*, 120 U.S. at 239 ("Military necessity will justify the destruction of property, but [it] will not compel private parties to [bear] on their own lands works needed by the government . . . [such as] bridges to facilitate the movements of troops, or . . . supplies . . ."); *Russell*, 80 U.S. (13 Wall.) at 629 (granting just compensation for taking American civilian ships to aid troop movement during Civil War). Compare *Wiggins v. United States (The Wiggins's Case)*, 3 Ct. Cl. 412, 422 (1867) (granting just compensation for military destruction of property to prevent it from benefitting the enemy), with *Mrs. Perrin's Case*, 4 Ct. Cl. 543, 547 (1868) (denying just compensation for same military action as *The Wiggins's Case* because *Wiggins's* property "was not destroyed in hostile operations against the public enemy, but for the purpose of preventing the aid and succor it would have afforded [the enemy]. . . ."), *aff'd*, 79 U.S. 315 (1871). The Supreme Court probably abrogated the distinction in *The Wiggins's Case* in *Caltex*, 344 U.S. at 155–56 (denying just compensation for American property destroyed abroad to prevent it from benefitting the enemy).

<sup>46</sup> See Meidinger, *supra* note 43, at 8–13.

<sup>47</sup> *Id.*



Hence, if the military necessity doctrine applies, the just compensation inquiry usually ends. This is more often than not the case in foreign takings because of how frequently the taking authority is the military. The doctrine does not apply, however, when the military takes property outside exigency<sup>48</sup> or when the military is not the taking authority.<sup>49</sup> Within the subset of foreign takings outside military necessity, the three general classifications of foreign takings determine the course of the matter: whether the claimant is an alien or citizen and whether the property is foreign or domestic.

*B. Foreign Takings Doctrine Without Military Necessity Pivots According to Kind*

1. American Property Seized Abroad

When a foreign taking involves the United States seizing American-owned property abroad, courts authorize just compensation.<sup>50</sup> The United States ought not evade constitutional guarantees because its citizens are abroad. The Supreme Court adopted the principle when it declared that “[t]he United States is entirely a creature of the Constitution,” and “the shield which the Bill of Rights and other parts of the Constitution provide to protect [a citizen’s] life and liberty should not be stripped away just because he happens to be in another land.”<sup>51</sup> In compliance with their principle, courts sustain a citizen’s cause of action against the United States for just compensation for taking foreign property.<sup>52</sup>

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<sup>48</sup> See *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955) (granting claim for just compensation for taking an American’s foreign house for officer’s recreational club).

<sup>49</sup> *Gasser v. United States*, 14 Cl. Ct. 476 (1988) (holding that Hoover Dam construction took the property), *withdrawn*, 22 Cl. Ct. 165 (1990) (parties settled for compensation); *Anglo Chinese Shipping Co. v. United States*, 127 F. Supp. 553 (Ct. Cl. 1955) (denying just compensation for Hong Kong property seized by Allied Powers and not the United States), *cert. denied*, 349 U.S. 938 (1955); *Turney v. United States*, 115 F. Supp. 457, 460 (Ct. Cl. 1953) (finding that Philippine government effected a taking although United States military agents were used).

<sup>50</sup> *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851). In a curious exception to military necessity, the United States Court of Claims granted just compensation to a citizen’s foreign property seized during war. *The Wiggins’s Case*, 3 Ct. Cl. at 422 (holding just compensation for military necessity destruction arises “from the principles of natural justice and equity . . . . Nor is it necessary to support it by further citations of authorities.”). Judge Loring relied on traditional military necessity to deny just compensation in his dissent. *Id.* at 424–25 (Loring, J., dissenting).

<sup>51</sup> *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (holding that a citizen abroad retains right to a jury trial).

<sup>52</sup> See *Seery*, 127 F. Supp. 601 (granting claim for just compensation for taking an American’s foreign house for officers’ recreational club). Again, this assumes the military necessity doctrine does not apply. See *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952) (denying citizen’s claim for just compensation for foreign property because military necessity



## 2. Alien Property Seized Domestically

In the second class of foreign takings, when a foreign taking involves the United States seizing an alien's property domestically, the Supreme Court extends just compensation when the alien is a "friend" under *Russian Volunteer Fleet v. United States*.<sup>53</sup> The Supreme Court recently clarified the underlying principle in *Russian Volunteer Fleet*: when a resident alien takes affirmative steps to develop "substantial connections," constitutional protections accrue.<sup>54</sup> Traditionally, allowing an alien into the nation "implied protection,"<sup>55</sup> so *Verdugo-Urquidez*'s "significant voluntary connection[s]" test clarifies the standard.<sup>56</sup>

When a domestic alien fails to establish substantial connections, a court dismisses a claim for just compensation.<sup>57</sup> Alternatively, when the alien petitioner's

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trumps). *But see, e.g.,* *Langenegger v. United States*, 756 F.2d 1565, 1572 (Fed. Cir. 1985) (denying citizen's claim for just compensation for foreign property seized outside military necessity because United States involvement was too attenuated: "[T]he court must consider whether the *United States*' involvement was sufficiently direct and substantial to warrant its responsibility under the fifth amendment"); *Anglo Chinese Shipping*, 127 F. Supp. at 557 (denying claim for just compensation for foreign property seized because the United States was not the taking authority). The *Langenegger* court dismissed the idea that the Philippine government in *Turney* acted wholly under the coercion of the United States. *Langenegger*, 756 F.2d at 1571.

<sup>53</sup> *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931). The Supreme Court looked to *Wong Wing v. United States*, which universalized Fourteenth Amendment coverage to "all persons within the territorial jurisdiction [of the United States]." 163 U.S. 228, 238 (1896). The scope of the holding in *Russian Volunteer Fleet* is limited because at the time, Congress specifically authorized just compensation for domestic seizure of the alien's property. *Id.* at 489 ("The Congress recognized this duty [of compensation] in authorizing the expropriation.").

<sup>54</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (denying application of Fourth Amendment rights to Mexican citizen lacking substantial connections to the United States). The Court limited the scope of prior holdings that grant constitutional protection for resident aliens while simultaneously clarifying the underlying principle. *Id.*; cf. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (denying habeas corpus protection to nonresident alien enemy, noting "[m]ere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen"). The Supreme Court based its holding in *Eisentrager* on the principle that "the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts . . . [nor may he] maintain an action in its courts during the period of hostilities." *Id.* at 776. In the 2004 Term, the Supreme Court cautiously distinguished alien enemies in the War on Terror from those in *Eisentrager*, overruling a lower decision that relied on *Eisentrager* to deny extending due process. *See Rasul v. Bush*, 542 U.S. 466, 476, 485 (2004) (implicitly questioning *Eisentrager*).

<sup>55</sup> *Eisentrager*, 339 U.S. at 777-78.

<sup>56</sup> *Verdugo-Urquidez*, 494 U.S. at 271.

<sup>57</sup> *See Hoffmann v. United States*, 53 F. Supp. 2d 483, 491 (D.D.C. 1999) (dismissing claim for just compensation because plaintiff failed to establish "the existence of voluntary



substantial connections relate to illegal activity, no constitutional protection accrues.<sup>58</sup> The Supreme Court recoiled at the supposition of extending constitutional protection to aliens lacking such substantial connections:

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. . . . No decision of this Court supports such a view. . . . None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.<sup>59</sup>

### 3. Alien Property Seized Abroad

The third general class of foreign takings involves an alien's property seized abroad. Among the controversies in this class, *Turney* goes the farthest afield to authorize just compensation. Other controversies in the same general class turn to other grounds for denying just compensation.<sup>60</sup>

In this respect, *Turney* stands as a lonely exception justified by mere convenience.<sup>61</sup> Outside the exigencies of war, the United States Court of Claims filled the jurisprudential gap with ad hoc whim. As a result, once a petitioner has standing, it may rebut military necessity and a court may entertain argument about how necessary a military action was.

Immediately, the propriety of executive power is under review: whether the military action was justified or merely discretionary or whether the United States acted

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or contractual relationships with this country”).

<sup>58</sup> See *Eisentrager*, 339 U.S. at 778–79; cf. *Hoffmann*, 53 F. Supp. 2d at 491 (challenging similar restriction under Trading with the Enemy Act).

<sup>59</sup> *Eisentrager*, 339 U.S. at 784–85 (citation omitted). One should note the Court thought such an innovation was radical “in the practice of *government*” rather than just the United States. *Id.* at 784 (emphasis added).

<sup>60</sup> See, e.g., *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 199 (1815) (authoring the doctrine of enemy soil to dismiss alien claim over alien property by construing military necessity); *Cardenas v. Smith*, 733 F.2d 909, 917 (D.C. Cir. 1984) (declining to extend Fifth Amendment protection to alien seeking just compensation on narrow factual and pleading grounds); *Ashkir v. United States*, 46 Fed. Cl. 438, 444–45 (2000) (declining to find any cause of action for alien claim regarding Somalian property despite *Turney*); *Rosner v. United States*, 231 F. Supp. 2d 1202, 1214 (S.D. Fla. 2002) (denying alien takings claim over foreign property, implicitly finding no cause of action for such a foreign taking, and disallowing alien to convert the claim into one by a resident alien for lack of substantial connections).

<sup>61</sup> *Turney*, 115 F. Supp. at 464 (noting relief is justified as lacking “inconvenience or practical difficulty”); see also *Seery v. United States*, 127 F. Supp. 601, 603 (Ct. Cl. 1955) (confirming the holding in *Turney* that just compensation is applicable when such appliance will not be “inconvenient”).



alone or in concert. A court is faced with political question and separation of powers issues where a petitioner may find grounds to collaterally attack executive war power.<sup>62</sup> It is better to police the floodgate of standing than attempt to redirect the rushing waters of political question doctrine and separation of powers. When the court in *Turney* granted the cause of action, it relied on a logical kernel to justify reaching the substantive takings issue. To refute *Turney*, one must refute that logic.

### *C. Turney Relied on a Logical Kernel to Internationalize the Constitution*

When the United States Court of Claims found a cause of action for just compensation in *Turney*, it adopted *Turney*'s logic that just because some constitutional rights do not extend abroad, the Takings Clause is not barred from extending abroad.<sup>63</sup> Specifically, just because an American convicted in Japan without a jury lacked standing to reverse a conviction due to denial of the right to a trial by jury, it did not "mean that other constitutional rights, such as the right to just compensation for property taken, which can, without inconvenience or practical difficulty, be applied to a taking abroad, should not be so applied."<sup>64</sup> The argument is weak because it rests on the twin pillars of convenience and absence of "practical difficulty."<sup>65</sup> For the United States' treasury, cash is rarely a practical difficulty.

The *Turney* logic would be stronger if constructed more directly: some constitutional rights extend abroad, so others should extend abroad for the same reason.<sup>66</sup> Jurisprudential arguments to overrule *Turney* ought to nullify the logic: a constitutional right to just compensation ought not extend abroad for the same reason that other constitutional rights do not extend abroad.<sup>67</sup> Opponents of *Turney* employ this argument: a constitutional right to just compensation ought not extend abroad because the Supreme Court declines to extend other constitutional rights abroad.<sup>68</sup> Thus, one may refute

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<sup>62</sup> See Petition for Writ of Certiorari at 8–11, *El-Shifa Pharm. Indus. Co. v. United States*, 125 S. Ct. 2963 (2005) (No. 04–1291) (challenging the President's determination that the underlying property was inimical to the United States).

<sup>63</sup> 115 F. Supp. at 464.

<sup>64</sup> *Id.* (citing *Ross v. McIntyre*, 140 U.S. 453 (1891)).

<sup>65</sup> *Id.*

<sup>66</sup> The Supreme Court adopted this analogy in the seminal case *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (holding petitioner "alien friend" should enjoy Fifth Amendment rights because he enjoys Fourth Amendment rights) (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (extending access to writ of habeas corpus to domestic aliens)). The Court used the same analogy in *Wong Wing* to extend the Fourteenth Amendment to resident aliens in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). *Wong Wing*, 163 U.S. at 238. *But see* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 259–60 (1990) (holding an alien lacking substantial connections to the United States has no Fourth Amendment protection).

<sup>67</sup> This logic assumes that parts of the Constitution are similarly constituted.

<sup>68</sup> See *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 763 (2003) (noting the Supreme Court declined to extend Fourth Amendment protections abroad); *Ashkir v.*



the logic with doctrine concerning the extraterritorial scope of other constitutional guarantees.

*D. United States v. Verdugo-Urquidez Lays the Groundwork to Refute Turney's Logic*

El-Shifa's attempt to shift the scope of constitutional rights abroad is part of a larger debate over the extraterritoriality of other constitutional rights.<sup>69</sup> *United States v. Verdugo-Urquidez*<sup>70</sup> fulfills the requirement to refute *Turney*'s position. In *Verdugo-Urquidez*, the Court denied Fourth Amendment protection to a search of an alien's home on foreign soil.<sup>71</sup> United States marshals worked with Mexican police to apprehend a leader of a comprehensive and violent narcotics network.<sup>72</sup> Drug Enforcement Administration agents entered and searched Verdugo-Urquidez's home with permission from Mexico but without a warrant.<sup>73</sup> The Court held "the Fourth Amendment has no application" to a "citizen and resident of Mexico" in light of the "history, and our cases discussing the application of the Constitution to aliens."<sup>74</sup>

The Court found support in the text of the Fourth Amendment: grounding the right in "*the* people to be secure"<sup>75</sup> rather than merely "people."<sup>76</sup> The Court distinguished the Fourth Amendment from others, including the Fifth Amendment, because of this qualification of the right applying to *the* people.<sup>77</sup> The Court turned to the history of the

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United States, 46 Fed. Cl. 438, 442–44 (2000) (declining to extend right to just compensation abroad because the Supreme Court declined to extend Fourth Amendment protections abroad). These two cases rely on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding an alien has no Fourth Amendment protection concerning search of foreign property). *But see* *Rasul v. Bush*, 542 U.S. 466 (2004) (extending writ of habeas corpus to non-resident, enemy aliens because of unique history of the writ and statutory interpretation).

<sup>69</sup> See, e.g., 8A–19 NICHOLS ON EMINENT DOMAIN § 19.07 (2006) [hereinafter EMINENT DOMAIN] (linking foreign takings debate to the larger constitutional stakes); Roszell Dulany Hunter IV, Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649 (1986).

<sup>70</sup> 494 U.S. 259 (1990).

<sup>71</sup> *Verdugo-Urquidez*, 494 U.S. at 262.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 263. On this ground, the district court granted a motion to suppress incriminating evidence uncovered by the search. *Id.*

<sup>74</sup> *Id.* at 274–75.

<sup>75</sup> U.S. CONST. amend. IV (emphasis added).

<sup>76</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (holding 'the people' references "a class of persons who are part of a national community or who have otherwise developed *sufficient connection* with this country to be considered part of that community" (emphasis added)). The dissenting justices would hold any person impacted by the laws of the United States as part of "the people." *Id.* at 284 (Brennan, J., dissenting). This argument adopts inherency theory of right. See *infra* Part II.C.

<sup>77</sup> *Verdugo-Urquidez*, 494 U.S. at 265.



Fourth Amendment to support its holding that “the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.”<sup>78</sup>

The Court cautioned that the holding may not cross-apply to the Fifth Amendment without friction because the it includes “a fundamental trial right of criminal defendants.”<sup>79</sup> This qualification would not affect the Takings Clause because it does not relate to a trial right of criminal defendants.<sup>80</sup> By implication, the Court’s holding that the Fourth Amendment would not limit the United States’ actions respecting aliens in foreign territory would also inform the scope of other constitutional rights, such as the Fifth Amendment entitlement to just compensation.<sup>81</sup> This standard would properly limit the extraterritorial scope of the Takings Clause.

Conversely, dissenting justices *would* have extended a right under the United States Constitution to a citizen and resident of Mexico whose Mexican property was subjected to criminal inquiry.<sup>82</sup> They founded their argument in a theory of “mutuality” and reasoned that United States enforcement of its laws abroad without the accompanying constitutional protections discourages foreign nations from respecting our laws.<sup>83</sup>

*Verdugo-Urquidez* tees up the deeper controversy concerning the scope of extraterritorial constitutional rights. The Court adopted a theory of substantial relations that looked to the connection between the individual and the authority.<sup>84</sup> For example, in the context of *Turney*, the relationship between the Filipino corporation and the United States would have to have been substantial to warrant Fifth Amendment protection. *Verdugo-Urquidez* thus established a foundation for crafting a broader theory of the scope of constitutional rights, and it may also anchor the Takings Clause in a relationship inquiry rather than an identity inquiry.<sup>85</sup>

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<sup>78</sup> *Id.* at 266.

<sup>79</sup> *Id.* at 264 (referencing the Fifth Amendment protection against self incrimination).

<sup>80</sup> *See id.* (noting the constitutional violation of the Fourth Amendment is “fully accomplished” before trial (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974))).

<sup>81</sup> *But see* EMINENT DOMAIN, *supra* note 69, at § 19.07[3] (noting consistent trend of lower courts granting just compensation for foreign takings).

<sup>82</sup> “Today the Court holds that although foreign nationals must abide by our laws even when in their own countries, our Government need not abide by the Fourth Amendment when it investigates them for violations of our laws. I respectfully dissent.” *Verdugo-Urquidez*, 494 U.S. at 279 (Brennan, J., dissenting).

<sup>83</sup> *Id.* at 285–86.

<sup>84</sup> *See supra* Part I.B.

<sup>85</sup> *See generally supra* Part I. However, the Court implicitly reserved the Fifth Amendment debate for a future time. *Verdugo-Urquidez*, 494 U.S. at 265 (suggesting textual analysis is stronger for the Fourth Amendment than for the Fifth Amendment). But the Court reinforced a prior case that ruled foreign aliens lack Fifth Amendment protection: *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Verdugo-Urquidez*, 494 U.S. at 269 (“[O]ur rejection of extraterritorial application of the Fifth Amendment was emphatic . . .”). It is not clear this analysis applies



*E. Verdugo-Urquidez's Refutation of Turney Is Deeply Rooted in Precedent*

The Court in *Verdugo-Urquidez* rooted its holding in a deeper line of jurisprudence: the *Insular Cases*.<sup>86</sup> This series of cases explored the scope of constitutional protections to people of lands under acquisition by the United States such as Puerto Rico,<sup>87</sup> Philippines,<sup>88</sup> and Hawaii.<sup>89</sup> The *Insular Cases* withheld constitutional protections to such lands absent an *express* congressional extension of rights. The Court compared the limited protection extended to lands "ultimately governed by Congress," with assertions by "aliens in foreign nations," and it concluded "it is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its power."<sup>90</sup>

The Supreme Court in *Verdugo-Urquidez*<sup>91</sup> also reinforced a prior holding that bounded constitutional rights to the United States: *Johnson v. Eisentrager*.<sup>92</sup> In *Eisentrager*, the Supreme Court denied a writ of habeas corpus to an alien enemy apprehended abroad.<sup>93</sup> The Court recoiled at the implications of extending constitutional rights to enemy aliens, requiring "the American Judiciary to assure [enemies] freedoms of speech, press, and assembly . . . right to bear arms . . . security against 'unreasonable' searches and seizures . . . as well as rights to jury trial . . ."<sup>94</sup> More importantly for the Takings Clause, the Supreme Court noted if Fifth Amendment jury trial rights applied to enemy aliens, "the same must be true of the companion civil-

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to the Takings Clause because these cases only reference general Fifth Amendment due process.

<sup>86</sup> *Id.* at 268; cf. *Balzac v. People of Porto Rico*, 258 U.S. 298, 305 (1922) (referencing jurisprudence concerning congressional extension of constitutional rights to the Philippines, Puerto Rico, and Hawaii as the *Insular Cases*).

<sup>87</sup> See *Balzac*, 258 U.S. at 304–05, 313 (1922) (holding the Sixth Amendment's provision for a jury trial inapplicable to citizens of Puerto Rico because the Organic Act of Porto Rico of 1917 did not extend such a trial right). The Court qualified its holding by distinguishing "fundamental rights" and "grants of power and limitation," such that due process rights "had from the beginning full application in . . . Porto Rico . . ." *Id.* at 312–13; see also *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (plurality opinion) (holding Revenue Clauses of the Constitution do not extend to Puerto Rico because it was a territory but not a state).

<sup>88</sup> See *Ocampo v. United States*, 234 U.S. 91, 97–99 (1914) (declining to extend grand jury provision to Philippines); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (holding a right to jury trial does not extend to the Philippines by force of the Constitution alone).

<sup>89</sup> See *Hawaii v. Mankichi*, 190 U.S. 197, 217–18 (1903) (declining to extend jury and grand jury rights to Hawaii because such rights are not so fundamental as to activate at the "moment of annexation").

<sup>90</sup> *Verdugo-Urquidez*, 494 U.S. at 268–69. This holding fundamentally rejects the inherent theory of rights. See *supra* Part I.C.

<sup>91</sup> *Id.* at 269 (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

<sup>92</sup> 339 U.S. 763 (1950).

<sup>93</sup> *Id.* at 784.

<sup>94</sup> *Id.*



rights Amendments, for none of them is limited by its express terms . . . .”<sup>95</sup> The Court rebuked such broad constitutional scope as lacking a hint of support from any constitutional commentators and as contrary to the “practice of every modern government.”<sup>96</sup>

Accordingly, the extraterritoriality of Fourth and Fifth Amendment due process may guide the extraterritoriality for the Takings Clause by constitutional construction. One qualification may be that personal liberty was at stake in *Verdugo-Urquidez* and *Eisentrager* while compensation for property was at stake in *Turney* and *El-Shifa*. Thus, due process for liberty may extend to the world while due process for property may be reserved. In spite of this hypothetical construct, *Verdugo-Urquidez* and *Eisentrager* demonstrate how the Supreme Court pegs the scope of these rights to one another.

Nevertheless, the Supreme Court narrowly changed its mind while daintily distinguishing *Eisentrager*. Recently, the Court granted a writ of habeas corpus to enemy aliens captured abroad.<sup>97</sup> The Court excepted *Eisentrager* because the enemy combatants detained in Cuba owed allegiance to no nation at war with the United States and denied wrongdoing.<sup>98</sup> The Court in *Rasul v. Bush* grounded its holding on the special history of the writ of habeas corpus and the distinguishing facts of the case.<sup>99</sup> For purposes of this inquiry, *Rasul*’s criticism of *Eisentrager* does not bar the analogy for the Fifth Amendment. The unique history of a writ of habeas corpus is due to the stakes: personal liberty or imprisonment. Despite the narrow *Rasul* exception, the Court’s fundamental position about the scope of constitutional rights in *Eisentrager* and *Verdugo-Urquidez* stands: an alien lacking substantial connections with the United States does not enjoy full constitutional protection.

In summary, *Turney* falls in a narrow category of controversies: aliens seeking just compensation for foreign property outside the military necessity doctrine. The legal grounds for extending standing to such petitioners are frail, especially when compared to permitting enemy-alien collateral attack on the Executive’s power. The Supreme Court constrains the international scope of constitutional provisions, which cautions against a far-flung cause of action for just compensation. At the next opportunity, an appropriate tribunal should overrule *Turney*. In order to do so, such a court must enter a theoretical debate.

## II. THE THEORETICAL STAKES

For an appropriate tribunal to overrule *Turney*, it must enter a subtler struggle. The battle among philosophies of constitutional rights undergirds the legal debate over just compensation for foreign takings. Across the spectrum and history of such controversies, three theories of rights struggle for preeminence: territorial, contract, and inherent.

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 784–85.

<sup>97</sup> See *Rasul v. Bush*, 542 U.S. 466, 473 (2004).

<sup>98</sup> *Id.* at 476.

<sup>99</sup> *Id.* at 473–75.

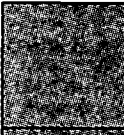

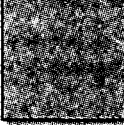



In order to overrule *Turney*, an appropriate tribunal must rest its holding in a contractual theory of right and no other.


### A. Territorial Theory of Right

The territorial theory of right is the most ancient of the three theories because it is rooted in notions of sovereignty in soil.<sup>100</sup> Under this theory, one's rights are claims whose vitality extends as far as the physical soil of the sovereign authority. The claim rises from the dirt rather than the claimant. If the claim involves property beyond the territorial authority of the sovereign, the right extinguishes. Consequently, if a taking occurs outside the United States, no claim for just compensation is valid even if the authority is the United States or the claimant is an American. In theory, this paradigm would authorize just compensation for a domestic taking of alien property.

Figure 1, above, shows that a claimant's capacity to demand just compensation for a taking turns on the location of the property. If the property is in the United

		Identity of Property	
		U.S.	Alien
Identity of Claimant	U.S.		
	Alien		

**Legend**

 Claimant may assert a claim


 Claimant may not assert a claim

Fig. 1: Territorial Theory of Right

States, the claimant may assert a claim whether the claimant is foreign or domestic, loyal or inimical. Every margin is filled according to the identity of the dirt.

As illustrative, consider *Thirty Hogsheads of Sugar v. Boyle*, in which Chief Justice John Marshall wrote for the Court denying a claim for just compensation for military seizure of sugar because it was the fruit of enemy soil.<sup>101</sup> A Danish citizen's agent shipped the sugar from Santa Cruz to Great Britain by British transport during the War of 1812.<sup>102</sup> The owner, a Dane, was not an enemy of the state, yet an American

<sup>100</sup> See generally 2 THOMAS HOBBS, *LEVIATHAN* 167–76 (E.P. Dutton & Co., 1950) (noting sovereignty extends with geographical scope of sovereign power); KARL MARX, *The Fetishism of Commodities and the Secret Thereof*, in *IDAS KAPITAL* 71–83 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., International Publishers 1967) (1867) (human labor stamps its quality literally into the *thing* as the commodity, changing its inherent character).

<sup>101</sup> 13 U.S. (9 Cranch) 191, 199 (1815).

<sup>102</sup> *Id.* at 195.



privateer seized the British ship.<sup>103</sup> The Court reasoned that “[w]hile that island [Santa Cruz] belonged to Denmark, the produce of the soil, while unsold, was . . . Danish property, whatever might be the general character of the particular proprietor.”<sup>104</sup> Therefore, “[w]hen the island became British, the soil and its produce, while that produce remained unsold, were British.”<sup>105</sup> The Court reasoned that although a Dane owned the sugar, it was British sugar so long as Great Britain’s sovereign authority extended to the soil from which the sugar came.<sup>106</sup> The rights of an owner of property peg to the sovereign whose authority governs that property. Territory is the measure of the right.<sup>107</sup>

*Mrs. Perrin’s Case*,<sup>108</sup> another example, presented a similar story: an American citizen stored her property in Nicaragua, and a United States sloop of war attacked and destroyed the pirate cove Greytown, destroying Mrs. Perrin’s goods.<sup>109</sup> The ruling denying just compensation was based on the principle that “one who takes up a residence in a foreign place and there suffers an injury to his property by reason of belligerent acts . . . must abide the chances of the country in which he chose to reside . . . .”<sup>110</sup> Mrs. Perrin’s American citizenship did not avail her because her property was in pirate dirt.

The Supreme Court outlined the justification behind this theory in *The Prize Cases*, which involved claims for just compensation for cargo ships seized by a Union naval blockade.<sup>111</sup> At issue was whether the neutrality of the cargo owner or hostility of the cargo should govern the fate of the cargo.<sup>112</sup> The divided Court chose the latter:

[w]hether property be liable to capture as ‘enemies property’ does not in any manner depend on the personal allegiance of the owner . . . . The produce of the *soil* of the hostile territory . . . as the

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 197.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 199.

<sup>107</sup> See the *Insular Cases* cited *supra* notes 86–89.

<sup>108</sup> 4 Ct. Cl. 543 (1868).

<sup>109</sup> *Id.* at 546–47.

<sup>110</sup> *Id.* at 548–49.

<sup>111</sup> *The Prize Cases*, 67 U.S. (2 Black) 635, 665–66 (1862). The Court started by assuming that each ship was neutral. See *id.* at 665. Curiously, the ships each serviced the Confederacy in the midst of the Civil War, and Chief Justice Taney (who authored an infamous decision regarding fugitive slaves) dissented, ruling the owners should have restoration of the ship and cargo. See *id.* at 698–99 (Nelson, J., dissenting); see also *Young v. United States*, 97 U.S. 39, 60 (1877) (affirming denial of just compensation to seized neutral ship because even neutral property is assigned the allegiance of the enemy and is subject to seizure if it aids the enemy); *Green v. United States (Green’s Case)*, 10 Ct. Cl. 466, 474 (1874) (denying just compensation for affirmatively loyal citizen whose property was seized in enemy territory).

<sup>112</sup> *The Prize Cases*, 67 U.S. (2 Black) at 666.



*source of its wealth and strength . . . are always regarded as legitimate prize, without regard to the domicil[e] of the owner . . .*<sup>113</sup>

As a matter of utility, property aids the enemy sufficiently to qualify for a military necessity exception to just compensation. One can see how readily military necessity doctrine emerges.

The United States Court of Claims elaborated on this “harsh” doctrine: in the “stress of war” it is too difficult to discriminate between friendly and enemy property.<sup>114</sup> The court also cited an underlying theory of territoriality:

Property is considered to be necessarily hostile by its *origin* . . . .  
Land . . . is necessarily associated with the permanent interests of the State to which it belongs, and its proprietor, [is] so far from being able to impress his own character, if it happens to be neutral . . . . The produce of such property therefore is liable to capture under all circumstances in which enemy’s property can be seized.<sup>115</sup>

So far, each takings example applying a territorial theory of right arises in a time of war such that utility and the stress of war excuses the distinction between the loyalty of the owner and the loyalty of the property.

The scope of this theory stretched when the Supreme Court turned to this theory of right in extending due process protection to resident aliens because they lived in United States territory.<sup>116</sup> Eventually, the Supreme Court repudiated this theory of right when it extended due process protection to an American on trial outside of the territorial United States.<sup>117</sup> *Reid v. Covert* stands for the proposition that wherever the United States acts it is “entirely a creature of the Constitution” and may not evade its limitations because the citizen is standing on different dirt.<sup>118</sup>

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<sup>113</sup> *Id.* at 674 (emphasis added).

<sup>114</sup> *Juragua Iron Co. v. United States*, 42 Ct. Cl. 99, 112 (1907).

<sup>115</sup> *Id.* (emphasis added) (citation omitted).

<sup>116</sup> *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (extending due process to resident alien because “all persons *within the territory* of the United States are entitled to the protection” (emphasis added)); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (extending due process rights to resident alien because the rights “are universal in their application, to all persons *within the territorial jurisdiction*” (emphasis added)).

<sup>117</sup> *See Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (applying due process protections to citizen tried by United States tribunal overseas); *id.* at 56 (Frankfurter, J., concurring) (noting territorial limitations on rights is “a notion that has long since evaporated”).

<sup>118</sup> *Id.* at 5–6; *see also id.* at 7 (applying principle to the Fifth Amendment, though not specifically to the Takings Clause). *But see United States v. Verdugo-Urquidez*, 494 U.S. 259, 283–84 (1990) (Brennan, J., dissenting) (arguing Fourth Amendment should extend to the search of alien’s foreign property because the alien is imprisoned and prosecuted on United States *soil*).



If the United States Court of Claims operated according to a territorial theory of right, the plaintiff in *Turney* would have failed to state a valid claim because both the owner and the property were beyond the territory of the United States. The court authored *Turney* four years before the Supreme Court implicitly rejected the territorial theory of right in *Reid*.<sup>119</sup>

Curiously, the Court of Claims preceded its holding in *Turney* with some brief notations mimicking a relationship-based theory of right: decisions granting just compensation to a domestic, friendly alien and to an American citizen whose foreign property was seized abroad.<sup>120</sup> This alternative, contract theory of right shifts focus from *where* the property or person is to the *relationship* of the property or person to the taking authority.

### *B. Contract Theory of Right*

The contract theory of right modifies the territorial theory<sup>121</sup> by pegging a right to the individual in a sufficient relationship to the taking authority. The *relationship* between the parties creates the right.<sup>122</sup> The claim may arise in any soil so long as the claimant is in privity with the authority. Under this theory, a taking effected outside the United States would give rise to a valid claim for just compensation if the authority is the United States and the owner is American. Likewise, a form of contract in fact may arise between the United States and a resident alien. A claim for just compensation would be invalid if the authority is other than the United States or the owner is a non-resident alien or enemy alien.

Figure 2, below, demonstrates variety in whether a claimant may assert a claim for just compensation. The key is whether the relationship between the claimant and the United States is sufficient to warrant the right. An American citizen's citizenship would have such connections per se, regardless of whether the property is foreign or

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<sup>119</sup> See *Reid*, 354 U.S. at 5–6 (applying due process protections to citizen tried by United States tribunal overseas).

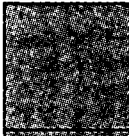
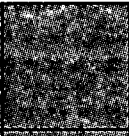
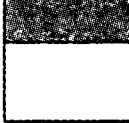

<sup>120</sup> See *Turney v. United States*, 115 F. Supp. 457, 464 (Ct. Cl. 1953) (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931); *Wiggins v. United States*, 3 Ct. Cl. 412 (1867)).

<sup>121</sup> Chief Justice Marshall hinted at a connection between the territorial theory and contract theory of right by reasoning “the proprietor has *incorporated himself with the permanent interests of the nation* as a holder of the soil, and is to be taken as a part of that country . . . independent of his own personal residence and occupation.” *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 197 (1815) (emphasis added) (quoting *Case of the Vrow Anna Catharina*).


<sup>122</sup> See HOBBS, *supra* note 100, at 144–54; *id.* at 145 (“From this Institution of a Commonwealth are derived all the *Rights* and [*Faculties*] of him, or them, on whom the [Sovereign] Power is conferred by the consent of the People assembled.”); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 331–32 (Peter Laslett, ed., Cambridge Univ. Press, 1988) (1690) (political societies begin by consent of participants in compact to consent to that general will).



domestic. Therefore, the margins in the figure are filled for the citizen, even if the citizen has little other connection. This presumes the citizen is not an enemy.

		Identity of Property	
		U.S.	Alien
Identity of Claimant	U.S.		
	Alien		

**Legend**

 Claimant may assert a claim


 Claimant may not assert a claim

Fig. 2: Contract Theory of Right

The alien may also establish sufficient connections, but it is easier to find such connections when the property is located in the United States. An alien whose American home is seized would have a strong argument for substantial connections by virtue of the property's location. The margins in the figure are not filled for an alien with domestic property because in theory, if the domesticity of the property is the only connection, a court may find insufficient connections.

It would be easier to find that an alien with domestic property has sufficient connections than an alien with foreign property. It would be difficult, but not impossible, for an alien with foreign property to have sufficient connections to the taking authority. The inquiry is theoretically consistent but ad hoc and fact specific in application.

The territorial theory of right concurs with the contract theory of right concerning claims by domestic people or concerning domestic property. The contract theory adds the option of extending rights to citizens and property abroad. Although the citizen leaves the territory or owns foreign property, the relationship with the taking authority does not change. There is no magic in the dirt but rather in the association.

Proponents of the contract theory of right include the first Chief Justice of the United States, who held in *Chisholm v. Georgia* that "the Con[s]titution of the United States is . . . a compact made by the people of the United States to govern them[s]elves . . ." <sup>123</sup> Chief Justice John Marshall read the Constitution similarly in *McCulloch v. Maryland*, stating that "[t]he government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." <sup>124</sup> By implication, the parties to the Constitution, "[w]e the People," <sup>125</sup>

<sup>123</sup> 2 U.S. (2 Dall.) 419, 471 (1793) (second emphasis added), *superseded* by U.S. CONST. amend. XI.

<sup>124</sup> 17 U.S. (4 Wheat.) 316, 404–05 (1819) (emphasis added).

<sup>125</sup> U.S. CONST. preamble (emphasis added).



due to their relationship to their government, were granted protections in exchange for submission. James Madison also proffered this contract theory as justification for protecting domestic aliens under the Constitution.<sup>126</sup> Madison was not alone, for the compact theory of the Constitution was widespread among the Founders<sup>127</sup> and explicitly implemented in the judiciary.<sup>128</sup>

Some early controversies where courts followed this theory of right include granting a claim for just compensation for the United States military occupying an Austrian home for an officer's recreational club,<sup>129</sup> granting a similar claim for property destruction abroad during military engagement,<sup>130</sup> and extending due process rights to citizens tried abroad.<sup>131</sup>

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<sup>126</sup> It does not follow, because aliens are not parties to the Constitution . . . that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.

MADISON'S REPORT ON THE VIRGINIA RESOLUTIONS (1800), *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (photo. reprint 1987) (Jonathan Elliot ed., 2d ed. 1836). This excerpt supports a form of contract in fact between the domestic alien and the government. *See also* THE FEDERALIST No. 48, at 297 (James Madison) (Jacob E. Cooke ed., 1961) (defending the Constitution as a "compact" including "[t]he principle of reciprocity"). *But see* Hunter, *supra* note 69, at 672) (criticizing this reading of founding history as "a sophistic extension of the metaphor [that] does violence to their work").

<sup>127</sup> *See generally* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 224–65 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press, 1987) (1833); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2550–51 (2005) (arguing the Constitution should be internationalized while acknowledging this departs from the Founders' understanding of a compact theory).

<sup>128</sup> Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 5–7 (1999) (showing the judicial use of social contract analysis for sundry laws such as sovereignty questions, slavery, negligence, property, criminal procedure, and others); *see also* Paul B. Stephan III, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777, 785 (1980) ("A great deal of history lies behind the idea that the Constitution, above all, embodies a series of reciprocal obligations between the people of this country and their government. Extending rights to aliens, to individuals who are not parties to the compact between the federal government and its people, is contrary to this tradition and should be rejected unless it can be said that, by doing so, substantial benefits would inure to U.S. citizens.").

<sup>129</sup> *See* Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955).

<sup>130</sup> *See* Wiggins v. United States (*The Wiggins's Case*), 3 Ct. Cl. 412, 422 (1867). *But see* Mrs. Perrin's Case, 4 Ct. Cl. 543, 548–49 (1868) (denying just compensation for same circumstances as *The Wiggins's Case* because of military necessity doctrine).

<sup>131</sup> *Reid v. Covert*, 354 U.S. 1, 5–6 (1957).



The contract theory of right often emerges when an alien's associations with the United States become substantial enough to warrant the extension of constitutional rights, like an implied contract.<sup>132</sup> For example, the Supreme Court declined to extend Fifth Amendment protection to non-resident aliens<sup>133</sup> while contemplating that "[t]he alien . . . has been accorded a generous and *ascending scale of rights* as he increases his identity with our society. . . . [L]awful presence in the country creates an *implied assurance* of safe conduct and gives him certain rights . . . ."<sup>134</sup>

More recently, the Supreme Court declined to extend Fourth Amendment rights to an alien lacking any "voluntary *connection* with this country that might place him among 'the people' of the United States."<sup>135</sup> The Court adopted the lower court's dissenting opinion that viewed "the Constitution as a 'compact' among the people of the United States, and the protections . . . expressly limited to 'the people.'"<sup>136</sup>

If the United States Court of Claims had adopted the contract theory of right in *Turney*, it would have rejected the claim for just compensation because the owner, a foreign corporation,<sup>137</sup> lacked any association with the United States outside of the

<sup>132</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 777–78 (1950) ("We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country *implied protection*." (emphasis added)); see *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (granting habeas corpus protection to resident alien who established sufficient voluntary connections to the United States) ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment."); see also *id.* at 596 n.5 ("The Bill of Rights is a futile authority for the alien seeking [initial] admission. . . . But once an alien lawfully . . . resides in this country he becomes invested with [constitutional] rights guaranteed . . . all people within our borders." (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring))).

<sup>133</sup> *Eisentrager*, 339 U.S. 763. But see *Rasul v. Bush*, 542 U.S. 466 (2004) (extending habeas corpus protection to Taliban prisoners captured during the War on Terror due to its special history and a statutory exception to *Eisentrager*).

<sup>134</sup> *Eisentrager*, 339 U.S. at 770 (emphasis added). Note an overlap in the rhetoric between contract and territorial theory in that presence in the territory causes an implied contract: "the Court has been at pains to point out that it was the *alien's* presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.* at 771 (emphasis added); see also *id.* (extending analysis to "property rights of immigrants or transients of foreign nationality").

<sup>135</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (emphasis added).

<sup>136</sup> *Id.* at 264 (citing *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1233 (9th Cir. 1988) (Wallace, J., dissenting), *rev'd*, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)). But see *id.* at 276 (Kennedy, J., concurring) (rejecting a contract theory of the Constitution); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . ."). See generally *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1231–37 (9th Cir. 1988) (Wallace, J., dissenting) (exploring history and text of the Constitution to sustain a contract theory of rights), *rev'd*, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

<sup>137</sup> *Turney v. United States* 115 F. Supp. 457, 459 (Ct. Cl. 1953).



original sale, which expressly disclaimed warranty.<sup>138</sup> The property was also located abroad and was under foreign control. The original sales contract did not expressly or implicitly incorporate the Takings Clause. The final theory of right, however, would counsel otherwise: since the United States cannot act but by the inherent limitations in the Constitution, the Takings Clause would fully apply to the foreign corporation even absent association.

### C. The Inherent Theory of Right

The inherent theory of constitutional rights unites two viewpoints: a fundamental rights viewpoint, which attaches the right to all people, and a bound sovereignty viewpoint, which asserts that the sovereign lacks the power to act beyond its foundation. In other words, either the right is inherent or the sovereign limitation is inherent. The presence of the right does not flex with the claimant's relationship to the authority, nor with the location or identity of the claimant or property.

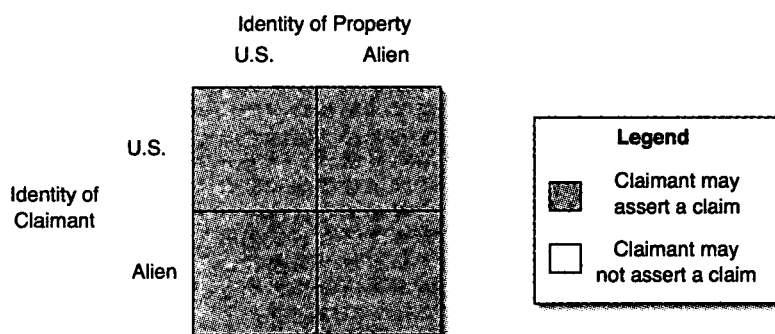


Fig. 3: Inherent Theory of Right

Figure 3 demonstrates that neither axis controls the claimant's standing to assert a claim. The most alien claimant, loyal or inimical, may assert a claim if the taking authority was involved. This claim stands whether the property is foreign or domestic. The inquiry is simple: if the taking authority acted, it must give just compensation. Every margin is filled, even the enemy alien with hostile property.

This theory would grant a claim for just compensation to *any* claimant whose property the United States seized, whether or not the claimant or property is American. The *only* relevant question is whether the United States took the property. The United States Court of Appeals for the Federal Circuit confessed this consequence when reviewing a foreign taking: "When considering a possible taking, the focus is not on the acts of others, but on whether sufficient direct and substantial United States involvement exists."<sup>139</sup>

<sup>138</sup> *Id.* (underlying contract sold the property "as is" and without any warranty of guarantee).

<sup>139</sup> *Langenegger v. United States*, 756 F.2d 1565, 1571 (Fed. Cir. 1985) (emphasis omitted),



A prominent proponent of the inherent theory was Thomas Jefferson, who wrote of "unalienable Rights . . . among [which] are Life, Liberty, and the pursuit of Happiness."<sup>140</sup> Since such rights are so "endowed by their Creator" and "unalienable," no authority except that Creator could trespass against them.<sup>141</sup> Though Jefferson may have been the most strident proponent of inherent theory, these fundamental rights were qualified for women and slaves. They were more fundamental for some than for the rest.<sup>142</sup>

In a strikingly transparent adoption of inherent theory, the United States Claims Court granted just compensation to inhabitants of the Marshall Islands when the United States used the islands for nuclear testing.<sup>143</sup> A fluke of the case was that Congress had nearly adopted a contract that would have squarely shifted the case into a contract theory of right,<sup>144</sup> but instead the court adopted an inherent theory. At oral argument, counsel for the United States persuaded the court that the Takings Clause does not extend to aliens asserting rights over foreign property.<sup>145</sup> The court reversed course<sup>146</sup> and adopted inherent theory rhetoric to grant just compensation: "All of the *restraints* of the Bill of Rights are applicable to the United States *wherever* it has acted."<sup>147</sup>

*cert. denied*, 474 U.S. 824 (1985). The court authored a two-part test for this question: "the nature of the United States' activity, and . . . the level of the benefit the United States has derived." *Id.* at 1572; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES § 711(c) (1987) ("A state is responsible . . . for injury to a national of another state caused by an official act or omission that violates . . . a right to property or another economic interest that . . . a state is obligated to respect for persons . . ."). *But see id.* at § 711(c) cmt. d (supporting right to damages for "arbitrar[y] depriv[ation] of his property" but noting disagreement about the scope of international constitutional protection).

<sup>140</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Although Jefferson did not specifically include property, the Constitution did. *See* U.S. CONST. amend. V.

<sup>141</sup> *But see* U.S. CONST. amends. V, XIV (authorizing violation of life, liberty, and property so long as due process of law precedes the violation).

<sup>142</sup> Even the most strident advocates of an inherent theory of right must concede that the Constitution implicitly authorizes violations of fundamental rights, such as life, liberty, and property, so long as the violations succeed due process. *See* U.S. CONST. amends. V, XIV. At the margin, the inherent theory must concede that fundamental rights are not so inherent and the sovereign is not so bound. *Cf. Turney*, 115 F. Supp. at 464 (adopting a novel convenience doctrine).

<sup>143</sup> *Juda v. United States*, 6 Cl. Ct. 441, 458 (1984).

<sup>144</sup> *Id.* at 445 (pending contract would have granted full compensation for property and relocation resulting from nuclear testing).

<sup>145</sup> *Id.* at 458 ("At the conclusion of oral argument counsel were advised that defendant's motion to dismiss probably would be allowed as to the taking claims on the ground that the complaint failed to state a claim on which relief could be granted.").

<sup>146</sup> *See id.* ("Further reflection and review of applicable precedent has changed that tentative conclusion.").

<sup>147</sup> *Id.* (emphasis added). Pushing the doctrine even further, the court disclaimed any reliance on degrees of the fundamental nature between rights: "There is no suggestion that the protections of the just compensation clause . . . are any less 'fundamental' than the other protections . . ." *Id.*; *cf. Gasser v. United States*, 14 Cl. Ct. 476, 476 n.1 (1988) (granting just



Additionally, the court implied an inherent theory of right was proper merely because it was the 1980s.<sup>148</sup> The United States Court of Claims has also read cases like *Turney* as merely a question of whether the United States was the taking authority.<sup>149</sup>

The Supreme Court parted from the territorial theory of right by granting due process protection to citizens abroad but justified the departure under an inherent theory of right.<sup>150</sup> The Court held the government is “entirely a creature of the Constitution.”<sup>151</sup> The holding applied to citizens abroad, but the rhetoric went further: any time the United States acts, it cannot help but act subject to its circumscribed sovereignty.

The Supreme Court recently struggled between contract and inherent theory in *Verdugo-Urquidez*, in which dissenting justices adopted inherent theory by holding the “focus of the Fourth Amendment is on *what* the Government can and cannot do, and *how* it may act, not on *against whom* these actions may be taken.”<sup>152</sup> Ultimately, the Court rejected inherency theory: “it is not open to use in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its power.”<sup>153</sup>

One complication of inherent theory is whether all rights are fundamental and whether all limits on government are inherent or if only some of each are inherent. Even the majority in *Verdugo-Urquidez* left room for the possibility that the Fourth Amendment might be contract based, applying to “*the people*”<sup>154</sup> construed as Americans, but the broad term “persons”<sup>155</sup> might extend further.<sup>156</sup>

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compensation for Mexican property flooded by United States action to the Colorado River and holding arguments disclaiming foreign takings “required further factual inquiry”), *withdrawn*, 22 Cl. Ct. 165 (1990) (parties settled for just compensation).

<sup>148</sup> *Juda*, 6 Cl. Ct. at 458. Evidently the *fundamental* nature of the Constitution changes with the seasons, which suggests it is not fundamental at all. One wonders what, exactly, we constituted in 1789. See David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle* (U. Chicago, Pub. Law Working Paper No. 09, 2006), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=224285](http://papers.ssrn.com/paper.taf?abstract_id=224285).

<sup>149</sup> See *Porter v. United States*, 496 F.2d 583, 591 (Ct. Cl. 1974) (“A key element of these precedents, however, is that each concerned an alleged taking *by the United States*, regardless of where the property was located. Thus, in the present case . . . they must show the United States carried out the alleged taking of property.”).

<sup>150</sup> See *Reid v. Covert*, 354 U.S. 1, 6 (1957).

<sup>151</sup> *Id.* at 5–6; see *id.* at 7 (applying principle to Fifth Amendment due process though not to the Takings Clause). The Court rooted its philosophy in ancient history, citing Paul's assertion of rights as a Roman citizen. *Id.* at 6. Of course, Paul asserted this right in Roman territory and before a Roman judge. See *Acts* 22:22–29, 25:1–12.

<sup>152</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting). Justice Brennan also read the Ninth Amendment to presume preexisting rights. *Id.*

<sup>153</sup> *Id.* at 268–69.

<sup>154</sup> U.S. CONST. amend. IV (emphasis added); see also *id.* at amends. IX, X, and XIV, § 1.

<sup>155</sup> *Id.* at amend. V.

<sup>156</sup> *Verdugo-Urquidez*, 494 U.S. at 265.



One problem with varying the applicability of rights in this way is that the Court must author a rights hierarchy in which some rights are more fundamental than others.<sup>157</sup> A rights hierarchy refutes the underlying premise of an *inherent* theory: if rights are fundamental or sovereign bounds are set, how may rights be sometimes fundamental or sovereign bounds be sometimes set? A hierarchy qualification to inherency theory reduces to ad hoc fundamentals—a contradiction. At that point, inherent theory is a red herring for judicial whim.

Strict inherency theory would award just compensation to enemies of the state. If the sole question is whether the United States acted, then if the United States acts on enemies, the same constitutional protections would apply.<sup>158</sup> Likewise, military necessity doctrine is inimical to inherent theory because it qualifies that which is *inherent*. By definition, the doctrine is firm: if the United States acts, it is always subject to the Constitution, or if a human being is involved, all fundamental rights are in play. Inherent theory must, therefore, overrule military necessity.<sup>159</sup>

The inherent theory of right is the only framework that justifies granting just compensation to aliens for foreign property. If the property and alien are beyond the United States, the territorial theory declines just compensation. If the alien and property lack association with the United States, the contract theory declines just compensation. But if the United States took the alien's property, the inherent theory grants just compensation. The petitioners in *Turney* and *El-Shifa* could find no more comforting a theory of right than one making them third party beneficiaries to the United States Constitution. Therefore, if a court reverses *Turney*, it must likewise reject inherent theory of right.

#### *D. The Contract Theory of Right Is Superior to Either Alternative*

For the jurist desiring to hybridize consistency with flexibility, an ad hoc approach is preferable. The only theory of right conforming to this preference is the contract theory of right because for the right to accrue, a court must find an association. A court is invited to examine the relationship between the claimant and the authority, the surrounding circumstances, and the equities. In contrast, a jurist adopting either a territorial theory or inherent theory has already decided a controversy's equities:

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<sup>157</sup> See *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring) (“[W]hich specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”).

<sup>158</sup> See *Rasul v. Bush*, 542 U.S. 466, 470–72 (2004) (granting due process rights to Taliban enemies captured during the War on Terror). The Court adopts an inherent theory view of habeas corpus because it “does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody . . .” *Id.* at 478 (quoting *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494–95 (1973)). Just like inherent theory fundamentals, the only relevant question is whether the authority acted.

<sup>159</sup> This is the goal of some inherency theory disciples. See *infra* Part III.A.



for each, a single question is dispositive, but neither is satisfactory. One theory would betray cosmopolitan citizens and the other would capitulate to enemies.

The most strident territorial disciple would make room for military necessity, and the most flamboyant inherent theory acolyte would turn away at the necessary conclusion of treating the enemy as the friend. The more moderate approach is the contract theory of right. The notion of consent by the governed favors a relationship inquiry between the authority and the claimant. Likewise, a charter of negative liberties implies mutuality and bilateral sacrifice like a social contract. Finally, the contract theory avoids the consequence of adopting an inherent theory of right: alien collateral review of war powers.

### III. THE POLITICAL STAKES AND THE REAL STORY

Legal and theoretical justifications for overruling *Turney* may be persuasive, but the political stakes at hand breathe oxygen into the flame. It is far easier for an adversary of the United States to defeat it in court than on the battlefield. It is also far easier for a domestic adversary to defeat a proposal by judicial decree than convince the sovereign electorate to alter governance. How tempting an international Constitution would be to a foreign enemy lacking an army of troops but wielding a vanguard of lawyers.<sup>160</sup> The inherent theory of right embraces this consequence.

Petitioner in *El-Shifa* tapped into jurisprudence expanding the scope of constitutional rights beyond citizenship.<sup>161</sup> In the petition for a writ of certiorari counsel for El-Shifa sought to position the lower court's decision in *El-Shifa* as contrary to *Hamdi v. Rumsfeld*, a recent Supreme Court decision holding "threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator."<sup>162</sup> El-Shifa sought adjudication of the President's

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<sup>160</sup> See *Saddam to Sue Bush and Blair*, UNITED PRESS INTERNATIONAL, <http://www.uruknet.info/?p=19926> (noting Saddam Hussein's attorneys distributed copies of a complaint alleging President Bush and Prime Minister Blair illegally used weapons of mass destruction against Iraq, "torturing Iraqi prisoners, destroying Iraq's culture heritage . . . inciting internal strife [and] polluting Iraq's air, waters[,] and environment").

<sup>161</sup> Petition for Writ of Certiorari at 6–8, *El-Shifa Pharm. Indus. Co. v. United States*, 125 S. Ct. 2963 (2005) (No. 04–1291) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)).

<sup>162</sup> *Hamdi*, 542 U.S. at 535. The Court cautioned district courts about the balance between the national security interests of the nation and the citizen's interest in fundamental rights:

We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.



declaration of property as enemy property<sup>163</sup> just as *Hamdi* granted “a basic system of independent review.”<sup>164</sup> In essence, El-Shifa wanted a court to hold the President’s military designation of enemy property was wrong in fact.<sup>165</sup>

*Hamdi* was tightly rooted in the fundamental habeas corpus rights of a citizen<sup>166</sup> even though the citizen in question joined an enemy force at war with his nation.<sup>167</sup> Admittedly, counsel for El-Shifa had quite a hill to climb connecting *Hamdi* to *El-Shifa* given how rooted the former was in a citizen’s constitutional rights. But the argument illustrates potential consequences of the open door that *Turner* and inherent theory of right created.

#### *A. Academic Commentators Tend to Favor Internationalizing the Constitution*

Another element to the back story is a growing academic objection to United States power, influence, and sovereignty. Such academic objections seek to internationalize the Constitution.<sup>168</sup> Such critics argue the Constitution should be internationalized because the United States is often a bad actor and needs external checks.<sup>169</sup> More

*Id.* at 538–39. The Court allowed the possibility of military tribunal review serving this process unless no such “appropriately authorized and properly constituted” tribunal exists. *Id.* at 538 (plurality opinion).

<sup>163</sup> Petition for Writ of Certiorari at 1, *El-Shifa Pharm. Ind. Co. v. United States*, 125 S. Ct. 2963 (2005) (No. 04–1291); *see also* *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1363 (Fed. Cir. 2004) (declining to accept plaintiff’s demand that the court second-guess the President’s discrete war power decision), *cert. denied*, 125 S. Ct. 2963 (2005).

<sup>164</sup> *Hamdi*, 542 U.S. at 535.

<sup>165</sup> Petition for Writ of Certiorari at 11–12, *El-Shifa Pharm. Indus. Co. v. United States*, 125 S. Ct. 2963 (2005) (No. 04–1291) (“Thus, a valid takings claim may arise out of the destruction of property by military operations only in the presumably rare circumstance in which private property of a non-enemy located in a country at peace with the United States is openly and deliberately destroyed by military forces that are not responding to an imminent danger.”).

<sup>166</sup> *Hamdi*, 542 U.S. at 527–35. At the beginning of the section, the Court noted the “extraordinary constitutional interests at stake.” *Id.* at 527.

<sup>167</sup> *Id.* at 519 (plurality opinion). After defining the scope of enemy combatant status, the Court found that the government’s allegations against *Hamdi* did not rise to the level of affirmative actions of war against the United States. *Id.* at 526–27.

<sup>168</sup> *See, e.g.*, Raustiala, *supra* note 127, at 2558–59 (constitutional rights should be international because “American officials frequently engage in criminal justice and regulatory activities beyond our borders.”); Hunter, *supra* note 72, at 649 (“Since World War II, however, the United States has assumed the role of a world leader and has acquired massive overseas commitments. These foreign involvements require an answer to the question of what restraints the United States government must observe when acting abroad.”); Remsen M. Kinne IV, Note, *Making America Pay: Just Compensation for Foreign Property Takings*, 9 B.C. THIRD WORLD L.J. 217, 247 (1989) (arguing foreign takings authorize protection against “an interventionist American foreign policy”).

<sup>169</sup> *See* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) (“The increasingly unilateral and



subtly, commentators suggest the Constitution should be internationalized because we live in a more modern time—implicitly, we ought to be less barbaric<sup>170</sup> than those living in the pre-modern times, like our Founders.<sup>171</sup> When such commentators are confronted with contract theory like in *Verdugo-Urquidez*, some respond with simple incredulity.<sup>172</sup> Critics ground their arguments in inherent theory in either form: natural rights<sup>173</sup> or the theory that the Constitution universally binds the government.<sup>174</sup>

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aggressive character of United States foreign policy should heighten concern about the application of American law to foreign defendants.”); C. M. A. McCauliff, *The Reach of the Constitution: American Peace-time Court in West Berlin*, 55 NOTRE DAME L. REV. 682, 706–07 (1980) (“As the presence of the United States is more frequently felt abroad, it will become increasingly necessary to have standards against which to measure the conduct of United States officials toward . . . any individual persons or governmental entities over which United States sovereignty is exercised.”).

<sup>170</sup> Mark Gibney, *Policing the World: The Long Reach of U.S. Law and the Short Arm of the Constitution*, 6 CONN. J. INT’L L. 103, 126 (1990) (A domestic Constitution “is a comfortable vision of the world, comfortable for us at least, but it is an unjust one as well. It simply considers our own interests, but not the interests of others.”).

<sup>171</sup> See, e.g., Kal Raustiala, *supra* note 127, at 2559 (“Twenty-first-century courts need to think functionally, not formalistically, about spatial scope of the restraints on government power . . .”); *id.* at 2550–51 (arguing the Constitution should be internationalized while acknowledging this departs from the Founders’ understanding of a compact theory); Jonathan Turley, *Legal Theory: “When in Rome”: Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U.L. REV. 598, 660 (1990) (“[T]he presumption on extraterritoriality would be reflective of the world as it is at the dawn of the twenty-first, not the twentieth, century.”); *id.* at 603 (internationalizing the Constitution would “bring the extraterritoriality presumption into conformity with the contemporary realities of the world economy and environment in the late twentieth and early twenty-first century”); *cf.* *Juda v. United States*, 6 Cl. Ct. 441, 458 (1984) (justifying an international constitutional application merely because it was the 1980s). Curiously, the European Union is not as interested as American commentators in adopting an inherency theory of right. See Hugh Williamson, *EU Six Consider Introduction of “Integration Contracts” for Migrants*, FIN. TIMES (London), Mar. 24, 2006, at 8 (Germany, Britain, France, Poland, Spain, and Italy seek to bind immigrants by contract to adopt the host nation’s “social norms—or risk being expelled”).

<sup>172</sup> See Gibney, *supra* note 170, at 114 (arguing Rehnquist’s language in *Verdugo-Urquidez* “cannot be taken literally”).

<sup>173</sup> See, e.g., John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, N.Y.U. J. INT’L L. & POL. 287, 297 (1985) (“[T]he Bill of Rights was conceived not as a grant of rights, but as a proclamation of rights that inhered in each person. The Bill of Rights, accordingly, was drafted in universal language.” (citations omitted)); Hunter, *supra* note 69, at 673 (“[T]he natural rights theme . . . argues for extend[ed] protections to all individuals.”).

<sup>174</sup> See, e.g., Ragosta, *supra* note 173, at 293–94 (“In applying the Constitution abroad, however, it is always a U.S. citizen—a government official—who is being controlled by the Constitution.”); Hunter, *supra* note 69, at 650 (“[C]onstitutional protection from United States government conduct [should] be extended to all persons, at home and abroad.”); Kinne, *supra* note 168, at 231–32 (advocating “uniform just compensation protections” to



The refutation of inherent theory above attacks its application at the margin: to foreign enemies, which is the logical consequence of inherent theory. However, if one objects to American sovereignty, power, or influence, one may not recoil at protecting an enemy of the state because the interest of the commentator and the enemy coincide: frustrating American foreign behavior.

One bold commentator vehemently argues for the superiority of the contract theory of right over inherency theory: Paul Stephan.<sup>175</sup> He refutes inherent theory as applied. The “real predicate” for the right arising in this context is action on alien soil: “the right does not exist unless the court determines the government acted unacceptably overseas.”<sup>176</sup> But American courts are improperly situated to assess the validity of foreign behavior in contrast to the political branches.<sup>177</sup> When the United States acts within a hostile country, “irregular conduct may be the only way of protecting U.S. interests.”<sup>178</sup>

Judicial second-guessing of the political branches’ foreign behavior is costly. Political branches lose a significant bargaining chip in international relations: negotiating rules of international norms through practice or treaty.<sup>179</sup> If the judiciary imposes a set way of international conduct on the United States, it cannot reward or punish third parties for international conduct. International contract is superior to judicial norm because it is tailored to the parties at hand rather than discovered in two-hundred-year-old penumbræ.<sup>180</sup>

The consequences of an international Constitution, particularly an international Takings Clause, are unacceptable:

Those citizens of North Vietnam who suffered risk of a “taking” of “life” without “due process” during the bombing of that country could have sought an injunction against the raids based on the fifth amendment, and survivors of those killed now could seek damages against our government. Those Iranians who were temporarily detained in the desert during the unsuccessful attempt to rescue the U.S. hostages could sue for violations of their fourth amendment rights. Foreign leaders everywhere could seek to enjoin the surveillance of their actions by U.S. intelligence services.<sup>181</sup>

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aliens abroad).

<sup>175</sup> Stephan, *supra* note 128, at 777.

<sup>176</sup> *Id.* at 788.

<sup>177</sup> *Id.*; see also *id.* at 789 (criticizing the institutional disability of judges to conform extraterritorial application of the Constitution); *id.* at 784 (“Often the government acts overseas to protect the interests of the United States, as when it apprehends a terrorist . . . . Judicial barriers would impede and perhaps inhibit these efforts.”).

<sup>178</sup> *Id.* at 784.

<sup>179</sup> *Id.* at 784–85.

<sup>180</sup> See *id.* at 789.

<sup>181</sup> *Id.* at 786.



Paul Stephan envisioned an international Constitution would lead enemies to “enlist the aid of our courts in attacking government misconduct.”<sup>182</sup> Such litigants would enjoy “interest from the date of the taking to the date of payment, and to attorneys’ fees and other litigation costs, including the cost of expert witnesses.”<sup>183</sup> Stephan could not have envisioned the international scope of asymmetrical warfare after the Cold War, but this Age of Terror even draws the judiciary into the battle field. Therefore, an international Constitution becomes a way for enemies to exercise collateral attack on American war-making power.

*B. An International Constitution Is Unreasonable in an Age of Terror*

Judicial tribunals may be exploited even if they are well intentioned for the ends of justice. As a contemporary example, consider the pending trial of Saddam Hussein. Saddam Hussein attracts lawyers from across the globe<sup>184</sup> to aid his defense against war crimes charges.<sup>185</sup> His legal supporters share the goal of using the trial as a means of disputing and disrupting the United States’ War on Terror.<sup>186</sup> Under this goal, the trial drifts from a pursuit of justice to an alternative theater in this war on terror.

Ramsey Clark, President Johnson’s Attorney General, is among the best known of the lawyers aiding Hussein, motivated by his strong belief in the criminality of the United States against “President” Hussein.<sup>187</sup> Attorneys like Clark desire to tackle the United States in such tribunals because of personal offense at foreign policy.<sup>188</sup> Clark combines this legal advocacy with political advocacy against the United States,<sup>189</sup> including aiding international anti-war activists.<sup>190</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> EMINENT DOMAIN, *supra* note 69, at § 19.07[3] (citations omitted).

<sup>184</sup> See Farnaz Fassihi, *Judgment Day: Hussein’s Lawyers Aim to Focus Trial on U.S. Occupation*, WALL ST. J., Oct. 19, 2005, at A1 (referencing hundreds of lawyers from the United States, United Kingdom, Belgium, Japan, Malaysia, Libya, Jordan, Yemen, and Sudan lending aid). French and Algerian lawyers also lend Hussein legal aid as part of 2,000 volunteer lawyers. See Richard Boudreaux & Henry Winstein, *Hussein Defense in Chaos as Trial Nears*, L.A. TIMES, Sept. 29, 2005, at A1.

<sup>185</sup> See Fassihi, *supra* note 184, at A1.

<sup>186</sup> See *id.* (citing Professor Michael Scharf of Case Western Reserve University who helped train the judges for the trial).

<sup>187</sup> Ramsey Clark, *Why I’m Willing to Defend Hussein*, L.A. TIMES, Jan. 24, 2005, at B9 (The tribunal ought to have “the power and the mandate to consider charges against leaders and military personnel of the U[nited] S[tates], Britain and the other nations that participated in the aggression against Iraq . . . [T]he days of victor’s justice must end.”). Clark endorses impeaching President Bush. See Michael Janofsky, *Antiwar Rallies Staged in Washington and Other Cities*, N.Y. TIMES, Sept. 25, 2005, at 26.

<sup>188</sup> *Id.*; see also Fassihi, *supra* note 184, at A1.

<sup>189</sup> Clark delivered an address before ANSWER, an anti-war organization. See Janofsky, *supra* note 187, at 26.

<sup>190</sup> See Michael Betsch, *Bush, US Naval Base Targeted by Anti-War Group*, CNSNEWS



More troubling than former attorney generals seeking judicial tribunals and controversies to advance a political end is al-Qaeda's efforts to do the same. Al-Qaeda affirmatively trains its militant Islamic brothers to exploit the judicial resources of the West in their international jihad.<sup>191</sup> Islamic jihad brothers are instructed to accuse interrogation authority of torture "whether or not he has injuries."<sup>192</sup> Congressional testimony confirms al-Qaeda's goal to "exploit our judicial process for the success of their operations."<sup>193</sup> Exploiting our judiciary is part of the overall goal to "use America's freedom as a weapon against us."<sup>194</sup> When our military enemy is "an amorphous federation of geographically dispersed, fanatical cells rather than a nation-state,"<sup>195</sup> the judiciary is as susceptible to turning into a battle ground as any other forum.

If the judiciary was once insulated from the vicissitudes of peripheral affairs, which is doubtful, it cannot claim to be so now. Lawyers, politicians, and, now, enemies of the state deliberately target the judiciary as a front in an international struggle. The role of the judiciary in governance ought not be discounted, but it is poorly situated to handle incoming litigation seeking to collaterally attack executive power for every adverse foreign influence on property. The political stakes for *Turney's* doctrine of international expansion is too costly to remain convenient. It must be reversed.

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.COM, Jan. 9, 2003, <http://www.cnsnews.com/ViewPentagon.asp?Page=//Pentagon/archive\\200301\\PEN20030109a.html> (last visited Aug. 26, 2006).

<sup>191</sup> See Bin Laden's Terrorism Bible, The Smoking Gun, <http://www.thesmokinggun.com/archive/jihadmanual.html> (UK/BM trans.) (last visited Aug. 26, 2006) [hereinafter JIHAD MANUAL]. In *United States v. Bin Laden*, the court partially granted Osama bin Laden and Ayman Al Zawahiri's motion to suppress evidence acquired during interrogation abroad by providing the protection of the Fifth Amendment. 132 F. Supp. 2d 168 (S.D.N.Y. 2001). The tenor of the subsequent history changed after September of that year. For criticism of *Bin Laden*, see generally Mark A. Godsey, *Miranda's Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 DUKE L.J. 1703 (2002).

<sup>192</sup> JIHAD MANUAL, *supra* note 191, at 30 (instructing the brother to insist on seeing a medical examiner and on entering notation of torture in the report of the interrogation). The manual also instructs brothers to allege torture, deny all prior statements, and demand the interrogation be quashed during prosecution regardless of what actually happened at interrogation. *Id.* at 30; see also Rowan Scarborough, *Captives Told to Claim Torture*, WASH. TIMES, May 31, 2005, available at <http://www.washingtontimes.com/national/20050531-121655-7932r.htm> (viewed Nov. 11, 2005) ("An al Qaeda handbook preaches to operatives to level charges of torture once captured, a training regime that administration officials say explains some of the charges of abuse at the Guantanamo Bay prison camp.").

<sup>193</sup> John Ashcroft, U.S. Attorney Gen., Testimony Before the U.S. Senate Judiciary Committee (Dec. 6, 2001), <http://www.usdoj.archive/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm>.

<sup>194</sup> *Id.*

<sup>195</sup> Ross J. Hleb, Colonel, USMC, Letter to the Editor, WALL ST. J., Nov. 3, 2005, at A13.



## CONCLUSION

*El-Shifa* is, after all, merely a takings claim that the court dismissed as non-justiciable in lieu of second guessing executive declarations of military necessity, but the argument at stake in the controversy sought to hamstring United States sovereign power. Some of the arguments above apply to internationalizing other parts of the Constitution, but their thrust applies to the Takings Clause, particularly in foreign military activity. The costs of an international Constitution are high with an international Takings Clause. Such a radical shift requires adopting an inherent theory of constitutional rights, which, if followed to its logical end, would frustrate American foreign behavior. For commentators seeking to truncate American sovereignty, or for enemies seeking to defeat America, this is good news. Despite *El-Shifa*'s loss, this debate is not resolved; it is imminent.<sup>196</sup>

*El-Shifa* managed to breach the barriers the contract theory of rights creates. The controversy approached using a takings claim in federal court as collateral review of executive war powers. *El-Shifa*'s counsel sought to pair judicial review of enemy combatants with judicial review of enemy property, piercing the military necessity doctrine. At worst, a foreign enemy could further this work and use our judiciary as a means of prosecuting a theater of an asymmetrical jihad. The legal, theoretical, and political arguments warrant reversal of *Turney* to close off the judiciary to such litigants because the Fifth Amendment ought not grant such litigants constitutional entitlements.

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<sup>196</sup> EMINENT DOMAIN, *supra* note 69, at § 19.07[3] (noting the "undoubted[] . . . further litigation to come in this developing area of foreign takings").



## INTRODUCTION: THE FIRST AND SECOND ANNUAL BRIGHAM-KANNER PROPERTY RIGHTS CONFERENCES

On November 5–6, 2004, the William & Mary School of Law inaugurated the annual Brigham-Kanner Property Rights Conference to inquire into pressing American legal questions surrounding property rights. The conference is named after Toby Prince Brigham, a founding partner of Brigham Moore, LLP, and Professor Emeritus Gideon Kanner of Loyola Law School.

### I. THE 2004 BRIGHAM-KANNER PROPERTY RIGHTS CONFERENCE

The inaugural conference awarded Professor Frank I. Michelman of Harvard Law School with the Brigham-Kanner Prize. Professor Michelman's influential article *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*,<sup>1</sup> criticized the fairness of compensation practices, specifically challenging the administrative and legislative agencies' tendency to fall short of their responsibilities to give just compensation following takings for public use. Professor Michelman has also published prolifically on property law, constitutional law, and legal theory.

In this issue, the *William & Mary Bill of Rights Journal* presents the following written contributions to the conference:

*Michelman as Doctrinalist*  
Gregory S. Alexander

*Kelo's Moral Failure*  
Laura S. Underkuffler

*Nuance and Complexity in Regulatory Takings Law*  
Gregory M. Stein

In addition to these authors, the following participants lent their expertise at the conference: The Honorable Jonathan M. Apgar, Roanoke City Circuit Court; The Honorable Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit; The Honorable Rebecca Beach Smith, U.S. District Court for the Eastern District of Virginia; Tobey Prince Brigham, Brigham Moore, LLP; James S. Burling, Institute for Justice; Timothy J. Dowling, Community Rights; Steven J. Eagle, George Mason University School of Law; William A. Fischel, Dartmouth College; Eric A. Kades, William & Mary School of Law; Gideon Kanner, Loyola Law School; Richard J. Lazarus, Georgetown University Law Center; Daniel R. Mandelker, Washington University in St. Louis School of Law; and Ronald H. Rosenberg, William & Mary School of Law.

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<sup>1</sup> 80 HARV. L. REV. 1165 (1967).



## II. THE 2005 BRIGHAM-KANNER PROPERTY RIGHTS CONFERENCE

The *William & Mary Bill of Rights Journal* is also proud to publish pieces from the second annual Brigham-Kanner Property Rights Conference, which occurred on October 28–29, 2005, at the William & Mary School of Law and was co-sponsored by the William & Mary Property Rights Project and the Institute of Bill of Rights Law.

Professor Richard A. Epstein of the University of Chicago Law School was awarded the 2005 Brigham-Kanner Property Rights Prize. Professor Epstein is the director of the John M. Olin Program in Law and Economics and has vigorously contributed work in a wide range of legal debates, drawing citation by the Supreme Court of the United States.

In this issue, the *William & Mary Bill of Rights Journal* presents the following written contributions to the conference:

*Taking Stock of Takings: An Author's Retrospective*

Richard A. Epstein

*Impact of Richard A. Epstein*

James W. Ely, Jr.

*Reconstructing Richard Epstein*

Eduardo M. Peñalver

*Takings: An Appreciative Retrospective*

Eric R. Claeys

In addition to these published scholars, the following scholars served as panelists at the conference: Robert W. Ashbrook, Dechert, LLP; Vicki L. Been, New York University School of Law; Dana Berling, Institute for Justice; M. Timothy Iglesias, University of San Francisco School of Law; Eric A. Kades, William & Mary School of Law; Bradley C. Karkkainen, University of Minnesota Law School; S. William Moore, Brigham Moore, LLP; Mark Tunick, Florida Atlantic University; and Joseph T. Waldo, Waldo & Lyle, PC.

The *William & Mary Bill of Rights Journal* is driven to publish innovative, timely, and artful pieces that substantially contribute to the development of constitutional law. We trust these eminent ensembles provoke subsequent debate in the legal community to advance this development, especially in property rights. We are grateful to the participants for their additions to these ongoing discussions, particularly the authors of the articles included in this issue. We hope publication of these conferences properly honors Messrs. Brigham and Kanner for their service.



## MICHELMAN AS DOCTRINALIST

Gregory S. Alexander\*

Frank Michelman, the theorist, is a figure known to judges and legal scholars literally around the world. Michelman's wildly successfully 1967 *Harvard Law Review* article, *Property, Utility, and Fairness*, invented the economic model of takings that is now the starting point for every economic analysis of the takings issue.<sup>1</sup> The same article is simultaneously the origin of a mode of analyzing takings disputes based upon a Rawlsian theory of fairness.<sup>2</sup> I can think of no other legal topic in which virtually the entire theoretical landscape was not simply described, but created by, a single piece of scholarship.

Michelman's subsequent writings on takings, such as, to pick only three examples, the magnificent 1987 *Iowa Law Review* article, *Possession vs. Distribution in the Constitutional Idea of Property*;<sup>3</sup> his keynote article in the 1988 *Columbia Law Review* symposium;<sup>4</sup> and his 1993 *William & Mary Law Review* comment on *Lucas*,<sup>5</sup> are similar examples of high legal theory at its very best. To put it as directly as I can, no one does theory better than Frank Michelman.

But I want to praise a different Michelman as well: Michelman the doctrinalist. With Michelman's dominance as a theorist of takings law as dominant as it is, it is easy to overlook or underplay his contribution to takings law strictly at the level of doctrinal and case analysis. At this level as well, Michelman has no rival.

Let's go back to the *Property, Utility, and Fairness* article. In this sprawling, complex, magisterial work (I sometimes think of it as takings law's counterpart to Mahler's *Symphony of a Thousand*), Michelman's powers as a doctrinal analyst are in full display. Two contributions are especially notable. The first is his account and critique of

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\* A. Robert Noll Professor of Law, Cornell University. I am grateful to Professor Eric Kades for inviting me to the conference honoring Frank Michelman, whose work has inspired me for many years and whose friendship I treasure.

<sup>1</sup> Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) [hereinafter Michelman, *Ethical Foundations*].

<sup>2</sup> *Id.* at 1219-24.

<sup>3</sup> Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987).

<sup>4</sup> Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988) [hereinafter Michelman, *Takings*].

<sup>5</sup> Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301 (1993) (discussing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).



the permanent physical occupation test, commonly associated with the 1982 *Loretto*<sup>6</sup> decision.<sup>7</sup> Michelman anticipated not only *Loretto*'s categorical approach but facts similar to *Loretto* itself.<sup>8</sup> He pointed out that "courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical take-over."<sup>9</sup> He went on to say that

[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership. This may be true although the invasion is practically trifling from the owner's point of view.<sup>10</sup>

Michelman identified the two flaws with this rule of decision that are well-known today: the *fortuitousness* of the permanent physical occupation factor and its elevation of purely *nominal harms* to the level of a constitutional violation.<sup>11</sup> Both of these factors figured prominently in the withering criticisms that commentators leveled at *Loretto*.<sup>12</sup> In rejecting Justice Marshall's seeming elevation of form over substance, these critics were only restating points that Michelman had already made abundantly clear.<sup>13</sup>

The second doctrinal contribution of that article that I want to single out here concerns another familiar judicial test, the *Hadacheck*<sup>14</sup> doctrine. As we all know, that doctrine provides that government actions that prevent or abate public harms are non-compensable, even when that action inflicts very substantial losses on private owners.<sup>15</sup> The problem in this test is now familiar to all takings mavens: a government land-use restriction that is sustained on the ground that it prevents a public harm can just as easily be characterized as one that extracts a benefit for the public, an action that

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<sup>6</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>7</sup> Michelman, *Ethical Foundations*, *supra* note 1, at 1184-90, 1226-29.

<sup>8</sup> Compare *id.* at 1185 (discussing installation of subterranean utility lines), with *Loretto*, 458 U.S. at 422 (finding the installation of television cables on the roof and side of a building constituted a taking).

<sup>9</sup> Michelman, *Ethical Foundations*, *supra* note 1, at 1184.

<sup>10</sup> *Id.* at 1184-85.

<sup>11</sup> *Id.* at 1226-27.

<sup>12</sup> See, e.g., Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 613-14 (1984); John J. Constonis, *Presumptive and Per Se Takings: A Decisional Model for the Takings Issue*, 58 N.Y.U. L. REV. 465, 505-09 (1983); Elizabeth G. Patterson, *Property Rights in the Balance—The Burger Court and Constitutional Property*, 43 MD. L. REV. 518, 566-68 (1984).

<sup>13</sup> Michelman, *Ethical Foundations*, *supra* note 1, at 1185.

<sup>14</sup> *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

<sup>15</sup> *Id.* at 410-11.



presumably requires compensation. Whether the government is more aptly characterized as harm-preventing than benefit-conferring requires a neutral benchmark. Is a regulation forbidding roadside billboards, Michelman asked, one that prevents the harms of roadside blight and distraction or one that secures the public benefits of safety and amenity?<sup>16</sup> As Michelman put it, this test “will not work unless we can establish a benchmark of ‘neutral’ conduct which enables us to say where refusal to confer benefits . . . slips over into readiness to inflict harms.”<sup>17</sup> Joe Sax had recognized the problem and recast it in terms of his “enterprise/arbitration” approach.<sup>18</sup> Michelman showed that this approach is subject to the same basic challenge:

why should it be thought less odious for society to force a landowner to contribute without compensation to the welfare of his neighbors (those who suffer from his nuisance-like activities) than to the welfare of all of us (who suffer from his refusal to dedicate his land to public uses)?<sup>19</sup>

But Michelman did not throw the baby out with the bath. He recognized that there is a stubborn intuitive appeal to the distinction, and he dug deeper, much deeper than anyone else had or has since, to see if the harm-prevention/benefit-conferring distinction, which so many courts seemed to find sensible, indeed does usefully serve some other analytical purpose.<sup>20</sup> His answer, of course, was yes:<sup>21</sup> “The true office of the harm-prevention/benefit-extraction dichotomy is . . . to help us decide whether a potential occasion of compensation exists at all.”<sup>22</sup> The distinction does not help us decide what efficiency and fairness require by way of compensation, but it does help us recognize situations that do not raise any compensation issue at all because the social action in question is one that merely corrects some prior theft-like redistribution or deliberate redistributive gamble, rather than collectively pursuing an efficient use of resources.<sup>23</sup> The intuitive appeal of the distinction, Michelman saw, was that activities restricted by harm-preventing measures are usually of the theft or gamble-like variety, which are a matter of corrective justice or other non-efficiency reason; whereas activities restricted by public-benefit-conferring measures typically are efficiency-based, raising the compensation question.<sup>24</sup>

Now, characteristically, Michelman took pains to caution against drawing any sharp distinction between these two types of measures.<sup>25</sup> You should not always assume that

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<sup>16</sup> Michelman, *Ethical Foundations*, *supra* note 1, at 1197.

<sup>17</sup> *Id.*

<sup>18</sup> Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62–64 (1964).

<sup>19</sup> Michelman, *Ethical Foundations*, *supra* note 1, at 1201.

<sup>20</sup> *Id.* at 1235.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1239.

<sup>23</sup> *Id.*

<sup>24</sup> *See id.*

<sup>25</sup> *Id.* at 1236–37.



no legitimate compensation issue is raised by a regulation that is ostensibly nuisance-abating or that a legitimate compensation question is always posed by a measure that seems to be a restriction on innocent activity for efficiency's sake.<sup>26</sup> The distinctive should not be determinative, but it should be considered in deciding whether there is a compensation question at all.<sup>27</sup> Once again, Michelman's strong instinct for standards and against categorical rules is in full view. Once again, Michelman rigorously explains how a conventional takings doctrine, properly understood, operates in a rational and fair way.<sup>28</sup>

Fast-forward to 1988. Michelman's lead contribution to the Columbia symposium, *The Jurisprudence of Takings*, dissected four major and well-known Supreme Court takings cases from the 1986–87 Term.<sup>29</sup> His aim, as he put it, was to “give a cogent account of the[] decisions,” rather than to “grandly theorize either them or the constitutional texts they construe.”<sup>30</sup> Specifically, he set out to see if the cases fit within an existing pattern of regulatory takings cases and to explain that pattern.<sup>31</sup>

The result was illuminating, to say the least. The pattern that Michelman saw was a reaction against the failure, over sixty-five years, for the Court's informal open-ended balancing approach to consistently yield victories for the claimant.<sup>32</sup> The Court was, as he put it, “moving noticeably towards a reformation of regulatory-takings doctrine.”<sup>33</sup> But it was not some crude version of legal formality that Michelman saw.<sup>34</sup> What he saw in the four cases was a much subtler and more limited variety of formalism.<sup>35</sup> He gave *Nollan*,<sup>36</sup> for example, a narrow reading that, as he put it, “fully explain[ed] the opinion and its result without, implausibly, turning *Nollan* into *Lochner redivivus*.”<sup>37</sup> It has since become clear that *Nollan*, even extended by its subsequent partner, *Dolan*,<sup>38</sup> was mostly certainly not “*Lochner redivivus*.” What nettled the Court in both cases was the coerced sacrifice of the owner's right to exclude the public, a fact that, as Michelman pointed out with respect to *Nollan*, put the cases in the vicinity of *Loretto*, with its per se takings rule.<sup>39</sup> Michelman's rendering of the

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<sup>26</sup> *Id.* at 1237–38.

<sup>27</sup> *Id.* at 1238–39.

<sup>28</sup> *See id.* at 1241.

<sup>29</sup> *See* Michelman, *Takings*, *supra* note 4.

<sup>30</sup> *Id.* at 1601.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1621–22. During this period, only two cases were decided in favor of claimants. *Id.* at 1621 n.105.

<sup>33</sup> *Id.* at 1622.

<sup>34</sup> *See id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>37</sup> Michelman, *Takings*, *supra* note 4, at 1609 (contrasting *Nollan* with *Lochner v. New York*, 198 U.S. 45 (1905)).

<sup>38</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>39</sup> Michelman, *Takings*, *supra* note 4, at 1608.



limited impact of *Nollan* seems to have been confirmed in subsequent decisional law, even taking *Dolan* into account.

Similarly, Michelman read *First English*<sup>40</sup> in a way that made the regulation's indefinite duration, the key to the case.<sup>41</sup> He rejected a broader reading (like Justice Stevens did) that would have made the case a broad endorsement of the principle of "conceptual severance by time shares."<sup>42</sup> Here again, subsequent developments have borne out the perspicacity of Michelman's narrow reading, for it squares nicely with Justice Stevens's analysis in *Tahoe-Sierra*.<sup>43</sup> In fact, at the end of his discussion of *First English*, Michelman posed a hypothetical that nearly matched the facts of *Tahoe-Sierra* itself, for a time-limited building moratorium.<sup>44</sup> As Michelman correctly predicted, the Court there "regard[ed] [the] case as presenting a new and unresolved question."<sup>45</sup>

I could go on with many more examples of Michelman's prescient and illuminating readings of cases and rules of decision in takings jurisprudence, but time is limited and I think my point is apparent by now. Let me close with a radical thought: rereading Michelman's analyses of takings doctrine in these and other articles made me think that there is a lot more coherence in takings law than conventional wisdom acknowledges. Those who repeat the conventional wisdom that there is no logic or order in takings need to spend some more time reading Michelman, the master doctrinalist.

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<sup>40</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

<sup>41</sup> Michelman, *Takings*, *supra* note 4, at 1616–17.

<sup>42</sup> *Id.* at 1617–19.

<sup>43</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

<sup>44</sup> Michelman, *Takings*, *supra* note 4, at 1621.

<sup>45</sup> *Id.*; accord *Tahoe-Sierra Pres. Council*, 535 U.S. at 320–21.