September 2001

Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE — *Paradissiotis v. United States*:

Takings Challenges that Implicate National Security Concerns

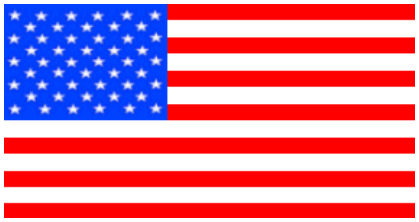
In the comfort of the post-Cold War era of tranquility, the takings debate focused primarily on domestic police powers, such as land-use regulation. We sometimes forget that federal efforts to protect national security interests also are subject to takings challenges. Indeed, the Supreme Court's takings docket has never been as full as it was during the years immediately following World War II.

These wartime takings cases are illuminating. Despite the exigencies of the last century's most dangerous global conflict, the Supreme Court never abandoned the Takings Clause's central protection for landowners. Indeed, the Court was rigorous in demanding that the government pay property owners even for short-term expropriations of private property. The Court did, however, establish a bright-line between expropriation and regulatory impositions, requiring compensation for the former but not the latter. Compare *United States v. Pewee Coal Co*., 341 U.S. 114 (1951), with *United States v. Central Eureka Mining Co*., 357 U.S. 155 (1958).

In recent years, courts have continued to give the government a wide berth in protecting national security interests where the government action does not constitute an outright expropriation. For instance, in *Paradissiotis v. United States*, 49 Fed. Cl. 16 (March 27, 2001), a Cypriot citizen with business ties to the Libyan government alleged a taking after the federal Office of Foreign Asset Control (OFAC) prohibited him from exercising certain stock options. The OFAC issued the order pursuant to the International Emergency Economic Powers Act (IEEPA) and two 1986 Executive Orders that freeze assets controlled by the Libyan government and prohibit U.S. corporations from business dealings with Libya.

Notwithstanding the severe economic loss suffered by Paradissiotis, the court rejected the claim, concluding that order did not interfere with his reasonable expectations: "Claimants who deal in foreign commerce most often have knowledge at the time of contracting that foreign relations between this country and a foreign country might sour, and that the government might intervene and interfere with contractual rights. Such knowledge is enough to extinguish any reasonable expectation for takings purposes." Although Paradissiotis argued that he could not foresee the string of foreign policy events that led to the blocking order, the court responded that the public knew about the deteriorating relations between the United States and Libya for the entire seven years that he owned the options. Moreover, the Court emphasized that "national security is the epitome of promoting the public good of the United States" and requiring compensation for these orders would eviscerate the IEEPA.

EYE ON WASHINGTON — September 11th



Our hearts go out to the families of the victims of the terrible tragedy visited upon Washington, New York, and Pennsylvania on September 11, 2001.

Words cannot express our gratitude to the firefighters, police officers, and other local officials who have proven once again that they are our society's true heroes.

Unfortunately, some have sought to use the attack to push their own special interests. Just days later, Pacific Legal Foundation ran an opinion piece under the blaring headline -- "IT'S A DANGEROUS WORLD. DRILL FOR OIL" -- demanding that the Arctic National Wildlife Refuge and other environmentally sensitive areas be opened for drilling. Grist Magazine reports that "Rep. Don Young (R-Alaska) flew right over the cuckoo's nest and straight into nut-ville" by suggesting that eco-terrorists participated in the attacks. The Rev. Jerry Falwell pointed the finger at the American Civil Liberties Union and People for the American Way.

It is grossly inappropriate for anyone to exploit this tragedy or blame other Americans in order to advance a policy agenda. For now, our response to the attack should reflect our unity as Americans. In future months, there will be time enough to re-turn to public policy debates with civility and decorum.

OUTRAGE OF THE MONTH

PLF's Ploy in *Palazzolo* (and the Lessons to be Learned)

In last month's Outrage column, we wrote about the dirty-pool practices of some lawyers for the so-called property rights movement. This month's Outrage returns to this theme by drawing from Justice Ginsburg's dissent in *Palazzolo v. Rhode Island* (joined by Justices Souter and Breyer). It is exceedingly rare for U.S. Supreme Court Justices to upbraid the attorneys appearing before them for misrepresentation, but Justice Ginsburg's dissent accuses Pacific Legal Foundation (PLF), counsel for Palazzolo, of exactly that.

PLF's misrepresentation concerned the issue of whether Rhode Island might allow Palazzolo to build more than one home on his property. Palazzolo argued to the Supreme Court that his claim is ripe because the extent of permitted development is clear: one single family home and nothing more. In its brief on the merits, Rhode Island countered that the case is unripe, in part because Palazzolo might be able to build more than one house and failed to apply for permission to do so. The majority rejected the State's contention because the State failed to make this point clearly in its opposition to Palazzolo's petition for certiorari.

In dissent, Justice Ginsberg shows that the majority fell victim to a PLF "bait-and-switch maneuver," a con game that "moved the pea to a different shell." 121 S. Ct. at 2476. Here's how PLF's con game worked. In state court, Palazzolo pursued only a per se takings claim under *Lucas*, arguing that Rhode Island's wetland protections denied him all use of the property. Rhode Island responded in state court that the claim was meritless because Palazzolo may build at least one house on the property. Because Palazzolo pursued only a *Lucas* claim based on an alleged denial of all use, Rhode Island had no incentive in state court to show that Palazzolo could build more than one home. When PLF took over the case on appeal to the U.S. Supreme Court, it argued for the first time that there was a taking under *Penn Central*'s multifactor test, thereby elevating the significance of whether Palazzolo could build more than one home. PLF then falsely asserted in its cert. petition that the record was clear that Palazzolo could build only one home and nothing more. Rhode Island did not take issue with the false assertion in its opposition to PLF's cert. petition. Although the majority ruled that the State thereby "waived" any objection to this "fact," Justice Ginsburg explains that this "fact" was never found by any court, but rather "was simply asserted, inaccurately" by PLF.

Justice Ginsburg chillingly concludes: "This Court's waiver ruling thus amounts to an unsavory invitation to unscrupulous litigants: Change your theory and misrepresent the record in your petition for certiorari; if the respondent fails to note your machinations, you have created a different record on which this Court will review the case." 121 S. Ct. at 2476.

The lesson for state and local governments is clear: Be on the lookout for false factual statements and bait-and-switch maneuvers by lawyers for takings claimants. And if called on to prepare an opposition to a petition for certiorari, expressly contest any factual misrepresentations made in the cert. petition. Otherwise, they may come back to haunt you.

ON THE HORIZON

Although Takings Watch focuses primarily on regulatory takings challenges to land use controls and other community protections, we also monitor non-land use takings cases. On October 10, 2001, the Supreme Court will hear oral argument in *Verizon Communications, Inc. v. FCC*, No. 00-511, a challenge to portions of the Telecommunications Act of 1996 that seek to make local phone service more competitive. The Act requires existing carriers like Verizon to make equipment available to new market entrants at a regulated rate. Current FCC rules require the use of replacement costs, rather than historical costs, to set the rate. The case raises interesting issues regarding whether takings concerns should ever be used to narrow the interpretation of a statute. If the Court were to read the 1996 statute narrowly due to takings concerns, the ruling could have an adverse spillover effect on state and local laws. A future Takings Watch will report on the ruling in *Verizon* once the Court hands down a decision.

QUOTE OF THE MONTH

"[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

Mugler v. Kansas, 123 U.S. 623, 665 (1887)