

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The top bulb has a dark blue cap. The bottom bulb has a light blue cap.

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*Federal Responses to International Conflict and Terrorism:
Property Rights Issues*

Robert Meltz, American Law Division

October 6, 2004

Abstract. Among federal actions dealing with international conflict, wars, and terrorism, direct impingements on private property are common. Besides the obvious ravages of battle, there have historically been military occupations and requisitions of property not in the actual theater of war. And, non-military measures may be used against assets, attachments on foreign assets, causes of action, and so on. Unsurprisingly, holders of affected property interests have claimed that their property was taken and demanded compensation, invoking the Takings Clause of the Fifth Amendment. This report finds that based on case law to date, Takings Clause limits on federal response to international threats are few, but most certainly do exist mostly when private property is impressed into military service not in the theater of actual war.

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Federal Responses to International Conflict and Terrorism: Property Rights Issues

October 6, 2004

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Federal Responses to International Conflict and Terrorism: Property Rights Issues

Summary

Among federal actions dealing with international conflict, wars, and terrorism, direct impingements on private property are common. Besides the obvious ravages of battle, there have historically been military occupations and requisitions of property not in the actual theater of war. And, non-military measures may be used against assets, attachments on foreign assets, causes of action, and so on.

Unsurprisingly, holders of affected property interests have claimed that their property was “taken” and demanded compensation, invoking the Takings Clause of the Fifth Amendment. This report finds that based on case law to date, Takings Clause limits on federal response to international threats are few, but most certainly do exist – mostly when private property is impressed into military service not in the theater of actual war.

Successful takings claims in the international area, often involving national security, are made difficult by four principles. First, international dangers have consistently prompted courts to extend extra deference to responsive government measures when resolving regulatory takings claims. Second, courts say that when dealing in foreign commerce, the possibility of evolving world circumstances and U.S. response thereto make any expectation of government noninterference unreasonable. Third, the benefit accruing to the property owner from the government action may outweigh the harm. And fourth, there is deference to the President’s constitutional role as representative of the federal government in the field of foreign relations – often expressed as the “political question doctrine.”

The protection extended by the Takings Clause also depends on the legal status of the property’s owner. The property of U.S. citizens gets the most protection; enemy alien property, none; and friendly alien property somewhere in between, depending on whether the alien has “substantial connections” with the United States.

Takings claims against the freezing and vesting of foreign assets have universally been rejected, though with an occasional judicial caution that an overly protracted freeze might be a taking. In other areas, government frustration of performance under international commercial contracts appears to have yielded no successful takings claims, while law enforcement, where physical damage results from the pursuit of criminal suspects or financial damage results from the operation of front organizations, has prompted some judicial concerns and a minority of successful takings claims at the state level.

In sharp contrast with the poor record of takings claims in the above areas, claimants challenging the impressing of private property into military or related government service generally have prevailed – wartime or not. Examples include military overflights, seizure and operation of coal mines during wartime, and requisitioning of private property. But military destruction of property in connection with actual battle, or to thwart an advancing enemy, is not compensable.

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Federal Responses to International Conflict and Terrorism: Property Rights Issues

To be sure, property rights are not the first thing that leaps to mind when thinking about wars, terrorism, and international conflicts. Yet among the federal actions taken to deal with such threats, direct impingements on private property rights are common. Besides the obvious ravages of battle, there have historically been military occupations or requisitions of property not in the immediate theater of war. Non-military measures may be taken against financial holdings, corporate facilities, contract rights, attachments on assets, and causes of action of U.S. nationals against foreign governments or their nationals. Such impingements on private property can be quite severe, involving significant assets owned by U.S. citizens, friendly aliens, or enemy aliens.

Unsurprisingly, holders of such property have cried foul. They have claimed that their property was “taken” and demanded compensation, invoking the Takings Clause of the Fifth Amendment.¹ (Indeed, government responses to 9/11 have already generated at least three reported cases resolving takings claims.²) This report reveals that based on case law to date, Takings Clause limits on federal response to international threats appear to be few, but most certainly do exist – chiefly when private property is impressed into military service not in the theater of actual war. However, the case law has not yet addressed all areas in the foreign-conflicts realm that could potentially raise takings claims.

One further caution: most cases cited in this report deal with clearly defined enemies and clearly delineated theaters of war. The newer decisions are just beginning to address Takings Clause issues in the blurrier context of combating terrorism, where the enemy may be terrorism-supporting states with whom the United

¹ U.S. Const. amend. 5: “[N]or shall private property be taken for public use, without just compensation.”

² *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002) (Treasury Department’s blocking of Foundation’s assets was not a taking), *affirmed*, 333 F.3d 156 (D.C. Cir. 2003); *Global Relief Foundation v. O’Neill*, 207 F. Supp. 2d 779 (N.D. Ill.) (Treasury Department’s seizure of Foundation’s assets and temporary blocking order was not a taking), *affirmed*, 315 F.3d 748 (7th Cir. 2002), *cert. denied*, 124 S. Ct. 531 (2003); *Air Pegasus of D.C., Inc. v. United States*, 60 Fed. Cl. 448 (2004) (FAA’s permanent ban on flights at heliport near U.S. Capitol was not a taking).

States is otherwise at peace,³ stateless entities such as al-Qaeda, or indeed, nationals of the United States or friendly foreign countries.

I. Broad Doctrines That Mitigate Against Takings

The existence of war, terrorism, or other international conflict does not suspend the Takings Clause's protection of private property.⁴ Still, several broad takings-law principles of particular relevance to international threats and national security present daunting obstacles for takings claims in this area.

Heightened judicial deference in regulatory takings cases

International dangers have consistently prompted courts to extend extra deference to responsive government measures when dealing with *regulatory* takings claims. (“Regulatory takings claims” are those based on the government’s restriction of a property’s *use*, rather than its physical invasion or outright expropriation of the property.) Indeed, the judicial deference is great enough that our research failed to reveal any instance where a regulatory taking claim based on federal government action against an international threat has succeeded.

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

³ A forerunner in this gray area is *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 111-112 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966), a due process challenge to the freezing of a Cuban national’s assets in New York under the Trading with the Enemy Act. The court noted that while the United States was not formally at war with Cuba, qualifying plaintiff as a friendly alien, a court did not have to ignore the fact that that nation “has launched a campaign of subversion throughout the Western Hemisphere.”

⁴ *YMCA v. United States*, 396 F.2d 467, 470 (Ct. Cl. 1968), *affirmed*, 395 U.S. 85 (1969).

of the United States nevertheless greatly outweighs plaintiff's loss.”), *affirmed*, 304 F.3d 1271 (Fed. Cir. 2002).⁵

The *Condor Operating Co.* and *Paradissiotis* decisions demonstrate that heightened judicial deference is not restricted to international dangers of the traditional-war variety, or even to hostilities at all.

One element of the general regulatory takings analysis is a balancing of the governmental interest advanced by the challenged government action against the burden imposed on the property owner.⁶ The foregoing decisions in the international conflict and terrorism realms often do not explicitly link their statements of deference to this broad takings-test factor – but such a relative weighing is obviously what they are doing. In the case of major threats to the security of the state, the governmental interest is deemed to be so compelling as to be dispositive, or nearly so.

Reduced expectations when doing business internationally

Another factor in the general regulatory takings test is the extent to which the government's action frustrated the *reasonable* investment-backed expectations of the property owner-plaintiff.⁷ Citing this factor, the courts unanimously have spurned the takings claims of persons whose relations with foreign countries – through contracts, leaseholds, causes of action for compensation, etc. – were frustrated when the United States responded to deteriorating or hostile relations with those countries. When dealing in foreign commerce, these decisions say, the possibility of changing world circumstances and U.S. response thereto make any expectation of government noninterference *unreasonable*. One is charged with awareness that relations between the affected countries might sour, and that the government might act in a way that interferes with one's property rights.⁸ *See, e.g., 767 Third Avenue Assocs. v. United States*, 48 F.3d 1575 (Fed. Cir. 1995); *Chang v. United States*, 859 F.2d 893 (Fed.

⁵ At the state level, see *Citoli v. City of Seattle*, 61 P.3d 1165 (Wash. App.), *rev. denied*, 75 P.3d 968 (2003), where police shut off utilities to a building illegally occupied and barricaded by protesters, with the result that a lawful business in the building ultimately was forced to close permanently. In finding no taking of the business, the court stated: “Where the necessities of war or civil disturbance require the destruction or injury of private property, the resulting losses must be borne by the owners of the property, in that the safety of the state in such cases overrides all considerations of private loss.” *Id.* at 1181.

⁶ *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488, 492 (1987).

⁷ This factor in the regulatory takings test was originally stated by the Supreme Court using “*distinct* investment-backed expectations.” *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (emphasis added). With no explanation, the Court morphed this phrase into “*reasonable* investment backed expectations” in most of its later regulatory takings decisions. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001) (emphasis added).

⁸ This principle is loosely related to a domestic takings law precept: persons who voluntarily do business in a heavily regulated field cannot claim disappointment of reasonable expectations when the Congress revisits the field to bolster the legislative scheme. *See, e.g., Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

Cir. 1988); *Paradissiotis v. United States*, 49 Fed. Cl. 16 (2001), *affirmed*, 304 F.3d 1271 (Fed. Cir. 2002); *Abraham-Youri v. United States*, 36 Fed. Cl. 482, 486 (1996), *affirmed*, 139 F.3d 1462 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998); *Rockefeller Center Properties v. United States*, 32 Fed. Cl. 586, 592 (1995); *Belk v. United States*, 12 Cl. Ct. 732, 734 (1987), *affirmed*, 858 F.2d 706 (Fed. Cir. 1988).

Most of the just-cited cases involve property interests (e.g., contracts) acquired at a time when the international situation was already foreboding – as in *767 Third Ave. Assocs.* with the threat of ethnic strife in Yugoslavia, and in *Chang* and *Paradissiotis* with Libyan support of international terrorism. Or the plaintiffs had chosen to live in a country “where the potential for kidnapping and other terrorist acts existed and the possibility that the United States would have to intervene was always present.” *Belk*, 12 Cl. Ct. at 734 (with regard to Iran). However, such pre-acquisition stormclouds are not a prerequisite for courts to discount the property owner’s expectations of government nonintervention, and deny the taking claim. It is enough that the property interest was acquired at a time when the President had broad statutory authority to impose measures against foreign assets in response to international conflicts.⁹ *767 Third Ave. Assocs.*, 48 F.3d at 1580-1581; *Rockefeller Center Properties*, 32 Fed. Cl. at 592-594.

Benefits accruing to the plaintiff

In several cases, courts have rejected the taking claim because the challenged government action also conferred substantial benefit on the plaintiff, even if incidental benefit accrued to the United States as well. The leading case is *YMCA v. United States*, 395 U.S. 85, 92 (1969), where no taking was found when U.S. troops occupied buildings in Panama to protect them from rioters. *Accord*, *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997); *Belk v. United States*, 858 F.2d 706, 709 (Fed. Cir. 1988).

Deference to government conduct of foreign policy and the President’s role as commander in chief / Political question doctrine

Yet another recurring hurdle for the taking plaintiff is judicial deference to the President’s constitutional role as representative of the federal government in the field of international relations, and his latitude as commander in chief. “Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.” *Haig v. Agee*, 453 U.S. 280, 292 (1981). *Accord*, *Regan v. Wald*, 468 U.S. 222, 242 (1984). This deference plays out both as to (1) the reviewability of the government action on which the taking claim is based, and (2) as a factor in the taking analysis itself.

Reviewability of the government action on which the taking claim is based. Government declarations and decisions involving national emergencies, war, and foreign relations are often held to be outside the judicial reach – generally on “political question” grounds. The classic statement of the political question doctrine remains that of *Baker v. Carr*, 369 U.S. 186 (1962), which recognized that only

⁹ See discussion of International Emergency Economic Powers Act and Trading with the Enemy Act in section III.

certain types of cases are committed to the judicial branch for resolution. To be beyond judicial reach under the doctrine, a case must involve at least one of six factors, among them whether there is a “a textually demonstrable commitment of the issue to a coordinate political department, or a lack of judicially discoverable and manageable standards for resolving it” *Id.* at 217.

Numerous takings claims involving international conflicts have foundered on the political-question shoal.¹⁰ For example, *Belk v. United States*, 858 F.2d 706 (Fed. Cir. 1988), dealt with the Algerian Accords, under which the United States and Iran ended the hostage crisis in 1981. Several of the former hostages argued that because the Accords extinguished their causes of action against Iran, the U.S. had taken those causes of action.¹¹ Though denying their claim on the merits, the court concluded alternatively that review of a policy decision made by the President during an international crisis is barred as a political question. “Most, if not all, of [the *Baker v. Carr*] concerns are present in this case.” *Id.* at 710.

Most recently, the Federal Circuit used the political question doctrine to rebuff a taking claim brought by the owner of a manufacturing plant in the Sudan destroyed by U.S. cruise missiles. *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004). The missile attack was ordered by President Clinton following bombings of two U.S. embassies in East Africa, based on U.S. belief that the perpetrators were associated with al-Qaeda and that the plant was manufacturing chemical weapons for al-Qaeda. The court found that the Constitution commits to the President the power to designate enemy property in foreign territory – so, under the first *Baker* factor, the matter was a nonjusticiable political question.¹² Because the court thus had to accept that plaintiff’s property was enemy property, there could be no taking (see section II).¹³ However, the court stressed the limited nature of its ruling in two respects. The outcome might have been different, it said, had the plant

¹⁰ As have *non*-takings claims involving international conflicts. *See, e.g.*, *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191, 1194-1195 (D. Mass. 1986) (whether Nicaragua posed sufficient threat to trigger President’s powers under International Emergency Economic Powers Act is nonjusticiable political question), *affirmed on other grounds*, 814 F.2d 1 (1st Cir. 1987).

¹¹ The court assumed without deciding that causes of action constitute “property” for purposes of the Takings Clause.

¹² *See also* *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (whether seceded southern states are to be regarded as belligerents is a determination for President as commander in chief, and courts must be governed by that decision); *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 109 (2d Cir.) (courts will not review presidential declaration of national emergency – a determination “so peculiarly within the province of the chief executive”), *cert. denied*, 385 U.S. 898 (1966).

¹³ *Compare* *Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988), where the finding of a political question (whether the President properly evaluated the “true facts” of the Libyan crisis) did *not* preclude reaching the question whether the President’s actions constituted a taking.

been located *in* the United States,¹⁴ or had there been no evidence that the President had in fact determined that the plant belonged to an enemy of the United States.

Not every case or controversy that touches on foreign relations lies beyond judicial cognizance as a political question. *Baker*, 369 U.S. at 211. Courts assert that the doctrine is a narrow one, and are aware it offers a tempting refuge for the government defendant. Thus, the political question defense was rejected in *Langenegger v. United States*, 756 F.2d 1565 (Fed. Cir.), *cert. denied*, 474 U.S. 824 (1985), where the taking claim was based on El Salvador's confiscation of U.S.-citizen-owned land as part of an agrarian reform program encouraged by the United States. Resolution of the case, said the court, required no determination of El Salvador's sovereignty, nor did the plaintiff question the executive's authority or the validity of the expropriation. *See also Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc) (due process claim against U.S. military's occupation of U.S. citizen's property in Honduras to train Honduran army does not raise political question), *vacated on other grounds*, 471 U.S. 1113 (1985).

Deference as a factor in the takings analysis itself. In *Rockefeller Center Properties v. United States*, 32 Fed. Cl. 586 (1995), the merits of the taking claim were reached. The Treasury Department's blocking of assets pursuant to the International Emergency Economic Powers Act was found to further the important public interest in the President's ability to deal with international events. This public interest entered the takings analysis through the "character of the government action" factor, a component of the canonical takings test.¹⁵ No taking was found.

II. Status of the Property Owner and Location of the Property

The protection extended by the Takings Clause depends first on the legal status of the property's owner – whether a U.S. citizen, friendly alien, or enemy alien. In the case of friendly aliens, it depends further on the territorial or extraterritorial location of the property. The law developing in this area is particularly important in light of the increasing frequency with which congressional statutes reach extraterritorial conduct, and with which U.S. offices abroad pursue the fight against terrorism, drug trafficking, counterfeiters, and corrupt financiers.

U.S. citizens

The general rule is that the Takings Clause protects the property of U.S. citizens against takings by the United States wherever in the world the property may be located. *Ashkir v. United States*, 46 Fed. Cir. 438, 444 (2000) (collecting cases). An

¹⁴ One presumes the court is referring to the additional *process* that might be required to designate enemy property in the U.S. There can be little question that enemy property may be taken or destroyed without compensation even in the U.S. See section II of this report.

¹⁵ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

exception is that all property, even that of U.S. citizens, is regarded as enemy property when located in enemy territory (see below, this section).

Friendly aliens

In the leading case, the property of a friendly alien (a Russian corporation) was held to be protected by the Takings Clause, just as that of U.S. citizens. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489, 491-492 (1931). Because the alien's property was vessel-construction contracts with a New York shipyard, the decision is usually read as restricted to property located within the United States.¹⁶ *Russian Volunteer Fleet* also declared that an alien's ability to invoke Takings Clause protection is not dependent on U.S. citizens being entitled to prosecute similar claims against the alien's government in the courts of that country. *Id.* at 491-492. (But while the Takings Clause does not demand reciprocity, Congress does, at least when the case is filed in the U.S. Court of Federal Claims. Under 28 U.S.C. section 2502, the United States may be sued in that court only by citizens of foreign governments that afford U.S. citizens the right to sue such governments in their courts.)

Russian Volunteer Fleet received judicial gloss in a later decision asking whether the Fourth Amendment's protection against unreasonable searches and seizures applies to property owned by a nonresident alien – but located in a *foreign* country. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). In holding that the Fourth Amendment does not, the Court surveyed other cases, including *Russian Volunteer Fleet*, in which it had held that friendly aliens enjoy certain rights under the U.S. Constitution. Those cases, it clarified, “establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.” *Id.* at 271. But because *Verdugo-Urquidez* involved the Fourth Amendment, and because its holding was not based exclusively on the substantial connections prerequisite, its authoritativeness with regard to *Russian Volunteer Fleet* and the Takings Clause remained in doubt.¹⁷

Newer case law has grappled with the effect of *Verdugo-Urquidez* on the Takings Clause, ruling unanimously that the substantial connections rule does apply to alien-filed claims. Given the extraterritorial location of *both plaintiffs and their property* in these cases, such connections were held to be absent, and the takings claims dismissed. *Hoffman v. United States*, 53 F. Supp. 2d 483 (D.D.C. 1999), *affirmed*, 17 Fed. Appx. 980 (Fed. Cir. 2001) (unpublished). involved German nationals suing the United States for its refusal to turn over a photographic archive and watercolors painted by Adolf Hitler, taken from Germany during the allied occupation after World War II.¹⁸ *Ashkir v. United States*, 46 Fed. Cl. 438 (2000),

¹⁶ See, e.g., *Ashkir v. United States*, 46 Fed. Cl. 438, 440 (2000).

¹⁷ For a view of the case law immediately prior to *Verdugo-Urquidez*, see Remsen N. Kinne IV, *Making America Pay: Just Compensation for Foreign Property Takings*, 9 B.C. Third World L. J. 217 (1989).

¹⁸ This unpublished affirmance is not citable as precedent. As the trial court, the Federal Circuit observed that where an alien plaintiff has neither resident alien status nor property (continued...)

involved a citizen of Somalia asserting a taking by the United States, based on the U.S. military's occupation of and injury to his compound in Mogadishu in aid of U.N. relief efforts. And *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002), involved a takings class action by Hungarian Jews who alleged that their valuables, confiscated by the pro-Nazi Hungarian government in 1944, were seized by the U.S. army while being shipped by train to Germany, and never returned. *Rosner* also stressed that the substantial connections with the United States must exist at the time of the alleged taking, not later.

Notwithstanding the unanimous endorsement of *Verdugo-Urquidez* in these trial-court decisions, the Federal Circuit recently declined to overrule its own contrary precedent. In *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1957), the Circuit's predecessor court had held that U.S. seizure of radar equipment in the Philippines after World War II, owned by a Philippine corporation, was a taking. The court had rejected the government's broad argument that the Takings Clause lacks extraterritorial application. In its recent *El-Shifa* case, the Federal Circuit characterized *Turney* as counseling in favor of applying the Takings Clause extraterritorially despite the absence of substantial connections, placing *Turney* squarely in conflict with *Verdugo-Urquidez*. It expressly declined to resolve this conflict, however, because it did not need to: *El-Shifa* could be dismissed solely on political question grounds (see section I).

At present, then, the Federal Circuit has not ruled authoritatively on whether there is a substantial-connections prerequisite for takings claims brought by friendly aliens against the United States. Case law reviewed above, however, suggests that if and when the Circuit does rule, it will endorse its existence.

Enemy aliens

In contrast with friendly aliens, the property of enemy aliens receives no Takings Clause protection wherever the property may be found. *Cummings v. Deutsche Bank*, 300 U.S. 115, 120 (1937); *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1355 (Fed. Cir. 2004).

Under the "rules of war," property of any person located in enemy territory is deemed enemy property, notwithstanding the nationality of the owner. As enemy property, it may be destroyed without Takings Clause compensation. *Juragua Iron Co. v. United States*, 212 U.S. 297, 305-308 (1909). Query, however, whether the courts may balk at some confiscations in enemy territory, where the property is owned by a non-enemy national and the confiscation is unrelated to military necessity. For example, in *Seery v. United States*, 127 F. Supp. 601, 605 (Ct. Cl. 1955), the court expressed skepticism that the military could use a U.S.-citizen-owned estate in Austria as an officers' club without effecting a taking, even assuming Austria was still enemy territory months after Germany's surrender.¹⁹

¹⁸ (...continued)

located within the United States, he generally lacks a substantial connection.

¹⁹ The court discerned a taking largely based on the rules of war under international law. (continued...)

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

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

Freezing of assets

Freezing of assets was accomplished, until 1977, under the Trading with the Enemy Act (TWEA).²⁰ During that time, the TWEA applied to both wartime and any other period of national emergency declared by the President (typically in peacetime). In 1977, Congress enacted the International Emergency Economic Powers Act (IEEPA),²¹ which removed the national emergency authority from TWEA and ensconced it exclusively in IEEPA. At the same time, IEEPA qualified the emergency authority to reach only “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States” and respecting which the President declares a national emergency under IEEPA.²² IEEPA also grandfathered existing exercises of national emergency authority under TWEA. Both statutes now authorize the President to prohibit, among a long list of things, “exercising any right ... with respect to ... any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.”²³

As far as reported court decisions reveal, every taking claim based on an asset freezing order under TWEA or IEEPA has failed. The key rationale used by courts has been that the freezing of assets is merely temporary and not a vesting of title in

¹⁹ (...continued)

These rules, beyond the scope of this report, prescribe when property captured or found on battlefields, and property in military-occupied areas, may be “confiscated” (permanently appropriated without compensation) or “seized” (taken with a duty to return or compensate at the end of the armed conflict) – or must instead be “requisitioned” (appropriated in occupied territory for the needs of an army of occupation, with compensation as soon as possible). *See generally* Elyce K.D. Santerre, *From Confiscation to Contingency Contracting: Property Acquisition On or Near the Battlefield*, 124 Mil. L. Rev. 111, 112-122 (1989).

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

²¹ 50 U.S.C. §§ 1701-1707.

²² IEEPA § 202, 50 U.S.C. § 1701. The President may declare a national emergency only under the procedures in the National Emergencies Act. 50 U.S.C. §§ 1601-1651.

²³ TWEA § 5(b)(1)(B), 50 U.S.C. App. § 5(b)(1)(B); IEEPA § 203(a)(1)(B), 50 U.S.C. § 1702(a)(1)(B). The only difference between the two provisions, as pertinent here, is the USA PATRIOT Act’s addition to IEEPA in 2001 of presidential authority to “block during the pendency of an investigation” the rights listed in IEEPA section 203(a)(1)(B).

the United States. *See, e.g., Tran Qui Than v. Regan*, 658 F.2d 1296, 1304 (9th Cir.1981). *Accord, Global Relief Found. v. O’Neill*, 207 F. Supp. 2d 779, 802 (N.D. Ill.), *affirmed*, 315 F.3d 748 (7th Cir. 2002), *cert. denied*, 124 S. Ct. 531 (2003); *Holy Land Found. for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57, 78 (D.D.C. 2002), *affirmed*, 333 F.3d 156 (D.C. Cir. 2003).

Moreover, “temporary” has been loosely construed. Even the passage of considerable time since the freeze was imposed may not raise the taking specter, if hostile relations are equally longstanding. *See, e.g., Tole S.A. v. Miller*, 530 F. Supp. 999 (S.D.N.Y. 1981) (blockage of assets of Cuban corporation for 18 years effected no taking), *affirmed*, 697 F.2d 298 (2d Cir. 1982) (table). Query, however, whether the Supreme Court’s recent decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), noting that land-use planning moratoria may become takings if kept in place long enough, may lead courts to view protracted foreign asset freezes as takings. *See Holy Land Found.*, 219 F. Supp. 2d at 78 (owner of property frozen eight months may “some day” have a more viable taking claim, citing *Tahoe-Sierra*). *See also Nielsen v. Sec’y of the Treasury*, 424 F.2d 833, 843-844 (D.C. Cir. 1970) (blocking of foreign assets raises taking issue if continued indefinitely).²⁴

Another rationale cited for ruling against the taking claimant is that the blocked foreign assets may be needed to satisfy present or future claims of U.S. citizens against the foreign country or its nationals, or to use as leverage in negotiations with the hostile nation. *Tole S.A.*, 530 F. Supp. 999 (discussing cases). “There is no reason,” said the Supreme Court, “why [the United States] may not ... make itself and its nationals whole from assets here before it permits such assets to go abroad in satisfaction of claims of aliens made elsewhere” *United States v. Pink*, 315 U.S. 203, 228 (1942).²⁵

In a recent case, the U.S. invoked IEEPA to prohibit a Cypriot citizen with Libyan ties from exercising stock options in a U.S. company – owing to Libya’s support of terrorism. During the freeze, the stock options expired, resulting in a total loss to the plaintiff. In finding no taking of the option contract, the trial court relied particularly on the contingent nature of foreign commerce. *Paradissiotis v. United States*, 49 Fed. Cl. 16, 22 (2001). On appeal, plaintiff argued unsuccessfully that the Treasury Department should have permitted him to exercise his stock options and then retained the proceeds in a blocked, interest-bearing account, and that failure to do so was a taking. 304 F.3d 1271 (Fed. Cir. 2002).

²⁴ The Restatement (Third) of Foreign Relations Law (1987) seems not to insist on “indefinite” duration in order for an asset freeze to be a possible taking. “Extended” deprivation may be enough. Section 712, Comment g, Reporters’ Note No. 6.

²⁵ *See generally Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 112-113 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966).

Vesting of assets

TWEA and IEEPA authorize not only the freezing of foreign assets, but the vesting of such assets.²⁶ The TWEA vesting authority is available during wartime; the IEEPA authority, “when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals.” In contrast with the freezing of assets, vesting has the United States actually taking ownership of the property, so that it may be “held, used, administered, liquidated, sold, or otherwise dealt with” by the U.S.²⁷ The Supreme Court has cautioned that “this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and [Takings] Clauses ... only by those provisions of the act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure.” *Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958).

Suspension of judicial process and executive settlement of claims

In the name of foreign policy, the President has considerable authority to suspend judicial process against foreign assets and to settle with foreign nations the claims of U.S. citizens against those nations, or their nationals.²⁸ These executive powers received considerable judicial scrutiny for possible takings in the aftermath of the Iranian hostage crisis.²⁹ The key documents are the IEEPA, under which President Carter blocked removal or transfer of Iranian assets in the U.S. except by license, and the Algerian Accords, under which the United States later agreed to substitute binding arbitration for private litigation against Iran in U.S. courts.

Some courts have held that the President’s suspension of private claims against Iran presented no *ripe* taking issue, since plaintiffs might recover fully in arbitration before the Iran-U.S. Claims Tribunal. *See, e.g., American Int’l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (D.C. Cir. 1981); *Chas. T. Main Int’l, Inc. v. Khuzestan Water and Power Auth.*, 651 F.2d 800 (1st Cir. 1981). Others have refused

²⁶ TWEA § 5(b)(1), 50 U.S.C. App. § 5(b)(1); IEEPA § 203(a)(1)(C), 50 U.S.C. § 1702(a)(1)(C). The vesting authority in IEEPA was not added until 2001, through the USA PATRIOT Act.

For example, the first President Bush, in response to Iraq’s invasion of Kuwait, *froze* that country’s assets in the U.S. under IEEPA. Exec. Order No. 12722 (1990), 50 U.S.C. § 1701 note. During the second Iraq war, the current President Bush invoked IEEPA to *vest ownership* of such Iraqi assets in the U.S. Department of the Treasury. Exec. Order No. 13290 (2003), 50 U.S.C. § 1701 note.

²⁷ The quoted phrase in the text appears in both the statutory provisions cited in note 26, *supra*.

²⁸ “[T]he President’s power to espouse and settle claims of our nationals against foreign governments is of ancient origin and constitutes a well-established aspect of international law.” *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 246 (1983), *affirmed*, 765 F.2d 159 (Fed. Cir. 1985) (table). *See generally* *Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981).

²⁹ *See generally* Peter W. Adler, Note, *The Iran-U.S. Accords and the Taking Clause of the Fifth Amendment*, 68 Va. L. Rev. 1537 (1982); Lawrence W. Newman, *A Personal History of Claims Arising Out of the Iranian Revolution*, 27 N.Y.U. J. Int’l L. & Pol’y 631 (1995).

to reach the merits on political question grounds. *See, e.g., Belk v. United States*, 858 F.2d 706, 710 (Fed. Cir. 1988).

Where the taking issue in the case was reached, courts have stated or implied that in a proper case an executive cancellation of private claims by settlement could be a taking. *See, e.g., Langenegger v. United States*, 756 F.2d 1565 (Fed. Cir.) (opining that an earlier decision of the court, finding no taking based on U.S. settlement of individual claims against China, did not stand for an absolute rule that extinguishment of claims can never be a taking), *cert. denied*, 474 U.S. 824 (1985); *American Int'l Group*, 657 F.2d at 446. Research reveals no instance, however, where a taking has been found. For example, when the United States, through the Algerian Accords, extinguished causes of action asserted by the former Iranian hostages against the government of Iran, there was no taking. *Belk*, 858 F.2d 706. *Belk* pointed out that because the Accords brought about the release of the hostages, they received a valuable benefit for the compromise of their claims. Similarly, no taking resulted when the President vacated pre-judgment attachments of Iranian assets made pursuant to revocable license. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

More recently, holders of small claims against Iran asserted a taking based on the United States' espousal and settlement of their claims against that country. *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998). The \$50 million fund available to the successful claimants was enough that each claimant received the full amount of principal awarded, but only a third of the interest accrued. No taking of the interest resulted, said the court, because as in *Belk*, the settlement here sought to benefit the claimants, whose claims had languished many years. Moreover, it said, "those who engage in international commerce must be aware that international relations sometimes become strained" *Id.* at 1468.

IV. International Contracts

Federal measures against foreign governments may severely frustrate performance under existing contracts with those governments or their nationals. In asserting takings, disappointed contract parties cite the fact that contract rights are generally held to be "property" for purposes of the Takings Clause, placing them under its protective umbrella.³⁰ In the international realm, however, takings plaintiffs invariably collide head-on with the contingent nature of expectations when contract performance hinges on the maintenance of friendly relations between nations. As a further obstacle, courts on occasion note the additional takings law precept that the U.S. is held to only frustrate contract performance, not take a contract

³⁰ *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken ... provided that just compensation is paid."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States.").

right, when its actions incidentally block performance under existing contracts.³¹ Research reveals no successful takings claims in this area. *See, e.g., Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988) (employment contract); *767 Third Avenue Assocs. v. United States*, 48 F.3d 1575 (Fed. Cir. 1995) (leasehold contract); *Paradissiotis v. United States*, 304 F.3d 1271 (Fed. Cir. 2002) (stock option contract).³²

In *Chang*, for example, U.S. nationals or resident aliens entered into employment contracts with a Libyan oil company in 1985. The following year, the President issued an executive order under IEEPA, declaring a national emergency because of the threat posed by Libyan support of international terrorism. The order declared that “no U.S. person may perform any contract in support of an industrial or other commercial or governmental project in Libya.” Plaintiffs’ claim that the United States had thereby taken their employment contracts was rejected under the traditional three-factor balancing test for regulatory takings. Most pertinent to the international context of the dispute, the court said that persons entering into employment contracts overseas are on notice that contract performance turns on the continuation of friendly relations between nations. Indeed, relations between the United States and Libya were deteriorating at the time the contracts were entered into.

V. Law Enforcement

In the course of their duties, law enforcement personnel may damage or destroy private property, as a byproduct of pursuing criminal suspects. They may also seize property or bring about its forfeiture. Often, the harmed individual is an innocent party, and plainly these make the most compelling takings plaintiffs.

This area is vast and is only touched upon here. Much of the case law deals with law enforcement by state personnel, where the classic situation involves police damage to the homes or retail stores of innocent parties in the process of breaking down doors or flushing out criminal suspects. The majority view is that no taking occurs; at most, the state action constitutes a tort.³³ These state cases presumably have relevance to federal law enforcement against terrorists as well.

Several federal agencies now combating terrorism have been on the receiving end of takings claims arising out of non-terrorism-related law enforcement. A typical

³¹ *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923).

³² Where the government’s action frustrates future sales abroad in the absence of any contracts, a taking claim based on such future losses approaches the frivolous. *See, e.g., Galloway Farms v. United States*, 834 F.2d 998 (Fed. Cir. 1987) (losses to Iowa farmer as result of grain embargo on trade with Soviet Union, in response to Soviet invasion of Afghanistan, caused no taking).

³³ *See generally* Charles E. Cohen, *Takings Analysis of Police Destruction of Innocent Owners’ Property in the Course of Law Enforcement: The View From Five State Supreme Courts*, 34 *McGeorge L. Rev.* 1 (2002); *Kelly v. Story County Sheriff*, 611 N.W.2d 475, 482-483 (Iowa 2000) (collecting cases).

seizure case is *Alde, S.A. v. United States*, 28 Fed. Cl. 26 (1993), holding that the U.S. Customs Service's seizure and temporary possession of a private airplane until the court denied forfeiture was not a taking, despite the fact that while in government storage the plane was heavily damaged by hurricane and theft. The court stated absolutely that "[s]eizures carried out by the Government under its police power are not takings." *Id.* at 34. Parenthetically, forfeiture of private property, even as regards the interests of innocent owners or co-owners, is also rarely held to be a taking. *See, e.g., Bennis v. Michigan*, 517 U.S. 1163 (1996).

The CIA and FBI have been sued for takings where businesses created as fronts ultimately produced financial loss to innocent parties. In *Adams v. United States*, 20 Cl. Ct. 132 (1990), the CIA created and operated an investment-banking firm for intelligence gathering. The firm eventually went bankrupt, and the resulting losses to the firm's customers prompted them to claim a taking. Under the one scenario analyzed by the court that gave rise to a colorable taking claim, the plaintiffs' losses resulted chiefly from market losses, so the CIA was not accountable for any taking, or the losses were not extensive enough to surmount the takings threshold. And, the character of the government action cut against a taking, since the losses were not claimed to be the direct result of the cover operation, hence were purely consequential.

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

VI. Physical Takings and Appropriations, Mostly by the Military

Impressing private property into public service

The courts have long regarded physical occupations and outright expropriations as the most serious sort of government interference with property. Small wonder, then, that takings claims based on physical takings or expropriations, as opposed to regulatory interferences, have often succeeded – despite the existence of war. The successful claims have arisen where the government, almost always the military, has impressed private property into public service, rather than destroyed it as an incident of hostilities. “[T]he government does not avoid the Takings Clause by simply using its military forces as cover for activities that would otherwise be actionable if performed by one of its civilian agencies.” *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1356 (Fed. Cir. 2004). Merely because appropriating the property aids a war effort, even directly, is not sufficient to deflect the taking claim.

The rule that military appropriations must be compensated, at least when not demanded by the immediate needs of battle, is illustrated by the abundant takings decisions on military flights over private property. When the interference with the use and enjoyment of such property is sufficiently severe, courts find takings in both wartime, *see, e.g., United States v. Causby*, 328 U.S. 256 (1946) (taking resulted from low and frequent flights of military aircraft, during World War II, over chicken farm), and peacetime, *see, e.g., Argent v. United States*, 124 F.3d 1277 (Fed. Cir. 1997). A related factual circumstance led to a taking holding in *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (if U.S. installed guns not simply as wartime defenses, but to subordinate adjacent resort to government's right to fire across it at will in peacetime, a servitude has been taken). A *non*-military case of wartime appropriation is *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), where a taking was found based on the government's seizure and operation of coal mines during World War II, to avert a strike.^{34 35}

The case law finding compensable expropriation of U.S.-citizen property for use by the military stretches well back to the nineteenth century. *See, e.g., United States v. Pacific Railroad*, 120 U.S. 227, 234 (1887) (noting that "where property of loyal citizens is taken for the service of our armies," compensation is required); *United States v. Russell*, 80 U.S. (13 Wall.) 623, 629 (1871) (compensation required where Union Army requisitioned three steamboats to carry freight during Civil War); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852) (compensation required where Army took for use the wagons and mules of a merchant who had been forced to follow it into Mexican territory). Discussing *Russell* and *Mitchell*, a later court isolated the distinction between compensable and noncompensable military actions – the former, it said, did not involve "impending danger in the context of a hostile confrontation Instead, the property ... was requisitioned in a manner much akin to the procurement of goods and services under contract" *YMCA v. United States*, 396 F.2d 467, 471 (Ct. Cl. 1968), *affirmed*, 394 U.S. 85 (1969).³⁶

³⁴ The decision in *Pewee Coal Co.* is often juxtaposed by courts with that in *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). In the former the United States actually took over and ran the mines; indeed, it posted "U.S. Property" signs at the mine entrances. In the latter, the United States closed the mines by regulatory action but asserted no dominion over them. This difference was dispositive in leading the Supreme Court to find a taking in *Pewee Coal Co.*, but not in *Central Eureka*. *See id.* at 165-166.

³⁵ *See also Hohri v. United States*, 782 F.2d 227, 243 (D.C. Cir. 1986), *vacated on jurisdictional grounds*, 482 U.S. 64 (1987), holding that takings claims brought by Japanese-Americans sent to internment camps during World War II may proceed, given a later congressional report concluding there was no military justification for the internment. The court rejected the United States' argument that government actions taken pursuant to a "perceived need to protect national security" cannot be a taking. "Only a showing of actual (and not merely imagined) military emergency vitiates a Takings Clause claim." *Id.*

This decision arguably implies that had the military justification for the internment *not* been later rejected, the taking claim could not proceed – notwithstanding that the property was owned by U.S. citizens and located within the United States, far from the theater of actual war.

³⁶ *See also United States v. Caltex*, 344 U.S. 149, 152-153 (1952) (similarly reading *Russell* and *Mitchell* as confined to requisition-type situations).

Destruction of property in connection with actual battle

Nearer the thick of battle, even the deliberate destruction of private property by the military is usually noncompensable. A well-settled rule is that the wartime destruction of private property by the United States to prevent its capture by an advancing enemy is not a taking. *United States v. Caltex*, 344 U.S. 149 (1952) (Army destruction of oil terminals in Philippines during World War II to impede advance of Japanese Army); *United States v. Pacific Railroad*, 120 U.S. 227, 234 (1887) (Union Army destruction of bridges in Missouri during Civil War to impede advance of Confederate Army). See also *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909) (Army destruction of U.S. company's property in enemy territory during Spanish-American War, to prevent spread of yellow fever, is not a taking; all property in enemy territory is enemy property, subject to confiscation without compensation).

Least surprising, property damage due to battlefield operations is noncompensable. "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 the consequences." *Caltex*, 344 U.S. at 153, quoting *Pacific Railroad*, 120 U.S. at 234. The noncompensability of both damage from battlefield operations and destruction to avoid enemy capture is a legal first cousin of the common law's recognition 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 that the property of many and the lives of many more could be saved." *Caltex*, 344 U.S. at 154.