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The Search for Bright Lines in Takings Clause Analysis: *Maritrans, Inc. v. United States*

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THE SEARCH FOR BRIGHT LINES IN TAKINGS CLAUSE ANALYSIS: *MARITRANS, INC. V. UNITED STATES*

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INTRODUCTION

Congress enacted the Oil Pollution Act of 1990 ("OPA 90") as a response to the 1989 Exxon Valdez oil spill disaster.[1] This act requires that all single-hulled oil transportation vessels be replaced by, or retrofitted to become, double-hulled vessels.[2] Maritrans, Inc. ("Maritrans"), the owner of thirty-seven single-hulled vessels, claimed that the majority of its fleet became obsolete the moment OPA 90 became effective.[3] Maritrans filed a claim against the United States government and sought compensation for the loss of its vessels or, in the alternative, the cost of retrofitting them to meet the new standards.[4]

This comment will address the viability of a "bright line" test for determining whether a compensable taking has occurred. Part I gives an overview of the events leading up to the OPA 90 and studies the effect of OPA 90 on Maritrans. Part II gives a brief history of Fifth Amendment Takings Clause jurisprudence and focuses on the development of this body of law as it relates to the issues in the case at hand. Part III combines this background with the particular reasoning applied by the Federal Court of Claims in *Maritrans v. United States*. Part IV analyzes the court of claims' decision and how it advances an understanding of compensable takings analysis. Two particularly relevant areas of this analysis are: (1) how much regulation is required before a claimant is refused just compensation; and (2) whether there is a distinction between takings of personal property and real property.

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[1] 46 U.S.C. § 3703 (1990).

[2] *See id.*

[3] *See* Maritrans, Inc. v. United States, 40 Fed. Cl. 790 (1998).

[4] *See id.*

I. CASE HISTORY

A. The Oil Pollution Act of 1990

On March 24, 1989, the *Exxon Valdez* oil tanker ran aground on Bligh Reef, Alaska, and spilled more than eleven million gallons of oil into Alaska's Prince William Sound.[5] It was one of the most extensive environmental disasters in U.S. history and the clean-up costs exceeded two billion dollars.[6] In response to this catastrophe, Congress enacted OPA 90.[7]

OPA 90 requires that all vessels "constructed or adapted to carry . . . oil in bulk as cargo or cargo residue" and which operate in waters under the jurisdiction of the United States, have a double-hull.[8] Double-hull construction uses a second hull to act as a shell around the typical single-hulled tanker. The shell provided by the second hull enables the inside hull to remain intact even when the outside hull has been punctured or torn.[9] The purpose of the extra protection is to minimize oil leakage.[10] This requirement provides for the transition of tankers already in use.[11] Vessels that have a single hull may operate unchanged until January 1, 2010,[12] while those vessels with a double bottom or double sides (but not a complete double-hull) may operate 'as is' until January 1, 2015.[13]

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[5] *See* S. REP. NO. 101-99, at.1-2 (1990).

[6] *See* <http://www.oilspill.state.ak.ussettlement/ settlement.htm> (March 8, 2000). The resulting settlement between the State of Alaska, Exxon and the United States called for $25 million in criminal penalties to be paid by Exxon (after they were given a credit of $100 million for assisting in the clean-up), $100 million in restitution for environmental damage, and $900 million as a civil settlement to be paid over 10 years with additional liability to local governments of $100 million should the cost figures used in the settlement prove to be inadequate to restore their resources.

[7] *See* 46 U.S.C.A. §3703a (1990).

[8] OPA 90 at (a)1-2.

[9] *See* Tammy M. Alcock, *"Ecology Tanks" and the Oil Pollution Act of 1990: A History of Efforts to Require Double-Hulls on Oil Tankers*, 19 ECOLOGY L. Q. 97, 108-09 (1992).

[10] *See id.*

[11] *See* OPA 90 at (c)(4)(A).

[12] *See id.*

[13] *See id.* at (c)(4)(B).

B. Maritrans

Maritrans owns a domestic fleet of barges used for the transport of oil.[14] Thirty-seven of the vessels in the fleet were affected by OPA 90, a substantial portion of Maritrans' fleet.[15] By the date of trial, eleven vessels had been sold or scrapped because of the regulation. Approximately ninety percent of Maritrans' remaining vessels were not double-hulled as required by OPA 90 and must either be retrofitted or eventually taken out of service.[16] Only sixteen percent of the fleet's overall carrying capacity of 4.3 million barrels of oil were compliant.[17] Seventy-four percent of carrying capacity was invested in vessels with single hulls and single bottoms which would have required extensive retrofitting to meet the regulations by 2010.[18] The remaining ten percent of carrying capacity was represented by vessels with double bottoms which must be retrofitted to meet the regulations by January 1, 2014.[19]

At trial, Maritrans argued that OPA 90 was a regulatory taking of its corporate property because retrofitting their non-compliant vessels was not economically feasible.[20] Maritrans also argued that the regulation eliminated any market in which they could have previously sold the non-compliant vessels.[21] The company stated that this frustration and depravation of investment-backed expectations as to the useful working lives of their vessels entitled them to compensation.[22] Maritrans claimed it felt the economic impact immediately even though the dates for compliance with OPA 90 were fifteen to twenty-five years in the future.[23] The company reasoned that the damage to investment-backed expectations was inflicted on the date OPA 90 was enacted into law, for it was at this moment that "the future revenue stream was terminated as of a date certain for each vessel."[24]

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[14] *See Maritrans*, 40 Fed. Cl. 790, 791.
[15] *See id.*
[16] *See id.*
[17] *See id.*
[18] *See id.*
[19] *See id.*
[20] *See id* at 792.
[21] *See id.*
[22] *See id.*
[23] *See id.*
[24] *Id.* at 791.

C. History of the Case

Maritrans brought suit in the Federal Court of Claims asserting that OPA 90 was a compensatory taking of its property as defined by the Fifth Amendment.[25] The court of claims applied the two-tiered Takings Clause analysis used by the Federal Circuit of the United States Court of Appeals in *M & J Coal Co. v. United States*[26] as set forth in *Lucas v. South Carolina Coastal Council*.[27] At issue in *M & J Coal* was whether the Office of Surface Mining's refusal to allow mining that could produce significant damage to structures above the coal seam constituted a compensable taking.[28] M & J Coal Co. ("M & J") stated that they had purchased from the property owners the rights to mine the coal seam beneath their property "without being liable for any injury or damage done to the overlying surface."[29] They claimed that a taking occurred when the Office of Surface Mining placed restrictions on these property rights.[30]

The two-tiered analysis applied by the court of appeals required M & J to show that the use or interest allegedly taken by the government was a "'stick in the bundle of property rights' acquired by the owner."[31] The second inquiry is whether government action interfered with that property right. In making these inquiries, the court held that the M & J purchased only the right to mine coal, not the right to mine in a way that endangered public health and safety.[32] The court concluded that the second inquiry in the two-tier analysis was unnecessary because M & J failed to satisfy the first-tier by showing a property right existed.

As stated above, if the first-tier demonstrates that a property right exists, then the court seeks to determine whether government interference with that right has occurred. This further inquiry is comprised of three factors which were outlined in *Penn Central v. City of New York*.[33] *Penn Central* requires that a court examine (1) the character of the government's action; (2) the economic impact of the

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[25] *See id.*

[26] 47 F.3d 1148 (Fed. Cir. 1995). The OSM had issued a cessation order for M & J to stop the mining of coal pillars which had been left as supports for the overlying land by earlier mining operations.

[27] 505 U.S. 1003 (1992).

[28] *See M & J Coal*, 47 F.3d at 1150.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1154 (citing *Lucas*, 112 S. Ct. at 2889).

[32] *See id.*

[33] 438 U.S. 104 (1978).

government's action on the claimant; and (3) the interference with the investment backed opportunities of the claimant resulting from the governmental action in question.[34] These determinations are made on a case-by-case basis.

In July 1997, the court of claims ruled that at the time Maritrans built or acquired each of its vessels it could not have reasonably foreseen that double-hulls would be required during their estimated working lifetime.[35] This holding satisfied the third factor in the *Penn Central* analysis in that OPA 90 interfered with the investment backed expectation of Maritrans when it purchased its single-hulled vessels. The analysis articulated in *Penn Central* presumes the existence of a valid property right. After the court of claims' decision in *Maritrans*, however, the government asked the court to re-examine the *Penn Central* assumption by asking whether Maritrans *actually* possessed a property right in their vessels. In light of this request, the government also re-asserted the rule that no compensable taking can occur without a valid property interest.[36]

The government's request dated back to April 1997 when the United States moved for a dismissal of the action for failure to state a claim upon which relief could be granted.[37] More specifically, the government claimed that Maritrans did not possess a property right within the meaning of the Fifth Amendment.[38] The government's motion was denied by the court on grounds that:

> whether an industry is so highly regulated as to deprive its participants of a compensable property interest in maintaining operations is a matter of degree, and perhaps of fact. The U.S. shipping industry may be highly regulated, but we are not prepared to rule that plaintiffs cannot prove a set of facts that would entitle them to relief.[39]

Notwithstanding the denial of the government's motion, the question of whether Maritrans could prove the existence of a property right as a matter of fact still remained.

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[34] *See id.* at 2648.
[35] *See Maritrans*, 40 Fed. Cl. 790, 793.
[36] *See id.* at 791.
[37] *See id.*
[38] *See id.*
[39] *Id.*

II. ISSUES AND LEGAL BACKGROUND

A. From "Invasion" to "Regulation": The Early Stages of the Takings Concept

In 1791 the Fifth Amendment to the Constitution of the United States was ratified, stating in part that "private property [shall not] be taken for public use, without just compensation."[40] This portion of the Fifth Amendment, known as the Takings Clause, was selectively incorporated into the Fourteenth Amendment to the Constitution, thereby applying the provisions and restrictions of the clause to the individual states.[41] Early case law construed the Takings Clause language narrowly, holding that compensation was only necessary when the government physically invaded or destroyed private property.[42]

The rule that any physical invasion of private property by the government results in a compensable taking is still valid. For instance, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[43] the Court held that even the limited space required for the running of a television cable through the walls of a building and the addition of connection boxes on the building's roof were sufficient invasions of the cable company's private property to require compensation by the government. Through the 1920s, however, the United States Supreme Court rejected arguments that government regulations were compensable takings when they did not result in governmental invasion or occupation of private property, even though these regulations sometimes created great hardships on property owners.[44]

The Court's definition of compensable takings significantly broadened in 1922 with Justice Holmes' majority opinion in

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[40] U.S. CONST. amend. V.

[41] *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 17 S. Ct. 581 (1897).

[42] *See, for example,* Lawton v. Steele, 152 U.S. 133 (1894) (finding no taking when "game and fish protector", appointed by state, destroyed nets used for illegal fishing); Pumpelly v. Greenbay and Mississippi Canal Co., 80 U.S. 166 (1872) (finding the government to have "taken" property by flooding it during the creation of a government authorized dam).

[43] 458 U.S. 419 (1982).

[44] *See* Robert K. Best, *Evolution and Thumbnail Sketch of Takings Law*, SC43 ALI-ABA 1 at 3-4 (1998) (discussion of pre-1920's takings cases.) *See also* Mugler v. Kansas, 8 S. Ct. 273 (1887)(state prohibition of brewery operation held not a taking); Reinman v. Little Rock, 35 S. Ct. 511 (1915)(city prohibition of livery stables held not a deprivation of property within the meaning of the fourteenth amendment); Hadacheck v. Sebastian, 36 S. Ct. 143 (1915) (prohibition of brickyard held not a taking).

Pennsylvania Coal Company v. Mahon,[45] which effectively expanded the field of compensable takings to include regulatory takings[46] In *Mahon*, Pennsylvania Coal Company requested compensation for the results of a governmental regulation which disallowed their mining of coal in areas where mining would likely cause damage to homes built above the coal seams.[47] In earlier cases, the Court had frequently held that it is within the police powers of a state to harm one person's property in order to achieve the greater good of the community.[48] Justice Holmes, however, asserted that government could go too far in its exercise of police powers and that the determination of whether the compensation should be awarded is a factual one.[49] In support of the case-by-case approach Holmes stated that

> As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.[50]

Furthermore, in analyzing those relevant facts, Holmes stated that great weight should be placed on the judgment of the legislature.[51] Holmes stopped short, however, of declaring that legislative prerogative was an automatic bar to regulatory takings actions. "The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its

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[45] 260 U.S. 393 (1922).

[46] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[47] *See id.* at 412.

[48] *See Mugler*, *Reinman* and *Hadacheck supra*, note 43.

[49] *See M & J Coal Company*, 47 F.3d 1148, 1155 (Fed. Cir. 1995). (The Plaintiff in *M & J Coal* argued that Justice Holmes' argument in *Mahon* required that they also be compensated for their inability to mine. The Court in *M & J Coal*, however, distinguished the two cases stating that *Mahon* involved conflicting private property rights, whereas the issue before them involved private rights versus public welfare. The Court also noted that in some cases the rights to mine directly underneath the houses, free from liability, was granted by previous owners.).

[50] *Mahon*, 260 U.S. at 413.

[51] *See id.* at 414.

constitutional power."[52] Therefore, although Holmes stopped short of requiring the regulation in question to withstand the strict scrutiny applied to laws abridging free speech[53] or those which distinguish between race or ethnicity[54] he would still require the government demonstrate more than a simple rational basis for their action. The burden of proof, however, remains with the plaintiff.

B. *Penn Central* and the Refinement of the Regulatory Takings Concept

Penn Central Transportation Company v. City of New York[55] was a watershed case in takings law because it allowed governments to expand their police powers in the area of land-use regulation.[56] In prior cases, the Supreme Court invalidated regulations which usurped or severely diminished the property rights of an individual, and thus avoided deciding the cases on Fifth Amendment grounds.[57]

In *Penn Central*, the plaintiffs wanted to build a fifty-five story office building above the Penn Central Station's Grand Central Terminal. Their plans were thwarted when the New York City Landmarks Preservation Commission exercised statutorily given veto power of construction projects and denied approval to build the office building.[58] Plaintiffs asserted that this denial amounted to an arbitrary deprivation of their property rights in the air-space above the terminal.[59] The Court applied the three factor test described above[60] and held the regulation did not amount to a taking because the Plaintiffs were left with reasonable use of their property and had other beneficial means of improving upon their property.[61]

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[52] *Id.*

[53] *See* Schenk v. Pro-Choice Network of Western New York, 117 S. Ct. 855 (1997) (holding certain injunctions held to be burdens on the free speech of protesters at abortion clinics).

[54] *See* Regents of the University of California v. Bakke, 98 S.Ct. 2733, (1978) (limiting states ability to use race as criteria for application to a state medical school).

[55] 438 U.S. 104 (1978).

[56] *See* Donald C. Guy and James A. Holloway, *The Direction of Regulatory Takings Analysis in the Post-Lochner Era*, 102 DICK. L. REV. 327, 336-39 (1998).

[57] *See* Jacqueline Kerry Heyman, *Regulatory Takings: When is Enough, Enough?*, 11 J. NAT. RESOURCES & ENVTL. L. 325, 328 (1995-96).

[58] *See Penn Central*, 438 U.S. at 117.

[59] *See id.*

[60] *See* section I. B., *supra*.

[61] The three factors include: the character of the governmental action; the regulation's economic impact on the claimant, and the regulation's interference with distinct investment-backed expectations of the claimant. *See Penn Central*, 438 U.S. at 119.

Penn Central is significant in holding that although a regulation can result in a compensable taking, the harm suffered by the property owner must be balanced with the benefits granted the community through the regulation. A diminution of value in one's property will not always be a taking.[62] However, Justice Brennan, writing for the majority in *Penn Central*, stated that compensation is required when the regulation is not reasonably necessary to effectuate a public purpose or if it has an unduly harsh impact on the owner's use of the property.[63]

Lucas v. South Carolina Coastal Council[64] is an example of the "unduly harsh" regulations that Brennan accounted for in his *Penn Central* opinion. Lucas owned coastal lots on which he wanted to build single-family homes similar to homes that he previously had built on adjacent parcels. Two years after his purchase of the property, South Carolina passed regulations forbidding any housing development on the parcels. Lucas filed suit claiming that the effects of the regulation amounted to a taking of his property in that it "deprive[d] [him]of any reasonable economic use of the lots, ... eliminated the unrestricted right of use, and render[ed] them valueless."[65]

The United State Supreme Court agreed.[66] In the opinion for the Court, Justice Scalia stated that "takings jurisprudence ... has been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."[67] The 'bundle of rights' referred to by Scalia is the collection of various rights which make up the concept of property. These rights can include the right to possess, use and sell property and may not always require ownership.[68] For instance, a property owner's granting of an easement to another party is the transfer of a "stick" from the overall bundle of sticks which comprise all property rights.[69] The government's granting of public access to a beach, for instance, may be considered the forced allocation of one of

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[62] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 512 (1997).

[63] Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Homes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 690 (1996).

[64] 505 U.S. 1003.

[65] *Id.* at 1009.

[66] *See id.*

[67] *Id.* at 1027.

[68] *See* Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 MARQ. L.R. 11 (1997).

[69] *See id.* (discussing the vertical and functional segmentation of this bundle of rights).

the rights associated with property ownership and may therefore be defined as a taking.[70]

III. OPINION AND REASONING

A. The Government Asserts the Existence of Bright Line Tests

At the July 1997 trial, the court of claims refused to dismiss the case stating that Maritrans could possibly present a set of facts proving OPA 90 substantially interfered with their expectations about the useful life of their vessels.[71] Therefore, summary judgment was inappropriate because at least one of the *Penn Central* factors might be proven by Maritrans.[72]

The government claimed on appeal that the second tier requirements of *Penn Central* were without importance. They asserted that Plaintiffs should be denied compensation because their claim could not survive the first tier of analysis (whether the Plaintiff possesses property rights that can be protected),[73] and they proposed two "bright line tests" to prove this position.

First, the government claimed that Maritrans has no protected interest in their tankers because the oil shipping industry is highly regulated and therefore Maritrans should have expected that future changes in regulations might require the early retirement of its vessels.[74] In short, the first "bright line" test is that participants in highly regulated industries cannot claim rights to property that is already the subject of intense regulation. The government also claimed that Maritrans did not have a protected property right because the Supreme Court has held that "non-real" property is less protected than real property.[75] Therefore, the second "bright line" test for determining whether a property right is present is whether or not the property in question is real or personal.

1. Heavy Regulation and Takings

The government relied upon a trilogy of cases for its assertion that heavy regulation of a type of property precludes compensation for

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[70] *See* Kaiser Aetna v. United States, 100 S. Ct. 383 (1979).
[71] *See Maritrans*, 40 Fed. Cl. at 791.
[72] *See id.*
[73] *See id.*
[74] *See id.*
[75] *See id.*

that property in the event of a taking. Each of these cases involved a court's finding that in a highly (federally) regulated environment, some property interests may be disregarded by the government without compensation. In *Bowen v. Public Agencies Opposed to Social Security Entrapment*[76] the Court addressed whether or not a statutory change making it impossible for a state to withdraw from the Social Security program constituted the taking of property.[77] The Court said no property right existed because the termination of the provision in the original legislation which would have permitted a state to withdraw "was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare."[78] Accordingly, in *Maritrans*, the high-level of regulations of the oil transportation business reserved in Congress the ability to make changes to that regulatory scheme. The government's argument required the Court to accept that the oil transportation industry was a government construct, and OPA 90 was merely a change in the existing regulatory scheme.

Another case relied upon by the government, *Mitchell Arms Inc. v. United States,*[79] addressed the existence of property rights in a government issued permit to import automatic rifles from Yugoslavia. Mitchell was a federally-licensed firearms importer who sold to wholesale and retail distributors and worked under permits to import automatic weapons commonly known as "assault rifles".[80] On March 14, 1989, the Bureau of Alcohol, Tobacco and Firearms ("ATF"), announced a suspension of all pending applications for such permits. Mitchell contacted the ATF and was told that he could still operate under his existing permit. Relying on this information, Mitchell arranged for a shipment of rifles and negotiated an irrevocable letter of credit for their purchase as part of the transaction.[81] On March 21, the ATF announced the suspension of all importation of assault rifles, including those purchased under existing permits.[82] Mitchell sued to recover the funds he lost when he purchased the irrevocable letter of credit for goods he could no longer import.

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[76]477 U.S. 41 (1986).
[77]*See id.* at 42.
[78]*Id.*
[79]7 F.3d 212 (Fed. Cir. 1993).
[80]*See id.* at 213.
[81]*See id.* at 214.
[82]*See id.*

The court of appeals held that Mitchell's property right was ownership of the rifles purchased through the letter of credit.[83] ATF's suspension of the license only took a collateral right, the right to import the rifles into the United States, and loss of that collateral right alone did not amount to a loss in his ownership right.[84] The court held that "collateral rights in property" are not protected property rights and are thus not covered by the Fifth Amendment requirement of just compensation.[85] Similarly, the government in *Maritrans* assumes that the right to use single-hulled tankers to transport oil is a right which is only collateral to Maritrans' right to own the vessels.

The court in *Mitchell* relied in part on reasoning set forth in *Allied-General Nuclear Services v. United States*.[86] In *Allied*, the Court of Appeals held that even though the government had "actively promoted and induced the plaintiff's expenditure of over $200 million" to build a plutonium recycling plant and that the eventual withdrawal of their permit to operate that plant made his investment worthless, the plaintiff's inability to show either an express or implied contract meant that they possessed no property rights.[87]

The *Allied* court stated that "(t)he Constitutional control of Congress over the public fisc is an adverse factor against liability for mere 'jawboning' by government employee's not authorized to commit it to legal liability."[88] The *Allied* decision offers strong support for the government's claims that the withdrawal of Maritrans' permits to operate single-hulled tankers is fully within the regulatory discretion of Congress and did not justify compensation even if Maritrans relied on the government's previous approval of the vessels.

The *Maritrans* court rejected the government's contention that *Mitchell*, *Bowen* and *Allied* establish that the property of any industry which is highly regulated by the government cannot be invested with property rights. The situation in these three cases, the court held, are easily distinguishable from the case at bar.[89] Each of the cases cited by the government concerned industries closely linked with national security or which have a history of volatile regulations. Arms trading has always been influenced by the government's opinions toward which nations are acceptable trade partners, and those who deal in the

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[83] *See id.*
[84] *See id.* at 217.
[85] *Id.*
[86] 839 F.2d 1572 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 819 (1988).
[87] *Id.* at 1577.
[88] *Id.* at 1578.
[89] *See Maritrans*, 40 Fed. Cl. at 796.

importation of arms know that government involvement in their business is an ever-present fact of life.[90] Due to the high level of politicization and susceptibility to fears of foreign attacks or thievery, changes in national policy on nuclear weapons during times of turbulent foreign relations are to be expected.[91]

Finally, the regulation of the maritime shipping industry is certainly distinct from the government's decisions on how it operates Social Security, a program wholly created by Congress.[92] Shipping is not a creature of Congress, and has a tradition that greatly precedes the Congress or the Court itself. The court of claims also pointed out that the holdings of the federal courts have rendered some highly regulated industries all but exempt from a takings claim.[93] For instance, the banking industry has not been allowed to assert that the governmental seizure of failing financial institutions is a compensable taking.[94] No court has ever claimed that a highly regulated industry should not have the *Penn Central* factors applied to them at all. Instead, it is the nature of the above regulations that allow courts to consistently reach the same conclusion of no compensable taking.[95] Therefore, the oil transportation industry deserves a right to have its situation examined under the traditional *Penn Central* analysis.

It should also be noted that in 1980 the Coast Guard had proposed regulations requiring ocean-going vessels to have double-hulls. A study performed by the National Academy of Science, however, found that such a regulation would be a financial strain of such magnitude as to bankrupt some industry companies.[96] Subsequently, the Coast Guard withdrew the proposed rule change.[97] This fact makes it more difficult to hold that Maritrans knew that a double-hullrequirement was likely.

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[90] *See id.*

[91] *See id.* at 797.

[92] *See id.*

[93] *See* Branch v. United States, 69 F.3d 1571 (1995) (concerning the highly regulated banking industry and takings claims as applied to insolvent institutions); *see also* Concrete Pipe and Prods. of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993) (concerning the difficulty in proving a takings claim in ERISA cases).

[94] *See Maritrans*, 40 Fed. Cl. at 797.

[95] *See id.*

[96] *See id.* at 791.

[97] *See id.*

2. Property Rights are Less Favored for Personal Property

The government maintained that even if the court did not recognize a "bright line" test which excludes highly regulated industries from traditional takings jurisprudence, it should not ignore that a distinction has been drawn between the taking of real property and personal property. The government asserted that personal property has traditionally enjoyed less protection than real property from regulatory takings. For example, in *Andrus v. Allard,*[98] the Supreme Court held that a prohibition on the sale of eagle feathers did not constitute a taking even though it rendered the goods economically worthless. In *Andrus*, claimant was a dealer in Native American artifacts. Some of these artifacts included feathers from birds, the sale of which had been banned pursuant to the Eagle Protection Act and Migratory Bird Treaty Act. As with Maritrans, the personal property claimed to have been "taken" from Andrus was procured by the claimant before the regulation in question was promulgated.[99]

The government claims that the real/personal property distinction of *Andrus* was echoed in *Lucas*, when the Court held that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)."[100] This line of reasoning would allow the government to be successful in *Maritrans* even if the property in question was not *itself* highly regulated since personal property *in general* is highly regulated.

The highly regulated nature of personal property, so the argument goes, should put the owner on alert that it may also suffer further regulation by the state. Justice Scalia supports this particular argument by noting that within the history of the Takings Clause, real property, unlike personal property, has not had "the 'implied limitation' that the State may subsequently eliminate all economically valuable use."[101] In contrast, owners of real property have enjoyed, and even relied upon, the government's historical reluctance to regulate real property. Thus, there is not any notice to real property owners that a

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[98] 444 U.S. 51 (1979).
[99] *See id.* at 51.
[100] *Id.* at 797-98 (citing *Andrus*, 444 U.S. at 66-67).
[101] *Lucas*, 505 U.S. at 1028.

significant portion of their ownership rights could be terminated at any time.

The court of claims noted that Scalia's line of analysis was mere dicta and not binding upon the court.[102] The court also held that the government's argument amounted to only a modified version of the "highly regulated" exception disposed of above.[103] The court went on to conclude that neither *Lucas* nor *Mitchell* held that regulation, per se, precluded *all* property rights in personal property; rather, personal property has traditionally been treated differently from real property because it has always been more highly regulated.[104] Those limits, the court maintained, have been applied on an *ad hoc* basis.[105] For instance, in *Mitchell*, the court considered whether the industry in which the personalty is used depends upon a governmental regulatory scheme and whether or not property rights exist independent of that scheme.[106] However, if a regulation goes *beyond* the "background expectations" of the property owner, the loss of those rights are to be compensated.[107]

The court of claims stated that even though the oil shipping business was highly regulated, as was the system of import permits in place in *Mitchell*, Maritrans' use of shipping vessels was not dependent on a governmental regulatory scheme. [108] Instead, Maritrans relied on preexisting rights of use under the common law, none of which prevent OPA 90 from being a taking.[109] It also noted that the degree of regulation did not imply that the transportation of oil by tankers and barges was a nuisance, or otherwise inclined to be prohibited under common law.[110] Therefore, OPA 90 was not within Maritrans' "background expectations" and thus qualified as a compensatory taking.

In summarizing its position, the court relied upon the case of *Abrahim-Youri v. United States,*[111] a case that also originated in the court of claims. Abrahim-Youri was one of several individuals that had claims pending against the Government of Iran, following that nation's

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[102] *See Maritrans*, 40 Fed. Cl. at 799.

[103] *See id.* at 798.

[104] *See id.*

[105] *See id.* at 799 (discussion of B-West Imports, Inc. v. United States, 75 F.3d 633 (1996)).

[106] *See id.* at 798 (citing Mitchell Arms, Inc. v. United States, 7 F.3d 212 (1993)).

[107] *See id.*

[108] *See Maritrans*, 40 Fed. Cl. at 798.

[109] *See id.* at 798, n.17 (discussing how traditional property rights have inhered to vessel ownership).

[110] *Maritrans*, 40 Fed. Cl. at 799.

[111] 139 F.3d 1462 (Fed. Cir. 1997).

attack on the United States Embassy in Tehran.[112] As part of a settlement agreement with Iran, the United States government voided all citizen actions against Iran and offered to pay off all canceled claims out of a fifty million dollar fund created for this purpose.[113] The fifty million dollars was insufficient to meet all of the claims against Iran, and plaintiffs claimed that their loss of the right to sue Iran for the difference (per the government's agreement with Iran) was a governmental taking.[114] The Federal Court of Claims found no taking occurred and this decision was upheld by the Federal Court of Appeals.[115]

The court of appeals in *Abrahim-Youri* did not claim as support for their decision the heavy regulation of foreign investments or the fact that the loss was of personal property only, even though applying such blanket rules were available options.[116] Instead, they held that "those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity."[117] In other words, the court of appeals held that preexisting common law or state law "background principles" define the "sticks" of a property owner's bundle of rights. *Abrahim-Youri* contained those facts which the government in *Maritrans* claimed as proof of their argument, yet the court of appeals chose to ignore them. The *Maritrans* court used the silence of the court of appeals as precedent for their decision.

IV. CONCLUSION

The Federal Court of Claims has rejected the government's attempt to draw "bright lines" in the sometimes murky environment of Fifth Amendment Takings Clause jurisprudence. At a subsequent trial, the court of claims added nothing to the "bright lines" analysis though it did hold that the mere passage of OPA 90 did not result in a taking.[118] Accordingly, compensation may be due Maritrans once OPA 90 has required the retirement of vessels in its fleet, but just because a

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[112] *See id.* at 1474-65.

[113] *See Maritrans*, 40 Fed. Cl. at 799-80.

[114] *See id.*

[115] *See id.*

[116] *See id.* at 800 (In this instance, the personal property in question was the chosen by the Plaintiff in an action against the Iranian government).

[117] *Id.*

[118] *See id.*

legislative act has economic consequences does not mean a taking has occurred.[119]

Even though the *Maritrans* decision does not provide the bright lines that would add predictability to regulatory takings claims, in its rejection of those bright lines, the court of claims does help sharpen some areas of takings law. First, how highly regulated must an industry be before a regulatory taking is not compensable? The court suggests that the level of regulation, though a factor, must be viewed in light of the history of that regulation. Industries or activities that are traditionally susceptible to high levels of regulation may be subject to the taking of property rights without compensation on an *ad hoc* basis.[120] One would assume that this exception would apply to industries that produce toxic by-products, uncomfortable levels of noise, or intense odors.

Other highly regulated industries that may be precluded from compensation for regulatory takings are those that depend upon a governmental regulatory scheme. Both *Mitchell* (which involved the international arms sales industry) and *Allied-General* (which involved the nuclear energy industry) have traditionally relied upon the government's regulatory scheme in order to operate. In a sense, these industries exist only at the insistence of Congress. It appears reasonable, therefore, that any level of regulation, and perhaps even the complete prohibition against the activities central to these industries, must be contemplated if not expected by industry participants.[121] Put another way, when the nature of an industry's regulation obviates reasonable reliance upon currently existing property rights, a taking by further regulation cannot be said to interfere with the property owner's investment backed expectations. Therefore, the *Penn Central* test would not be applicable to property owners in that particular industry.

The *Maritrans* decision also holds that the historical context of regulations are important in determining whether a compensable taking has occurred. The court demands that for an industry to be essentially without property rights, it must have a history which recognizes this fact. One must look at the common law treatment of an industry or

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[119] *See id.*

[120] *See Maritrans*, 40 Fed. Cl. at 799.

[121] It should be noted that both *Allied-General* and *Mitchell* involve situations in which the claimant relied upon the promise of government officials when making their investment. In *Allied-General*, the claimant relied upon a permit issued by a government agency while in *Mitchell*, the claimant relied on verbal assurances that his permit would be honored. However, *Bowen* is perhaps a clearer example of a property right based upon a governmental regulatory schema, namely, the Social Security system.

property type and determine whether a regulatory taking is "off limits."[122] The trait of being "off limits" to non-compensated regulatory takings may be limited, however, as this trait most likely has a high correlation with those industries which rely on a scheme of governmental regulation or are traditionally held as nuisances under the common law.

Finally, is there a distinction between the taking of personal property and the taking of real property? The *Lucas* decision hints of such a distinction. Though not relied upon by the *Maritrans* court, Justice Scalia's dicta in *Lucas* may be a harbinger of the future direction of the Court under which a bright line test may emerge. Justice Scalia claims that because of the government's traditionally high level of involvement in commercial dealings and because personal property, historically and culturally, has been highly regulated, an individual's loss of a stick from the bundle of personal property rights is to be expected and thus not eligible for compensation upon a regulatory taking.[123]

Whether or not such a blanket rule covering personal property is workable or desirable need not be considered here, particularly since the court was also given facts which demonstrated that the government had earlier rejected such a regulation as unworkable. Even if Justice Scalia's reasoning had not been dicta, there was a strong argument that the implied risk inherent in personal property ownership had been waived by the government's own actions (the rejections of an earlier proposed double-hull requirement). But as *Mitchell* and *Allied* demonstrated, the Court has been reluctant to find the government to be liable for compensation even when the claimant invested in the property based upon the words or deeds of the government.

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[122] *See Maritrans*, 40 Fed. Cl. at 798.

[123] *See Lucas*, 505 U.S. at 1028.