

# ***Great Falls Mfg. Co. v. Garland*, 124 U.S. 581 (1888): The Final Battle after Thirty Years of Litigation over the Rights to Great Falls on the Potomac**

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*Great Falls Mfg. Co. v. Garland*, 124 U.S. 581 (1888): The Final Battle after Thirty Years of Litigation over the Rights to Great Falls on the Potomac

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**Abstract:**

The Great Falls Manufacturing Company owned extensive land and water rights at the Great Falls on the Potomac River at the time the United States decided to use the Great Falls as a water supply to the new capital in the City of Washington. In order to use its power of eminent domain, the federal government passed two Acts between 1858 and 1888. During that time, the United States and the Great Falls Manufacturing Company pursued 30 years of litigation to argue the just compensation that was due for the property taken at Great Falls. The 30 years ended in 1888 when the Supreme Court decided that it would not decide whether the second Congressional Act was unconstitutional since the company had waived that right. While the reasoning of this Supreme Court decision was slightly questionable, the potential effect on future takings victims were extreme.

**Discipline:**

Law, Eminent Domain, History, Maryland History, Supreme Court History, Land and Riparian Water Rights

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**I. INTRODUCTION**

The Great Falls at the Potomac River has long been the center of controversy due to its potential as a source of both water and power.<sup>1</sup> The fight for control over the Great Falls has continued for over 300 years, beginning in 1632.<sup>2</sup> In the mid-19<sup>th</sup> Century, the United States realized the potential for Great Falls, especially in connection with supplying water to the new capital in the City of Washington.<sup>3</sup> However, there were two companies that had asserted title to the land and water at Great Falls, specifically the Great Falls Manufacturing Company and the Chesapeake & Ohio Canal Company.<sup>4</sup> Therefore, the United States was forced to either purchase the lands owned by the companies or condemn the land and water rights through the power of eminent domain in order to build the necessary structures to supply water to the capital.<sup>5</sup>

Congress passed an Act, first, in 1858 that allowed the United States to take land under the power of eminent domain at Great Falls for building a dam to supply water to the City of Washington.<sup>6</sup> After this 1858 Act, the government took the Great Falls Manufacturing Company's land and water rights in order to begin building the dam at Great Falls.<sup>7</sup> The government was allowed to take the land after a condemnation proceeding was held and the United States paid the concluded award.<sup>8</sup> After building half

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<sup>1</sup> S. Doc. No. 790 , at 2 (1911).

<sup>2</sup> *Id.*

<sup>3</sup> *See* 11 Stat. 263, ch. 14 (1858).

<sup>4</sup> S. Doc. No. 790 at 2-6 (1911).

<sup>5</sup> Lozupone, Constantine E., "The History and Construction of the Potomac Dam at Great Falls, Maryland," Internet Archive, April 27, 1934,. Web. 17 Nov. 2015.

<sup>6</sup> 11 Stat. 263, ch. 14 (1858).

<sup>7</sup> *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 655-56 (1884).

<sup>8</sup> *Id.*

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of the dam, Congress again passed an Act in 1882 that allowed the federal government to take land at Great Falls in order to complete the aqueduct.<sup>9</sup> This second Act allowed the United States to take land before a condemnation proceeding, which meant individuals and companies with taken property were forced to submit claims for just compensation to the Court of Claims.<sup>10</sup> After 1882, the United States then took additional land and water rights from the Great Falls Manufacturing Company in order to complete the dam at Great Falls.<sup>11</sup>

The Great Falls Manufacturing Company, unwilling to let its land and water rights be taken for anything less than just compensation, pursued litigation against the United States between the years 1858 and 1888 in order to assert its claim under the 5<sup>th</sup> amendment.<sup>12</sup> This 30 year battle between the United States and the Great Falls Manufacturing Company for title to Great Falls came to a seeming end when the Supreme Court made its ruling in the case *Great Falls Mfg. Co. v. Garland*.<sup>13</sup> In this case, the Supreme Court held that the company had waived the right to contest the constitutionality of the 1882 Congressional Act by bringing a suit in the Court of Claims.<sup>14</sup> However, in doing so, the Supreme Court gave all future individuals the impossible choice between abiding by a potentially unlawful taking statute so as to not

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<sup>9</sup> 22 Stat. 168, ch. 294 (1882).

<sup>10</sup> *Id.*

<sup>11</sup> *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 655-56 (1884).

<sup>12</sup> See e.g., Brewer, Nicholas, "Message of the President of the United States communicating, in compliance with a resolution of the Senate, a copy of the opinion of Judge Brewer in the Great Falls land condemnation case," *The Making of Modern Law*, Gale, 2015. Web. 17 Nov. 2015; *Great Falls Mfg. Co. v. Garland*, 124 U.S. 581 (1888).

<sup>13</sup> 124 U.S. 581 (1888).

<sup>14</sup> *Id.* at 599.

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lose their right to just compensation and risking the chance that they receive no money in order to expend resources by bringing a private action to argue the statute's unconstitutionality.<sup>15</sup>

Many critics pointed out that the Great Falls Manufacturing Company had not put any use to the land or water at Great Falls during their time as a corporation and suggested that the company's true tactic was to wait to receive compensation from the federal government.<sup>16</sup> Regardless of its true intention, the company pursued litigation for 30 years in order to receive just compensation under the 5<sup>th</sup> amendment. Ultimately, the successor company, Great Falls Power Company, was able to settle the takings claim with the United States in 1902 for more money than the Great Falls Manufacturing Company ever received.<sup>17</sup>

**II. THE HISTORY OF GREAT FALLS & THE SURROUNDING LAND,  
WATER, AND PROPERTY RIGHTS**

**a. Discovering the Potomac River, Great Falls, and Nearby Colonies**

The Chesapeake Bay is the largest estuary in North America with tributaries from the District of Columbia and six states: Maryland, Virginia, West Virginia, Delaware, Pennsylvania, and New York.<sup>18</sup> The Potomac River is the second largest tributary that

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<sup>15</sup> *Id.* See *infra* Section VI.

<sup>16</sup> S. Doc. No. 790, at 5 (1911).

<sup>17</sup> Montgomery County Circuit Court (Land Records), *Deed Great Falls Power Company to the United States of America*, recorded November 26, 1903, Liber TD 27, Folio 138-139, MSA CE 63-133.

<sup>18</sup> "Maryland at a Glance: Chesapeake Bay – Charting the Chesapeake, 1590-1990," Maryland State Archives, Maryland Manual On-Line, 2015. Web. 10 Nov. 2015.

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flows into the Chesapeake Bay.<sup>19</sup> On the Potomac River is the Great Falls, which is a series of rocky rapids that extends for nearly three-fourths of a mile.<sup>20</sup> In 1608, Captain John Smith first discovered the Potomac River and named it the “Patawomeke.”<sup>21</sup> At that time the area around the Potomac River was populated by three Indian tribes: the Pamunkey, Powhatan, and Nanticoke.<sup>22</sup>

In 1632, Lord Baltimore George Calvert requested King Charles I to approve an establishment of the Province of Maryland.<sup>23</sup> When Lord Baltimore died later that year, Lord Baltimore’s son, Cecil Calvert, was responsible for taking over the duties as second Lord Baltimore.<sup>24</sup> On June 20, 1632, King Charles I granted charter to Lord Baltimore Cecil Calvert for constructing the Colony of Maryland on the Potomac River.<sup>25</sup> In 1688, however, King James II granted charter of the Potomac River to Lord Culpeper of the state of Virginia.<sup>26</sup> This was the first instance in which there was conflict over who had the right to the Potomac River and Great Falls.

In 1781 and 1783, Maryland and Virginia, respectively, adopted acts that confiscated the land that was originally granted by King Charles I and King James II in

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<sup>19</sup> “Maryland at a Glance: Chesapeake Bay – Charting the Chesapeake, 1590-1990,” *supra* note 18.

<sup>20</sup> H.R. Doc. No. 1, Pt. II, Vol. II., Appendix B B B, at 3232(1894).

<sup>21</sup> “River Basins of the United States: The Potomac,” U.S. Department of the Interior, Geological Survey. Web. 10 Nov. 2015.

<sup>22</sup> “River Basins of the United States: The Potomac,” *supra* note 21.

<sup>23</sup> “Cecilius Calvert (1605-1675),” Archives of Maryland: Biographical Series. Web. 10 Nov. 2015.

<sup>24</sup> “Cecilius Calvert (1605-1675),” *supra* note 23.

<sup>25</sup> *State of Maryland v. State of West Virginia*, 217 U.S. 1, 24 (1910).

<sup>26</sup> *Morris v. U.S.*, 174 U.S. 196, 223 (1899).

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order to establish the states' ownership of the territory.<sup>27</sup> Because both Maryland and Virginia considered themselves the rightful owner of the Potomac River, a question of which state had authority over the water arose. In order to resolve this conflict, the two states entered into The Compact of 1785.<sup>28</sup> This Compact was an agreement to be adopted by both states in order to establish the proper boundary line between the states as well as the issues of navigation and access to the Potomac River.<sup>29</sup> After both legislatures met in Mount Vernon to discuss and draft The Compact of 1785, both states adopted an act that ratified the agreement.<sup>30</sup> The Compact declared that both states “shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river.”<sup>31</sup> However, the Compact of 1785 did not resolve the boundary line between Virginia and Maryland.<sup>32</sup>

Years after The Compact of 1785, the two states passed conflicting laws regarding the river and continued to disagree about who had a right to the Potomac.<sup>33</sup> In

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<sup>27</sup> *Potomac Shores, Inc. v. River Riders, Inc.*, 219 Md. App. 29, 38 (2014).

<sup>28</sup> 1786 Md. Laws ch.1, “An Act to approve, confirm and ratify, the compact made by the commissioners appointed by the general assembly of the commonwealth of Virginia, and the commissioners appointed by this state, to regulate and settle the jurisdiction and navigation of Patowmack and Pocomoke rivers, and that part of Chesapeake bay which lieth within the territory of Virginia. Lib. TBH. No. A. vol. 584.”

<sup>29</sup> *Virginia v. Maryland*, 540 U.S. 56, 68 (2003) (quoting 1785–1786 Md. Laws ch. 1 (preamble)); *Potomac Shores, Inc. v. River Riders, Inc.*, 219 Md. App. 29, 38 (2014).

<sup>30</sup> *Potomac Shores, Inc. v. River Riders, Inc.*, 219 Md. App. at 38-39.

<sup>31</sup> *Virginia v. Maryland*, 540 U.S. 56, 62 (2003) (quoting Va. Code Ann. Compacts App., pp. 342–343 (Lexis 2001)).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 69.

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1874 Maryland and Virginia agreed to submit the question of their respective boundary claims on the Potomac River to arbitration.<sup>34</sup> The arbitrators issued their decision on January 16, 1877, which became known as the Black-Jenkins Award.<sup>35</sup> This arbitration concluded that Virginia had ownership only to “the soil to low-water mark on the [Virginian] shore of the Potomac” in addition to the right to remove and use the water in the Potomac River.<sup>36</sup> Therefore, the Black-Jenkins Award granted Maryland the entire bed of the Potomac River as well as the majority of the islands, including Conn’s Island and Falls Island.<sup>37</sup> Still, this arbitration did not prevent all future disagreements regarding ownership of the river, especially conflicts between a sovereign entity and private companies.<sup>38</sup>

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<sup>34</sup> *Potomac Shores, Inc. v. River Riders, Inc.*, 219 Md. App. 29, 39 (2014).

<sup>35</sup> *Virginia v. Maryland*, 540 U.S. 56, 62 (2003)

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See Potomac Shores, Inc. v. River Riders, Inc.*, 219 Md. App. at 42-43.

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**b. Great Falls Manufacturing Company & the Potomac River**

George Washington, before becoming President of the United States, established the Potomac Company in 1785 in the hope of creating transportation on the Potomac, since no boat was able to navigate the treacherous rocks and drops at Great Falls.<sup>40</sup> The State of Virginia then presented the Great Falls on the Potomac River to George Washington in 1788 as president of the Potomac Company.<sup>41</sup> The Potomac Company was granted exclusive, navigable rights to the Potomac River.<sup>42</sup> George Washington remained president of the Potomac Company until he became the first president of the United States in 1789.<sup>43</sup> This effort by George Washington seemed to catalyze the movement of obtaining interest in land and water rights at Great Falls. In 1824, the Virginia legislature

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<sup>39</sup> Photo from Washington D.C. at the Great Falls on the Potomac River from 1862. Found at: <http://www.old-picture.com/pics/civil-war/001/Potomac-Falls-Great-River.htm>.

<sup>40</sup> Preble, Edward, *The Encyclopedia of the Wars of the Early American Republic, 1783–1812*, at 539. ABC-CLIO, 2014. *Google Books*. Web. 10 Nov. 2015.

<sup>41</sup> S. Doc. No. 790, at 1 (1911).

<sup>42</sup> *Id.* at 4.

<sup>43</sup> Preble, *supra* note 40.



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revoked the Potomac Company's charter after it became bankrupt and granted charter, instead, to the Chesapeake & Ohio Canal Company, "providing that the waters of the Potomac should forever be devoted, first of all, to the maintenance of the company's canal for navigation purposes."<sup>44</sup> The next company to follow suit in obtaining charter and title to the Potomac River was the Great Falls Manufacturing Company.<sup>45</sup>

On February 4, 1839, Virginia passed an "Act to incorporate the Great Falls manufacturing company" for "the purpose of manufacturing ... at and near the Great Falls of the Potomac river."<sup>46</sup> The company obtained 750 acres of land below Great Falls on the Virginia shore soon after being chartered in Virginia.<sup>47</sup> Then in 1847, Maryland acknowledged the Virginia Act that incorporated the Great Falls Manufacturing Company.<sup>48</sup> The Corporation also secured certain riparian rights along with the purchase of real estate, but these riparian rights were never determined by the company or the states.<sup>49</sup> Later in 1854, the Company purchased Conn's Island, which sits in the Maryland territory of the Potomac River just before Great Falls.<sup>50</sup> With these purchases of land and water rights, the Great Falls Manufacturing company owned a total of approximately 900 acres across Maryland and Virginia shores and on the Potomac River by the year 1855.<sup>51</sup>

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<sup>44</sup> S. Doc. No. 790, at 1 (1911); *see also* Preble, *supra* note 40.

<sup>45</sup> *See infra* Section I.b.

<sup>46</sup> 1839 Acts of the General Assembly of Virginia, ch. 222.

<sup>47</sup> S. Doc. No. 790, at 5 (1911).

<sup>48</sup> Laws of Maryland, 1847-1848, p. 146.

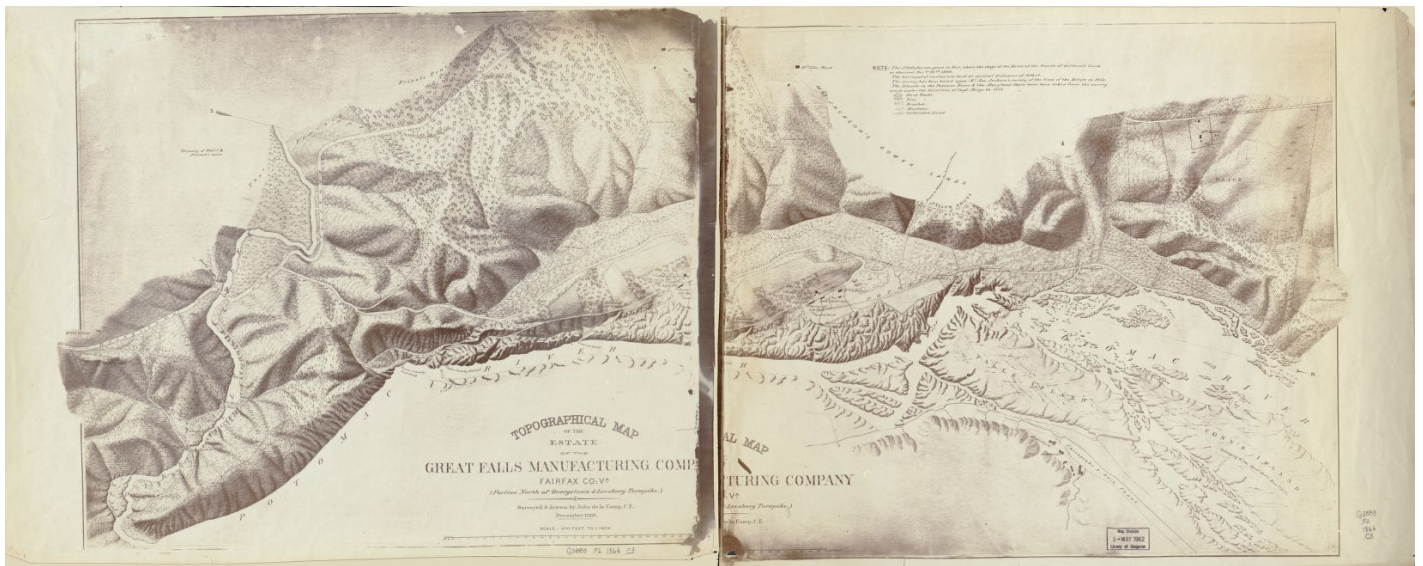
<sup>49</sup> S. Doc. No. 790, at 5-6 (1911).

<sup>50</sup> *Lozupone*, *supra* note 5.

<sup>51</sup> Price, J.E., "Power Plans for the Great Falls of the Potomac," *Electrical Review*. Vol. 44 No. 14: 501-502. Web.

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A contemporary article reveals that the Great Falls Manufacturing corporation's overall scheme for the property was "to operate its mills by direct water power, aided, when needed, by steam machinery." These plans included using 200 acres for building the mills along the Potomac River.<sup>53</sup> In addition to constructing mills, the company planned on using the other 700 acres to establish a city beside the water source.<sup>54</sup> This scheme for using the water of the Potomac seemed to be especially prudent since the "power of the falls was estimated at 13,000 horse-power, sufficient for 20,000 looms, aggregating 900,000 spindles."<sup>55</sup> The point on the Potomac River that was deemed to have the highest available power was at Great Falls since there are two currents and many

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<sup>52</sup> Land owned by Great Falls Manufacturing Company in a Topographical Map. Found at:  
<http://www.loc.gov/maps/?q=&fa=location%3Avirginia%7Clocation%3Afairfax+county>.

<sup>53</sup> Price, *supra* note 51.

<sup>54</sup> Price, *supra* note 51.

<sup>55</sup> Price, *supra* note 51.

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drops.<sup>56</sup> Although this was the Great Falls Manufacturing Company's objective, the corporation ultimately did not follow through with this plan.<sup>57</sup>

Between the date the company was incorporated, in 1839, and the year 1895, the Great Falls Manufacturing corporation did not improve upon the land or water that it had obtained.<sup>58</sup> The Great Falls Manufacturing Company did not make use of the land nor did it make any development on the Potomac River.<sup>59</sup> In fact, some went as far as saying that the corporation "displayed no signs of activity."<sup>60</sup> Perhaps because of this lack of progress, many believed that the Great Falls Manufacturing Company had an alternative scheme of purchasing real estate and riparian rights at Great Falls that the company foresaw the government wishing to obtain for supplying water.<sup>61</sup> This "activity" was described by government officials as "mulcting the United States when the latter attempted to utilize the waters at or above the [Great] falls."<sup>62</sup> Supporting the argument that the company was merely awaiting for the federal government to acquire and pay for the land and riparian rights at Great Falls, the Maryland General Assembly granted the federal government the right to condemn property in its state "for supplying the City of Washington with [w]ater" in 1853.<sup>63</sup> The year after the state legislature passed this Act, in 1854, the Great Falls Manufacturing Company obtained Conn's Island and adjoining

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<sup>56</sup> Price, *supra* note 51.

<sup>57</sup> Price, *supra* note 51. *See also* S. Doc. No. 790, at 5 (1911).

<sup>58</sup> S. Doc. No. 790, at 5 (1911).

<sup>59</sup> *Id.*

<sup>60</sup> Lozupone, *supra* note 5.

<sup>61</sup> S. Doc. No. 790, at 5 (1911).

<sup>62</sup> *Id.*

<sup>63</sup> 1853 Laws of Maryland ch. 179. Passed May 3, 1853. "AN ACT giving the assent of the State of Maryland, to such a plan as may be adopted by the President of the United States, for supplying the City of Washington with Water."

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riparian rights on Great Falls.<sup>64</sup> Although many believed that this was the ultimate scheme of the corporation, the United States government nevertheless had to pursue a condemnation proceeding in order to take the land owned by the Great Falls Manufacturing Company.<sup>65</sup>

**III. ESTABLISHING THE CITY OF WASHINGTON: TENSION  
BETWEEN NEEDING FRESH WATER SUPPLY IN THE CAPITAL &  
COMPLYING WITH THE 5<sup>TH</sup> AMENDMENT**

During the same time period that Maryland, Virginia and companies as landowners began fighting over title to the property along Great Falls, the federal government attempted to establish the capital in the City of Washington.<sup>66</sup> Between 1774 and 1800, the sessions of Congress were held in multiple different cities.<sup>67</sup> Specifically in the ten years from 1790 to 1800, the city of Philadelphia was the “temporary capital” of the newly formed United States.<sup>68</sup> On July 16, 1790, an Act of Congress was passed for the purpose of establishing a “permanent seat of government” alongside the Potomac River “located between the Eastern Branch of the Potomac and the Conogochoqueague Creek.”<sup>69</sup> In the year 1800, the session of the Sixth Congress was held in the City of Washington and all of the executive departments were moved to the new capital.<sup>70</sup> After

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<sup>64</sup> Lozupone, *supra* note 5.

<sup>65</sup> Brewer, Nicholas, “Message of the President of the United States communicating, in compliance with a resolution of the Senate, a copy of the opinion of Judge Brewer in the Great Falls land condemnation case,” *The Making of Modern Law*, Gale, 2015. Web. 17 Nov. 2015

<sup>66</sup> Fishback, Frederick L., “Washington City, Its Founding and Development,” *Records of the Columbia Historical Society*, Vol. 20 (1917): 194-224. Web.

<sup>67</sup> Fishback, *supra* note 66 at 199-200.

<sup>68</sup> Fishback, *supra* note 66 at 202.

<sup>69</sup> Fishback, *supra* note 66 at 208.

<sup>70</sup> Fishback, *supra* note 66 at 203-04.

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having established the new Washington City, the government then had to decide how best to supply water to the capital.

When the Indian tribes occupied the area now known as Washington D.C., there was a water supply in the form of springs and brooks.<sup>71</sup> Even after the capital was founded, the city largely relied on the springs and wells for water supply between 1800 and 1859.<sup>72</sup> During that time, in 1804 and 1808, the city built pipelines from the Ridge Spring, which was one of the largest springs in the capital.<sup>73</sup> “This is the first record of water supply for public use by pipeline in the city.”<sup>74</sup> Many pipelines were constructed to extend from the other springs in the city of Washington in order to supply water to public buildings. However, these waterlines had to be updated and maintained on a year to year basis.<sup>75</sup> Private homeowners in the capital had the choice of going to public pumps or building wells on their own property, which was mostly done by the wealthy residents.<sup>76</sup> However, by 1850 the population of the capital had increased to about 51,000, and a water supply coming solely from wells and pipelines from springs was no longer adequate to satisfy the growing city.<sup>77</sup>

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<sup>71</sup> Johnson, Paul M., “Geology, Ground Water Resources of Washington, D.C., and Vicinity.” Geological Survey Water-Supply Paper 1776. United States Government Printing Office, Washington, 1964. Web. 10 Nov. 2015.

<sup>72</sup> Johnson, *supra* note 71.

<sup>73</sup> Johnson, *supra* note 71 at 44.

<sup>74</sup> Johnson, *supra* note 71 at 44.

<sup>75</sup> Johnson, *supra* note 71 at 45.

<sup>76</sup> Johnson, *supra* note 71 at 46.

<sup>77</sup> Johnson, *supra* note 71 at 46.

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This is largely the reason why several surveys to analyze public water supply in the city of Washington was conducted soon after 1850.<sup>78</sup> Specifically, in the years between 1850 and 1852, an extensive study was conducted for the best way to supply water to the city.<sup>79</sup> Throughout all of the surveys and studies, much consideration was given to the water just above Great Falls on the Potomac River.<sup>80</sup> However, this was not a new concept for water supply. In 1798, George Washington wrote in a letter “that the water of the Potomac may, and will be brought from above the Great Falls into the Federal City, which would, in future, afford an ample supply of this object.”<sup>81</sup> At the end of the surveys, General Totten, who was one of the surveyors, suggested that a dam be built at Great Falls.<sup>82</sup> This idea was more concretely developed by Captain M. C. Meigs of the Corps of Engineers in his report that detailed a project of how to derive water from the Potomac above the Great Falls into the city of Washington.<sup>83</sup>

After these surveys and suggestions, the Thirty-Second Congress then passed a provision in the general appropriations bill in 1853 stating, “To be expended under the direction of the President of the United States for the purpose of bringing water into the city of Washington, upon such plans and from such places as he may approve, one hundred thousand dollars: Provided, That if the plan adopted by the President of the

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<sup>78</sup> Johnson, *supra* note 71 at 46.

<sup>79</sup> Johnson, *supra* note 71 at 46.

<sup>80</sup> Johnson, *supra* note 71 at 46.

<sup>81</sup> Johnson, *supra* note 71 at 46 (quoting Orndorff, R. L., “Introductory History, in Public water systems, District of Columbia: District of Columbia,” Dept. Sanitary Eng. Inf. Pamph., 1962, at 29).

<sup>82</sup> “The Great Falls: The Manufacturing Company and the Washington Water Supply,” *The Baltimore Sun* 26 Mar. 1894, web.

<sup>83</sup> S. Doc. No. 48 (1853).

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United States should require water to be drawn from any source within the limits of Maryland, the assent of the legislature of that State should first be obtained.”<sup>84</sup>

Because the President ultimately approved the plan for an aqueduct from the Maryland shore to Conn’s Island with a conduit of 9 feet, the federal government still had to wait for assent from the Maryland state legislature before starting construction.<sup>85</sup> The federal government was required to obtain Maryland’s condemnation power because in the 1850s the federal government could not exercise eminent domain within a state’s territory.<sup>86</sup> In fact, the federal power of eminent domain was not established until 1875.<sup>87</sup> By May 3, 1853, Maryland obliged by passing An Act giving the assent of the State of Maryland, to such plan as may be adopted by the President of the United States, for supplying the City of Washington with Water.<sup>88</sup> This Act bestowed the federal government with the State of Maryland’s power of eminent domain in order to use the water of the Potomac River for the new capital’s supply.<sup>89</sup> Specifically, the Act stated that “if the United States...cannot agree with the owners for the purchase of any land which may be required for the purposes aforesaid... it shall nevertheless be lawful for the United States to enter upon such lands, and to take.”<sup>90</sup>

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<sup>84</sup> 10 Stat. 206, ch. 97 (1853).

<sup>85</sup> Moore, Charles. *Purification of the Washington Water Supply*. Washington, Government Printing Office, 1901. *Google Books*. Web. 10 Nov. 2015.

<sup>86</sup> William Buade, *Rethinking the Federal Eminent Domain Power*, 122 *YALE L. J.* 1738, 1741-42 (2013).

<sup>87</sup> *See Kohl v. United States*, 91 U.S. 367 (1875).

<sup>88</sup> 1853 Laws of Maryland, ch. 179.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (emphasis added).

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After being given Maryland's power of eminent domain, the federal government still had to decide how best to build a dam on the Potomac River as quickly as possible in order to supply the capital with water when certain companies owned land and water rights at Great Falls. At the time, the three main landowners beside Great Falls were the Great Falls Manufacturing Company, the Chesapeake and Ohio Canal Company, and the United States.<sup>91</sup>

Since the Great Falls Manufacturing Company acquired title to Conn's Island in 1854, the government had to either purchase the right to the island from the corporation or use its powers of eminent domain to proceed with a taking of the island and other land rights.<sup>92</sup> Although there is some indication that the United States attempted to make offers to buy the land from the Great Falls Manufacturing Company between 1853 and 1858, the government was ultimately forced to resort to a taking of the land necessary to build the dam at Great Falls.<sup>93</sup> The federal government passed An Act to acquire certain Lands needed for the Washington Aqueduct, in the District of Columbia on April 8, 1858, which allowed the United States to take the land at Great Falls *after* two events: (1) a jury decided upon the proper value of the land, and any damages, of the government's use or taking; and (2) that the determined value is paid by the United States to that owner.<sup>94</sup>

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<sup>91</sup> H.R. Doc. No. 1, Pt. II, Vol. II., Appendix B B B, at 3232(1894).

<sup>92</sup> Lozupone, *supra* note 5.

<sup>93</sup> See 11 Stat. 263, ch. 10 (1858) ("Whereas it is represented that the works of the Washington aqueduct, in the District of Columbia, are delayed in consequence of the proprietors' refusal, in some cases, to sell lands required for its construction at reasonable prices...").

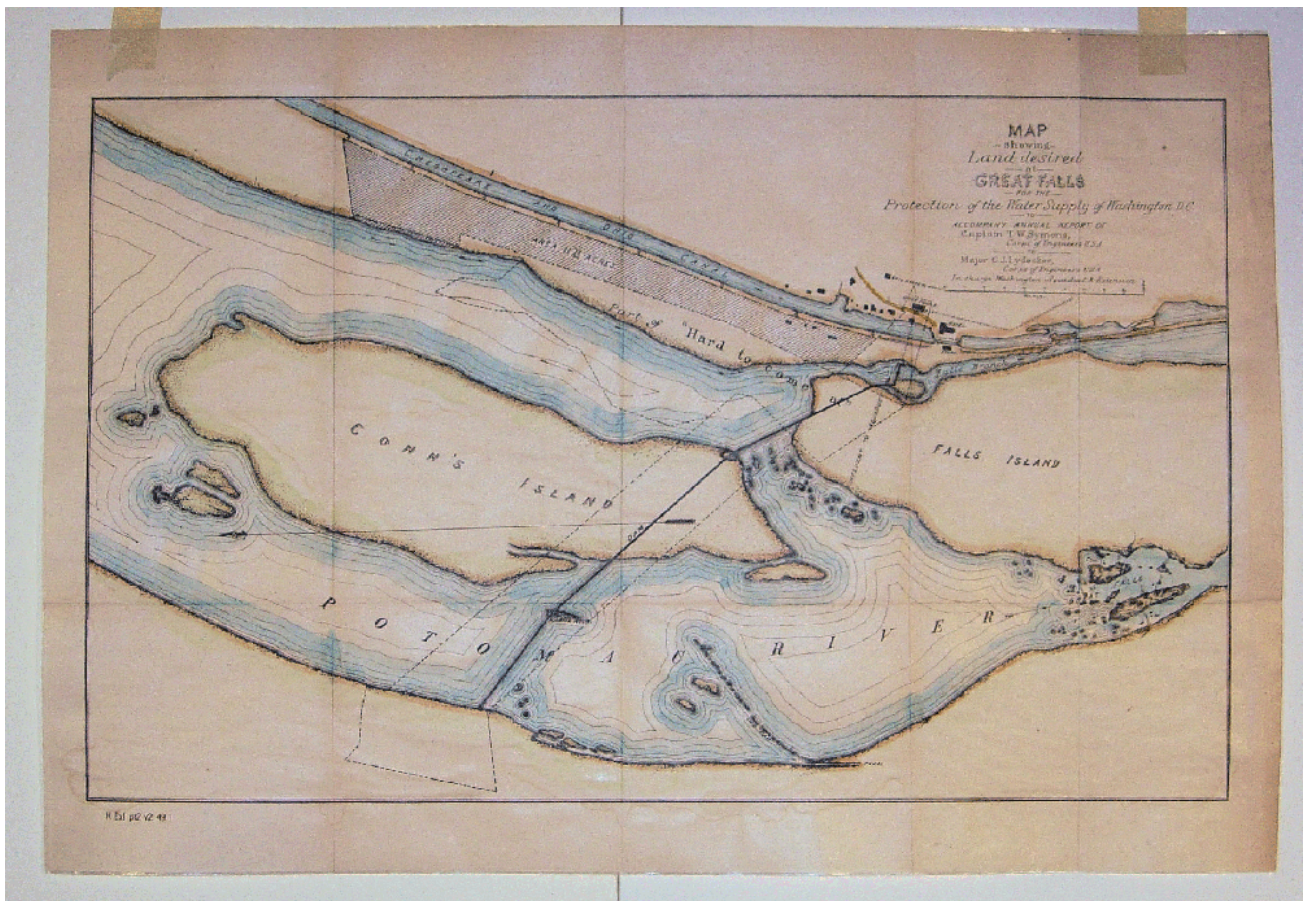
<sup>94</sup> 11 Stat. 263, ch. 10 (1858).



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After this Act was the beginning of 30 years of litigation between the Great Falls Manufacturing Company and the United States over the value, damages, and rights to Conn's Island in Great Falls of the Potomac River.<sup>95</sup> In the meantime, the United States began planning and building the dam from the Maryland shore to Conn's Island in 1864 and finished this portion of the aqueduct in 1867.<sup>96</sup>



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<sup>95</sup> See *infra* Section IV.

<sup>96</sup> *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 655-56 (1884).

<sup>97</sup> Image of the projected route of the aqueduct at Great Falls through Conn's Island. Found at: <http://glenecho-cabinjohn.com/GF-01.html>.

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**IV. THE BATTLE BETWEEN GREAT FALLS MANUFACTURING  
COMPANY AND THE U.S. FOR OWNERSHIP OF GREAT FALLS**

Although in many cases a taking is resolved with a single condemnation proceeding that grants the landowner value and gives possession of the land to the sovereign entity, litigation between the Great Falls Manufacturing Company and the United States regarding the taking of the land and water at Great Falls prolonged for 30 years.<sup>98</sup>

**a. The 1858 Condemnation Proceeding in the Circuit Court for  
Montgomery County**

The 30 year battle began when the United States brought a condemnation proceeding against the Great Falls Manufacturing Company in the Circuit Court for Montgomery County on August 20, 1858.<sup>99</sup> The jury in this proceeding awarded the Great Falls Manufacturing Company \$150,000 for “all damages which the said company have sustained, do sustain, and will sustain by erecting said dam for said aqueduct through said pieces of land” based on the company’s argument that their rights to Conn’s Island, the Toulson Tract on the Virginia shore, and connected riparian rights were impaired by the dam.<sup>100</sup> Specifically, the jury calculated that just compensation for building the dam and diverting water was \$150,000 because the jurors included injuries to the company’s riparian rights in connection with a track of land on the Virginia

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<sup>98</sup> H.R. Doc. No. 1, Pt. II, Vol. II., Appendix B B B, at 3232(1894).

<sup>99</sup> Brewer, *supra* note 65 at 11-17. This suit was brought in a Maryland court as opposed to a federal court because the United States was using Maryland’s power of eminent domain to take certain land and water within Maryland territory.

<sup>100</sup> Brewer, *supra* note 65 at 11-17.

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shoreline, called the Toulson Tract, in addition to the damages to the corporation's title to Conn's Island caused by diverting the water in the Potomac River.<sup>101</sup>

However, the United States requested the Court to set aside the award made by the jury in the 1858 condemnation proceeding.<sup>102</sup> Judge Nicholas Brewer on the Circuit Court for Montgomery County decided to grant the federal government's motion to overturn the jury's award of just compensation.<sup>103</sup> Judge Brewer reasoned that the "damages were extravagant and excessive" because the jury had wrongly considered the affects to the riparian rights on the Virginia shore as well as the damage of having water in the Potomac diverted.<sup>104</sup> Judge Brewer opined that it was improper for the jury to award compensation based on the land rights in Virginia.<sup>105</sup> This was error because the taking in this case only occurred on the land in Maryland and the water of the Potomac, which was owned by the state of Maryland with the exception of Virginia's navigation rights.<sup>106</sup> In his opinion, Judge Brewer also supported his decision to overturn the jury's award because the juror's testimony showed that they awarded the sum of \$150,000 because of their belief that the company had a right to the entire bed of the Potomac River between Conn's Island and the Virginia shore, that the company had the exclusive right to divert and use the Potomac River between Conn's Island and the Virginia shore, and that the

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<sup>101</sup> Brewer, *supra* note 65 at 9.

<sup>102</sup> Brewer, *supra* note 65 at 11-12.

<sup>103</sup> Brewer, *supra* note 65 at 11-17.

<sup>104</sup> Brewer, *supra* note 65 at 16 (overturning the jury award because it was based on "gross mistakes, both as to law and to fact." Specifically, Judge Brewer rejected the jury's award because it included damages to land in Virginia, damages to water that was outside of the company's riparian rights, and damages for a future use of water power.).

<sup>105</sup> Brewer, *supra* note 65 at 16.

<sup>106</sup> Brewer, *supra* note 65 at 16.

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proper measure for just compensation was the “value of the water to the United States.”<sup>107</sup> In sum, Judge Brewer concluded that the jury had improperly awarded compensation based on damages to rights that should not have been considered and rights that the company did not have.<sup>108</sup> The United States’ motion to set aside the award was therefore granted.<sup>109</sup>

**b. Parties Agree to Arbitration After an Unresolved Condemnation Proceeding**

Since the condemnation proceeding did not calculate just compensation for the taking of Conn’s Island and the surrounding water channels, the Great Falls Manufacturing Company and the federal government conceded to submit the question of damages to federal arbitration.<sup>110</sup> On November 20, 1862, the president of the corporation at the time, Cyrus Moore, entered into a contract in which the company and the Secretary of the Interior agreed that the amount of damages to the company’s land and riparian rights shall be calculated by five arbitrators: Jesse L. Williams of Indiana; the Hon. B. R. Curtis of Massachusetts; the Hon. G. Swan of Ohio; Linus Child, esq. of Massachusetts; and the Hon. George M. Dallas of Pennsylvania.<sup>111</sup> The arbitrators reviewed four separate plans for the dam in order to determine the appropriate award of damages for each proposal.<sup>112</sup> The next year, on February 28, 1863, the commissioners submitted a report with estimated damages of \$63,766 for the first plan of Dam A, \$50,000 for the second

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<sup>107</sup> Brewer, *supra* note 65 at 16.

<sup>108</sup> Brewer, *supra* note 65 at 16-17.

<sup>109</sup> Brewer, *supra* note 65 at 17.

<sup>110</sup> *Great Falls Mfg. Co. v. United States*, 16 Ct. Cl. 160, 160 (1880) *aff’d*, 112 U.S. 645 (1884).

<sup>111</sup> *Id.* at 166.

<sup>112</sup> *Id.* at 170.

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plan of Dam B, \$77,200 for the third plan of Dam C, and \$15,692 for the “plan 4<sup>th</sup>.”<sup>113</sup>

Ultimately the United States adopted the fourth plan, which consisted of building a dam from the Maryland shore to Conn’s Island.<sup>114</sup>



<sup>113</sup> *Id.* at 170-71.

<sup>114</sup> *Id.* at 170.

<sup>115</sup> Image of the four different plans submitted by the United States to the federal arbitrators in 1862. Found at: <http://msa.maryland.gov/megafile/msa/speccol/sc5700/sc5796/000024/000000/000010/tif/14446-4.tif>.

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Although the award calculated for this fourth plan was much less than the original jury determination in the condemnation proceeding, the Secretary of the Interior, J.P. Usher, refused to pay this award because he felt as though the company's land and riparian rights were not injured by the dam.<sup>116</sup> Specifically, the Secretary argued that the United States should be relieved from paying the just compensation because the act of diverting 65,000,000 gallons of water from the Potomac River at Great Falls did not damage the rights of the company since there is enough water supply for the City of Washington and the landowners of Great Falls to share.<sup>117</sup> The Secretary also argued that the Great Falls Manufacturing Company did not have proper title to Conn's Island and the connected riparian rights.<sup>118</sup> As such, the Secretary and the engineers reported to Congress that the damages to land and water rights "remains unsettled," rather than relaying to Congress that they need to pay the amount of just compensation that the arbitrators calculated.<sup>119</sup>

**c. Great Falls Manufacturing Company Brought Suit in Court of Claims to Recover Arbitration Award**

Because they had yet to receive payment for the government's taking of Conn's Island, Great Falls Manufacturing Company again took to the courts to receive just

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<sup>116</sup> *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 655 (1884) ("The sums being large, I did not feel justified in applying the [] existing appropriation for the completion of the aqueduct to the payment thereof, preferring to submit the whole matter to congress for its determination.").

<sup>117</sup> *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 655 (1884).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

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compensation.<sup>120</sup> Specifically, the company petitioned the Court of Claims in 1868 for an award of \$500,000, which they then amended to \$143,592 and then again lowered to \$15,692.<sup>121</sup> They argued that they were entitled to this compensation either because of the contract that they entered into with the Secretary of State, or in the alternative, that they were entitled to this award as just compensation for the taking of property and water along Conn's Island in Great Falls.<sup>122</sup> The United States took the position that the company had not followed a provision in the agreement that required the corporation to prove their title to the land.<sup>123</sup> The Court of Claims ultimately decided that the Great Falls Manufacturing Company had provided evidence of their title to Conn's Island and, as such, they were entitled to just compensation equal to the amount the arbitrators found to be sufficient for the completion of the fourth plan: \$15,692.<sup>124</sup>

The United States appealed this decision to the Supreme Court, which was decided on December 22, 1884.<sup>125</sup> In this case, the Supreme Court recognized that “the water-rights and privileges in question have for nearly 20 years been held and used by officers and agents of the government, without any compensation whatever having been made therefor to the claimant.”<sup>126</sup> Similarly, the Court made clear that even though the government took the land at Conn's Island due to an act of Congress, the United States is

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<sup>120</sup> See generally *Great Falls Mfg. Co. v. United States*, 16 Ct. Cl. 160 (1880) *aff'd*, 112 U.S. 645 (1884).

<sup>121</sup> *Id.* at 188.

<sup>122</sup> *Id.* at 189.

<sup>123</sup> *Id.* at 196.

<sup>124</sup> *Id.* at 200.

<sup>125</sup> *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884).

<sup>126</sup> *Id.* at 656

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still required to pay just compensation.<sup>127</sup> The Court ultimately affirmed the ruling of the Court of Claims because the Company's title to the land was valid and the compensation was sufficient.<sup>128</sup> This ruling signified the first time that the Great Falls Manufacturing Company was going to receive just compensation for the land and riparian rights that had been taken over 20 years before.<sup>129</sup> However, this Supreme Court case was not the last of the litigation between the corporation and the United States.<sup>130</sup>

**V. *GREAT FALLS MFG. CO. V. GARLAND*: IS THE CONGRESSIONAL  
ACT ALLOWING FOR THE COMPLETION OF THE DAM AT  
GREAT FALLS UNCONSTITUTIONAL?**

The case *Great Falls Mfg. Co. v. Garland* was initially filed in the Court of Claims after the Congressional Act of 1882 since this was the remedy that the Act required in order for parties with taken land to receive just compensation.<sup>131</sup> However, the Great Falls Manufacturing Company believed this Act to be unconstitutional. As such, the corporation brought a case before the Circuit Court for the District of Maryland in 1885 requesting an injunction to stop the United States from taking their land until just compensation was paid.<sup>132</sup> The case before the Federal District Court of Maryland regarding the constitutionality of the Act was then appealed to the Supreme Court, which

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<sup>127</sup> *Id.* Specifically, the Court held that this action was proper in the Court of Claims because it was based on an implied contract between the parties that was founded when Congress passed the Act requiring just compensation for land taken to construct the Washington Aqueduct.

<sup>128</sup> *Id.* at 658-59.

<sup>129</sup> *See id.* at 656-58.

<sup>130</sup> *See Great Falls Mfg. Co. v. Garland*, 25 F. 521 (C.C.D. Md. 1885) *aff'd*, 124 U.S. 581 (1888).

<sup>131</sup> *Great Falls Mfg. Co. v. Garland*, 25 F. 521, 521 (C.C.D. Md. 1885) *aff'd*, 124 U.S. 581 (1888). *See also Great Falls Mfg. Co. v. Garland*, 124 U.S. 581, 599 (1888).

<sup>132</sup> *Great Falls Mfg. Co. v. Garland*, 25 F. 521, 521 (C.C.D. Md. 1885) *aff'd*, 124 U.S. 581 (1888).



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issued its decision in 1888.<sup>133</sup> This Supreme Court Case is the final battle by the Great Falls Manufacturing Company to secure just compensation for the land and riparian rights that the United States took in order to complete the dam at Great Falls.

**a. The Backdrop of the Second Set of Litigation Between the Great Falls  
Manufacturing Company and the United States**

Around 1880, General Benjamin Butler<sup>134</sup> secured a majority stock in the Great Falls Manufacturing Company and later became President of the corporation.<sup>135</sup> As a lawyer who adamantly believed that the Act passed by Congress in 1882 to complete the dam from Conn’s Island to the Virginia shore was unconstitutional, Benjamin Butler argued the cases discussed below in order to prevent any further intrusion on the land and riparian rights of the Great Falls Manufacturing Company.<sup>136</sup> This desire by Benjamin Butler began the last cases in the long legal fight between the United States and the Great Falls Manufacturing Company over the rights and damages of Conn’s Island due to the construction of the Washington Aqueduct.<sup>137</sup>

In 1882, Congress passed “An act to increase the water-supply of the city of Washington, and for other purposes,” which allowed the federal government to take all necessary land and water rights via condemnation in order to complete the dam on the

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<sup>133</sup> *Great Falls Mfg. Co. v. Garland*, 124 U.S. 581 (1888).

<sup>134</sup> *See infra* Appendix A.

<sup>135</sup> “The Great Falls Company: Why a Defunct Corporation has been Revived,” *The Baltimore Sun*, 23 Apr. 1883. Web.

<sup>136</sup> *See Great Falls Mfg. Co. v. Garland*, 25 F. 521, 521 (C.C.D. Md. 1885) *aff’d*, 124 U.S. 581(1888).

<sup>137</sup> *See infra* Section VI.

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Potomac River from Conn's Island to the Virginia shore.<sup>138</sup> The Act explained that just compensation to be paid to the owners of taken land and water rights should be determined by three appraisers outside of the government and which need be accepted by the landowners.<sup>139</sup> In the event that the property owners do not accept the compensation determined by the appraisers, the Act permitted landowners to bring a suit in the Court of Claims if they wish to argue for a different amount of compensation.<sup>140</sup> After Congress passed the Act in 1882, the federal government began to intrude and build on Great Falls Manufacturing Company's land and water at Conn's Island and the Virginia Toulson Tract.<sup>141</sup>

**b. The Great Falls Manufacturing Company's Case Before the Court of  
Claims**

The Great Falls Manufacturing Company brought a claim before the Federal Court of Claims under the 1882 federal statute to receive compensation for the land and water rights taken to finish the aqueduct between Conn's Island and the Virginia shore.<sup>142</sup> In this suit, the Great Falls Manufacturing Company conceded that the taking of their land to complete the Washington aqueduct was legal.<sup>143</sup> However, the decision by the Court of Claims and the award to the Great Falls Manufacturing Company is unknown as the later decisions do not discuss these details.<sup>144</sup> The only issue before the Court of

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<sup>138</sup> 22 Stat. 168, ch. 294 (1882).

<sup>139</sup> 22 Stat. 168, ch. 294 (1882).

<sup>140</sup> 22 Stat. 168, ch. 294 (1882).

<sup>141</sup> *Great Falls Mfg. Co. v. Garland*, 124 U.S. at 597.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 598.

<sup>144</sup> *See generally id.*

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Claims was how much the company should be awarded as just compensation for the government taking their land between Conn's Island and the Virginia shore.<sup>145</sup> However, the Great Falls Manufacturing Company was unwilling to accept this award<sup>146</sup> because it filed suit against the United States in the Federal District Court of Maryland in 1885 to argue that the process proscribed by the 1882 statute was unconstitutional and the government should be enjoined from completing the dam.<sup>147</sup>

**c. 1885 Decision by the Circuit Court for the District of Maryland**

General Benjamin Butler, as the attorney representing Great Falls Manufacturing Company, argued that the 1882 Congressional Act requiring the completion of the dam at Great Falls was unconstitutional based on 5 grounds: (1) the Act does not allow just compensation to be lawfully adjusted and determined; (2) the Act does not allow for just compensation to be ascertained by a jury; (3) that the Act limited injured landowners from seeking a remedy in any court outside of the Court of Claims; (4) that the Act allows the United States only to pay the just compensation if wants to pay it; and (5) the Act does not require the government to wait to take the land until after appropriation of just compensation is completed.<sup>148</sup> In addition, Butler argued that the United States did not act in accordance with the 1882 Congressional Act and did not act in accordance with the rules of eminent domain when the Company "was notified, not that its lands and

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<sup>145</sup> *Id.* at 598-99.

<sup>146</sup> It is also possible that the Court of Claims decided that the Great Falls Manufacturing Company should not be awarded anything more for the land taken to complete the Washington dam.

<sup>147</sup> *Great Falls Mfg. Co. v. Garland*, 25 F. 521, 523-24 (C.C.D. Md. 1885) *aff'd*, 124 U.S. 581 (1888).

<sup>148</sup> *Id.* at 523-24.

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water-rights were to be condemned, but that 'in addition to acquiring to and for the United States (sic) any outstanding title to these lands at the Great Falls it is also proposed to acquire all water-rights implied in the possession of the same, or needed for purposes contemplated by the act under which these proceedings are taken.’<sup>149</sup> Because the Act authorizing the United States to complete the dam at Great Falls is unconstitutional, Butler argued that the Court should grant an injunction to stop any construction from Conn’s Island to the Virginia Shore.<sup>150</sup>

The Circuit Court quickly rejected the arguments that the Act was unconstitutional because it did not require an award determined by a jury since the requirement of a jury award was dispensed with in long string of case law.<sup>151</sup> Similarly, the Court determined the Act was constitutional regardless of the only remedy being in the Court of Claims because it is an “impartial tribunal” that has the knowledge necessary to make judgment on a petitioner’s complaint.<sup>152</sup> As to the question of unconstitutionality based on the allowed taking before compensation, the Court ruled that it is not necessary in all cases for compensation to occur before the taking of property when the taking entity is the “sovereign power itself.”<sup>153</sup> The Court supported this ruling by analyzing that “the courts have relaxed the strict rule applicable to private corporations in favor of the sovereign power itself, where the legislature has deemed the importance and urgency of the public use sufficient to call for taking the property before the compensation is

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<sup>149</sup> *Id.* at 52-26.

<sup>150</sup> *Id.* at 521.

<sup>151</sup> *Id.* at 525.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 529.

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ascertained, and where the solvency of the state was undoubted, its good faith unquestioned, an adequate method of ascertaining the compensation provided.”<sup>154</sup> For the remaining complaints of unconstitutionality, the Court simply reasoned that the government has in the past and, would likely in this case, paid the value determined by the Court of Claims as “just compensation.”<sup>155</sup>

In effect, the Circuit Court denied that the Act was unconstitutional and refused to grant the Great Falls Manufacturing Company an injunction.<sup>156</sup> Therefore, this was the second time the company was required to wait around for an uncertain period in order to adjudicate and receive just compensation for a taking of their land and riparian rights.<sup>157</sup> When the company merely tried to argue that it should be paid just compensation before the United States was allowed to invade their property, the Circuit Court “relaxed the strict rule” of eminent domain since the taking entity was the United States government rather than a private entity.<sup>158</sup> Because Butler was determined that this ruling was unjust, the Great Falls Manufacturing Company appealed the case to the Supreme Court.<sup>159</sup>

**d. 1888 Supreme Court Decision**

Although the Circuit Court for the District of Maryland had laid out the issue of the case extensively, Justice Harlan, writing for the Supreme Court, re-characterized the main question before the Court after considering the arguments made by the Great Falls

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 530.

<sup>156</sup> *See generally id.*

<sup>157</sup> *See id.*; *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884).

<sup>158</sup> *Great Falls Mfg. Co. v. Garland*, 25 F. 521, 529 (C.C.D. Md. 1885) *aff'd*, 124 U.S. 581 (1888).

<sup>159</sup> *See Great Falls Mfg. Co. v. Garland*, 124 U.S. 581 (1888).

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Manufacturing Company.<sup>160</sup> In so doing, the Court presented the issue to be whether the United States, by passing the 1882 Congressional Act to complete the dam at Great Falls, was really following the first plan assessed by the federal arbitrators as requiring \$63,766 in just compensation reviewed by the Supreme Court in 1884.<sup>161</sup> Although this argument seems fairly persuasive, the Court held that the parties were not bound by that award and that the compensation should, instead, be determined by assessing the value of the land at present time.<sup>162</sup>

Therefore, the Supreme Court turned to the arguments of land taken outside of the maps and surveys drawn as required by the Act.<sup>163</sup> However, the Supreme Court quickly disposes of this claim by stating that the United States government did not take any more land than “was reasonably necessary for the purposes described in the act of congress,” and that the government will pay for the land that was actually taken by the method proposed in the Act.<sup>164</sup>

Turning to the issue of unconstitutionality, the Court recognizes that these “are questions of much interest, and their examination, in light of the authorities, might not be altogether unprofitable.”<sup>165</sup> However, the Court refuses to address these questions.<sup>166</sup> Instead, the Court reasons that they need not analyze the constitutionality of the 1882 Congressional Act because the plaintiff company had “waived” the right to ask a Court to

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<sup>160</sup> *Id.* at 595.

<sup>161</sup> *Id.* See also *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884).

<sup>162</sup> *Great Falls Mfg. Co. v. Garland*, 124 U.S. 581, 595 (1888).

<sup>163</sup> *Id.* at 597-98.

<sup>164</sup> *Id.* at 597.

<sup>165</sup> *Id.* at 598.

<sup>166</sup> *Id.*

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determine whether they were due compensation before the taking because the corporation had pursued the Court of Claims that was declared the proper final tribunal to decide compensation in the Act.<sup>167</sup> The Supreme Court summarized its refusal to analyze the constitutional issues when it stated, “In short, the plaintiff has voluntarily accepted the provisions of the act of congress in respect to the mode of ascertaining the compensation to be made to it.”<sup>168</sup>

In refusing to pursue the questions of constitutionality, the Court rejected the argument by the Great Falls Manufacturing Company that they were not waiving their right to contest the constitutionality of the Act by bringing a claim before the Court of Claims, but they did so simply because they were scared that they would lose all chance to receive compensation for the taking to complete the dam.<sup>169</sup> The Supreme Court explained that the reasons that the company “acquiesced” in the taking of their property at Great Falls was not a factor that would sway the Court to analyze the constitutionality of an Act passed by the government, especially when “it is to be assumed that the United States is incapable of bad faith.”<sup>170</sup>

Overall, the Supreme Court refused to grant the Great Falls Manufacturing Company an injunction to prevent the United States from taking their land before just compensation is provided, which was originally permitted by a potentially unconstitutional Act of Congress.<sup>171</sup> Although the Circuit Court for the District of

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<sup>167</sup> *Id.* at 598-99.

<sup>168</sup> *Great Falls Mfg. Co.*, 124 U.S. at 599.

<sup>169</sup> *Id.* at 600.

<sup>170</sup> *Id.* at 599.

<sup>171</sup> *See generally id.*

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Maryland reviewed the company's argument that the Act was unconstitutional, the Supreme Court did not opine on the question of constitutionality.<sup>172</sup> Rather than analyze whether the 1882 Act was constitutional, the Court reasoned that the company had already waived this question by following the Act's directions to secure compensation.<sup>173</sup> Therefore, the Great Falls Manufacturing Company was required to wait to see if the Court of Claims would decide that the corporation did deserve just compensation and, if so, how much was required.<sup>174</sup>

**VI. THE SUPREME COURT'S MOTIVATION IN ITS 1888 DECISION &  
THE ULTIMATE CONSEQUENCES FOR THE 5<sup>th</sup> AMENDMENT**

In its 1888 decision, the Supreme Court was unwilling to rule on the constitutionality of the 1882 Act of Congress, and reasoned that it has no duty to do so because the Great Falls Manufacturing Company had waived their rights by proceeding in the Court of Claims.<sup>175</sup> Although there is longstanding maxim that Federal Courts are not to rule on a constitutional issue if the case can be resolved on other grounds,<sup>176</sup> in this case the Supreme Court was arguably more motivated by the fact that it had already granted money to this company in 1884 for the same public use.<sup>177</sup> In the case appealed by the Court of Claims in 1884, Justin Harlan, again writing for the Supreme Court, felt

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<sup>172</sup> *Id.* at 598-99.

<sup>173</sup> *Id.*

<sup>174</sup> *See id.* at 600. Although there is record that there was a suit filed in the Court of Claims in 1884 for the damages of 300,000 there is no record of the outcome of this claim. In fact, this suit may have been stalled to await the outcome of the 1888 Supreme Court decision.

<sup>175</sup> *See generally Great Falls Mfg. Co. v. Garland*, 124 U.S. 581 (1888).

<sup>176</sup> *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

<sup>177</sup> *See United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884).



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strongly that the company was owed just compensation under the 5th Amendment for the land taken at the Potomac River when it stated:

[I]t is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting, as is done in the petition in this case, that the government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation.<sup>178</sup>

However, when the time came in 1888 for Justice Harlan on the Supreme Court to address significant constitutional questions relating to the 5<sup>th</sup> amendment taking clause, the highest court in the land refused to do so because the company had proceeded to the Court of Claims to adjudicate the amount of just compensation owed.<sup>179</sup>

Moreover, the Supreme Court appeared to be more interested in denying any responsibility of the United States to pay the awards determined by the federal arbitrators for the plan that the government ultimately pursued.<sup>180</sup> In rejecting this argument, the Supreme Court explained that the 1882 Act made no reservation about the prior determination of the federal arbitrators, and, as such, the awards were not binding on the parties.<sup>181</sup> In doing so, the Court was specifically unwilling to analyze important questions of whether Congress can, by passing Acts, take lands for public use under the power of eminent domain and ascertain a tribunal without jury for deciding compensation

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<sup>178</sup> *Id.* at 658.

<sup>179</sup> *Great Falls Mfg. Co.*, 124 U.S. at 599.

<sup>180</sup> *Id.* at 595.

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

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at a later date.<sup>182</sup> But, the Court made sure to address what effect, if any, the award of the federal arbitrators in 1883 had on the company's rights to just compensation.<sup>183</sup> Their decision to entertain one question while ignoring the other seems to relay the attitude that the Court was not willing to hear more claims by this company for compensation as a result of the taking at Great Falls.

More important than the reasons behind the Supreme Court's decision is the consequences of the holding in *Great Falls Mfg Co. v. Garland*.<sup>184</sup> This opinion signified that, after 1888, any time that a person or company had land or property taken by the government via a statute or act that had a method for determining just compensation, those individuals with taken property had two choices: (1) to submit to the method spelled out in the statute and hope that its methods were fair and the compensation was just; or (2) risk receiving absolutely no compensation by bringing an expensive private cause of action, asserting that the act was unconstitutional.<sup>185</sup> Neither of these options seem particularly appealing since both choices have the risk of not acquiring compensation that is just. Moreover, neither of these options guarantee the same level of fairness that would be gained through a condemnation proceeding.<sup>186</sup>

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<sup>182</sup> *Id.* at 599.

<sup>183</sup> *Id.* at 595.

<sup>184</sup> 124 U.S. 581 (1888).

<sup>185</sup> *See Great Falls Mfg. Co.*, 124 U.S. at 599.

<sup>186</sup> *See supra* Section IV. Although in the case of the Great Falls Manufacturing Company, it appears that even a condemnation proceeding award can be overturned if the United States government so requests.

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This decision to allow a party with taken property to proceed only via one available remedy was rejected by several subsequent cases in state courts.<sup>187</sup> In 1890, the Supreme Judicial Court of Massachusetts, Suffolk stated correctly that it “certainly would be unjust if a party who reasonably deemed that a statute by authority of which his property was taken was unconstitutional should be compelled to elect whether he would seek for damages under the act, and thus formally admit that this property was lawfully taken, or abandon any claim therefor, and rely solely on his remedy for an unlawful taking.”<sup>188</sup> This reasoning was again adopted in an opinion by the Supreme Judicial Court of Massachusetts in 1896 when the Court decided to assess the questions of whether an act was constitutional despite the fact that the petitioners had already filed a claim seeking damages for the taking of their land.<sup>189</sup>

The logic of the courts in Massachusetts was the exact explanation that Benjamin Butler advanced before the Supreme Court in 1888 when he argued that the company invoked the jurisdiction prescribed by the Congressional Act “from fear that, if it did not file its petition in that court within the time limited, it might lose the right to demand compensation for its property.”<sup>190</sup> Instead of acknowledging that ignoring this claim would be unjust, the Supreme Court easily rejected this argument as “immaterial.”<sup>191</sup> By holding that the company had waived its right to contest the constitutionality of the Act,

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<sup>187</sup> See e.g., *Moore v. Sanford* 151 Mass. 285 (1890); *Norcross v. Cambridge*, 166 Mass. 508 (1896).

<sup>188</sup> *Moore v. Sanford* 151 Mass. 285, 286 (1890).

<sup>189</sup> *Norcross v. Cambridge*, 166 Mass. 508, 510 (1896).

<sup>190</sup> *Great Falls Mfg. Co.*, 124 U.S. at 600.

<sup>191</sup> *Id.*

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despite findings by other courts that this type of waiver would be unjust,<sup>192</sup> the Supreme Court required individuals with taken property in the future of making the impossible decision between adhering to a potentially unfair determination of compensation or expending money to litigate the constitutionality of a statute that allows a taking.<sup>193</sup>

**VII. AFTER THE 1888 SUPREME COURT CASE: THE DEED TO GREAT FALLS POWER CO. AND FURTHER LEGAL BATTLES FOR THE RIGHTS TO GREAT FALLS**

Sometime after the Supreme Court refused to grant the Great Falls Manufacturing Company an injunction to receive compensation prior to the taking at Great Falls, President of the corporation, Benjamin Butler, began discussing selling the company's rights and land. Although the company discussed with several possible buyers, the Great Falls Manufacturing Company ultimately sold its land and water rights to the Great Falls Power Company.<sup>194</sup> The deed that transferred the rights to the Great Falls Power Company specifically detailed that the Great Falls Manufacturing Company was to retain the claims against the United States for the land and water taken at the Potomac River.<sup>195</sup> Therefore, the Great Falls Manufacturing Company still maintained that they were due compensation for the land and water rights that were taken to complete the dam at Great Falls.

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<sup>192</sup> *See Moore v. Sanford* 151 Mass. 285, 286 (1890).

<sup>193</sup> *See generally Great Falls Mfg. Co. v. Garland*, 124 U.S. 581 (1888).

<sup>194</sup> Montgomery County Circuit Court (Land Records), *Deed Great Falls Manufacturing Company to Great Falls Power Company*, July 22, 1895, Liber JA 49, Folio 364-378, MSA CE63-95.

<sup>195</sup> *Id.* (“reserving only the claims of this company against the United States for damages for lands taken and for water heretofore diverted from the Virginia Channel in said river...”).

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The Great Falls Power Company was chartered in Virginia in 1894, just before it received the land and water rights of the Great Falls Manufacturing Company.<sup>196</sup> Maryland then passed an Act that granted Great Falls Power Company the right to “erect dams, hold real estate and erect and maintain lines for tile transmission of electricity.”<sup>197</sup> Although the Great Falls Power Company had the general scheme to build a dam that would provide power to Baltimore and the City of Washington,<sup>198</sup> there were some that believed that this new company was simply the Great Falls Manufacturing Company with a different name, especially because Benjamin Butler’s son was one of the first presidents of the Great Falls Power Company.<sup>199</sup>

The Great Falls Power Company did not give up the dispute over the land and water rights that were taken from the United States to complete the dam across the Potomac River at Great Falls. The company and the United States finally settled the claim for \$63,766 in 1902.<sup>200</sup> This amount for approximately sixty-thousand dollars was the exact amount that the federal arbitrators determined was just compensation due if the United States proceeded to build a dam that extended from Maryland shore to Conn’s Island and then from Conn’s Island to the Virginia shore.<sup>201</sup> Because this was ultimately the plan that the federal government undertook, albeit in a two-part process, the Great

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<sup>196</sup> Acts of Assembly 1893-1894 Virginia, ch. 605 (March 3, 1894).

<sup>197</sup> Laws of Maryland 1894, ch. 540, page 797-798.

<sup>198</sup> Price, *supra* note 51 at 502.

<sup>199</sup> See “News and Notes.” *The Metal Worker*, 28 Sept. 1895, page 63. Web.

<sup>200</sup> Montgomery County Circuit Court (Land Records), *Deed Great Falls Power Company to the United States of America*, recorded November 26, 1903, Liber TD 27, Folio 138-139, MSA CE 63-133.

<sup>201</sup> See *Great Falls Mfg. Co. v. United States*, 16 Ct. Cl. 160, 170 (1880) *aff’d*, 112 U.S. 645 (1884).

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Falls Power Company was able to recover the amount that the federal arbitrators originally established. Yet, this was the argument made by the Great Falls Manufacturing Company in 1888, which the Supreme Court specifically rejected because the parties were not “bound” by the arbitration.<sup>202</sup> Therefore, the Great Falls Power Company was given the just compensation in 1902 for the land and water rights that were taken from the Great Falls Manufacturing Company in 1883.<sup>203</sup>

Outside of the dispute between the new corporation and the United States, the Great Falls Power Company continued to have struggles with different companies over the rights to Great Falls.<sup>204</sup> For example, the Great Falls Power Company disputed Chesapeake and Ohio Canal Company, one of the three original land and riparian owners of Great Falls in the 1850s.<sup>205</sup> This dispute continued until at least the year 1925 during which the two companies contested the title to a specific tract of land that consisted of a “strip commencing on the western bank of the Potomac River.”<sup>206</sup> This is one of the many cases that shows the dispute over title to the property along Great Falls were far from resolved.<sup>207</sup> Therefore, the thirty year litigation between Great Falls Manufacturing Company and the United States was just one of many legal battles over the valuable property on the Potomac.

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<sup>202</sup> See *Great Falls Mfg. Co. v. Garland*, 124 U.S. 581, 595 (1888).

<sup>203</sup> Montgomery County Circuit Court (Land Records), *Deed Great Falls Power Company to the United States of America*, recorded November 26, 1903, Liber TD 27, Folio 138-139, MSA CE 63-133.

<sup>204</sup> See *Chesapeake & Ohio Canal Co. v. Great Falls Power Co.*, 143 Va. 697, 703 (1925).

<sup>205</sup> See *id.*

<sup>206</sup> *Id.* at 703.

<sup>207</sup> See *e.g.*, *Jeweler v. Potomac Elec. Power Co.*, 217 Md. 458, 465 (1958); *Potomac Elec. Power Co. v. Birkett*, 217 Md. 476, 478, 143 A.2d 485, 487 (1958).

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**VIII. CONCLUSION**

The case, *Great Falls Mfg. Co. v. Garland*, may have appeared to most as another attempt by an inactive company to gain money from the federal government. However it may have seemed, the case had great implications on how individuals could combat takings achieved via statutes. Although it seems the Great Falls Manufacturing Company was never paid just compensation by the United States for the lands it took to complete the dam at Great Falls, the Great Falls Power Company as successor was able to settle that claim for \$63,766.

There is some irony in this since the Supreme Court explicitly concluded in 1888 that the company and the United States were in no way bound by the previous awards determined by the federal arbitrators.<sup>208</sup> Although the Great Falls Manufacturing Company endured 30 years of litigation, the company only received approximately \$15,000 for the lands the United States originally took at Great Falls.<sup>209</sup> Perhaps many onlookers would deem this appropriate since the corporation never made any improvements or use of the land it owned; nevertheless, the company and president, Benjamin Butler, attempted to argue important issues of constitutionality with respect to the 5<sup>th</sup> amendment that were never addressed by the Supreme Court.<sup>210</sup>

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<sup>208</sup> *Great Falls Mfg. Co.*, 124 U.S. at 595.

<sup>209</sup> *See United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884).

<sup>210</sup> *See generally Great Falls Mfg. Co.*, 124 U.S. 581 (1888).

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**IX. APPENDIX A: THE GREAT FALLS MANUFACTURING  
COMPANY'S LATE PRESIDENT, GEN. BENJAMIN F. BUTLER**



Benjamin Franklin Butler was born in Deerfield of the state of New Hampshire on November 5, 1818.<sup>212</sup> In 1840, the age he turned twenty-two, Benjamin Butler was admitted to the bar.<sup>213</sup> Although at this early stage of his career some categorized him as the “ablest lawyer at the bar of his own State,”<sup>214</sup> the perception of Butler appeared to have changed over time.<sup>215</sup> During his time in the militia, Butler protected the City of

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<sup>211</sup> Image of Benjamin F. Butler. Found at:  
<http://opinionator.blogs.nytimes.com/2011/06/09/sgt-barney-longs-for-home-and-a-fight/>.

<sup>212</sup> Butler, Benjamin F. *Butler's Book*. A.M. Thayer & Co., 1892. *Google Books*. Web. 10 Nov. 2015.

<sup>213</sup> Bland, T.A. *Life of Benjamin F. Butler*. Lee and Shepard, Publishers, 1879. PDF.

<sup>214</sup> Bland, *supra* note 213 at 17.

<sup>215</sup> See Zobel, Hiller B., “Justice Oliver Wendell Holmes in the Trial Court,” 8 *Mass. Legal History* 35, 44 (2002).



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Washington as a soldier in the Union with almost absolute power.<sup>216</sup> Later in 1861, General Butler took control of the City of Baltimore in order to maintain peace and to protect the citizens, for which President Lincoln was very grateful.<sup>217</sup> After this victory and praise, Butler also invaded New Orleans and put forth various orders in order to maintain United States' control over the city.<sup>218</sup> However, one specific order earned him the title "Beast Butler" and immense criticism.<sup>219</sup> Although this may have been a moment in Butler's career that is remembered and disfavored by most, he turned to politics and was elected to Congress in 1869 and elected governor of Massachusetts in 1882.<sup>220</sup> It is said that after he grew tired of politics, the "remainder of his life was spent in speculation and manufacturing enterprises."<sup>221</sup>

Around the year 1880, Benjamin Butler secured control of the stock of the Great Falls Manufacturing Company.<sup>222</sup> After gaining control of the company, some critics noted that "Benjamin F. Butler was the president and moving spirit in the Great Falls Manufacturing Co. in the latter years of its existence."<sup>223</sup> However, in the years before the corporation sold its land and water rights to Great Falls Power Co., the main objective

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<sup>216</sup> *Id.* at 41.

<sup>217</sup> *Id.* at 47-8.

<sup>218</sup> Bland, *supra* note 213 at 86-96.

<sup>219</sup> Bland, *supra* note 213 at 96. General Order No. 28 required that when any female insulted a soldier of the United States Army, then "she shall be regarded and held liable to be treated as a woman of the town playing her avocation."

<sup>220</sup> Jones, Terry L. "The Beast in the Big Easy," N.Y. Times, May 18, 2012, [http://opinionator.blogs.nytimes.com/2012/05/18/the-beast-in-the-big-easy/?\\_r=1](http://opinionator.blogs.nytimes.com/2012/05/18/the-beast-in-the-big-easy/?_r=1).

<sup>221</sup> Hoar, George F. *Autobiography of Seventy Years*. New York: Charles Scribner's Son, 1903. Web.

<sup>222</sup> "The Great Falls Company: Why a Defunct Corporation has been Revived," *The Baltimore Sun*, 23 Apr. 1883. Web.

<sup>223</sup> S. Doc. No. 790 (1911).

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of the company was often categorized as acquiring real estate and sitting “tight, awaiting the time when Uncle Sam again would want to use the water of the Potomac River and could be forced to pay for the privilege.”<sup>224</sup> Benjamin Butler argued the company’s right to just compensation twice before the Supreme Court, never faltering in his belief that the government should have to abide by the 5<sup>th</sup> amendment.<sup>225</sup>

It has been said about Benjamin Butler that it “would be hard to find a leading supporter of General Butler who will say that he deems him honest, truthful.”<sup>226</sup> However, others have made clear that Butler “is a great achiever. He is a victorious kind of man...He has courage...He dares to tell the truth.”<sup>227</sup> This could be true of the case Benjamin Butler was arguing for his company: although many would not want to say it was founded in honesty, it was the argument that dared to tell the truth.

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<sup>224</sup> *Id.*

<sup>225</sup> See *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884); *Great Falls Mfg. Co. v. Garland*, 124 U.S. 581 (1888).

<sup>226</sup> Hoar, *supra* note 221 at 351

<sup>227</sup> Bland, *supra* note 213 at 194.