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Making America Pay: Just Compensation for Foreign Property Takings

Remsen M. Kinne

MAKING AMERICA PAY: JUST COMPENSATION FOR FOREIGN PROPERTY TAKINGS

I. INTRODUCTION

United States efforts to influence political process and policy-making in developing countries often result in the destruction or seizure of private property located in foreign jurisdictions. Recently, individuals who owned property in Nicaragua, Honduras and El Salvador sought compensation from the U.S. government under the fifth amendment to the United States Constitution (fifth amendment)[1] following expropriation of their property.[2] The claimants in

[1] "No person shall be ... deprived of life, liberty or property ... nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

[2] *See* Langenegger v. United States, 5 Cl. Ct. 229, 230-31 (1984), *aff'd in part and vacated in part*, 756 F.2d 1565 (Fed. Cir.), *cert. denied*, 474 U.S. 824 (1985); de Arellano v. Weinberger, 568 F. Supp. 1236, 1237-38 (D.D.C.), *aff'd sub nom.* Ramirez de Arellano v. Weinberger, 724 F.2d 143 (D.C. Cir. 1983), *different results reached on reh'g en banc*, 745 F.2d 1500 (D.C. Cir. 1984), *vacated and remanded*, 471 U.S. 1113 (1985), *on remand*, 788 F.2d 762 (D.C. Cir. 1986); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 597-99 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

these cases maintained that United States foreign policy activities in Central America caused the expropriations, creating compensable takings under the fifth amendment's just compensation clause (foreign takings).[3] Decisions in these cases highlight the possibility that those whose property is destroyed or seized as a result of U.S. activity abroad may obtain relief through "inverse condemnation" proceedings in U.S. courts.

This Note examines the U.S. government's constitutional obligation to compensate owners of property located outside U.S. territory. Courts generally recognize this constitutional remedy for the excesses of U.S. foreign policy. The just compensation clause clearly applies outside United States territory when invoked by U.S. citizens. Resident aliens also enjoy just compensation protection. Some authority indicates that foreign taking claims may also be brought by non-resident aliens. This Note outlines alternative arguments that may be advanced in support of the proposition that the just compensation clause protects non-resident aliens. Although U.S. policy-makers may be concerned at the prospect of compensating victims of overseas expropriations, foreign taking claims are not barred by the judiciary's traditional deference to the political branches in the area of foreign relations.

This Note proposes that courts retain a flexible approach to adjudicating foreign taking claims. "Indirect" United States involvement in the domestic affairs of foreign sovereigns presents a significant challenge to courts applying foreign takings authority. Most foreign taking cases address direct seizures of realty or personalty by the U.S. government or its agents. In *Langenegger v. United States*,[4] however, the United States Claims Court was faced with a just compensation claim alleging that advisory activity on the part of the U.S. government precipitated El Salvadoran land reform measures that deprived the plaintiff of his property. The United States Court of Appeals for the Federal Circuit upheld the Claims Court's rejection of the claim by introducing and applying a restrictive threshold

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[3] The *Langenegger* claimants sought monetary compensation under the fifth amendment for a plantation seized by the El Salvadoran government pursuant to a land reform program urged and designed by U.S. government advisors. 5 Cl. Ct. at 230-31. The *Ramirez de Arellano* plaintiffs sought injunctive relief where U.S. military advisors occupied a cattle ranch seized by Honduran troops. 568 F. Supp. at 1237-38. Plaintiffs in *Sanchez-Espinoza* sought injunctive relief and monetary compensation for property damage in Nicaragua caused by U.S.-backed *contras*. 568 F. Supp. at 597-99. For a general analysis of the illegality of the United States' intervention in Central America, see Note, *Lawless Intervention: United States Foreign Policy in El Salvador and Nicaragua*, 7 B.C. THIRD WORLD L. J. 223 (1988).

[4] 5 Cl. Ct. 229.

test (the *Langenegger* test) to determine whether a compensable foreign taking occurred. This Note suggests that the *Langenegger* test should not be followed as it conflicts with the Supreme Court's approach of balancing private loss against public benefit to identify compensable property takings.

II. The Fifth Amendment's Global Reach

A. *Guarantees Without Borders*

Courts hold that fifth amendment guarantees apply outside the United States.[5] In 1867, the Court of Claims in *Wiggins v. United States*,[6] awarded compensation to a claimant whose gunpowder, stored in Punta Arenas, Costa Rica for sale to the Nicaraguan government, was destroyed by a U.S. naval commander.[7] The court reasoned, following the principle of awarding compensation for takings within the U.S., that the commander's action was an exercise of eminent domain and that the claimant should be compensated.[8] Similarly, in affirming a compensation award to a claimant whose mules and wagons were destroyed in Mexico by the U.S. Army, Chief Justice Taney wrote in 1851 for the Supreme Court in *Mitchell v. Harmony*:[9] "[W]here the owner has done nothing to forfeit his [property] rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own."[10] Since World War II, claimants have received compen-

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[5] *E.g.*, Turney v. United States, 115 F. Supp. 457, 463-64 (Ct. Cl. 1953).

[6] 3 Ct. Cl. 412 (1867).

[7] Circumstances surrounding the gunpowder destruction are reported as follows:

> The evidence . . . tends to prove that in the early part of the year 1854 Commander Hollins, in command of the United States ship Cyane, was commissioned . . . by his government to proceed to the town of San Juan [Nicaragua], . . . and there to demand of the inhabitants of said town reparation for an alleged insult to the American minister . . . .
>
> That the authorities of [San Juan] refusing to comply with the demands of Hollins, he bombarded and destroyed the town.
>
> That a day, or a few days, after the destruction of [San Juan], Commander Hollins, . . . for fear that the powder [stored at Punta Arenas] might by some malicious persons of [San Juan] be ignited . . . ordered the powder to be thrown into the sea. *Wiggins*, 3 Ct. Cl. at 414 (Argument for the Claimants).

[8] *See id.* at 422. Specifically, the court analogized to the "principle" of Grant v. United States, 1 Ct. Cls. 41 (1863) (awarded compensation to a claimant whose property located in a U.S. territory was destroyed by the U.S. Army to prevent it from falling into insurrectionists' hands).

[9] 54 U.S. (13 How.) 115 (1851).

[10] *Mitchell*, 54 U.S. (13 How.) at 133 (discussing the government's assertion that claimant forfeited his property rights by "trading with the enemy").

sation from the U.S. government for takings in foreign countries including Austria[11] and the Phillipines.[12]

Despite these early holdings, courts did not generally accept the proposition that some fifth amendment guarantees, such as the right to a grand jury indictment, should be extended to foreign jurisdictions until 1957.[13] Justice Felix Frankfurter attributed this view in large part to the existence of consular courts' "extraterritorial jurisdiction."[14] Until 1956, consular courts were federal trial courts located in foreign countries pursuant to treaties ratified by the U.S. Senate. These courts exercised executive, legislative and judicial power over American citizens resident in those countries.[15] The U.S. Supreme Court and U.S. Courts of Appeal upheld consular courts' decisions against constitutional challenges, holding, in effect, that the United States Constitution applied to U.S. citizens abroad only to the extent that Congress provided.[16] Those opposed to compensating foreign takings referred to the existence of extraterritorial jurisdiction in support of their position. For example, in dissent in *Wiggins*, Judge Loring suggested that the scope of extraterritorial jurisdiction should not extend protections to property interests of those who subject their property to foreign law.[17]

President Eisenhower abolished the last consular court in 1956.[18] Within a year, the Supreme Court in *Reid v. Covert*[19] adopted the current view that the Bill of Rights extends without restriction

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[11] Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955).

[12] *Turney*, 115 F. Supp. 457.

[13] *See, e.g.*, Reid v. Covert, 351 U.S. 487 (1955), 354 U.S. 1 (1957). Justice Hugo Black, writing for the Court in a subsequent reversing opinion, summarized the Court's initial holding: "The majority held that the provision[] of . . . the Fifth . . . Amendment[] which require[s] that crimes be tried by a jury after indictment by a grand jury did not protect an American citizen when he was tried by the American Government in foreign lands for offenses committed there . . . . " 354 U.S. at 5.

[14] *Reid*, 354 U.S. at 54-64 (Frankfurter, J. concurring).

[15] *Id.* at 62-63.

[16] *See id.* at 54-55 (discussing In re Ross, 140 U.S. 453 (1891) (affirming denial of application for writ of habeas corpus by U.S. Navy crew member who was tried and convicted by a consular court in Yokohama, Japan).

[17] *See Wiggins*, 3 Ct. Cl. at 425 (Loring, J. dissenting) ("[Extraterritorial jurisdiction] has never been, and cannot be, extended to such interests in property as our citizens may have as members of a corporation created by and existing under the laws of a foreign country"). Judge Loring appeared to justify extraterritorial jurisdiction as a necessary adjunct to colonial administration. *See id.* at 422 (Loring, J. dissenting) ("Under the law of nations, as held in Europe and in this country, governments have such extraterritorial jurisdiction as may protect their citizens *in other countries not civilized* . . . .") (emphasis added).

[18] *Reid*, 354 U.S. at 62 n.9 (Frankfurter, J. concurring).

[19] 354 U.S. 1.

to American citizens abroad: "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."[20] This approach finds "plain meaning" support in the fifth amendment's protection of "persons," not geographical areas.[21]

Earlier decisions held that particular aspects of U.S. foreign relations, such as congressional governance of foreign territories, should be free of constitutional review.[22] These late nineteenth and early twentieth century decisions, referred to as the *"Insular Cases,"* addressed the relationship between the United States and territories where the U.S. exercised sovereign power.[23] The *Insular Cases* stood for the proposition that the Constitution's application should be limited geographically, in recognition of "the political reality that the strength of the United States did not extend to all aspects of life in its newly acquired territories."[24] In *Reid v. Covert*, Justice Hugo Black rejected the reasoning of these decisions and wrote for the Court:

> If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there.[25]

Since *Reid*, courts no longer seriously question whether the just compensation clause applies abroad. Instead, the focus of foreign

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[20] *Reid*, 354 U.S. at 6. *Accord* United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974) ("that the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens is well settled").

[21] *See supra* note 1. One commentator suggests that the theory of natural rights also supports the extraterritorial application of the Constitution. *See* Note, *The Extraterritorial Application of the Constitution — Unalienable Rights?*, 72 VA. L. REV. 649, 649 (1986) ("[D]ecisions concerning the extraterritorial application of the Constitution are influenced by several divergent themes: the theory of natural rights, the concept of a social contract, and the doctrine of territoriality"). The author argues that the theory of natural rights has become increasingly persuasive in this area of constitutional jurisprudence as scholars and practitioners move away from the doctrine of territoriality and the concept of a constitutional social contract. *Id.* at 649-50.

[22] *See, e.g.*, collected cases cited in *Reid*, 354 U.S. at 13 n.22.

[23] *See* Dorr v. United States, 195 U.S. 138, 142 (1904). For a list of the *Insular Cases*, see Note, *supra* note 21, at 654 n.28.

[24] *See* McCauliff, *The Reach of the Constitution: American Peacetime Court in West Berlin*, 55 NOTRE DAME LAW. 682, 684-89 (1980).

[25] *Reid*, 354 U.S. at 14 (footnotes omitted).

takings claims has shifted to determining what constitutes a compensable taking by the U.S. government of property located in foreign jurisdictions and who may bring such claims.

B. *Compensable Foreign Takings and Remedies*

1. Compensable Claims

Courts have steadily broadened their definition of a foreign taking. Courts uphold claims arising out of direct seizures of overseas property by the U.S. government. In *Seery v. United States*,[26] for example, an individual U.S. citizen whose Austrian residence was appropriated by the U.S. Army and converted into an officers' club received monetary compensation under the just compensation clause.[27]

Courts also hold that the fifth amendment applies when the U.S. secures possession of private property through the action of foreign sovereigns. In *Turney v. United States*,[28] the Phillipine government seized a corporation's radar equipment located in the Phillipines and turned the equipment over to the United States. The Court of Claims awarded the corporation monetary compensation pursuant to a taking claim.[29] Although foreign sovereigns may be considered as agents of the U.S. in foreign taking claims such as *Turney*, the Constitution does not reach the independent actions of foreign government officials.[30] Thus, a claim based on a taking effected by a foreign government must show that the taking was on behalf of the U.S. government. Courts determine whether a foreign government acts independently or on behalf of the United States by evaluating the particular circumstances of each case.[31]

The fifth amendment also seems to support foreign taking claims even where a foreign sovereign's seizure of property abroad does not result in the U.S. government acquiring a possessory in-

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[26] 127 F. Supp. 601.

[27] *Seery*, 127 F. Supp. at 606.

[28] 115 F. Supp. 457.

[29] *Turney*, 115 F. Supp. at 464.

[30] *See* Huther v. United States, 145 F. Supp. 916 (Ct. Cl. 1956) (U.S. not liable under just compensation clause where Canada constructed dam that caused flooding of plaintiffs' land). *Cf. Toscanino*, 500 F.2d at 280, n.9. *See also* Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741, 741-42 (1980) ("The Constitution never limits the conduct of foreign officials not acting to a U.S. request for aid").

[31] *See* Stonehill v. United States, 405 F.2d 738, 743-45 (9th Cir. 1968).

terest in the property. In *Langenegger v. United States*,[32] the court indicated that the U.S. government could incur just compensation liability by encouraging the El Salvadoran government to implement a land reform program resulting in seizure of the claimant's plantation.[33] Extending the fifth amendment's scope to such "indirect" takings recognizes that, at some point, U.S. government involvement in a foreign sovereign's policy-making activity may be sufficient to cause a taking.[34] This recognition is consistent with a significant presence in developing countries of the U.S. government and its agents acting as advisors concerning military and economic policy. Courts must accomodate in foreign takings law those foreign expropriations that would not have occurred but for these advisory activities.

Judicial recognition of indirect takings under the just compensation clause also affords relief for foreign expropriations that fall outside "ordinary" remedies as a result of U.S. involvement. Traditionally, U.S. citizens whose overseas property is expropriated by the act of a foreign government may pursue remedies including local actions against the expropriating foreign sovereign for compensation in cash or its equivalent,[35] or insurance claims under the federally-funded Overseas Private Investment Corporation ["OPIC"].[36] A citizen may also seek to convince the U.S. government to negotiate for compensation on his behalf with the expropriating sovereign.[37] The latter remedy is complemented by the Foreign Assistance Act, through which Congress gave the President discretionary power to cut off all U.S. assistance to expropriating countries that do not make compensation.[38] These remedies are not

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[32] 756 F.2d 1565.

[33] *Langenegger*, 756 F.2d 1571 ("There is nothing to suggest, as [the United States government] contends, that *whenever* the final act of expropriation is by the hand of a foreign sovereign, the United States cannot be held responsible") (emphasis in original).

[34] *Id.* at 1572. The *Langenegger* court found, however, on summary judgment disposition, that U.S. involvement was not sufficient to constitute a taking. *Id.*

[35] *See* Note, *infra* note 80, at 210.

[36] The Overseas Private Investment Corporation ["OPIC"] is a federally-funded entity offering insurance to U.S. citizens conducting business overseas, established by Congress through 22 U.S.C. § 2191 (1982). Insurance benefits are triggered by losses caused by the action of a foreign government.

[37] *See* Note, *infra* note 80, at 210.

[38] 22 U.S.C. § 2370 (1982). Courts are not empowered, however, to determine whether the executive has wrongfully failed to proceed under the Foreign Assistance Act, limiting the effectiveness of this Act as an individual remedy. Aerotrade, Inc. v. Agency for International Development, 387 F. Supp. 974, 975-76 (1982).

triggered until a foreign sovereign expropriates property.[39] Thus, substantial U.S. involvement in a foreign expropriation weakens the possible success of these "ordinary" expropriation remedies.

With personalty and realty seizures, courts also entertain taking claims by individuals whose claims against a foreign sovereign are extinguished by acts of the U.S.[40] Claim extinguishment actions seek compensation in the amount that the claimant would have received if the underlying claim against a foreign sovereign had not been discharged or settled by the U.S. government. Since the underlying claims are filed in U.S. courts (otherwise the U.S. could not discharge them), actions for extinguishment of these claims are not strictly foreign taking claims. Claim extinguishment actions are related to foreign taking claims, however, to the extent that both are just compensation claims arising out of U.S. foreign policy acts.

Early "claim extinguishment" cases arose out of the fact that sovereign immunity formerly barred individuals from bringing claims against foreign sovereigns unless the U.S. government brought claims on their behalf.[41] The federal government at times bargained away its right to pursue individuals' claims for concessions in international negotiations after promising the individuals that it would pursue the claims, giving rise to fifth amendment actions.[42]

Recent taking actions for claim extinguishment also arise out of U.S. government negotiations with foreign sovereigns, although individuals are no longer barred by sovereign immunity doctrine. In 1982, for example, the U.S. and the People's Republic of China ["PRC"] agreed to discharge and settle all then-pending expropriation claims against the PRC in U.S. courts. In *Shanghai Power Co. v. United States*,[43] a U.S. corporation had claims pending against the PRC at the time that the treaty was concluded. The corporation argued that the U.S. expropriated its property interests by extinguishing its claims through the treaty settlement. The court held that this was a valid cause of action under the fifth amendment, but found that the treaty settlement amount provided sufficient com-

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[39] OPIC, however, will pay benefits even if an expropriation results from a shift in U.S. foreign policy. 22 U.S.C. §§ 2191–99 (1982).

[40] *E.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981).

[41] *See* Note, *The U.S.-Iran Accords and the Taking Clause of the Fifth Amendment*, 68 VA. L. REV. 1537, 1542-47 (1982) (general discussion of foreign taking claims based on discharge or settlement of claims by the U.S. government).

[42] *Id.*

[43] 4 Cl. Ct. 237, 239-40 (1983).

pensation so as to render the taking constitutional.[44] Courts determine whether a compensable taking occurred by claim extinguishment on a case by case basis.[45]

2. Equitable Remedies

Although foreign taking claims often seek monetary compensation, and are therefore adjudicated in the Court of Claims, injunctive and declaratory relief are also available in connection with a foreign taking. Courts grant such relief only after applying the doctrine of equitable discretion to the claim.[46] This doctrine ensures that grants of extraordinary relief will not violate the constitutional separation of powers that consigns the conduct of foreign affairs to the executive branch. For example, the D.C. Circuit in *Ramirez de Arellano* offered the following reasoning in support of its holding that declaratory and injunctive relief could be appropriately granted to prevent U.S. military advisors from occupying a Honduran ranch:[47]

> [T]he . . . facts do not show that the Executive's conduct of foreign affairs would be impaired by an equitable decree that required the defendants to abide by United States constitutional . . . requirements. Plaintiffs . . . merely ask the federal court to prevent the United States . . . from running military training operations on *their* property, which has *not* been lawfully expropriated. Carefully tailored equitable relief might correct the unlawful condition without challenging the United States' relations with any Central American country or its military policy . . . . Separation of powers considerations do not fell the plaintiffs' complaint.

In effect, the D.C. Circuit weighed the intrusiveness of the relief into the conduct of U.S. foreign policy against the immediate need for, and effectiveness of, the remedy sought.

Courts may refuse to grant declaratory and injunctive relief where the claimant's request for relief becomes moot.[48] For example, the D.C. Circuit later held in *Ramirez de Arellano* that the plaintiffs' plea for injunctive relief became "attenuated" when U.S. military advisors departed voluntarily from the Honduran ranch.[49]

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[44] *Shanghai Power*, 4 Cl. Ct. at 239-40.

[45] *See, e.g., Langenegger*, 756 F.2d at 1573.

[46] *See, e.g., Ramirez de Arellano*, 745 F.2d at 1521.

[47] *Id.* at 1531.

[48] *See Ramirez de Arellano*, 788 F.2d at 764.

[49] *Id.*

Although the court previously determined that the plaintiffs' claim for injunctive and declaratory relief was appropriate, the effect of "attenuation" was to partially moot the claim, narrowing the claim to a request for declaratory prohibition of the military advisors' return to the ranch.[50] The court held that the plaintiffs had no immediate need for such declaratory relief and, as a result, that the intrusiveness of the remedy into U.S. foreign affairs tipped the balance of the equities against extraordinary relief.[51]

C. *Just Compensation and Foreign Nationals*

1. Aliens' Property Located in the U.S.

One need not be a U.S. citizen to bring a just compensation claim when a taking occurs within the United States. The fifth amendment protects resident aliens and U.S. citizens.[52] In *Russian Volunteer Fleet v. United States*, a corporation organized under the laws of Russia brought a just compensation claim after the United States requisitioned the corporation's ships located in New York.[53] The Supreme Court held that the Constitution permitted the claim.[54] The *Russian Volunteer* Court extended the just compensation clause to aliens' property within the U.S. by relying on its earlier decisions extending due process protections to aliens within the U.S.[55]

2. Aliens' Property Located Outside the U.S.

Whether aliens may invoke the just compensation clause with respect to private property located outside the U.S. is less clear. It is incongruous that an alien, protected by the fifth amendment inside the U.S.,[56] should be subject to unconstitutional U.S. government acts once outside American jurisdiction, while an American

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[50] *See id.*

[51] *See id.* ("Now that equitable relief . . . would merely forestall a potential violation, it is far from clear that a favorable disposition of plaintiffs' claims on the merits would warrant equitable relief that intrudes into the conduct of foreign and military affairs").

[52] Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931), *followed by* United States v. Pink, 315 U.S. 203, 228 (1942). *Cf.* Au Yi Lau v. United States Immigration and Naturalization Service, 445 F.2d 217, 223 (aliens in the United States are protected by the fourth amendment), *cert. denied*, 404 U.S. 864 (1971).

[53] *Russian Volunteer*, 282 U.S. 481.

[54] *Id.*

[55] *Id.* at 489 (citing, *inter alia*, Wong Wing v. United States, 163 U.S. 228, 238 (1896)).

[56] *See supra* notes 52–55 and accompanying text.

expatriate has a constitutional claim for the same acts. *Reid*, however, has not completely quelled the appeal for some judges of earlier authority: "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.'"[57]

This predicament is inconsistent with the Supreme Court's pre-*Reid* declaration in *Balzac v. Puerto Rico*[58] that "[t]he Constitution of the United States is in force . . . whenever and wherever the sovereign power of the government is asserted."[59] Still, courts are content to leave this area of law in disarray by not reaching the question of whether the fifth amendment extends to aliens abroad.[60] For example, the D.C. Circuit Court of Appeals did not address a claim by twelve Nicaraguan citizens that the U.S. government's support of the Nicaraguan *contras* violated the fourth and fifth amendments of the U.S. Constitution, reasoning that no relief was available in any event.[61] As Circuit Judge Wallace of the Ninth Circuit indicates, the application of the Consitution to aliens abroad requires a fusion of "one line of Supreme Court cases establishing that American *citizens* have constitutional rights abroad [with] another line holding that aliens in the United States are entitled to constitutional safeguards . . . ."[62] Several possible arguments may be advanced in favor of extending just compensation clause protections to aliens abroad.

a. *Ramirez de Arellano v. Weinberger*

In *Ramirez de Arellano v. Weinberger*, the U.S. Court of Appeals for the District of Columbia indicated that courts may be willing to entertain claims against the U.S. government by aliens whose property is expropriated abroad, at least where U.S. citizens have some interest in the property.[63] In 1983, the U.S. Department of Defense

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[57] United States v. Verdugo-Urquidez, 856 F.2d 1214, 1230 (9th Cir. 1988) (Wallace, J. dissenting) (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936)).

[58] 258 U.S. 298 (1922).

[59] *Balzac*, 258 U.S. at 312-13 (held that constitutional due process guarantees protect U.S. citizens abroad).

[60] *E.g.*, *Sanchez-Espinoza*, 770 F.2d at 208.

[61] *Id.* The Nicaraguans' suit, with joining suits by U.S. Congress members and residents of Florida, was brought in federal district court for the District of Columbia, and sought, *inter alia*, tort damages and injunctive relief, but did not contain a just compensation claim. *Id.* at 206-10.

[62] *Verdugo-Urquidez*, 856 F.2d at 1230 (Wallace, J. dissenting) (discussing whether the fourth amendment applies to aliens abroad).

[63] *See Ramirez de Arellano*, 745 F.2d 1500.

(DOD) decided to establish a "Regional Military Training Center" (RMTC) in Honduras to be used to train El Salvadoran soldiers.[64] The DOD selected the site on which the RMTC was built, and staffed the RMTC with U.S. military advisors including approximately 100 Green Berets.[65] When completed, the RMTC occupied a portion of a cattle ranch and shrimp packing facility owned by a group of Honduran corporations. An individual American citizen, Temistocles Ramirez de Arellano, controlled the Honduran corporations through stock ownership in a tiered group of Honduran and American corporations.[66] The Honduran corporations, their controlling entities and Ramirez de Arellano brought suit in U.S. district court alleging, *inter alia*, that the DOD's acts constituted "an unauthorized and unconstitutional deprivation of the use and enjoyment of [the plaintiffs'] property."[67] The plaintiffs also alleged that the DOD's establishment of the RMTC without notice or hearing violated the due process clause of the fifth amendment to the U.S. Constitution.[68]

Although these claims were ultimately dismissed for "attenuation" upon withdrawal of U.S. military personnel from the RMTC,[69] the D.C. Circuit held that these allegations were sufficient to withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[70] The court held that the plaintiffs had standing due to Ramirez de Arellano's American citizenship,[71] but specifically left open the question of whether the Honduran corporations could

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[64] *Ramirez de Arellano*, 724 F.2d at 146.

[65] *Id.*

[66] *Id.* The ranch was owned by a Honduran corporation, in turn owned by three other Honduran corporations, in turn owned by Temistocles Ramirez de Arellano, an individual American citizen, through two United States corporations. *Ramirez de Arellano*, 745 F.2d at 1506.

[67] *Id.* at 1511.

[68] *Id.*

[69] The Supreme Court vacated this decision and remanded the case to the Court of Appeals "for reconsideration of its opinion and judgment in light of the Foreign Assistance and Related Programs Appropriations Act, 1985 Pub. L. No. 98-473, 98 Stat. 1884, 1893-1894, and other events occurring since October 5, 1984." *Ramirez de Arellano*, 471 U.S. 1113. On remand, the Court of Appeals found:

> since November 27, 1985 all U.S. military personnel have departed and all U.S.-owned facilities have been removed from [plaintiffs'] land. Upon consideration of these recent developments, we are persuaded that dismissal of the complaint should be upheld on the narrow ground that the controversy has now become too attenuated to justify the extraordinary relief sought . . . .

788 F.2d at 763-64 (footnote omitted).

[70] *Ramirez de Arellano*, 745 F.2d at 1511.

[71] *Id.* at 1515-20.

independently raise constitutional claims.[72] The majority resisted then Appeals Court Judge Scalia's argument in dissent that the plaintiffs should look only to Honduran law for a remedy because Honduran corporations directly owned the ranch.[73] The majority observed:

> [T]he corollary to Judge Scalia's position is not true: a United States citizen cannot escape the prescriptive reach of United States law solely by choosing to do business through a foreign corporation .... Constitutional rights and duties are closely related in scope; if the Constitution permits such a broad exercise of prescriptive power, then the protective reach of the Constitution should extend equally far.[74]

The D.C. Circuit's rejection of Judge Scalia's position supports the proposition that aliens should not be categorically barred from bringing foreign taking claims. In part, the court's holding rests on the fact that the plaintiffs included American persons whose interests in the ranch were interwoven with the Honduran corporations' interests. Nonetheless, the court's language is consistent with a position that aliens may invoke the protection of the just compensation clause in their own right whenever they are subject to the "prescriptive reach" of U.S. law.

b. *The Fourth Amendment Model*

Other courts have extended constitutional protections to aliens abroad by reasoning, similar to the D.C. Circuit in *Ramirez de Arellano*, that such protections of necessity accompany and constrain the federal government's conduct. At least one decision suggests reasoning on which fifth amendment protections could be extended to aliens. In *United States v. Toscanino*,[75] the U.S. Court of Appeals for the Second Circuit held that the fourth amendment protects aliens against certain egregiously illegal searches and seizures by United States officials outside the United States.[76] The court declared that any other result would be inconsistent with cases such as *Mapp v. Ohio* that prohibit the government from benefitting from

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[72] *Id.* at 1516.

[73] *Id.* at 1520 n.79 (responding to Scalia, J., dissenting at 1550).

[74] *Id.* at 1517 n.63.

[75] 500 F.2d 267, *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974).

[76] *Toscanino*, 500 F.2d 267 (U.S. government agent's arrest of an alien outside the United States by means violating fourth amendment search and seizure standards, including detention and torture during interrogation, invalidated the alien's subsequent conviction in federal district court).

illegal police conduct in obtaining evidence.[77] The court reasoned that "the government should be denied the right to exploit its own illegal conduct, and when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct."[78] Extending this reasoning to aliens and just compensation protections, one could argue that the government may not engineer property takings under its foreign policy powers and simultaneously avoid the fifth amendment's restrictions on public use of private property. Foreign policy objectives achieved in this fashion appear to fall in the category of "fruits of the government's . . . misconduct" prohibited by *Toscanino*.

The *Toscanino* court referred in its reasoning to fifth amendment decisions holding that the Constitution guarantees due process to "people," not to "citizens."[79] This "plain meaning" approach strengthens a position that *Toscanino*'s government misconduct analysis should be persuasive in foreign taking claims, as the just compensation clause's scope is defined by the same "people" that modifies the due process clause. Courts have also left open the possibility that fourth amendment illegal search and seizure doctrine may be of value in adjudicating fifth amendment foreign taking claims, increasing the applicability of *Toscanino*.[80]

Post-*Toscanino* decisions hold that *Toscanino* articulates a narrow exception to the general "*Ker-Frisbie*" doctrine that aliens cannot challenge the jurisdiction of American courts, even when they are

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[77] *See id.* at 272 (citing, *inter alia*, Mapp v. Ohio, 367 U.S. 643 (1961)).

[78] *Id.* at 275 (citation omitted).

[79] *Id.* at 280 (citing, *inter alia*, Katz v. United States, 389 U.S. 347, 353 (1967) and *Russian Volunteer Fleet*, 282 U.S. 481).

[80] Some courts hold that evidence obtained in violation of the fourth amendment by federal government agents should be excluded from state court trials as the federal/state nexus constitutes a "joint venture" sufficient to trigger the exclusionary rule. Joint venture doctrine was developed to prevent state law enforcement officials from avoiding fourth amendment requirements by introducing evidence illegally obtained by federal government agents. *See generally* collected cases in Note, *Alleged United States Involvement in Land Reform Program of El Salvador Did Not Support Fifth Amendment Taking Claim*, 20 TEXAS INT'L L. J. 210, 212 n.24 (1985). Courts continue to extend the joint venture doctrine in some circumstances to exclude evidence obtained illegally in foreign countries. *See, e.g.*, *Verdugo-Urquidez*, 856 F.2d 1214; United States v. Peterson, 812 F.2d 486 (9th Cir. 1987). In *Langenegger*, 5 Cl. Ct. at 232-33, the trial court rejected the claimants' argument that fourth amendment "joint venture" doctrine, by analogy, imposed just compensation liability on the U.S. government for its role in an El Salvadoran land reform program that expropriated claimants' plantation. The Court of Appeals for the Federal Circuit, however, affirmed the Court of Claims' dismissal on different grounds, and did not address the fourth amendment analogy. *Langenegger*, 756 F.2d 1565.

brought before such courts by illegal acts of U.S. agents.[81] The *Ker-Frisbie* doctrine, however, is based on the view that "due process of law is satisfied when one present in court is convicted of crime after being fully apprised of the charges against him and after a fair trial *in accordance with constitutional procedural safeguards*."[82] No such procedural safeguards exist to protect non-resident aliens against the excesses of the U.S. government's conduct of foreign policy. Thus, subsequent limitation of *Toscanino*'s scope in the criminal context does not necessarily limit its persuasiveness in the area of foreign takings.

d. *Uniform Constitutional Protections*

Even if *Toscanino* has been weakened, other authority supports the proposition that aliens abroad are protected against the U.S. government by the Constitution. In *United States v. Tiede*,[83] the United States Court for Berlin[84] held that the Constitution's sixth amendment's jury trial provision applied to an alien brought before that court.[85] The *Tiede* court reasoned that "American courts abroad should not differ from those accorded defendants tried in American courts in the United States."[86] In support of its holding, the *Tiede* court quoted an early Supreme Court opinion: "[The Constitution] 'is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.'"[87] *Tiede*'s holding and broad dicta concerning constitutional protections support the notion that aliens

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[81] The "*Ker-Frisbie*" doctrine was articulated in Ker v. Illinois, 119 U.S. 436 (1886) and affirmed in Frisbie v. Collins, 342 U.S. 519 (1952), *reh'g denied*, 343 U.S. 937. Most post-*Toscanino* courts hold that *Toscanino*'s exception to the *Ker-Frisbie* doctrine applies only where governmental misconduct is outrageous and flagrant. *See, e.g.*, United States *ex rel* Lujan v. Gengler, 510 F.2d 62, 65-66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). For recent decisions reaffirming *Ker-Frisbie*, see, *e.g.*, United States v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984); United States v. Crews, 445 U.S. 463, 474 (1980); *id.* at 477-79 (Powell, J. concurring in part) (White, J., concurring in result) (majority of court reaffirming *Frisbie*). *See also generally*, Annotation, *Jurisdiction of Federal Courts to Try Criminal Defendant Who Alleges that He Was Brought Within United States Jurisdiction Illegally or as a Result of Fraud or Mistake*, 28 A.L.R. FED 685 (1976).

[82] *Frisbie*, 342 U.S. at 522 (emphasis added).

[83] 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

[84] The United States Court for Berlin, established in 1955 and sitting in Berlin, West Germany, "is a court established pursuant to the powers granted to the President by Article II of the United States Constitution." *Tiede*, 86 F.R.D. at 237.

[85] *See id.* at 259-60.

[86] *Id.* at 252.

[87] *Id.* at 242 (quoting Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866)).

should enjoy uniform just compensation protections within and without the United States. This principle of uniform constitutional protections also is reflected in the Supreme Court's decision in *Johnson v. Eisentrager*,[88] holding that alien enemies should be denied constitutional protections in foreign jurisdictions because they do not enjoy such protections within the U.S.

e. *Johnson v. Eisentrager*

Some decisions indicate that aliens may not enjoy constitutional protection outside the U.S. For example, the Supreme Court in *Johnson v. Eisentrager*[89] held in a pre-*Reid* decision that German nationals, captured, convicted and confined overseas by an American military court for engaging in military activity against the U.S., had no Article I right to a writ of habeas corpus.[90] The Court supported its decision in part by quoting its earlier statement that constitutional "provisions are universal in their application, *to all persons within the territorial jurisdiction*, without regard to any differences of . . . nationality . . . ."[91] The Court stated further that "[e]xtraterritorial application of [the Constitution to aliens] would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment."[92]

Notwithstanding these statements as to the extraterritorial scope of the Constitution, the *Eisentrager* holding rests primarily on the Court's finding that the German nationals seeking a writ of habeas corpus were "alien enemies."[93] The Court reasoned that because alien enemies are denied constitutional protection within the United States, they should similarly be denied such protection in foreign jurisdictions.[94] With a holding so narrowly focused on

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[88] 339 U.S. 763 (1950).

[89] *Id.*

[90] *Id.* Article I, § 9, clause 2 of the U.S. Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it."

[91] *Eisentrager*, 339 U.S. at 771 (emphasis added by the Court) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1885) (discussing the fourteenth amendment's application to aliens within the U.S.)).

[92] *Eisentrager*, 339 U.S. at 784.

[93] *Id.* at 771-85. Generally, "alien enemies" are citizens of foreign governments at war with the United States.

[94] *See id.* at 784.

alien enemies,[95] *Eisentrager* provides little guidance as to whether friendly aliens, such as citizens of foreign countries with whom the United States is not at war, may maintain foreign taking claims.[96] Cases addressing issues other than foreign taking claims indicate that U.S. law distinguishes little, if at all, between citizens and friendly aliens.[97] Thus, *Eisentrager*'s emphasis on alien enemies may turn the holding to the advantage of friendly aliens bringing foreign taking claims.

Eisentrager was misleadingly characterized in a footnote in *Pauling v. McElroy*, a subsequent lower court opinion, as broadly holding that the Constitution does not protect aliens abroad.[98] Even if *Reid* does not weaken *Eisentrager*'s earlier holding concerning extraterritorial constitutional protections for aliens, *Eisentrager*'s reasoning itself supports an opposite conclusion to *Pauling*. One could reasonably find support in *Eisentrager*'s logic for an argument that because friendly aliens can bring just compensation claims for takings within the U.S., they should also be able to do so for takings in foreign countries.

C. *Judicial Review of Foreign Policy Acts*

1. Political Question and Act of State Doctrines

Courts are reluctant to curb the power of the political branches where foreign relations are involved.[99] Courts hold, however, that no foreign affairs exception restricts the applicability of the fifth amendment's just compensation clause.[100] Still, the political question

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[95] "We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States." *Id.* at 785.

[96] Where a foreign taking claimant is a citizen of a country at war with the United States, however, *Eisentrager*'s view of alien enemies' relationship to the Constitution may be relevant.

[97] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (aliens may not be excluded from state welfare program benefits); Sugarman v. Dougall, 413 U.S. 634 (1973) (a state's civil service may not exclude aliens); In re Griffiths, 413 U.S. 717 (1973) (aliens may not be prevented from practicing law); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (the engineering profession may not bar aliens from membership); Nyquist v. Mauclet, 432 U.S. 1 (1977) (aliens may not be excluded from state education benefits). *But see* Foley v. Connelie, 435 U.S. 291 (1978) (a state's police force may exclude aliens).

[98] Pauling v. McElroy, 278 F.2d 252, 254 n.3 (D.C. Cir.) (affirmed dismissal for lack of standing of alien plaintiff's suit alleging the U.S. government's nuclear testing program violated the Constitution), *cert. denied*, 364 U.S. 835 (1960).

[99] *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION at 205-24 (1972).

[100] *E.g.*, *Langenegger*, 756 F.2d at 1569.

doctrine, discussed by the Supreme Court in *Baker v. Carr*[101] and *Goldwater v. Carter*,[102] is often considered by courts determining jurisdiction and justiciability of foreign taking claims.[103]

Courts employ the political question doctrine to avoid violating the constitutional separation of powers.[104] Thus, under the political question doctrine as developed in *Baker* and *Goldwater*, courts will refuse to consider complaints that raise issues requiring judicial resolution of matters constitutionally committed to "coordinate branches" of the U.S. government.[105] Similarly, courts will refuse jurisdiction of cases that require the courts to move outside the area of "judicial expertise."[106] A court may also invoke the political question doctrine to deny jurisdiction where "prudential considerations" counsel against judicial intervention.[107]

In the area of foreign taking claims, the political question doctrine does not bar judicial review where the *Baker* and *Goldwater* standards permit.[108] Courts hold that foreign taking claims are justiciable under the political question doctrine when three elements are present. First, the alleged taking must have occurred within the territory of a foreign sovereign recognized by the U.S. Second, if the taking is alleged to have occurred through an act of expropriation by a foreign sovereign, the validity of the expropriation must not be at issue. Finally, the authority of the executive branch in effecting the taking must not be at issue.[109] In sum, a foreign taking claim is justiciable if it "seeks only a determination of the lawfullness of the executive's deprivation of [the plaintiff's] private property without just compensation."[110]

Trial courts often attempt to dispose of foreign taking claims on the grounds that they present non-justiciable political questions.[111] The Supreme Court, however, has indicated that it does

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[101] 369 U.S. 186 (1962).

[102] 444 U.S. 996 (1979).

[103] *See Langenegger*, 756 F.2d 1565; *Sanchez-Espinoza*, 770 F.2d 202; *Ramirez de Arellano*, 745 F.2d 1500. For a general discussion of the political question doctrine, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 71-79 (1978).

[104] *See Baker*, 369 U.S. at 210.

[105] *Goldwater*, 444 U.S. at 997-98 (Powell, J., concurring).

[106] *Id.*

[107] *Id. See also Baker*, 369 U.S. at 217.

[108] *See Langenegger*, 756 F.2d at 1568-70 (applying *Goldwater*, 444 U.S. 996, and *Baker*, 369 U.S. 186).

[109] *Id.*

[110] *Id.* at 1570.

[111] *See, e.g., de Arellano*, 568 F. Supp. 1236; *Langenegger*, 5 Cl. Ct. 229.

not favor categorical treatment of cases involving potential political questions as non-justiciable.[112] Recent appellate decisions are in accord with the Supreme Court, generally holding that foreign taking claims do not raise political question issues that affect justiciability.[113]

Similarly, the act of state doctrine, another separation of powers protection,[114] does not necessarily render foreign taking claims non-justiciable. The Supreme Court articulated the basis of the act of state doctrine in *Underhill v. Hernandez*:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[115]

The Federal Circuit summarized the act of state doctrine in the foreign takings area as preventing "judicial relief for certain claims that would require the court to pass on the validity of acts of a foreign state."[116] Foreign taking claims often allege that the U.S. acted directly or indirectly through a foreign sovereign.[117] However, foreign taking claimants seek only to have American courts "pass on" the constitutionality of U.S. government acts, thus avoiding the act of state issue.[118]

Ironically, as Judge Wilkey observed in dicta in *Ramirez de Arellano*, a court that finds an uncompensated taking to be the act of a foreign sovereign, and thus non-justiciable under the act of state doctrine, *a fortiori* issues an advisory finding that the President of the United States is obligated to retaliate against the foreign sovereign under the Foreign Assistance Act.[119] The Foreign Assistance Act's "Hickenlooper Amendment" provides in part: "The

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[112] *See generally* Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States*, 22 BUS. LAW. 3, 23-26 (1966).

[113] *See, e.g., Langenegger*, 756 F.2d at 1570.

[114] *Ramirez de Arellano*, 745 F.2d at 1534.

[115] Underhill v. Hernandez, 168 U.S. 250, 252 (1897), *aff'd by* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416-19 (1964).

[116] *Ramirez de Arellano*, 745 F.2d at 1533.

[117] *See, e.g., Turney*, 115 F. Supp. 457 (alleging that the Phillipine government seized plaintiffs' radar equipment and turned the equipment over to the United States).

[118] *See Ramirez de Arellano*, 745 F.2d at 1533 (holding that act of state doctrine could not bar the plaintiff's claim in any event as the defense was not raised at trial).

[119] *See id.* at 1539 ("under the reasoning advanced by the dissent, the President is currently derelict in his statutory duty to terminate all assistance to the government of Honduras") (referring to the "statutory duty" imposed by 22 U.S.C. § 2370(e)(1) (1982)).

President shall suspend assistance to the government of any country . . . when the government of such country . . . has nationalized or expropriated or seized ownership or control of property owned by any United States citizen . . . ."[120] Because the Foreign Assistance Act does not contain an implied private cause of action,[121] a court invoking the act of state doctrine in the context of a foreign taking action may "back into" an area proscribed to the judiciary.

2. Exception For Wartime Takings

A "wartime exception" may place a foreign taking outside the scope of the fifth amendment, reflecting the fact that many U.S. government property takings occur during war[122] or during post-war military occupations.[123] The wartime exception is rooted in post-Civil War cases that generally denied fifth amendment treatment to private property, such as bridges, that the Union Army destroyed for strategic purposes.[124] These cases articulated the policy that compensation for all wartime acts would soon exhaust the public treasury.[125]

The wartime exception also reflects a concept of overwhelming public necessity.[126] In *Juaragua Iron Co. v. United States*,[127] the Supreme Court addressed a wartime foreign taking claim that also involved public health considerations. There, the U.S. government destroyed a factory located in Cuba to prevent the spread of con-

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[120] 22 U.S.C. § 2370(e)(1) (1982).

[121] *See* Aerotrade, Inc. v. Agency for Int'l Development, 387 F. Supp. 974 (D.D.C. 1974).

[122] *See, e.g.*, United States v. Caltex (Phillipines), Inc., 344 U.S. 149 (1952) (although U.S. Army's seizure and destruction of a U.S. corporation's Manila oil refinery would be a compensable taking in peacetime, the fifth amendment does not guarantee compensation where private property with strategic value is destroyed to prevent the enemy from seizing and using it), *reh'g denied*, 344 U.S. 919 (1953).

[123] *See, e.g.*, Anglo-Chinese Shipping v. United States, 127 F. Supp. 535 (Ct. Cl.), *cert. denied*, 349 U.S. 938 (1955) (the Allied Command's requisition of a cable-laying vessel for use by occupied Japan was not a compensable taking although the Allied Command was an agent of the U.S.).

[124] *E.g.*, United States v. Pacific R.R., 120 U.S. 227 (1887). *Cf.* Aris Gloves, Inc. v. United States, 420 F.2d 1386 (Ct. Cl. 1970). Congress also provided a special exception from Court of Claims jurisdiction for claims arising out of damage by the U.S. Army and Navy during the Civil War. Act of July 4, 1864, ch. 240, 13 Stat. 381.

[125] *See, e.g.*, *Union Pacific RR*, 120 U.S. at 235.

[126] *See* United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) ("[war] makes demands which otherwise would be insufferable [but] which are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands").

[127] 212 U.S. 297 (1909).

tagious disease while the U.S. was at war with Spain.[128] The Court denied the just compensation claim brought by a U.S. corporation that owned the factory.[129] The Court's reasoning focused both on wartime exigencies of fighting alien enemies and on the need to protect the "health and safety" of U.S. troops in Cuba.[130]

Claims may be successful, even if based on government takings in wartime, where the plaintiff can show that the taking was arbitrary.[131] Courts have also found wartime takings unlawful when the U.S. officials effecting the takings have no congressional authority to do so.[132] However, allegations of arbitrary or unauthorized government action in the context of foreign taking claims may raise political question issues,[133] and may bar the claim from Claims Court jurisdiction.[134] Thus, foreign taking claims arising out of wartime acts by the U.S. government will probably be unsuccessful.[135]

3. State Secret Privilege

Finally, even if a foreign taking claim is justiciable and not within the wartime exception, the "state secret" privilege may effectively bar litigation of the matter. The federal government may invoke this absolute privilege to prevent disclosure of certain matters, such as those concerning national security, in the course of foreign takings litigation.[136] Courts evaluate the allegedly privileged material *in camera*.[137] If the privilege's scope is deemed broad enough, it may warrant dismissal of an otherwise justiciable claim. Still, no foreign taking claims have been dismissed for reasons of state secret privilege. Thus, with the exception of wartime-related claims, courts will generally adjudicate foreign taking claims despite their origin in the foreign policy acts of the executive and legislative branches of the U.S. government.

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[128] *See Juaragua Iron*, 212 U.S. at 301-02.

[129] *See id.* at 310.

[130] *See id.* at 308-09.

[131] Idaho Maryland Mines Corp. v. United States, 104 F. Supp. 576, 587-88 (Ct. Cl. 1952).

[132] The Paquete Habana, 175 U.S. 677, 711 (1900) (wartime capture of foreign fishing vessels off the coast of Cuba by U.S. government officials was unlawful because the seizures were unauthorized by Congress). *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (President's wartime seizure of domestic steel mills invalid for lack of congressional and constitutional authority).

[133] *See supra* note 109 and accompanying text.

[134] *See infra* note 188 and accompanying text.

[135] *But see Seery*, 127 F. Supp. 601, discussed *supra* at text accompanying note 26.

[136] *See Langenegger*, 756 F.2d at 1569. *See also* Foster v. U.S., 12 Cl. Ct. 492, 494 (1987).

[137] *Foster*, 12 Cl.Ct. at 494.

III. Elements of a Foreign Taking

A. *Direct and Substantial U.S. Involvement*

The *Langenegger* decision articulated for the first time a judicial test to determine whether a foreign taking has occurred. The court indicated that a claimant must show that the U.S. government had "sufficiently direct and substantial" involvement in an overseas expropriation to trigger just compensation liability.[138] The Federal Circuit in *Langenegger* developed this test by borrowing the "sufficiently direct and substantial" language verbatim from *Y.M.C.A. v. United States*,[139] a case alleging that the U.S. government took private property in the Panama Canal Zone.[140]

The Supreme Court in *Y.M.C.A.*, like the *Langenegger* court, was presented with a claim that the U.S. government effected a taking by causing a third party to deprive the plaintiffs of the use of their property. In *Y.M.C.A.*, U.S. Army troops ejected a rioting crowd from private buildings in the Canal Zone near the Panamanian border, occupied the buildings for some time, then withdrew.[141] The crowd attacked from the Panama side of the Canal Zone border, damaging the buildings during and after the Army occupation.[142] The Court affirmed the Court of Claims' summary judgment dismissal of the plaintiffs' claim that the Army's actions caused the crowd to damage the buildings, entitling the plaintiffs to just compensation.[143]

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[138] *See Langenegger*, 756 F.2d at 1571. The court also held that a claimant may establish an independent basis for a taking claim by a showing that the U.S. government acted so as to extinguish the claimant's otherwise live expropriation action against a foreign sovereign. *Id.* at 1573. This alternative basis follows such claim extinguishment cases as *Shanghai Power*. *Id.* (citing *Shanghai Power*, 4 Cl. Ct. 237). However, nothing in the Court of Appeals' opinions suggests that a claimant will be exempted from showing that the U.S. *caused* the claim extinguishment. In fact, although the *Langenegger* plaintiffs alleged claim extinguishment in the alternative, the court found that the U.S. State Department's refusal to cooperate in a diplomatic settlement with the government of El Salvador did *not* cause claim extinguishment. *See id.* at 1573. Thus, it appears that the court intended all foreign taking claims to be subject to a common "sufficiently direct and substantial" U.S. involvement requirement.

[139] 395 U.S. 85 (1969).

[140] *Langenegger*, 756 F.2d at 1570 (quoting *Y.M.C.A.*, 395 U.S. at 93 ("'[I]n any case where government action is causally related to private misconduct which leads to property damage–*a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment.*'") (emphasis added by the court)).

[141] *See Y.M.C.A.*, 395 U.S. at 86–91.

[142] *Id.*

[143] *Id.* at 93.

The *Y.M.C.A.* Court placed great weight in its reasoning on the fact that "[a]t the time the troops entered [the building], the riot was already well under way, and petitioners' buildings were already under heavy attack."[144] In effect, the Court agreed with the Court of Claims' determination that the U.S. Army was not the *sine qua non* of the property damage. "[W]here government action is causally related to private misconduct which leads to property damage," the Court continued, "a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment."[145] *Y.M.C.A.*'s "sufficiently direct and substantial" language is offered to guide courts in evaluating whether the U.S. caused a property deprivation. It follows, therefore, that the *Langenegger* test, based on *Y.M.C.A.*, should be an inquiry into the causation of a foreign taking.

B. *The Langenegger Test*

Instead of focusing on causation, the Federal Circuit in *Langenegger* identified two indicia of "sufficiently direct and substantial" U.S. involvement in an overseas expropriation. First, the court examined the "nature" of the U.S. government activity alleged to have caused the taking.[146] Where U.S. activity amounts only to "friendly persuasion," the court held, the U.S. government does not trigger just compensation liability.[147] The court found that U.S. encouragement of the El Salvadoran government to implement land reform did not rise above the level of "friendly persuasion."[148]

Second, the court examined the "benefit" that accrues to the federal government as a result of the alleged taking.[149] Where the sole benefit to the U.S. government is the enhanced political stability of its neighboring sovereigns, a finding of "sufficient direct and substantial" involvement is not warranted.[150] Apparently, both prongs of this "nature of U.S. activity"/"U.S. benefit" analysis must be satisfied to demonstrate the existence of a foreign taking.

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[144] *Id.* at 92–93.
[145] *Id.* at 93.
[146] *Langenegger*, 756 F.2d at 1572.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*

The *Langenegger* court proffered this two-prong test as a synthesis of earlier foreign taking decisions.[151] In fact, the court created this test by substantially reformulating existing takings law. To develop the "nature of U.S. activity" test, the Federal Circuit in *Langenegger* relied primarily on *Porter v. United States*,[152] although this language appears nowhere in the *Porter* opinion.[153] The Court of Claims in *Porter* dismissed a just compensation claim alleging that the U.S. government was obligated under the fifth amendment for actions of the government of Micronesia, a U.S. Trust Territory.[154] The Court of Claims, however, dismissed *Porter* for lack of jurisdiction,[155] reasoning that the plaintiffs' "taking claims focus only on the actions of Trust Territory officials . . . without authority to act on behalf of the United States."[156] In contrast, the *Langenegger* court, by its own stipulation, accepted the plaintiffs' allegations that U.S. government actions were part of the causal chain of events leading to the El Salvadoran land reform program and the expropriation:

> It is undisputed and indeed well known in this country that as a matter of foreign policy the United States . . . in the case of El Salvador . . . strongly supported the implementation of reforms as necessary to stability. Appellants assert . . . that the United States tied economic and military assistance to reform, provided financial aid for reform programs, and assisted in drafting the agrarian reform proposals by providing an expert who was under contract to the United States . . . . For summary judgment purposes only, *we take all this as true*.[157]

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[151] *See id.* at 1570–73 (citing, *inter alia*, *Shanghai Power*, 4 Cl.Ct. 237; Best v. United States, 292 F.2d 274 (1961); Anglo-Chinese Shipping Co. v. United States, 127 F. Supp. 553 (Ct. Cl. 1955), *cert. denied*, 349 U.S. 938; *Turney*, 115 F. Supp. 457).

[152] 496 F.2d 583 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975).

[153] *See Langenegger*, 756 F.2d at 1572 (citing *Porter*, 496 F.2d at 591). The Federal Circuit in *Langenegger* also cited *Turney*, 115 F. Supp. 457, *Anglo-Chinese*, 127 F. Supp. 553, and Best v. United States, 292 F.2d 274 (Ct. Cl. 1961) in developing its test. 756 F.2d at 72 ("The method of analysis of [*Turney*, *Anglo-Chinese* and *Best*] as well as the general doctrines announced by the Supreme Court . . . are controlling here"). *Langenegger*'s use of *Turney*'s authority is discussed in the text *infra*. *Anglo-Chinese* is clearly a military occupation decision, of limited use for adjudicating peacetime foreign takings. *See supra* notes 122–23 and accompanying text. The *Best* court explicitly did not address the constitutional taking claim of German contractor who sought additional payments from the U.S. Army military occupation command. *See Best*, 292 F.2d at 279 ("It is obvious from the above discussion that we do not reach the Constitutional question").

[154] *Porter*, 496 F.2d at 591–92. The claimants alleged, *inter alia*, that the government of Micronesia, a U.S. territory, obtained control of a private shipping company through coercion so as to subject the United States to just compensation liability. *Id.*

[155] *Id.* at 592.

[156] *Id.* at 591.

[157] *Langenegger*, 756 F.2d at 1567 (emphasis added).

By accepting the authority of the alleged U.S. government actions and granting jurisdiction to the *Langenegger* claim, the Federal Circuit necessarily placed the claim outside the control of jurisdictional decisions such as *Porter*. Although *Porter* stressed that its holding reflected the plaintiffs' failure to adequately plead unconstitutional U.S. activity, *Langenegger* relies on *Porter* despite specific allegations of U.S. wrongdoing.

The *Langenegger* court's reliance on *Porter* also seems misplaced in light of the Federal Circuit's stipulation that "[i]f the Salvadoran government had not been amenable to United States recommendations, it could have expected a loss of financial support."[158] The *Porter* court distinguished its plaintiffs' fatal failure to allege authorized U.S. actions from the Court of Claims' finding that the Phillipine government's action in *Turney v. United States*[159] "was prompted by 'irresistible pressure' from the United States."[160] *Langenegger*'s factual stipulation of U.S. financial leverage on El Salvador appears to supply the element of U.S. pressure absent in *Porter*. The *Porter* decision's distinction of its facts from *Turney*'s indicates that a showing of such U.S. pressure would increase the persuasiveness of cases awarding compensation in foreign taking claims, such as *Turney*. Yet the *Langenegger* court followed *Porter*, not *Turney*. Finally, the *Langenegger* court used its "nature of U.S. activity" test, constructed on *Porter*'s foundation, in order to dismiss the plaintiffs' claim on the merits in summary judgment. This substantive test mischaracterizes *Porter*, which simply articulates a test for determining whether the Claims Court has jurisdiction. Thus, it is at best uncertain whether *Porter* supports the "nature of activity" test that *Langenegger* cites it for.

As the second prong of its inquiry into whether U.S. involvement was sufficiently direct and substantial to require just compensation, the *Langenegger* court looked to the amount of benefit that the U.S. government received from the alleged foreign taking.[161] The court relied heavily on *Turney* in formulating this element of its test to determine whether a compensable taking occurred.[162] *Turney*, however, introduced an entirely different concept of benefit into foreign takings jurisprudence, calling into question *Langenegger*'s reliance on the case.

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[158] *Id.*

[159] 115 F. Supp. 457.

[160] *Porter*, 496 F.2d at 592 (citing *Turney*, 115 F. Supp. at 463-64).

[161] *Langenegger*, 756 F.2d at 1571-72.

[162] *See id.*

The purpose of the benefit test in *Turney* was to determine the amount of compensation to be awarded just compensation claimants in certain circumstances. The *Turney* court determined that the U.S. pressured the Phillipine government to seize radar equipment on its behalf from the plaintiff.[163] The court also found that this pressure substantially caused the Phillipine government to seize the equipment, constituting a taking under the fifth amendment.[164] Prior to the seizure, the Phillipine government imposed an embargo on export of the equipment, effectively reducing the equipment's fair market value to zero.[165] Thus, to value the compensation due the plaintiff, the *Turney* court looked to the U.S. government's replacement cost for the equipment, reasoning that the government benefitted by at least this amount.[166] Notwithstanding the *Langenegger* court's assertions to the contrary, *Turney* did not determine the *existence* of a foreign taking by reference to U.S. benefit.

The benefit test also conflicts with domestic takings doctrine. This doctrine is grounded on the view that the framers of the Constitution intended the fifth amendment to place the burden on the public where the government uses private property for the public good.[167] The rationale behind requiring government compensation for public use of private property is that government power should be constrained from infringing upon private property interests.[168] The *Langenegger* court's benefit test appears to be calculated to determine whether the U.S. government truly derived public use from an expropriation of overseas property.[169] Yet the Supreme Court has held that the federal government need not take property for its own use to constitute a compensable taking.[170] A

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[163] *Turney*, 115 F. Supp. at 463–64.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

[168] *See* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 176–81 (1871). *See also* Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 309 (1795).

[169] *See Langenegger*, 756 F.2d at 1572 ("[A] benefit of hemispheric stability must be characterized as a benefit only incidental to the expropriation. The expropriation by [El Salvador's] legislation was for the benefit of that country's national interest . . . and was not for the United States' *public benefit*.") (emphasis added).

[170] Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) (using "private enterprise for redevelopment of [a condemned] area" is within the U.S. government's constitutional power of eminent domain).

taking claim may lie even if a non-governmental party derives the tangible benefit of the taking.[171] Courts traditionally defer to congressional determination of which public uses justify exercising the sovereign taking power:

> We deal . . . with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.[172]

The *Langenegger* decision advances no reason why the court should not have similarly deferred to Congress' foreign policy goal of "hemispheric stability"[173] as a "public use" justifying a foreign taking.

Many U.S. foreign policy acts involve decisions and authorization originating in the executive branch. In the just compensation area, however, such executive involvement does not allow courts to proceed as if no delegated congressional authority exists. Courts hearing just compensation claims may find implied congressional authorization when a taking is "a natural consequence of Congressionally approved measures."[174] With numerous congressional appropriations bills directing funds to various foreign policy activities, an argument that a foreign taking is the "natural consequence" of congressional action seems eminently reasonable. Foreign taking claims are rarely denied for lack of delegated congressional authority.[175]

A focus on governmental benefit in determining whether a compensable taking occurred also suggests a rigidity in takings analysis rejected decades ago by the Supreme Court. In the late 19th century, takings law required that the government obtain a posses-

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[171] *See* Berman v. Parker, 348 U.S. 26, 33 (1954). *See also* Hawaii Housing Authority, 467 U.S. at 243–44 ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose").

[172] Berman v. Parker, 348 U.S. at 32–33.

[173] *Langenegger*, 756 F.2d at 1572.

[174] NBH Land Co. v. United States, 576 F.2d 317, 319 (Ct. Cl. 1978). *See also generally infra* notes 188–90 and accompanying text.

[175] *But see* The Paquete Habana, 175 U.S. 677 (1900).

sory interest to support a compensable taking claim.[176] By the early 20th century, however, courts no longer accepted this literal definition of property as "absolute dominion over things."[177] At the same time, the Court shifted its focus in property taking claims to an examination of the magnitude of private loss balanced against public advantage.[178] The benefit analysis moves away from the flexible balancing test, resisting the Supreme Court's preference for non-formulaic determinations of what constitutes a compensable exercise of the police power.[179]

C. *Foreign Takings Without the Langenegger Test*

Langenegger's two-prong "nature of U.S. activity" and "U.S. benefit" threshold test is perhaps best understood as an attempt to prevent raids on the U.S. Treasury through the just compensation clause. Sensitivity to limitations on government resources is not inappropriate in the area of takings law. As one commentator observes, just compensation rules "must not cost so much in awards to owners that no government would pay them without serious disruption of function."[180] Courts today may be alarmed at the expanding definition of foreign takings that appears to include indirect takings and possibly compensation claims brought by aliens in connection with property seized abroad. *Langenegger*'s gloss on what constitutes "sufficiently direct and substantial" U.S. involvement, however, reintroduces into takings law an insensitivity to the facts and circumstances of each case. Existing foreign takings law and threshold requirements for Claims Court jurisdiction may be

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[176] *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 667–69 (1887) (State regulation barring operation of a brewery held not to be a taking because, *inter alia*, the state did not physically appropriate property). *See also* Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 36–41 (1964).

[177] *See* Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 328–29 (1980) ("As the 19th century progressed, increased exceptions to both physicalist and absolutist . . . conception[s] of property were incorporated [by courts that] increasingly sought to protect valuable interests as property even though no thing was involved"). By the early 20th century, courts generally accepted a new characterization of property as "a set of legal relations among persons." *Id.* at 330.

[178] *See, e.g.*, Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) (Holmes, J., writing for the Court) (no compensable taking because comparatively insignificant private loss was justified by public advantage).

[179] *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260–61 (1980) ("No precise rule determines when property has been taken"); Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("[T]his Court, quite simply, has been unable to develop any 'set formula'").

[180] Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 170 (1974).

able to protect the Treasury, similar to the *Langenegger* test, while respecting current takings doctrine that focuses on the claimant's loss, not on the government's benefit.

Claimants seeking monetary compensation for a foreign taking in the Claims Court must satisfy the requirements of the Tucker Act. The Tucker Act, as amended, establishes the Claims Court as a court of special jurisdiction empowered to hear those categories of claims against the U.S. government defined by Congress. These claims include constitutional causes of action such as just compensation claims.[181] The Claims Court shares jurisdiction with U.S. district courts for such claims up to $10,000,[182] but enjoys exclusive jurisdiction of claims in excess of this amount pursuant to 28 U.S.C. § 1491.[183] Thus, any significant threat to the U.S. Treasury by foreign taking claims is posed through such claims brought in the Claims Court.

A broad category of foreign taking claims are removed from Claims Court jurisdiction by the general doctrine that the court has no power to grant declaratory judgment or injunctive relief.[184] The Claims Court need not consider whether a claimant has any other forum in which to vindicate a claim in denying jurisdiction.[185] For mixed claims similar to *Ramirez de Arellano*, this jurisdictional rule may reduce the number of monetary just compensation claims in excess of $10,000 by forcing claimants to pursue such mixed claims

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[181] The 1887 Tucker Act, codified as amended at 28 U.S.C. § 1491, extended the jurisdiction of the Court of Claims to include just compensation actions: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . . ." 28 U.S.C. § 1491 (1982). *See also* H. R. REP. No. 1077, 49th Cong., 1st Sess. at 3–4 (1886). The Court of Claims was created by the Congressional Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. In 1982, § 133(a) of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 39–40, transferred original jurisdiction formerly vested in the Court of Claims to the newly created United States Claims Court. The Claims Court is an Article I court. *See* S. REP. No. 275, 97th Cong., 1st Sess. at 7–8 (1981); H. R. REP. No. 312, 97th Cong., 1st Sess. at 24–26 (1981).

[182] 28 U.S.C. § 1346(a)(2) (1982).

[183] *See, e.g.*, International Engineering Co., Div. of A-T-O, Inc. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1048 (1975); Chelsea Community Hospital, SNF v. Michigan Blue Cross Ass'n, 630 F.2d 1131 (6th Cir. 1980).

[184] The Claims Court generally lacks the power to grant equitable relief. 28 U.S.C. § 1331 (1982). The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 25 at 39 (1982), gives the Claims Court equitable jurisdiction in certain personal and contract matters. *Cf.* United States v. King, 395 U.S. 1, 3 (1969) (no jurisdiction for declaratory judgment claims); Austin v. United States, 206 Ct. Cl. 719, *cert. denied*, 423 U.S. 911 (1975) (no affirmative non-monetary relief power unless tied to and subordinate to monetary award).

[185] *See* Porter v. United States, 496 F.2d at 591 (citing Kyer v. United States, 369 F.2d 714, 719 (1966)).

in U.S. dictrict court. Of course, nothing prevents a claimant from first bringing the equitable portion of a mixed claim in U.S. district court, then proceeding in Claims Court with the monetary claim.[186] Such an approach, however, confronts the plaintiff with the prospect of collateral estoppel binding the Claims Court to the district court's determination of facts and law.[187] This prospect may make litigation strategy sufficiently complex to deter mixed claims from being brought frequently.

Courts seeking to "weed out" illegitimate foreign taking claims could also accomplish their goal by requiring a higher threshold showing of congressional authority in such claims. For Court of Claims jurisdiction, a taking must be expressly or impliedly authorized by an act of Congress.[188] Foreign takings often occur pursuant to actions by the executive branch's foreign policy powers. In domestic taking claims, congressional authority is often broadly defined, and may even be found by a court where the taking is "a natural consequence of Congressionally approved measures."[189] In the foreign takings area, however, precedent exists for the Claims Court to reject jurisdiction of claims failing to sufficiently allege congressional authority.[190]

The congressionally established "treaty exception" to the Tucker Act[191] may also bar certain foreign taking claims from Claims Court jurisdiction. Under this exception, the Claims Court has no jurisdiction where a plaintiff's claim could not conceivably exist independently of a treaty or other agreement concluded between the United States and a foreign sovereign.[192] The treaty exception has been construed narrowly. For example, U.S. citizens in *Anderson v. United States*[193] sought compensation in the Claims Court after the U.S. government's operation of a dam caused flooding of their leasehold located in Mexico.[194] The *Anderson* court held that the treaty exception did not bar jurisdiction of the leasehold taking, although the complaint sought in part to establish that the

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[186] *See, e.g.*, Giordano v. Roudebush, 617 F.2d 511 (8th Cir. 1980).

[187] *See, e.g.*, Hahn v. United States, 757 F.2d 581 (3d Cir. 1985).

[188] *See generally* Regional Rail Reorganization Cases, 95 S.Ct. 335 (1974). *See also NBH Land Co.*, 576 F.2d 317.

[189] *NBH Land Co.*, 576 F.2d at 319.

[190] *See, e.g.*, The Paquete Habana, 175 U.S. at 711.

[191] 28 U.S.C. § 1502 (1982).

[192] *See generally* Hughes Aircraft Co. v. United States, 534 F.2d 889 (1976).

[193] 7 Cl. Ct. 341 (1985).

[194] *Anderson*, 7 Cl. Ct. at 342.

U.S. government's actions violated a U.S.-Mexico treaty.[195] Similarly, the Supreme Court in *Dames & Moore v. Regan*[196] held that the treaty exception did not bar Court of Claims jurisdiction where the federal government allegedly extinguished plaintiff's expropriation claims against the newly formed government of Iran.[197] In *Dames & Moore*, agreements between Iran and the United States discharged all claims against Iran currently pending in U.S. courts and established the Hague facility as the sole tribunal through which such claims could be settled.[198] One commentator argues that the legislative history and subsequent interpretation of the treaty exception supports a broader prohibition of just compensation claims that arise solely out of the collateral effects of U.S. foreign policy.[199]

IV. Conclusion

The definition of compensable foreign takings is broad, including both direct and indirect overseas expropriations of property by the U.S. government. Aliens, as well as U.S. citizens, may be able to claim the protection of the just compensation clause against the United States' uncompensated use or destruction of their property in foreign jurisdictions. Application of the just compensation clause to aliens' property abroad is supported by analogy to fourth amendment decisions and by the increasingly accepted view since *Reid v. Covert* that constitutional protections apply uniformly to those affected by United States actions. This constitutional remedy is of particular interest to those with property interests in developing countries, where an interventionist American foreign policy increases the likelihood of a foreign taking.

Still, a potential foreign taking claimant faces significant barriers to his claim. Colorable foreign taking claims must meet requirements that reflect the fact that these claims arise within the context of U.S. foreign relations. Thus, a claim must not challenge the alleged foreign taking as arbitrary or unauthorized. A claim must be justiciable under the political question and act of state doctrines. Claims arising out of wartime acts by the government will

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[195] *Id.* at 343.

[196] 453 U.S. 654 (1981).

[197] *Dames & Moore*, 453 U.S. at 690–91.

[198] *Id.* at 664–65.

[199] *See generally* P. R. Trimble, *Foreign Policy Frustrated — Dames & Moore, Claims Court Jurisdiction and a New Raid on the Treasury*, 84 Colum. L. Rev. 317, *and especially* at 325–62 (1984).

probably not be compensable. Claims Court jurisdictional requirements are added to these limitations.

The *Langenegger* court adds another restriction on foreign taking claims by focusing on what benefit the U.S. derived from the expropriation as a test of whether a foreign taking occurred. This approach conflicts with established just compensation authority that focuses on whether taking claimants make a colorable argument that the U.S. caused property to be seized or destroyed. The *Langenegger* benefit test also questions the explicit or implicit judgment of Congress that certain foreign policy goals constitute proper public purposes that support U.S. sovereign acts abroad. In the area of takings law, however, courts must defer to Congress' judgment. When the exercise of sovereign power to accomplish a congressionally authorized purpose produces a public use of private property, the just compensation clause provides a remedy for the property owner. Under the *Langenegger* approach, a property taking proximately caused by the United States' foreign policy apparatus may be dismissed prior to trial by a judge who finds that the taking produced no identifiable benefit for the United States. Such a finding substitutes the court's evaluation of United States foreign policy for that of the legislative and executive branches which create it. This policy evaluation by the court, in the area of takings law that gives considerable deference to legislative purpose, exceeds anyone's definition of the boundaries of the judicial function.

Rather than exhume 19th century takings doctrine that focused on whether the sovereign literally took property, courts adjudicating foreign taking claims should turn their attention to existing threshold requirements and jurisdictional tests. Attention to these requirements will allow courts to ensure that the *Langenegger* test remains an anomaly in foreign takings jurisprudence. Most importantly, these traditional limitations protect the Treasury while preserving a necessary flexibility in determining whether the U.S. government causes compensable takings to occur in foreign jurisdictions.

Remsen M. Kinne IV