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## Foreword

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## FOREWORD

*Chief Judge Loren A. Smith\**

In 1991, I was honored to write the foreword to the special issue of this law review devoted to the United States Claims Court.<sup>1</sup> While the volume number, the name of the court,<sup>2</sup> and the authors have changed, I am still honored and felt obligated to change my previous foreword. While some colleagues argued against this, insisting that no one reads forewords anyway so why not recycle, something about it seemed wrong!

There were also other more compelling reasons to write a new foreword. First, the old one has already been read by all of those likely to read forewords, however small the group. They would be disappointed with a rerun. Second, the old one had little relevance to this special issue since I am not psychic.<sup>3</sup> Third, since the court has changed its name, reprinting the old forward intact would look foolish, while editing it would require serious judicial decisions like when to use "Claims Court" and when to use "Court of Federal Claims." Such serious judicial decisions are in limited supply and should be reserved for actual cases. Finally, the authors of the articles in this issue as well as the workmanship of the law review editorial staff deserve a brand spanking new, never-been-read-before, no-previous-user, foreword! By gosh, I'll write one!

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\* Chief Judge, United States Court of Federal Claims. Chief Judge Loren A. Smith was appointed to the Claims Court in 1985 and has been the Chief Judge of the court since 1986. He received his J.D. from Northwestern University Law School in 1969.

1. See Special Issue, *United States Claims Court Symposium*, 40 CATH. U. L. REV. 509 (1991).

2. Pursuant to the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, Title IX, § 902(b), 106 Stat. 4506, 4516 (1992), the United States Claims Court was renamed the United States Court of Federal Claims, effective October 29, 1992.

3. Though certain commentators have suggested that psychic powers rather than logic and clear analysis may better explain my opinions, the court of appeals, on the whole, has rejected this approach. Compare *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991) (affirming Claims Court decision and stating: "All of the probative facts being thus readily available to a reader of this opinion, no useful purpose would be served by a mere recast in our own words of Chief Judge Smith's exhaustive exposition of the facts in his scholarly and well-reasoned opinion.) with *Winstar Corp. v. United States*, 994 F.2d 797 (Fed. Cir. 1993) (reversing Claims Court opinion in *Statesman Savings Holding Corp. v. United States*, 26 Cl. Ct. 904 (1992) (Smith, C.J.), in finding no government breach of contract under relevant provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified at 12 U.S.C. § 1464 (Supp. IV 1992))).

This special issue concerns property rights disputes that are currently before the courts. While property issues generally connote a narrow range of questions, the nature of the legal concept is actually vast. The Framers of the Constitution and the Bill of Rights had a very broad view of property. When the authors of the Declaration of Independence used the words "life, liberty and the pursuit of happiness,"<sup>4</sup> they were not just using a euphemism for property, they were using a synonym.

James Madison noted in 1792:

**PROPERTY.**

This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*

In the former sense, a man's land, or merchandize, or money is called his property.

In the latter sense, a man has property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.

Where there is an excess of liberty, the effect is the same, tho' from an opposite cause.<sup>5</sup>

As we prepare to enter the twenty-first century, the world has experienced what Abraham Lincoln at Gettysburg called a "new birth of freedom."<sup>6</sup> Gone are the communist and socialist totalitarian regimes of the past. Gone are so many of the one-party or one-person autocracies of the third world. And hopefully gone is the view that there is any substitute for the vigorous

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4. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

5. James Madison, *Property*, NATIONAL GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds. 1983).

6. Abraham Lincoln, Address at the Dedication of Gettysburg National Cemetery (November 19, 1863), in 2 ABRAHAM LINCOLN COMPLETE WORKS 439 (John G. Nicolay & John Hay eds., 1915).

defense of fundamental human rights against the legitimate sounding claims of economic development or national liberation. While much of the third world has suffered in the last two generations under the illusion, become a nightmare, that fundamental human rights to life, liberty and property could be suppressed for reasons of state, that nightmare is now ending. Though, while the world is waking, we are reminded daily by the headlines, that the nightmare is not over yet. For our part, we, in the great industrial democracies of the West must never forget the lesson taught by the Framers of the Constitution and the Bill of Rights: the fundamental human rights to life, liberty and property guarantee the integrity of the human person. To sacrifice these rights against the state to any social goal, no matter how laudable or compelling, is to enter the nightmare from which so much of the world is now waking.

I commend this excellent issue of the *Catholic University Law Review* to the reader. The focus of the issue on the Takings Clause of the Fifth Amendment furthers the development and analysis of this important area of constitutional law. Only by the process of rational inquiry can a free society ensure its continued freedom.

