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REGULATORY TAKINGS IN THE UNITED STATES CLAIMS COURT: ADJUSTING THE BURDENS THAT IN FAIRNESS AND EQUITY OUGHT TO BE BORNE BY SOCIETY AS A WHOLE

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Congress has placed the United States Claims Court in a unique position to emerge as the definitive arbiter of the Constitution's promise that private property shall not "be taken for public use, without just compensation." The Tucker Act, by carving out of the Claims Court's jurisdiction the entire universe of money claims under the "takings" clause of the Constitution, insures that the Claims Court will have the last word on the factually intensive inquiry into whether the government's regulatory action gives rise to a just compensation claim.

Fortunately, Claims Court judges operate within an institutional framework and a judicial environment which enhances their ability to decide correctly these complex and vexing lawsuits. First, they are, by reason of the Tucker Act's grant of jurisdiction, empowered "to entertain any suit for money against the United States which does not 'sound in tort' and which is founded upon the Constitution." Second, by reason of the Claims Court's national jurisdiction requiring that its sixteen judges handle all such claims, conflicts among the circuits, districts, or regions of the country are avoided. This homogeneity appears to have noticeably diminished the United States

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1. U.S. CONST. amend V.
Supreme Court's interest in reviewing Claims Court regulatory takings decisions, thereby underscoring the importance of the decisions penned by Claims Court judges. Third, the painstaking factual inquiry characteristic of Claims Court judges more often than not takes them to trials at the very site of the dispute, which enhances their ability to speak authoritatively about the effects of the government's regulatory schemes upon private property.

In order to fully understand the Constitution's critical protection of rights in private property, this Article first addresses the Claims Court's fifth amendment jurisprudence. Following this review, this Article concludes that the Claims Court, almost alone among judicial tribunals in this country, has intuitively understood the importance of the ad hoc factual inquiry prescribed by the Supreme Court for regulatory takings cases. This Article's examination of five recent Claims Court cases, which follows the fifth amendment review, is intended as an introduction to the insights of the Claims Court in this rapidly developing field of law.

I. NEW BEGINNINGS: THE SUPREME COURT'S 1986 TERM

The dawn of a new age in fifth amendment takings jurisprudence occurred very near the end of the Supreme Court's 1986 term with the decision of two watershed cases. In First English Evangelical Lutheran Church v. County of Los Angeles, the Court held that a regulatory taking gives rise to a fifth amendment guarantee of monetary compensation. In Nollan v. California Coastal Commission, the Court stated that a property regulation must substantially advance its governmental purpose for courts not to conclude it is a taking.

For more than fifty years prior to these decisions, governments and property owners had litigated to a stalemate over the extent to which the fifth amendment's proscription of taking for a public use without just compensation constrained the government's exercise of its legitimate regulatory pow-

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5. As discussed below, the vast majority of the important United States Supreme Court regulatory takings decisions have arisen from state court systems or, on occasion, from the "numbered circuits." The Supreme Court has consistently denied certiorari on cases arising through the Federal Circuit. See, e.g., Sperry Corp. v. United States, 853 F.2d 904 (Fed. Cir.), rev'd, 493 U.S. 52 (1989); Allied-General Nuclear Services v. United States, 839 F.2d 1572 (Fed. Cir.), cert. denied, 488 U.S. 819 (1988).

6. See, for example, the site visits recounted in cases such as Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987), and Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990), discussed infra notes 66-82 and accompanying text.

8. Id. at 306-07, 315, 321-22.
10. Id. at 834, 841.
Counsel for the regulatory authorities chanted rhythmically from the Supreme Court's landmark holding in *Euclid v. Ambler Realty Co.*, which stated that restrictions on the use of property are ordinarily valid and constitutional. Lawyers for landholders proclaimed their own mystic incantation from the magical pen of Oliver Wendell Holmes: "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." And, for the same fifty years the Supreme Court, like Diogenes in search of an honest man, sought in vain for a factual setting in which a regulatory action would activate the fifth amendment's guarantee of just compensation.

As a matter of constitutional theory, the riddle seemed insoluble. Traditional constitutional analysis held that the Bill of Rights defined the outer limits of permissible governmental action. If that governmental action violated protections of speech, due process, right to counsel, or equal protection, for example, it was invalid; if not, then the exercise of governmental authority was legitimate against a claim of constitutional invasion. How, then, could a common regulatory imposition such as a zoning ordinance or permit requirement be at once a legitimate exercise of constitutionally-granted authority and a violation of the fifth amendment?

The Court's first real attempt to grapple with this anomaly came in its 1978 decision in *Penn Central Transportation Co. v. New York City*, which upheld against a fifth amendment challenge the City's refusal to allow construction of an office building atop the historically-significant Grand Central Station. The Court forthrightly conceded its decades-long inability to concoct a usable test for regulatory takings:

While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] 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," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather

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14. See supra note 11 and accompanying text.
15. See, e.g., *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310 (1987) (citing approvingly appellant's argument therein that the fifth amendment "does not require compensation as a remedy for 'temporary' regulatory takings—those regulatory takings which are ultimately invalidated by the courts").
17. Id. at 107, 138.
than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." 18

In a valiant attempt to resolve this intractable constitutional conundrum, the Supreme Court set forth an approach which would subsequently be hailed as the "Penn Central test" for regulatory takings:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. 19

Although differently phrased, these three elements of economic impact on the property owner, the extent of reasonable investment-backed expectations for use of the property, and the importance of the governmental purpose served remain the principal stepping-stones of regulatory takings analysis. 20

Anxious to squeeze every drop of meaning from this long-awaited opinion, legal scholars and trial counsel alike instantly began to cite the Penn Central test for regulatory takings. 21

However, brief reflection demonstrates that the Penn Central formulation is much less of a specific three-pronged test for constitutional violations 22 than it is a cousin to the oft-referenced Potter Stewart definition of obscenity, "[I] know it when I see it. . . ." 23 Although the economic impact, reasonable expectations, and nature of the governmental action elements clearly are issues common to virtually all regulatory takings cases, subsequent Supreme Court takings decisions confirmed that the truly useful segment of the Penn Central formulation is the requirement that the Court conduct an ad hoc, case-by-case inquiry. 24 A more specific rule was not to emerge, however, until ten years later.

18. Id. at 123-24 (citations omitted).
19. Id. at 124 (citation omitted).
24. As discussed infra, the Claims Court at least has emphasized the equities of the particular case over a formulaic requirement that a regulatory takings claim prevail on all three issues set forth in the Penn Central test. The unfairness of requiring donation of a beach
The intervening decade saw the Court developing an exaggerated procedural threshold which enabled it to avoid deciding takings cases on the merits. Holding that the matters were not ripe for adjudication, the Court failed to reach the merits in cases both where property was severely down-zoned and where development was denied. Although the Court had much less difficulty in analyzing physical invasions of property, few observers realized that this seemingly parallel track of fifth amendment jurisprudence would soon contribute significantly to the Court's regulatory takings jurisprudence.

By the fall term of 1986, the stage was set for a dramatic pronouncement in regulatory takings law: the Court had accepted four major takings cases for argument that term and had hinted in cases such as United States v. Riverside Bayview Homes, Inc. that it might be inching toward a solution to the riddle of when a constitutional government action was an unconstitutional taking of private property without just compensation. Some believed the game was up when, on March 10, 1987, Justice Stevens wrote the majority opinion in Keystone Bituminous Coal Ass'n v. DeBenedictis, which declared that Justice Holmes' holding in Pennsylvania Coal Co. v. Mahon was mere dictum. Following Keystone, few courts even noted the later holding in Hodel v. Irving, an obscure Indian property law case which boldly declared that "one of the most essential sticks in the bundle of rights that are commonly characterized as property—[is] the right to exclude others." A new day was about to begin.
Within months of its *Keystone* and *Hodel* holdings, the Supreme Court declared that the fifth amendment guarantees monetary compensation when a regulatory taking has occurred. In *First English Evangelical Lutheran Church v. County of Los Angeles*,\(^3\) the Court flatly rejected the "California rule," which interpreted the fifth amendment's just compensation clause as a mere condition upon the exercise of the power of eminent domain.\(^3\) By this logic, California sought to limit its property owners' remedy for an uncompensated taking to invalidation of the offending statute. The legal system simply defined away the just compensation remedy by declaring that there could be no uncompensated takings, only invalid regulations, thereby protecting and encouraging the proliferation of California zoning and land use regulation.

In *First English*, the Supreme Court determined that the California rule unconstitutionally truncated the just compensation right to a fifth amendment money remedy.\(^3\) The Court analogized the eight-year application of an ordinance which forbade all construction, and thus allegedly constituted a taking,\(^3\) to a leasehold for a period of years, requiring compensation. Most significantly, the Court clarified the basic proposition that "the [fifth] amendment . . . is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of an otherwise proper interference amounting to a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'"\(^3\) This clarification of the fifth amendment's guarantee of a money remedy to vindicate the right of just compensation is the bedrock upon which subsequent Claims Court cases have been based. In fact, a contrary holding would likely have required dismissal of all of the five cases discussed in the next section.

Two weeks after its decision in *First English*, the Supreme Court determined that a property regulation which does not substantially advance its avowed governmental purpose constitutes a taking. In *Nollan v. California Coastal Commission*,\(^4\) the Court invalidated a requirement that an easement for public ingress and egress along the beach be donated as a condition of

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36. Id. at 315.
37. Id. at 317.
38. Because the case was decided on demurrer, its allegation that the regulation constituted a taking was accepted as true for purposes of the opinion. On subsequent retrial, the ordinance was held not to have been a taking, contradicting this allegation. *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App.3d 1353 (2nd Dist. 1989), cert. denied, 110 S. Ct. 866 (1990).
permitting reconstruction of a beach house. Adverting to the Court’s process as “intermediate scrutiny,” Justice Scalia's majority opinion offered a down-to-earth example of the nexus which must exist between the avowed governmental purpose and its impact upon the individual: “[W]hen that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury.” Thus, “[T]he Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization.”

The ad hoc factual inquiry into the actual rather than announced connection between the statutory purpose and its application to the landowner lies at the heart of the holdings in the five cases discussed below. Because of this unequivocal reaffirmation that a landowner has a constitutionally guaranteed right to recover just compensation for a regulatory taking, and that the takings determination itself must be made in a searching, ad hoc factual inquiry, the Claims Court's Tucker Act jurisdiction over such claims instantly became the focal point for illuminating those circumstances in which governmental regulation gives rise to a compensable taking of private property. This process of illumination continues to the present, as dozens of takings cases make their way through the Claims Court docket. In the next section, we explore a sample of the most recent and most significant of these decisions.

II. THE AD HOC FACTUAL INQUIRY IN ACTION—FIVE RECENT DECISIONS

True to the Supreme Court’s directive for an ad hoc, intensely factual inquiry, the Claims Court has developed over the past few years a body of takings law which is both cohesive and cogent. As previously noted, this is in large part due to the fact that the Claims Court is uniquely qualified to undertake the intensely insitu factual analyses required by recent Supreme Court decisions. A review of recent cases will show that the Claims Court has rarely shirked its duty to wrestle to the heart of a fact pattern and to tailor an appropriate result.

41. Id.
42. Id. at 837.
43. Id. at 841.
44. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).
A. The Blackballed Uranium Mine

*United Nuclear Corp. v. United States*\textsuperscript{46} arose out of mining leases located on a Navajo Indian reservation. The leases provided for annual rent and royalty payments to the Indian tribe plus a $79,000 signing bonus which United paid to the tribe along with an additional prepayment fee.\textsuperscript{47} In accordance with a long-established regulatory scheme, the Secretary of Interior approved the leases and United's subsequent exploration plans for the leased land.\textsuperscript{48} Pursuant to the leases, United spent more than $5 million exploring the land and uncovered valuable uranium deposits for which it developed a mining plan of operations.\textsuperscript{49} United submitted its plan to the Secretary for routine administrative approval, fully satisfying all of the Secretary's regulations. Approval was withheld, however, until United could obtain the approval of the Navajo Tribe, a requirement which the Secretary had never previously imposed and which was not contained in any Departmental regulations.\textsuperscript{50}

United spent more than three years trying to obtain tribal approval. In the end, however, United lost its leases because it failed to begin mining within the period the lease specified. The record established that the reason the Indian tribe refused to approve of the mining plan was that it wanted United to pay them an additional $10 million.\textsuperscript{51}

The Claims Court held that United should not be entitled to compensation for its loss of the leases because its expectations of mining on the leased land were not reasonable.\textsuperscript{52} In effect, United should have "question[ed] at the outset whether rules, regulations and requirements under the existing scheme, to which it voluntarily submitted itself, would change during the 10-year term of its lease."\textsuperscript{53}

The Federal Circuit rejected the assertion of the Claims Court in part because the Department of the Interior had not adopted the Secretary's new requirement of tribal approval of the mining plan through any formal rulemaking process. The court pointed out that, had the Secretary proposed such a regulation pursuant to his formal rulemaking authority, United could have opposed its application to its leases which had been entered into almost

\textsuperscript{46} 17 Cl. Ct. 768 (1989), rev'd, 912 F.2d 1432 (Fed. Cir. 1990).
\textsuperscript{47}  Id. at 769-70.
\textsuperscript{48}  Id. at 770.
\textsuperscript{49}  Id.
\textsuperscript{50}  Id. at 770-71.
\textsuperscript{51}  United Nuclear Corp. v. United States, 912 F.2d 1432, 1434-35 (Fed. Cir. 1990).
\textsuperscript{52}  United Nuclear Corp. v. United States, 17 Cl. Ct. at 775-76.
\textsuperscript{53}  Id. at 775.
six years earlier.\textsuperscript{54} Moreover, the Secretary had in fact proposed a regulation applicable to future leases which required only that the mining supervisor consult with the Indian mineral owner before approving of a mining plan.\textsuperscript{55} The Department, however, neither adopted this regulation nor gave an Indian tribe veto power before approving such mining leases.\textsuperscript{56} The lack of any valid justification for the government's requirement, as well as the resulting inequity of the situation, clearly persuaded the court to rule in United's favor.

\textbf{B. The Totalled Turkey Farm}

In \textit{Yancey v. United States},\textsuperscript{57} the court was faced with a claim for compensation for an alleged taking which occurred in furtherance of one of the government's paramount functions—protecting the health of its citizens. The Yanceys bought a flock of 3,000 turkey breeder hens and 295 turkey toms for the purpose of selling turkey hatching eggs produced on their farm in Rockingham County, Virginia, to out-of-state turkey farmers.\textsuperscript{58} As breeder stock, none of their turkeys were to be raised for meat. Unknown to the Yanceys, one month prior to starting their business, there was an outbreak of pathogenic Avian Influenza, a viral disease affecting poultry, in Lancaster County, Pennsylvania. Subsequently, there were milder outbreaks of the disease in parts of Maryland and Virginia.\textsuperscript{59} Because of these outbreaks, the United States Department of Agriculture (USDA) established a quarantine which covered certain counties of Maryland and Virginia, including Rockingham County. The quarantine applicable to the Yanceys prohibited interstate shipment of, among other things, poultry eggs.\textsuperscript{60}

The Yanceys spent up to $1,800 weekly to maintain their turkey flock. After a year of maintaining the flock, however, they decided that to continue maintaining it during the indefinite duration of the quarantine would be un-

\textsuperscript{54} United Nuclear, 912 F.2d at 1436.
\textsuperscript{55} \textit{Id}.
\textsuperscript{56} \textit{Id}. To this argument, the Federal Circuit stated:
It is difficult to understand . . . how encouraging the Indians not to live up to their contractual obligations, which they entered into freely and with the Secretary's approval, could be said to encourage self-determination. To the contrary, one would think that the best way to make the Indians more responsible citizens would be to require them to live up to their contractual commitments. \textit{Id} at 1437. The Secretary himself offered no basis whatsoever for his change in policy other than a vague and otherwise legitimate concern of Indian self-determination. \textit{Id}.
\textsuperscript{58} \textit{Id}. at 1536.
\textsuperscript{59} \textit{Id}.
economical. Thus, they sold the stock for slaughter, for $20,887.61. Although there was indemnification for contaminated stock under the USDA regulations, the Yanceys were not entitled to compensation for their loss because none of their stock was contaminated. Unable both to sell their stock in-state and unable to ship it out-of-state, the Yanceys lost their entire turkey breeding stock business, none of which was infected with the virus.

In reaching its decision to award compensation pursuant to the fifth amendment, the Federal Circuit was clearly impressed with the fact that the claimant learned of the quarantine from a newspaper only one day before it took effect and "[a]t the time of the acquisition of the turkey breeder flock . . . had the investment-backed expectation to sell the hatching eggs" out-of-state. Although the court could not award compensation under the USDA regulations, the court expressed its opinion that this construction was inequitable. The unfortunate plight of the new turkey breeding business owners, coupled with the inexplicable statutory compensation scheme, convinced the court through its ad hoc factual inquiry that the Constitution required compensation for the government-imposed quarantine.

C. The Case of the Missing Nexus

*Florida Rock Industries, Inc. v. United States* involved proposed limestone mining on wetlands. In 1972, Florida Rock Industries, a large-scale miner of limestone for cement production, bought a tract of 1,560 acres for $2,964,000 in Dade County, Florida, for the sole purpose of limestone mining. The property was located above a large limestone formation which was approximately fifty feet deep, tests of which showed that it would yield approximately 100,000 tons of usable rock per acre. When Florida Rock bought the property, it obtained all the necessary state and local permits or waivers to operate a limestone quarry. At that time, there were no applicable state or federal wetlands regulations. Because of a slump in southern Florida construction, however, Florida Rock did not attempt to mine the limestone until 1978. When it did, Florida Rock was told that, by reason of a change in the law, it would have to obtain a section 404 "dredge and fill"

61. *Yancey*, 915 F.2d at 1536.
62. *Id.* at 1536-37.
63. *Id.* at 1540.
64. *Id.* at 1538.
65. *Id.* at 1543.
69. *Id.* at 163.
permit pursuant to the Clean Water Act.\textsuperscript{70} On October 2, 1980, the Army Corps of Engineers denied Florida Rock's permit application, finding the permit would not be in the public interest.\textsuperscript{71}

In determining initially whether Florida Rock's expectation of mining on its land was reasonable, the court was influenced by the fact that Florida Rock had bought the property before the regulations were promulgated:

[T]he government has drawn a line in time, and has dictated that covered activity begun after a certain point is restricted. As defendant has conceded, if plaintiff had attempted to mine its property earlier, it probably would have been grandfathered in under the then-existing statutory scheme. Moreover, . . . limestone mining operations that had begun prior to the amendments to the Clean Water Act were ongoing at the time of trial.\textsuperscript{72}

Thus, again the court appeared to have been influenced in part by the inequity of a situation where property owners were "singled out" to bear the burden of a regulation merely because of the timing of the commencement of mining.

However, the more overriding concern in \textit{Florida Rock} was clearly that the government failed to convince the court that its argued nuisance was in fact an unreasonable threat to the environment. The government argued that to destroy the wetland would be to inflict a noxious injury upon the community, and therefore, prohibition of that use is not a taking because it is preventing a public nuisance.\textsuperscript{73} The Claims Court rejected this nuisance exception argument, however, in part because of the dearth of evidence introduced to support defendant's contention that claimant's proposed mining would endanger or destroy wetlands and risk contamination of the Biscayne Aquifer. The judge visited the property and observed:

[I]t is clear from the court's aerial visit of the site that the proposed use of plaintiff's property would not have created any significant increase in the risk of contamination posed to the Biscayne Aquifer. The extensive quarries in the area of plaintiff's property belie any claim that a nuisance is involved here.

Rock mining of the type planned for plaintiff's property never has been considered a nuisance. In fact, it is in this area, as the court observed, the precursor of stylish, if not elegant, residential development.\textsuperscript{74}

\textsuperscript{70} \textit{Florida Rock}, 791 F.2d at 895.
\textsuperscript{71} Id. at 896.
\textsuperscript{72} \textit{Florida Rock}, 21 Ct. Cl. 161, 169 (1990).
\textsuperscript{73} Id. at 166.
\textsuperscript{74} Id. at 166-67.
In short, the Court found there was no nexus between the prohibition of mining and the protection of the aquifer, which resulted in a taking of the value of the limestone.

**D. The Constitution's Safe Harbor**

*Loveladies Harbor, Inc. v. United States,* also a wetlands case, is similar to *Florida Rock.* In *Loveladies Harbor,* investors who bought property solely for a specific purpose, a housing development, were precluded from development by the wetlands statute. *Loveladies Harbor* was decided the same day as *Florida Rock* and by the same judge. In *Loveladies Harbor,* the plaintiffs acquired 250 acres of undeveloped land in Long Beach Township, New Jersey, for $300,000 in 1956. By 1982, the construction of new homes and the improvement by landfill consumed 199 of those acres, making the fair market value of the developed property increase over $200,000 per acre. The enactment of state and federal statutes which required permits before the filling of any wetlands prevented the development of the remaining fifty-one acres. The state eventually agreed to allow the plaintiffs to fill eleven and a half acres, provided that they create a corresponding amount of new wetlands. The Army Corps of Engineers, however, denied the plaintiffs' application to fill any acres. At issue before the Claims Court were the eleven and a half acres that the state permitted the plaintiffs to fill, as well as an additional acre previously filled by the plaintiffs.

The court's decision to award compensation for the loss of the fair market value of the plaintiffs' property rested largely on the inequity of the denial of the fill permits. The plaintiffs had invested in the property for one purpose only, development. By denying the required development permits, the government had effectively stripped the plaintiffs of all anticipated economic return. Unlike *Florida Rock,* however, the court did not question the nexus between the government's objective and its action. Rather, it asserted that: "[T]he central reason behind the denial [of the plaintiffs' fill permits] was the government's desire to preserve the wetlands along with its attendant wildlife and vegetation." The court indicated that even though the government had an important objective at stake, the regulation in this instance had gone too far in that it destroyed the entire value of plaintiffs' property:


76. *Loveladies Harbor,* 21 Cl. Ct. at 153; *Florida Rock,* 21 Cl. Ct. at 161, 163.

77. *Loveladies Harbor,* 21 Cl. Ct. at 154.

78. Id.

The Fifth Amendment guarantees that private property shall not be "taken for public use, without just compensation." This constitutional guarantee is more than just a limitation against the physical seizure or invasion of property by the government in the name of the public good. The Fifth Amendment also provides just compensation against governmental regulations which effectively accomplish the same destructive end.\(^8\)

What is further interesting about this analysis is the court's rejection of the government's proposed alternative uses for the property and instead its focus on the expectation of the property owner: "[D]efendant argues that among the potential uses plaintiffs' appraiser overlooks are birdwatching, hunting, and harvesting salt hay. Defendant offers little or no proof of any of these uses, relying instead on its perception that plaintiffs bear the entire burden of proof and persuasion."\(^8\) In looking at the intended development of the property, the court found that the plaintiffs suffered an almost total diminution of value due to the government action, and thus concluded that compensation of more than $2,658,000 was warranted.\(^8\)

**E. The Lost Value Coal Mine**

*Whitney Benefits, Inc. v. United States*\(^8\) involved attempts to mine a rich deposit of coal located in Sheridan County, Wyoming. Whitney Benefits was created in 1928 as a testamentary disposition of a large coal mine deposit in the Powder River Basin.\(^8\) In 1974, Whitney Benefits, Inc. and co-plaintiff Peter Kiewit Sons' Co. (PKS) entered into a leasing agreement giving PKS the right to mine Whitney coal in exchange for advance and operating royalties. Subsequently, PKS purchased surface property overlying Whitney coal to facilitate mining. In addition to the $581,798.80 in advance fees paid by PKS to Whitney, PKS also spent one million dollars in explora-

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80. Id. at 385.
81. Loveladies Harbor, 21 Cl. Ct. at 158.
82. The Claims Court summarily rejected the nuisance exception argument:
    Defendant also argues that plaintiffs' appraisal must be disregarded because the highest and best use proffered depends on an "impermissible activity," namely, placing fill in wetlands. This argument is reminiscent of defendant/appellant's argument in *Florida Rock*, to which the Federal Circuit responded, "We suppose appellant added this contention to provide a little humor for an otherwise serious and scholarly brief, and say no more about it." Neither shall this Court.

Loveladies Harbor, 21 Cl. Ct. at 157, n.5 (quoting *Florida Rock*, 791 F.2d at 905); see also Clampetti v. United States, 18 Cl. Ct. 548 (1989) (in this wetlands development case, the Claims Court did not reach the nuisance issue the defendant raised, but it did reject defendant's motion for summary judgment on that issue).
84. Id. at 396.
In 1977, however, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA), which required regulated coal mining through a permit proceedure. The Wyoming Department of Environmental Quality denied PKS's permit application on the grounds that the envisioned strip mining process could potentially disturb the underground water table necessary for the surrounding fertile agricultural land.

In support of its position that the denial of the mining permit was not a compensable taking of property, the government argued that denial of the right to mine coal still left the claimant with other sticks in its bundle; namely, the right to underground mine, the right to explore and mine minerals other than coal, and the right to ranch and farm. In particular, the government noted that the claimant retained "a valuable property right in farming and ranching the surface property." The Claims Court rejected this argument and instead focused on the diminution in value of the property with respect to the plaintiffs' expectation: "Because plaintiffs are claiming only that defendant took their coal rights, and not their surface rights, consideration of surface rights bought to facilitate the mining of Whitney coal as part of plaintiff's bundle of property rights is not warranted." Viewing the mining rights from this perspective, the court concluded that the economic impact of SMCRA on the claimant's ability to mine coal was to eliminate totally all economic value of their property. Thus, once again the court's decision to award compensation served to right a situation which if left uncorrected would work an inequity, even given an important government objective at stake:

This case presents a dispute where a proper government purpose, protecting agricultural land, must be balanced against the absolute diminution in value of the property at issue that the court has found. Logically, when a diminution in value is absolute, a taking is more easily found.

In the case at hand, the diminution in property value is total, and there is no public interest in causing plaintiffs to solely bear the burden of maintaining the AVF [underground water table] protected by SMCRA.

85. Id. at 397.
87. Whitney Benefits, 18 Cl. Ct. at 398.
88. Id. at 405.
89. Id.
90. Id.
91. Id. at 417.
92. Id. at 406.
III. THE EQUITABLE UNDERPINNINGS OF THE AD HOC TEST

There is a common theme in each of the five recent Claims Court decisions where the court has found a compensable taking. Each of these decisions is an example of how the Claims Court has redressed a situation which, if left untouched, would have left the property owner severely and adversely affected by the operation of a government regulation. Moreover, in none of the decisions would a rigid application of a three-prong test have necessarily resulted in a holding for the plaintiff. United Nuclear, for example, is a case which easily could have been decided differently simply by concluding that United’s expectation that it could rely on the leases located on an Indian reservation was unreasonable.93 As Chief Judge Nies pointed out in her dissent:

The circumstances surrounding this case provide no basis for United to have had the reasonable investment-backed expectations that it would be able to mine uranium under its leases with the Navajo Tribe merely because its mining plan was technically adequate under applicable regulations. The regulation with respect to mining plan approval did not guarantee mining.94

What tipped the balance in favor of United was the court’s concern with the inequity which would result by United’s having spent over $5 million in reliance upon leases and, having discovered valuable uranium deposits, for the Indian tribe to hold them up for “more bucks, more money.”95 This, coupled with the total lack of any articulated purpose by the government for the adoption of the new policy, left the court with no equitable option but to find in favor of United:

The Secretary’s requirement of tribal consent in the present case is a far cry from the kind of Presidential power invoked in Allied-General. The Secretary’s action reflects not concern over national safety, but an attempt to enable the Tribe to exact additional money from a company with whom it had a valid contract, which the government euphemistically describes as an attempt to encourage and promote Indian self-determination.96

Using Nollan as a springboard, the Claims Court has further subjected the stated governmental objectives to scrutinization in Florida Rock, where the government’s stated objective was to preserve wetland areas. The government argued that to destroy wetlands would be to inflict an injury upon the environment, and hence, to prohibit the destruction of the wetlands consti-

95. Id. at 1435.
96. Id. at 1438.
stituted the prohibition of a nuisance. Historically, the prohibition of a nuisance, even if it results in the taking of private property, has not constituted a compensable taking pursuant to the fifth amendment.\textsuperscript{97} However, the Claims Court rejected this argument in both \textit{Florida Rock} and \textit{Loveladies Harbor}. In \textit{Florida Rock}, the court subjected the argument to an intense factual review, leaving no doubt that the court was to review the judicially-created nuisance exception, and that Congress could not overrule it by legislation. Moreover, the executive branch was not to define the fifth amendment via the administrative review process. The court, therefore, examined for itself whether the proposed limestone mining constituted a public nuisance. Because the court could not find evidence that the proposed mining would constitute a nuisance, in that it would harm the environment, it concluded that there was no nexus between the government's stated objective of protecting the environment and prohibiting the mining.\textsuperscript{98}

In \textit{Loveladies Harbor}, the court summarily rejected the nuisance argument but was persuaded to award compensation by the additional fact that the effect of the government's denial of the fill permit was over 99 percent.\textsuperscript{99} As the court explained:

\begin{quote}
[T]he determination that there has been a taking ultimately calls as much for the exercise of judgment as for the application of logic. . . . It is this court's judgment that the drastic economic impact on plaintiffs' property, coupled with the court's earlier determination of a lack of countervailing substantial legitimate interest forms the basis for a finding that there has been a taking.\textsuperscript{100}
\end{quote}

At stake in \textit{Yancey}, however, was a government purpose of paramount importance, protection of public health, and the quarantine was directly tied to the achievement of that purpose. In fact, it could be argued that the Yanceys lost on all three prongs of the analysis.\textsuperscript{101} First, the governmental purpose was critical and the nexus was clear. Second, the diminution of value of the property was only seventy seven percent. Third, it could be said that owners of poultry farms should anticipate USDA regulations which could adversely affect their investment decisions.\textsuperscript{102} Nevertheless, this case,

\begin{footnotes}
\item 98. Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 166-68 (1990).
\item 100. Id. at 160 (citing Loveladies Harbor, 15 Cl. Ct. 381, 388-90 (1988)).
\item 101. Cf. Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907, 914-15 (3rd Cir. 1987) (holding that for a regulatory taking claim to prevail, a claimant must demonstrate that the government action is outside the police power and that the action adversely affects an investment backed expectation).
\item 102. See Miller v. Schoene, 276 U.S. 272 (1928) (government can destroy cedar trees infected with disease highly dangerous to apple trees without compensating cedar tree owners).
\end{footnotes}
perhaps more than any of the others, illustrates the point that the overarch-
ing concern of the court in the takings inquiry is the underlying equity of the
situation. In Yancey, the turkey farm owners had started the business just
one month before the quarantine was put into effect. More importantly,
they were a small "mom and pop" operation that was put out of business as
a result of the quarantine, although not a single one of their turkeys or eggs
was infected with the virus. The court clearly considered unfair the gov-
ernmental policy of reimbursing only those poultry owners with diseased
stock. Therefore, the court's factual inquiry found a constitutional means
of redressing the inequity.

Finally, in Whitney Benefits, the court again acted to adjust the burdens
imposed upon a private property owner, a large-scale coal miner which
claimed that $300 million of coal value was taken by the government's fail-
ure to approve its mining permit. The Whitney Benefits court rejected the
government's argument that alternative uses of its property existed and
looked specifically at the alleged taking of the coal estate. Thus defined,
the court concluded that "SMCRA effectively denied plaintiffs all economi-
cally viable use of their coal property." Hence, even though the court
found that the governmental purpose was substantial, it was insufficient to
overcome the fact that the governmental action effectively eliminated all eco-
monic value of what the court concluded, after an exhaustive factual review,
were plaintiff's reasonable investment-backed expectations.

In conclusion, takings jurisprudence in the Claims Court has developed
into a very specialized and fact-intensive process which focuses on the equi-
table adjustment of the burdens that "in fairness ought to be borne by soci-
ety as a whole rather than [by] an individual property owner." Indeed, it
may be said that takings jurisprudence from the district courts must be bor-
rowed carefully when cited in the context of Claims Court monetary actions.
It could be argued, of course, that the ad hoc factual inquiry required in a
suit to invalidate a statute differs from the ad hoc factual inquiry required to

104. Id. at 1542, 1543.
106. Id. at 405.
107. Armstrong v. United States, 364 U.S. 40, 49 (1960). This type of inquiry actually
follows directly from Justice Holmes' admonition in Pennsylvania Coal:
We are in danger of forgetting that a strong public desire to improve the public
condition is not enough to warrant achieving the desire by a shorter cut than the
constitutional way of paying for the change. As we already have said, this is a ques-
tion of degree—and therefore cannot be disposed of by general propositions.
determine whether a property owner is entitled to just compensation. The
injunctive suit naturally focuses more sharply upon the importance of gov-
ernmental action and the extent to which that purpose is substantially ad-
vanced in the particular case, in order to arrive at a judgment as to whether
this exercise of public power should be thwarted. The just compensation
suit, in contrast, examines much more closely the economic impact and the
reasonable expectations of the landowner to determine whether the conceit-
edly valid exercise of sovereign power has triggered the right to monetary
relief.108 In this sense, the Claims Court’s constitutional interpretation of
the fifth amendment may differ from that of the district courts,’ while both
may be equally valid constitutional law and equally faithful to the dictates of
Supreme Court jurisprudence.

IV. EPilogue: Executive Order No. 12,630 and Legislative
Efforts to Protect Private Property Rights

In an effort to formulate a prospective remedy for the ever-growing com-
plexity of governmental regulations and corresponding impositions on pri-
avate property, as evidenced by the over one billion dollars in outstanding
takings claims facing the United States government, President Reagan
signed into law Executive Order No. 12,630 (Order or Executive Order) on
March 15, 1988.109 Entitled “Governmental Actions and Interference with
Constitutionally Protected Property Rights,” the Order requires the execu-

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108. One unfortunate result of the division of fifth amendment jurisdiction between the
district courts and the Claims Court has been the tendency of the United States in defending
these claims to assert a “catch 22” defense. Litigants who file cases in the district courts
asserting that a regulatory scheme deprives them of their property without just compensation
are generally met with the assertion that Congress obviously intended this vitally important
statutory scheme to survive even if it meant paying just compensation for private property
taken as a result, and that the plaintiff’s remedy is therefore in the Claims Court. See, e.g.,
Preseault v. ICC, 494 U.S. 1 (1990); United States v. Riverside Bayview Homes, Inc., 474 U.S.
121 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). Conversely, should the liti-
gant file in the Claims Court a complaint which may be read to request relief other than money
by way of just compensation, the government will seek dismissal on the grounds that such a
case must be filed in the district court. See, e.g., Alta Verde Industries, Inc. v. United States,
18 Cl. Ct. 595 (1989), aff’d mem., 907 F.2d 158 (Fed. Cir. 1990); Atlas Corp. v. United States,
15 Cl. Ct. 681 (1988), aff’d, 895 F.2d 745 (Fed. Cir.), cert. denied, 111 S. Ct. 46 (1990);
Llamera v. United States, 15 Cl. Ct. 593 (1988). This “Tucker Act shuffle” is more than a
procedural annoyance which may result in the dismissal of an otherwise meritorious case, for
it places a premium upon the drafting of sharp pleadings and the gerrymandering of opinions
to avoid the jurisdictional dividing line. E.g., compare Empire Kosher Poultry, Inc. v. Hallo-
well, 816 F.2d 907 (3rd Cir. 1987) (rejecting transfer to Federal Circuit because the plaintiff
did not rely on Tucker Act jurisdiction) with Yancey v. United States, 915 F.2d 1534 (Fed.
Cir. 1990), reh’g denied, (1991 U.S. App. LEXIS 1555) (Federal Circuit properly reviewed
appeal from the Claims Court decision under the Tucker Act).
tive branch to examine whether a proposed policy or regulatory action poses the threat of a fifth amendment taking prior to its enactment.\textsuperscript{110}

The Executive Order draws heavily upon the regulatory coordination function of the Office of Management and Budget which Executive Order No. 12,291\textsuperscript{111} and the Executive Order on federalism\textsuperscript{112} established early in the Reagan Administration. The executive branch weaved threads of the environmental assessment process under the National Environmental Policy Act\textsuperscript{113} and aspects of the budgetary planning process into the fabric of the Order. The Executive Order reflects thoughtful consideration and vigorous debate throughout the affected government agencies, and attempts to establish a practical and workable procedure for implementing the holdings in \textit{Nollan} and \textit{First English}.

The legitimacy of the Executive Order is premised both upon the duty of the government to respect constitutional protections afforded by the Bill of Rights and upon the management principle that government should not undertake programs without knowing and planning for their potential costs:

Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.\textsuperscript{114}

The Executive Order requires that "[i]n formulating or implementing policies that have takings implications, each Executive department and agency shall be guided" by the principles established in \textit{Nollan} and \textit{First English}.

These "general principles," set forth in section 3 of the Executive Order, include the doctrines of nexus and proportionality established by \textit{Nollan} and the self-actuating right to just compensation set forth in \textit{First English}.

Although the Order exempts some actions from coverage,\textsuperscript{117} most traditional government regulatory functions fall within its scope. The Order sin-

\begin{itemize}
  \item \textsuperscript{113} See 42 U.S.C. § 4321 (1982).
  \item \textsuperscript{115} Id. § 3, 3 C.F.R. 556 (1988).
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} The Executive Order exempts from coverage, \textit{inter alia}, military or foreign affairs functions and seizure of property by law enforcement officials for forfeiture or evidence in a criminal proceedings. \textit{Id.} § 2(a), 3 C.F.R. 555 (1988).
\end{itemize}
gles out permitting processes and the creation of restrictions upon private property use, requiring that all departments and agencies observe the doctrines of nexus and proportionality and that they minimize processing delays. 118

Perhaps the most challenging of the Order’s requirements, however, is that a takings implications analysis (TIA) must be prepared “[b]efore undertaking any proposed action regulating private property use for the protection of public health or safety” or for other purposes. 119 When regulations focus on public health and safety purposes, the TIA must identify “with as much specificity as possible” the public health and safety risk that the proposed private property use creates, 120 establish that the proposed government action “substantially advances the purpose of protecting public health and safety against the specifically identified risk,” 121 establish that the proposed restrictions are “not disproportionate” to the landowner’s contribution to the overall risk, 122 and “estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.” 123 To encourage thoroughness and candor, the TIA will normally be considered an internal deliberative document not subject to production under the Freedom of Information Act. In any event, the Order “is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person.” 124

The Attorney General promulgated detailed guidelines for implementing the provisions of the Executive Order, as required by its terms. 125 In coordination with the United States Justice Department, most government agencies have also promulgated such guidelines and several TIA’s have been performed. 126 Nevertheless, the Order can accomplish its ends only to the extent that government agencies voluntarily comply with it. Regrettably, new filings in the Claims Court give little evidence that most federal agencies

119. Id. § 4(d), 3 C.F.R. 557-58.
120. Id. § 4(d)(1), 3 C.F.R. 558.
121. Id. § 4(d)(2), 3 C.F.R. 558.
124. Id. § 6, 3 C.F.R. 559 (1988).
126. Although a number of federal agencies have adopted such guidelines, they are treated as privileged and are unpublished.
have yet realized the wisdom of assessing the takings implications of their proposed acts.\footnote{127}

Beyond the Order, there have been several legislative attempts to formulate a legal framework for addressing the takings issue prior to government actions. The most notable current proposal was introduced in the 102nd Congress on January 14, 1991.\footnote{128} The Private Property Rights Act of 1991 mandates Executive Order No. 12,630's internal directive:

No regulation promulgated after the date of enactment of this Act by any agency shall become effective until the issuing agency is certified by the Attorney General to be in compliance with E.O. 12630 or similar procedures to assess the potential for the taking of private property in the course of Federal regulatory activity, with the goal of minimizing such where possible.\footnote{129}

This proposed legislation could constitute another important component of the working set of procedures designed to protect private property. As introduced, the bill creates a right of action under the Administrative Procedure Act to invalidate the regulation or other governmental action for non-compliance with the Executive Order.\footnote{130} Jurisdiction to entertain such a claim would reside in the district courts and "numbered circuits." Left unresolved, however, is whether those courts would apply a sophisticated "equities" test based on Claims Court jurisprudence or a more rigidly formulaic rule founded upon district court decisions.

V. CONCLUSION

Although the vast majority of takings cases are decided in the district courts, the Claims Court seems to have developed its jurisprudence more faithfully in keeping with the instructions of the Supreme Court that a searching, factual inquiry be made in each case to determine whether the government has violated the property owner's fifth amendment rights. This is no accident, for the vindication of individual rights against the federal government is the special province of this uniquely constituted court. The current docket will afford the Claims Court and the Federal Circuit many additional opportunities to fulfill its duty to adjust those burdens which in fairness and equity ought to be borne by society as a whole.

\footnote{127. See, e.g., CIT Group v. United States, No. 90-4027 (Cl. Ct. filed Dec. 19, 1990) (plain-tiff seeks to discover the taking implications analysis prepared in connection with its wetlands permit application).}
\footnote{130. Id. §§ 3-4, 3 C.F.R. 556-58.