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Takings, Torts & Turmoil: Reviewing the Authority Requirement of the Just Compensation Clause

*Jed Michael Silversmith**

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Identifying a meaningful distinction between common law torts and constitutional takings is a task that has evaded courts for the last hundred years. Courts struggle to distinguish between these two remunerative remedies because both frequently arise under similar circumstances. Nonetheless, this article will

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* J.D., University of Pennsylvania (1999), A.B. *magna cum laude*, Duke University, (1996). For previous discussions of constitutional law by the author, *see Confederate License Plates at the Constitutional Crossroads*, 54 MIAMI L. REV. (April 2000) (with Jack Achiezer Guggenheim), and *Between Heaven and Earth: Copyrights, Trademarks, and the Religion Clauses of the First Amendment*, 52 ALA. L. REV. (Winter 2001). Special thanks to Rohit Kumar and Dawn Figueiras for their invaluable assistance in helping grapple with this difficult topic.

show that the theoretical underpinnings of the Fifth Amendment are such that a plaintiff will only rarely suffer both a compensable taking and a tort. The article will posit that the primary difference between a tort and a taking is that the latter must be authorized. As a result, this article will focus on the authority requirement of the Fifth Amendment's Just Compensation Clause.

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[1] When the government takes property it may either affirmatively take the property, thereby exercising its power of eminent domain, or it may enact legislation or otherwise have its agents engage in conduct that effectively takes the property. This is called inverse condemnation. The Supreme Court has recognized that the government can inversely condemn property by means of a physical invasion[2] or by enacting an overreaching regulation.[3] Nevertheless, the government and its agents often engage in tortious conduct that is not tantamount to a constitutional taking. Although private parties can and do engage in tortious conduct against other private parties, their conduct cannot arise to the level of a constitutional violation. Just as a private individual can accidentally flood adjacent land, so too can the government. Similarly, government agents trespass on private property just as private actors trespass. Further, both private and public officials can act negligently. Although the legal remedy against the private party lies in tort, the government may be liable either under a tort theory or the Fifth Amendment's Just Compensation Clause. The victim of a government-induced wrong faces just that question—was his property tortiously destroyed or taken for purposes of the Fifth Amendment.

The first part of this article will examine the unique aspects of litigating against the government. Unlike a lawsuit filed against a private party, someone whose property was destroyed by government action may not plead tort and taking in his initial complaint. Rather, the property owner must pursue each theory in a

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1. U.S. CONST. amend. V.

2. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (installing a cable wire constitutes a physical invasion); United States v. Causby, 328 U.S. 256 (1946) (overhead flights constitute a physical taking of an avigation easement); Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. 166 (1871) (flooding).

3. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1984); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

different forum. These unique procedural hurdles stymie aggrieved plaintiffs.

Next, this article will examine when wrongful conduct by the government can be a taking. Specifically, this article will focus on the authorization requirement of the Fifth Amendment. In doing so, it will identify exactly what constitutes *ultra vires*–unauthorized–governmental action, and then differentiate between *ultra vires* conduct and authorized but illegal conduct.

The final two sections of this article will address the doctrinal differences between torts and takings. This article will compare the "natural and probable consequences" test with the concept of "proximate cause." In doing so, this article will show how most courts have followed a rule that only damage that occurs as a direct and certain result of governmental action can be a taking. This article will also examine how the courts, with few exceptions, have dismissed taking claims when the government's conduct arose out of mere negligence. Because courts require that a taking be intentional, the only overlap in this area is between intentional torts and takings. The final section of this article will focus on one distinction that courts have made between intentional torts and takings. Specifically, this article will explain how the courts have found that the more likely the event is to reoccur and the more substantial the damage, the more likely it will be a taking, not a tort. In sum, this article will clarify the overlap between torts and takings.

I.
FILING A LAWSUIT AGAINST THE FEDERAL GOVERNMENT

Before I discuss the doctrinal differences between takings and torts, it is important to note that recovering money damages from the government is fraught with procedural pitfalls. During the first half of the nineteenth century, "[t]he universally received opinion [was] that no suit [could] be commenced or prosecuted against the United States."[4] Rather, the primary avenue of relief for an aggrieved litigant was to obtain a private bill from Congress.[5] Neither private parties nor the United States received

4. Cohens v. Virginia, 19 U.S. 264, 411-12 (1821).

5. The Comptroller of the Treasury Department retained the authority to receive public accounts. The role of the Treasury Department was unclear. In 1789, then Congressman James Madison suggested the Comptroller served as arbitrator for individuals who sought remuneration from the government. *See* WILSON COWEN,

justice under this method of adjudicating claims.[6] First, private parties, particularly those who resided outside the District of Columbia, had the arduous burden of assembling a claim to present to a congressional committee. This task could include finding documents at the National Archives located in Washington D.C. and bringing witnesses there. "Moreover, when bills for relief in meritorious cases were reported, few of them were acted upon by either House, or, if passed by one, were not brought to a vote in the other House, and so fell at final adjournment, and if ever revived, had to be begun again before a new Congress and a new committee, and so on year after year and Congress after Congress."[7] The process also disadvantaged the government. The hearings themselves were ex parte matters as no counsel "appeared to watch and defend the interest of the government."[8] Some claimants used influential friends to speak with members of Congress in private, furthering an atmosphere of graft and corruption.[9]

In 1855, Congress enacted legislation that created the Court of Claims to make recommendations to Congress regarding claims of American citizens against the government.[10] In 1863, Congress gave the court jurisdiction to render a final judgment subject to review by the U.S. Supreme Court.[11] The bill, however, limited the court's jurisdiction to those claims "founded upon

SECTION ONE: 1855-1887, THE UNITED STATES COURT OF CLAIMS: A HISTORY 4-5 (citing 1 Annals of Cong. 635-36). Congress also attempted to transfer some pension claims to the federal judiciary, but the jurisdictional statute was such that it would only render an advisory opinion that the Secretary of War would accept. Courts dismissed these cases because they argued that the cases violated the independence of the judiciary. *Id.* (citing *Hayburn's Case*, 2 U.S. 409 (1792)). Subsequent legislation allowed the courts to sit as fact finders, but render no opinion. *Id.* (citing 1 Annals of Cong. 1435 (Gales & Seaton eds. 1793)). Nonetheless, Members of Congress initially feared that creating a court to adjudicate claims against the government violated Article I, section 9 of the Constitution. As a result, Congress remained the primary arbiter of claims.

6. *See* Cong. Globe, 37 Cong., 1st Sess. 123-24 (Apr. 15, 1862) (statement of Rep. A. G. Porter).

7. William A. Richardson, History, Jurisdiction, and Practice of the Court of Claims, 17 Ct. Cl. 3, 4 (1882).

8. *Id.* at 4.

9. *See* COWEN, *supra* note 5 at 9-13.

10. *See* 10 Stat. 612 (Feb. 24, 1855).

11. *See* 12 Stat. 765 (Mar. 3, 1863).

any law of Congress."[12] Congress rejected legislation that would have permitted the court to hear claims sounding in tort.[13]

A. *The Tucker Act*

In 1887, Congress enacted what has become the linchpin of the Court of Claims's jurisdiction–the Tucker Act.[14] By enacting the legislation, Congress created a forum for litigants to file takings claims against the federal government. Under the Tucker Act, the Court of Claims was the only legal body that could render a judgment against the United States for taking claims in excess of $10,000.[15] Congress also enacted the Little Tucker Act, which allowed federal district courts to enter judgments against the United States for claims of less than $10,000.[16] Although appeals from federal district court judgments were heard by their respective circuit court, decisions of the Court of Claims were only reviewed by the U.S. Supreme Court.[17]

In 1982, Congress passed the Federal Courts Improvement Act.[18] The judges of the Court of Claims became circuit judges on the newly created Court of Appeals for the Federal Circuit. The court's trial commissioners became judges on a newly created Claims Court, which now had the authority to enter final judgments. In 1992, that court became the Court of Federal Claims.[19] Under the 1982 legislation, federal district courts still retained jurisdiction over claims that were less than $10,000, but the Federal Circuit now hears appeals of those cases.[20]

The text of the Tucker Act provides that the

> Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded upon either the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the

12. *Id.*

13. One bill was introduced that would have waived sovereign immunity for torts was introduced, but it was never enacted. *See* Senate 2643.

14. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505. The Act has been revised numerous times. It is now codified at 28 U.S.C. § 1491.

15. *Id.*

16. *Id.*

17. *Id.*

18. Pub. L. No. 97-164, 96 Stat. 25.

19. *See* Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, 106 Stat. 4516.

20. *See* 28 U.S.C. §§ 1295, 1346(a)(2) (2001).

> United States, or for liquidated or unliquidated damages *not sounding in tort.*[21]

Thus, the Court of Federal Claims now has jurisdiction regarding constitutional claims stemming from a clause of the Constitution which can be interpreted as money mandating.[22] The primary constitutional provision that provides such claims is the Takings Clause of the Fifth Amendment.[23] All takings claims filed against the federal government that exceed $10,000 must be filed in the Court of Federal Claims. Further, the Federal Circuit alone has appellate jurisdiction over claims arising under both the Tucker Act and the Little Tucker Act.

B. *The Federal Tort Claims Act*

Although Congress created a forum for individuals to assert breach of contract claims and taking claims against the government in 1887, individuals whose claims against the United States sounded in tort still had no judicial remedy. These individuals' only avenue of relief was still to obtain a private bill from Congress. By the 1940s, Congress was considering upwards of 2,000 private bills a year.[24] In 1946, Congress enacted the Federal Tort Claims Act ("FTCA").[25] The FTCA waived sovereign immunity by making the United States liable to the same extent as a private individual for its tortious acts.[26] As a result of the FTCA, the federal government can be sued for many of the torts committed by its agents.[27]

There are several procedural differences between a tort and a taking. Unlike takings, where the courts have developed a federal common law, under the FTCA, liability is determined under state law.[28] When a tort occurs on federal property, the state law

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21. 28 U.S.C. § 1491(a)(1) (2001) (emphasis added).

22. *See, e.g.*, McPherson v. United States, 2 Cl. Ct. 670 (1983).

23. Article III, section 1 of the Constitution also serves as a money-mandating Constitutional provision: "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." *See generally* Williams v. United States, 240 F.3d 1019, 1025 (Fed. Cir. 2001).

24. *See* 1 LESTER S. JAYSON, HANDLING FEDERAL TORT CLAIMS §§ 2.01-2.10 (2001).

25. *See* 60 Stat. 842 (1946).

26. *See* Wood v. Standard Products Co., 671 F.2d 825 (4th Cir. 1982).

27. *See* Ewell v. United States, 776 F.2d 246 (10th Cir. 1985).

28. *See* 28 U.S.C. § 1346(b). The extent of the liability determined under this provision includes whether the government's conduct constitutes negligence, the amount of damages, whether a federal employee was acting within the scope of his duties, and the extent of third party liability (e.g., contribution and indemnification).

where the property is located is controlling.[29] The waiver of sovereign immunity has some limits. The most notable exception is the discretionary function exception to the FTCA, which exempts:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[30]

Besides the discretionary function exception, the Federal Tort Claims Act provides numerous other exceptions, but most importantly the Act states that the government will not be liable for certain common law torts under any circumstances.[31]

C. *Section 1500 of the Tucker Act*

Although litigants may avail themselves of both a tort remedy and a takings remedy, the Tucker Act precludes them from doing both at the same time. Section 1500 of the Tucker Act provides that the U. S. Court of Federal Claims

> shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.[32]

The statute was enacted in 1868 in response to attempts by Congress to bar former members of the Confederacy from recovering in both district court and the Court of Claims for property that

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29. *See* Morgan v. United States, 709 F.2d 580 (9th Cir. 1983) (applying Washington state law even though tort occurred on federal property). *Cf.* Insurance Co. of Pa. v. United States, 590 F. Supp. 435 (S.D. Miss. 1984) (noting that even though an airplane crash occurred in Kentucky, it was caused by air traffic controller's actions located in Indiana, so Indiana law applied).

30. 28 U.S.C. § 2680(a) (2001). The discretionary function exception is a jurisdictional prerequisite of the FTCA. General Dynamics Corp. v. United States, 139 F.3d 1280, 1282 (9th Cir. 1998).

31. *See* 28 U.S.C. § 2680(h) (2001). The torts are assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.

32. 28 U.S.C. § 1500 (2001).

the Union had seized during the Civil War.[33] Although the statute was initially passed to prevent a double recovery from the United States, it now has the effect of precluding some litigants from obtaining any compensation at all.[34] The statute serves as a bar to a Court of Federal Claims action for a plaintiff who is asserting two claims arising out of the same operative facts. Thus, the statute serves to limit a plaintiff's ability to pursue a tort and a takings claim against the United States.

There are some exceptions to this rule. A litigant may pursue a suit in the Court of Federal Claims as well as another forum when the plaintiff is seeking a different type of relief even though the cases arise from the same facts.[35] A plaintiff who is seeking equitable relief in a federal district court may file a taking claim with the Court of Federal Claims in which he seeks money damages.[36] In another common context, a plaintiff may seek back pay in the Court of Federal Claims as well as reinstatement in a federal district court.[37] This exception, however, is not relevant here because under both the Tucker Act and the FTCA a plaintiff may only pursue a claim for money damages. Thus, section 1500 would bar individuals from seeking money damages for both torts and takings.

Section 1500 prevents a litigant from pursuing a Tucker Act claim that was previously filed when other counts of the complaint are still pending in a district court,[38] or when parts of that claim were transferred from a federal district court.[39] The law also precludes a claim that is simultaneously filed in both federal district court and the Court of Federal Claims.[40] There is one loophole: a litigant who files in the Court of Federal Claims first can file a claim arising out of the same operative facts and seek-

33. *See* Payson R. Peabody et al., *A Confederate Ghost That Haunts the Federal Courts: The Case for Repeal of 28 U.S.C. § 1500*, 4. FED. CIR. B.J. 95 (1994).

34. *See* Keene Corp. v. United States, 508 U.S. 200, 206-07 (1993); Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (en banc): Vaizburd v. United States, 46 Fed. Cl. 309 (2000).

35. *Loveladies Harbor*, 27 F.3d at 1551 ("For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from *the same operative facts*, and must seek *the same relief*.").

36. *See, e.g.*, Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (plaintiff was seeking an Administrative Procedure Act review of the denial of land permits). *See also* Boston Five Cents Sav. Bank, FSB v. United States, 864 F.2d 137, 139 (Fed. Cir. 1988) (plaintiff was seeking an injunction).

37. Casman v. United States, 135 Ct. Cl. 647, 649-50 (1956).

38. 28 U.S.C. § 1500 (2001).

39. *Vaizburd*, 46 Fed. Cl. at 311.

40. United States v. County of Cook, Ill., 170 F.3d 1084, 1089-91 (Fed. Cir. 1999).

ing the same relief in federal district court.[41] Section 1500 has no bearing whatsoever on the jurisdiction of the federal district court to hear the tort claim.

A litigant seeking to file in both courts must be mindful of deferring to the statute of limitation perils. The statute of limitations for a takings claim is six years.[42] The FTCA requires that a plaintiff file an administrative claim with the appropriate agency within two years of the tort.[43] If the claim is denied by the agency, the plaintiff must file his tort suit within the later of two years from the date that the tort accrues or six months after the agency denial.[44] However, as section 1500 currently operates, if the tort claim is not resolved within six years of when the claim accrues, the plaintiff's takings claim is time-barred.[45]

In light of these statute of limitation issues, a plaintiff would be advised to immediately file an administrative tort claim with the relevant agency. Subsequently, the plaintiff should file in the Court of Federal Claims and seek a stay in that court pending resolution of the administrative claim. The plaintiff should then file a tort claim in district court. Finally, if the tort claim is unsuccessful, the plaintiff should resume the Court of Federal Claims case.[46]

II.
THE AUTHORIZATION REQUIREMENT OF THE FIFTH AMENDMENT

This section will focus on the authority requirement of the Fifth Amendment. It will examine the origins of the requirement and how it has evolved. Further, it will show how takings can be authorized for purposes of the Fifth Amendment, but still arise from illegal conduct. Finally, the article will contrast recovery under the Fifth Amendment with the discretionary function exception of the FTCA. In doing so, this article posits that property owners who are the victims of mistaken administrative

41. Tecon Engineers, Inc. v. United States, 343 F.2d 943 (Ct. Cl. 1965).

42. 28 U.S.C. § 2501 (2001). *See also* Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988).

43. 28 U.S.C. §§ 2401, 2672 (2001).

44. 28 U.S.C. § 2401 (2001).

45. Technically, § 2501 is a jurisdictional prerequisite for the claim, so the Court of Federal Claims simply does not have jurisdiction to hear the claim.

46. *See, e.g.*, Clark v. United States, 19 Cl. Ct. 220 (1990); Beverly v. United States, 24 Cl. Ct. 197 (1991), *aff'd*, 792 F.2d 1354 (Fed. Cir. 1992) (unpublished table decision).

action will not have a claim under the FTCA, but they may be able to recover under the Fifth Amendment. As a result, only in an exceptional case will a plaintiff be denied remuneration for detrimental governmental acts.

A. *An Overview of the Authority Requirement*

It stands to reason that the Fifth Amendment's pledge of compensation is limited to authorized actions. For example, if a federal employee, upon his own initiative, stole an automobile, the automobile's owner would not be able to bring a taking claim against the government because the federal employee's theft of the automobile was unauthorized. For example, when Congress condemns a piece of property, it is exercising its power of eminent domain, and thus acting within its constitutionally granted authority. As such, the actions of the official who actually takes the property are authorized. Justice Brown first explained the authority requirement, writing:

> [I]f property were seized or taken by officers of the government without authority of the law, or subsequent ratification, by taking possession or occupying property for public use, there could be no recovery, since neither the government nor any other principal is bound by the unauthorized acts of its agents.[47]

Similarly, in *Hughes v. United States*, a federal agent had dynamited a levee, thereby flooding the plaintiff's land.[48] The plaintiff filed suit in the Court of Claims, which granted her money damages. On appeal, the Supreme Court reversed. The Supreme Court noted that the plaintiff conceded that the federal agent only had the authority to destroy the levee in question when there was an impending emergency. Since at the time of the explosion, there was no emergency, the United States was not liable for a taking.[49]

A more poignant example of the authority requirement is evidenced when the government engages in activity that is overtly forbidden by statute, and hence *ultra vires*. In *Adams v. United States*, the plaintiff had invested in an Hawaiian investment banking firm, which subsequently became insolvent. One of the facts that the plaintiff alleged was that the bank, acting at the behest of the CIA, had converted the plaintiff's money into funds, which

47. United States v. Lynah, 188 U.S. 445, 479 (1903) (Brown, J., concurring).
48. Hughes v. United States, 230 U.S. 24, 35 (1913).
49. *Id.* at 35.

the CIA used for counter-intelligence operations.[50] According to the plaintiff's complaint, the CIA had committed several acts of securities fraud. The court, in holding that plaintiff failed to state a claim upon which relief could be granted, construed the facts in the plaintiff's complaint as true. The court granted the motion to dismiss on the grounds that the CIA's actions could not constitute a taking because the agency did not have the authority to appropriate funds in this manner.[51] The court reasoned that even if the CIA had acted as the plaintiff had alleged, its actions were in clear violation of the law, and hence *ultra vires*.[52]

Adams, *Hughes*, and *Lynah* are examples of cases where a government agent was acting outside the scope of his authority. In many respects, this is similar to the concept of *respondeat superior*, since Congress can still explicitly prohibit some conduct, which would seem to be within the agent's scope of activities.[53] The second step is determining if the conduct is authorized. This involves examining whether there is an express limit on the government agent's authority.

One case that illustrates that type of unauthorized conduct is *Hooe v. United States*.[54] In *Hooe*, the plaintiffs leased a building

50. Adams v. United States, 20 Cl. Ct. 132 (1990).

51. *See id.* at 137 ("[N]o agency or the Intelligence Community shall request or otherwise encourage, directly or indirectly, any person, organization, or government agency to undertake activities forbidden by this Order or by applicable law." (citing 3 C.F.R. § 113.129 (1979)) (emphasis omitted)).

52. In other contexts, courts have recognized that whenever a government agent acts beyond the scope of his authority, no taking will occur. *See, e.g.*, Mac'Avoy v. Smithsonian Institution, 757 F. Supp. 60, 69-71 (D.D.C. 1991) (holding that a plaintiff who alleged that the Smithsonian took paintings that he owned did not state a claim for a compensable taking because the Smithsonian did not have the authority to appropriate the plaintiff's property); Golder v. United States, 15 Cl. Ct. 513, 518 (1988) ("A seizure without probable cause would not be a proper exercise of the government's regulatory power. Therefore, if the DEA did not have probable cause for the seizure, plaintiffs could not sustain a Fifth Amendment taking claim."); Firemen's Insurance Co. of Newark v. Board of Regents of the Univ. of Tex., 909 S.W.2d 540, 543-44 (Tex. App. 1995). Similarly, when a zoning commission acts beyond the scope of its authority, no taking will occur even if its actions effectively take the plaintiff's land. Landgate, Inc. v. California Coastal Comm'n, 953 P.2d 1188 (Cal. 1998); Steinbergh v. City of Cambridge, 604 N.E.2d 1269 (Mass. 1992).

53. Ramirez de Arellano v. Weinberger, 724 F.2d 143, 151 (D.C. Cir. 1983) (Scalia, J.), *rev'd on other grounds*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985), *mooted by statute*, 788 F.2d 762 (D.C. Cir. 1986) (en banc). Judge Scalia compared this to the "scope of employment test." *Id.* "A master is subject to liability for a trespass or a conversion caused by an act done by a servant within the scope of employment." (citing 1 Restatement (Second) of Agency § 244).

54. 218 U.S. 322 (1910).

to the Civil Service Commission. The lease granted the Commission the right to use the entire building except the basement. Despite this, the Commission occupied the basement when it moved in. After three years, the lessor refused to renew the lease to the Commission unless the Commission agreed to raise its rent payments from $4,000 to $6,000 per year. Congress refused the request, but eventually appropriated $4,500 for the continued use of the building. The Secretary of the Interior, who was charged with providing space for the Commission, signed the new lease, which also forbade the Commission from using the basement. Nevertheless, the Commission continued to use the basement at all relevant times. After six years, the Commission vacated the premises.

The plaintiffs filed a suit for breach of contract and a Fifth Amendment taking. The plaintiffs sought to recover $9,000 (the difference between $6,000 per annum and the $4,500 rent actually paid). In denying the recovery, the Supreme Court found that Congress had declined to authorize the additional money for the rental.[55] Specifically, the Court pointed to a statute which read: "[N]o department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that year, or involve the Government in any contract for the future payment of money in excess of such appropriations."[56] Since the Secretary was not authorized to let the Commission use the basement at an additional expense to the government, the Supreme Court denied the plaintiffs' claims on both taking and contract grounds.[57] The Court explained:

> It is the Constitution which places these matters under the control of Congress. If an officer of the United States assumes, by virtue alone of his office, and *without the authority of Congress*, to take such matters under his control, he will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the government, "founded upon the Constitution." . . . The constitutional prohibition against taking private property for public use without just compensation is directed against the government, and not against individual or public officers proceeding without the authority of legislative enactment.[58]

55. *Id.* at 332-33.

56. *Id.* at 331.

57. *Id.* at 335-36.

58. *Id.* (citation missing) (emphasis in original). *See also* Regional Rail Reorganization Act Cases, 419 U.S. 102, 127 n.16 (1974) ("'The taking of private property by

After nearly one hundred years, the courts still apply this authorization requirement even if equitable considerations strongly favor the plaintiff. For example, in *Southern Cal. Fin. Corp. v. United States*, the Air Force used the property abutting plaintiff's property as an artillery storage site.[59] Because of the Air Force's temporary use of the neighboring land as a buffer, the Air Force leased the land in question from the owner rather than acquire it by eminent domain. After the lease expired, the landowner, who was the plaintiff's predecessor in interest, declined to renew the government's lease. As a result, the government used its power of eminent domain to condemn a six-month interest with the power to renew its interest for one-year periods until 1967.[60] In 1967, the government re-instituted its condemnation power with a similar lease lasting until 1972 because the property owner would not lease the land, and the government declined to purchase the land. In 1969, the plaintiff purchased the land, and three years later, he asked the government to purchase the land. Instead, the government again condemned for a temporary period of time. In 1974, the plaintiff filed a suit in the Court of Claims, alleging that the Air Force's conduct constituted a permanent, compensable taking.

In denying the plaintiff's claim, the court noted that "it is clear that a taking of the permanent or indefinite character now claimed by plaintiff would have required the specific consent of Congress," and that "the Air Force deliberately sought to avoid the need for [Congress's] approval."[61] As a result, the court believed that to grant the plaintiff money damages for inverse condemnation was improper because the Air Force was not authorized to condemn the land.[62] Instead, the court reasoned that the plaintiff's correct remedial avenue would be to enjoin

an officer of the United States for public use, without being authorized, expressly or by . . . implication, to do so by some act of Congress, is not the act of the government,' and hence recovery is not available in the Court of Claims.") (citing Hooe v. United States, 218 U.S. 322, 336 (1910)); United States v. North Am. Transp. & Trading Co., 253 U.S. 330, 333 (1920) ("In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.").

59. Southern Cal. Fin. Corp. v. United States, 634 F.2d 521 (Ct. Cl. 1980).

60. *Id.* at 522.

61. *Id.* at 523-24.

62. Cabinet officials or other executive officials cannot, without congressional approval, institute eminent domain proceedings. *See* Union Oil Co. of Calif. v. Morton, 512 F.2d 743, 750 (9th Cir. 1975).

the government from obtaining one-year renewable tenancies.[63] In essence, the court was holding that, just as in *Hooe*, since Congress did not authorize the Air Force to condemn the land, the plaintiff was not entitled to money via an inverse condemnation proceeding.

Similarly, in *Tabb Lakes Ltd. v. United States*,[64] the Army Corps of Engineers denied the plaintiff land development permits under the Clean Water Act. The Corps reasoned that the permits involved lands that were wetlands, and, since it had jurisdiction over any construction permits issued on wetlands, it had jurisdiction to order a halt to the construction. After ten months of negotiations with the Corps, the plaintiff withdrew his application and filed a declaratory judgment action alleging that the land was not subject to the Corps's jurisdiction. The district court agreed, noting that the plaintiff's property constituted waterways, not wetlands, and thus not within the auspices of the Clean Water Act.[65] Subsequently, the plaintiff sought damages for a taking claim filed in the Court of Federal Claims. Since the Corps "improperly invoked" its jurisdiction, the Federal Circuit concluded that the plaintiff's claim did not allege a valid taking claim.[66] The actions of the Corps could not constitute a taking because they were unauthorized.

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63. *See Southern Cal. Fin. Corp.*, 634 F.2d at 525. The court wrote: "Is plaintiff left without a remedy, if the trial judge is right that the Government's method of procuring successive temporary interests leads to the virtual use by the Government, without proper payment, of a full-scale interest equal to a fee or perpetual easement? We think not. Next time around (in 1981 or 1982), plaintiff can oppose the Air Force's effort to obtain another group of successive one-year easements by urging on the District Court that the Government's attempt is not in good faith or in the exercise of proper discretion. . . ." *Id.*

In Armijo v. United States, 663 F.2d 90, 97 (Ct. Cl. 1981), the court noted that the express requirement of congressional authorization ceased to be in the statute as of 1960. The court explained that it had erroneously followed the statute because both parties erroneously stipulated to the fact that the statute contained this wording. Thus, the legal theory on which the *Southern Cal. Fin. Corp.* case was decided remains, even though the holding in that case is no longer good law.

64. 10 F.3d 796 (Fed. Cir. 1993).

65. *Id.* at 799.

66. *Id.* at 803. The court suggested that the plaintiff's proper claim was a due process claim. *See also* Short v. United States, 50 F.3d 994, 1000 (Fed. Cir. 1995); A-1 Cigarette Vending v. United States, 19 Fed. Cl. 345, 350-55 (2001); A-1 Amusement Co. v. United States, 48 Fed. Cl. 63, 65-68 (2000).

B. *"Authorized but Illegal" Takings*

The fact that governmental conduct is authorized does not mean it is legal. Illegal acts may be compensable takings. As one judge noted: "Not all illegal acts of government are considered unauthorized for the purpose of determining the government's liability to pay compensation under the Tucker Act."[67] Sometimes the government engages in wrongful but authorized conduct, and such conduct can constitute a taking. For example, when the government mistakenly bombs private property instead of federal property, an authorized but illegal taking occurs.

On other occasions, a government agent acts within the scope of his authority and makes a decision that constitutes a compensable taking. Generally, the aggrieved property owner files a lawsuit under the Administrative Procedure Act.[68] Even if the lawsuit results in the agency's action being reversed, courts are split as to the extent of money damages to which the property owner is entitled. Courts recognize that these agency decisions, which are subsequently reversed, may be compensable as temporary takings.[69] As one court explained, "[r]ecovery under the Tucker Act has been permitted when a taking by an officer is the natural consequence of congressionally approved measures or the result of an exercise of discretion granted to an official for the implementation of a congressional statute."[70] For example, in *Del-Rio Drilling Programs, Inc. v. United States*,[71] the plaintiffs owned mining rights to land held in trust by the federal government for the Ute Indian Tribe.[72] The Tribe, however, opposed the plaintiffs removing minerals from the land and unilaterally imposed restrictions on the plaintiffs even though, as was subsequently determined, the Tribe did not have the authority to do so.[73] Rather than seeking an equitable remedy under the Administrative Procedure Act, the plaintiffs filed, *inter alia*, an inverse condemnation claim in the Court of Federal Claims. The

67. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1523 (D.C. Cir. 1984). *See also* Malone v. Bowdoin, 369 U.S. 643, 647 (1962); Roman v. Velarde, 428 F.2d 129 (1st Cir. 1970).

68. 5 U.S.C. §§ 701-706 (2001).

69. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987); 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575 (1992).

70. *Ramirez*, 745 F.2d at 1523 (footnote omitted).

71. 146 F.3d 1358 (Fed. Cir. 1998).

72. *Id.* at 1360.

73. *Id.* at 1361.

crux of the plaintiffs' complaint was that the Department of the Interior, "acting in its regulatory capacity, erred in conditioning exercise of the [permits] on obtaining tribal consent."[74] The Federal Circuit found that the government officials were clearly acting within the scope of their authority, and so their mistake was merely part of a good faith effort to enforce the relevant statutes.[75] The court ruled, however, that a good faith mistake by a government employee is not an impediment to a takings claim.[76] "If the government appropriates property without paying just compensation, a plaintiff may sue in the Court of Federal Claims on a takings claim regardless of whether the government's conduct leading to the taking was wrongful . . . ."[77] The court emphasized that the mistake gave rise to two separate legal proceedings and remedies, and that the plaintiffs' decision not to seek equitable relief did not undermine the plaintiffs' takings claim.[78]

Since authorized but illegal actions are compensable, a plaintiff is not required to exhaust his administrative appeals. All the plaintiff must do is obtain a final decision.[79] A plaintiff is not required to exhaust his administrative appeals within an agency, nor must he file a claim under the Administrative Procedure Act ("APA").[80] In *Florida Rock Industries, Inc. v. United States*, the

74. *Id.*

75. *Id.* at 1363.

76. *Id.*

77. *Id.*

78. *Id.* at 1363-64 (citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 319-22 (1987)). *See also* United States v. Great Falls Mfg. Co., 112 U.S. 645, 656 (1884) ("[I]f, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution . . . there is no sound reason why the claimant might not waive that right, and, electing to regard the action as a taking under its sovereign right of eminent domain, demand just compensation.").

79. *See, e.g.*, Bayou Des Familles Development Corp. v. United States, 130 F.3d 1034, 1037 (Fed. Cir. 1997); Robbins v. United States, 40 Fed. Cl. 381 (Fed. Cl. 1998), *aff'd*, 178 F.3d 1310 (Fed. Cir. 1998) (unpublished table decision), *cert. denied*, 527 U.S. 1038 (1999); Formanek v. United States, 18 Cl. Ct. 785, 789-93 (Cl. Ct. 1989).

A plaintiff must, however, obtain a final decision. Howard W. Heck & Assocs. v. United States, 134 F.3d 1468, 1471 (Fed. Cir. 1998); Bamber v. United States, 45 Fed. Cl. 162, 164 (Fed. Cl. 1999). Despite that, the Court of Federal Claims has also noted that the permit process itself may be "so burdensome that it effectively deprives the property of value." Hage v. United States, 35 Fed. Cl. 147, 164 (Fed. Cl. 1996); *see also* Stearns Co., Ltd. v. United States, 34 Fed. Cl. 264 (Fed. Cl. 1995).

80. *See* Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1363 (Fed. Cir. 1998) ("If the government appropriates property without paying just com-

plaintiff owned land from which it sought to extract limestone.[81] The Army Corps of Engineers issued a cease and desist order forbidding the plaintiff from extracting the limestone. The Corps reasoned that the extraction of the limestone would destroy wetlands "whose benefits extended far beyond Florida Rock's own property."[82] Nevertheless, the government argued unsuccessfully that the plaintiff should have appealed this matter before a district court under the APA. The Federal Circuit disagreed. It explained that the plaintiff, by filing in what is now the Court of Federal Claims, merely conceded that the government's decision was authorized.[83] Nonetheless, the court explained that the United States could still argue that the actions were unauthorized either in the sense that they exceeded the scope of the plaintiff's actual job duties or that they were specifically forbidden by some act of Congress.[84] Of course, the government could argue that the decision was illegal, but unlawfulness is not a bar to a takings claim.

Another example of the authorized but illegal conduct occurred in *Eyherabide v. United States*.[85] In that case, the plaintiffs owned property adjacent to a Navy gunnery range. The Navy, however, mistakenly believed that it owned the plaintiffs' property and used it for artillery exercises. The plaintiffs alleged

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pensation, a plaintiff may sue in the Court of Federal Claims on a taking claim regardless of whether the government's conduct leading to the taking was wrongful, and regardless of whether the plaintiff could have challenged the government's conduct in another forum."); Devon Energy Corp. v. United States, 45 Fed. Cl. 519, 529-30 (Fed. Cl. 1999) ("That a separate appellate board, the IBLA [Interior Board of Land Appeals] in this case, could *administratively review* BLM's [Bureau of Land Management's] decision and find that it was improper in no way impacts the issue of whether the *initial decisionmaker* came to a final definitive position.... [T]he IBLA can at most review BLM's denial, it cannot participate in BLM's decisionmaking in the first place." (emphasis in original)).

81. Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986).

82. *Id.* at 896.

83. *Id.* at 899.

84. *Id.* ("In defending, the government may deny the authority and in that way authority could become an issue in a Tucker Act taking case."). *Accord* Froudi v. United States, 22 Cl. Ct. 647, 649 (1991) ("[T]he allegation that the actions of government officials were authorized is not an element of a just compensation claim. Instead, the averment that the government officials were not authorized to act as they did is an affirmative defense."). *But see* Osprey Pacific Corp. v. United States, 41 Fed. Cl. 150 (1998) (holding that the government may not argue that its actions were unauthorized).

85. 345 F.2d 565 (Ct. Cl. 1965).

that the government's shelling of the land rendered it nearly valueless.[86] The court, in granting the plaintiffs' claim, explained:

> Nor is this a case in which we can say that the implication of a taking is negated because the actions of the defendant's representatives were wholly unauthorized. The guard who cautioned the caretakers [of the plaintiffs' property] acted within the scope of his duties, as did the naval personnel who lobbed shells, dropped casings and other objects, and flew over and near the property; the placement of the warning signs was also obviously within the local authority of the gunnery range. No statute or regulation forbade these activities. *They cannot be characterized as unauthorized merely because they may have been mistaken, imprudent, or wrongful.*[87]

Thus, in granting plaintiffs' takings claim, the court recognized that the federal agents were mistaken. Nonetheless, the court still recognized that a taking had occurred because the mistake flowed from the authorized conduct of the Navy. As in *Del-Rio Drilling Programs*, the fact that the plaintiffs could have enjoined the government from shelling its land, but simply chose not to do so did not negate the taking claim.[88]

The Court of Federal Claims revisited this issue in *Boling v. United States*.[89] In this case, the government constructed a dam that the plaintiffs alleged negligently eroded their property. The court declined to grant the government's motion to dismiss and allowed the plaintiffs to present evidence showing that erosion was a natural and probable consequence of the construction of a dam. The court explained that "[t]he fact that plaintiffs may consider certain aspects of the Government's conduct to be negligent

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86. *Id.* at 569 n.6.

87. *Id.* at 570 (emphasis added) (citations and notes omitted).

88. Not all courts are comfortable with recognizing a taking claim for negligent government action. In Catellus Dev. Corp. v. United States, 31 Fed. Cl. 399 (1994), *aff'd*, 98 F.3d 1356 (Fed. Cir. 1996) (unpublished table decision), the court when confronted with the identical set of facts as those in *Eyherabide* denied the plaintiff's taking claim. The court explained that the government inadvertently bombed the plaintiff's property because "it made mistakes in preparing maps of the area in which [plaintiff's] property adjoin[ed] the [government's property]." *Id.* at 400-01. In holding for the government, the court reasoned:

> It is settled, though, that a taking occurs, and compensation as allowed by the Fifth Amendment must be paid, when there has been a *legal* action by the government. Illegal government actions do not result in takings. The record in this matter shows that the government had no right to bomb the land, and that the government bombed under no color of statute or regulation. It made a mistake. . . . [The] claim, if there is a claim at all, may in fact be a due process claim, or sound in tort.

Id. at 408-09 n. 9.

89. 41 Fed. Cl. 674 (1998), *rev'd on other grounds*, 220 F.3d 1365 (Fed Cir. 2000).

does not automatically remove [the] court's takings jurisdiction."[90] The government argued that even if it had been negligent, there was insufficient evidence to establish a taking claim. The court disagreed, noting that negligent or illegal conduct does not bar a taking claim, so long as the conduct was still authorized. Rather, once a plaintiff can show that the conduct was authorized, then it may show that the conduct led to a compensable taking.

In summary, to establish a claim for compensation under the Fifth Amendment, a plaintiff must show that the conduct was authorized and that it is of the magnitude or character to be compensable under the Fifth Amendment. This second requirement demands that the plaintiff show that the harm suffered was a natural and probable consequence of the conduct and that the harm substantially interfered with the property.

C. *Public Use and the Discretionary Function Exception*

It stands to reason that authorized action that takes property should be compensated. Still, both the *Del-Rio Drilling Programs* court and Judge Scalia's opinion in *Ramirez de Arellano* lacked any substantive discussion on whether a Fifth Amendment taking can occur without a public use. Certainly, in challenging the decision of a federal regulator for purposes of a taking claim, a plaintiff may not also allege that the government's conduct was tortious. The discretionary function exception to the FTCA should always serve as a bar to challenges of authorized but illegal takings precisely because there are sound policy reasons to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[91]

In all of the cases discussed above, the plaintiff is seeking compensation due to a mistake by the government. Nevertheless, as the court in *Boling* pointed out, "The question whether the invasion of property by the Government amounts to a taking as opposed to a tort does not turn on the care (or lack thereof) with which an authorized action is pursued . . . ."[92] Thus, the authori-

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90. *Id.* at 679.

91. United States v. Gaubert, 499 U.S. 315, 322-23 (1991) (quoting United States v. Varig Airlines, 467 U.S. 797, 814 (1984). *See also* Berkovitz v. United States, 486 U.S. 531, 539 (1988) ("The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment.").

92. *Boling*, 41 Fed. Cl. at 679.

zation requirement of the Fifth Amendment serves to allow recovery whenever a governmental decision, be it correct or incorrect, takes property. In contrast, the FTCA's discretionary function will never allow recovery for the implementation of a policy even if "the discretion involved [is] abused."[93]

A few courts have recognized that unauthorized conduct can arise to the level of a compensable taking.[94] Several constitutional commentators have also examined the nature and extent of the public use requirement.[95] Nevertheless, the Supreme Court's decision in *Eastern Enterprises v. Apfel* has further muddied the Fifth Amendment waters.[96] In that case, the plaintiff was challenging the retroactive application of liabilities imposed by the government. Five Justices agreed that the takings clause of the Fifth Amendment was inapposite. Justice Breyer explained that "at the heart of the [Fifth Amendment] lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for *legitimate government action* that takes 'private property' to serve the 'public' good."[97] In light of *Eastern Enterprises*, it is unclear whether unauthorized or authorized but illegal conduct will be compensable under the Fifth Amendment.

Considering, however, that many courts have begun to recognize unauthorized conduct as compensable, property owners will be penalized by mistaken government conduct that is conducted in good faith. If *Eastern Enterprises* serves as a harbinger to limit constitutional remuneration to those cases where conduct is legitimate, and courts define legitimate as lawful, plaintiffs who suffer from mistaken conduct will only have a due process claim against the government. And, due process claims, although they may vindicate a plaintiff's interest, do not provide compensation for a government's actions. Further, in light of the strong bar that the discretionary function exception serves to limit tort claims against the federal government, legislatures may wish to consider

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93. *See supra* note 31.

94. *See, e.g.*, Corn v. City of Lauderdale Lakes, 904 F.2d 585 (11th Cir. 1990); Fountain v. Metro. Atlanta Rapid Transit Auth., 678 F.2d 1038, 1043 (11th Cir. 1982); Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 640 So. 2d 54 (Fla. 1994).

95. John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1065-93 (2000); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1111-24 (1993); Matthew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245, 260-78 (1998).

96. Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).

97. *Id.* at 554 (Breyer, J., dissenting) (second emphasis added).

redefining public use to include instances of authorized but illegal government conduct so that its effects will be compensable in some form.

III.

CERTAINTY VS. FORESEEABILITY: THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

The federal takings jurisprudence dating back to Justice Brown's concurrence in *Lynah* suggests that a Fifth Amendment taking cannot occur unless the action is explicitly authorized. A strict reading of his concurrence suggests that many government actions should not be compensable takings. Still, many courts recognize that some "unauthorized" actions (in the strictest sense) are compensable under the Fifth Amendment. These courts have applied a broader and more evenhanded application of the authorization requirement, which is that the federal agent's conduct must be in "substantial compliance with [a] congressional... mandate."[98] Thus, in determining whether a taking has occurred, courts do not look for an affirmative grant of authority. Instead, they look to whether the conduct is prohibited, as was the case in *Hooe v. United States*, or plainly beyond the scope of the agent's authority, as in *Adams v. United States*.[99] As such, courts recognize that a plaintiff should be able to recover if he can show *a certain and direct causal link* between the government's conduct and the harm. As one court explained, all that is required is "an intent on the part of the [government] to take plaintiff's property or an intention to do an act *the natural consequence of which* was to take its property."[100]

A. *Direct Causation*

Courts recognize that a taking occurs when the taking is a direct consequence of an authorized action. *Portsmouth Harbor Land & Hotel Co. v. United States* serves as an example of this rule.[101] In that case, the plaintiff owned an island that it used as a resort. On a neighboring island, the government built a for-

98. Ramirez de Arellano v. Weinberger, 724 F.2d 143, 165 (D.C. Cir. 1983) (Wilkey, J., dissenting).
99. Hooe v. United States, 218 U.S. 322 (1910); Adams v. United States, 20 Cl. Ct. 132 (1990).
100. Columbia Basin Orchard v. United States, 132 F. Supp. 707, 709 (Ct. Cl. 1955) (emphasis added).
101. Portland Harbor Land & Hotel Co., 260 U.S 327 (1922).

tress where it tested its artillery. Much of the artillery that the government discharged from its property crossed over the plaintiff's island. As a result, the plaintiff was unable to use the island as a resort. In recognizing that the plaintiff stated a claim for a compensable taking, Justice Holmes wrote:

> "As the United States built the fort and put in the guns and the men, there is a little unnatural willingness to find lack of authority to do the acts even if the possible legal consequences were unforeseen. If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought or not."[102]

In this case, the Court found that a taking occurred because clearly firing the guns over a resort would diminish the value of the resort. Thus, the Court recognized that if the authorized acts were certain to disrupt the plaintiff's use of this land, then a taking would occur.[103] In dissent, Justice Brandeis argued that since the officers of the Army were not specifically authorized to condemn this land, no taking could occur. He explained that "authority to take the land by purchase or by eminent domain is not conferred by the Secretary of War merely because he has authorized, directly or indirectly, certain discharges of guns."[104] Subsequent decisions in the Court of Claims have embraced the majority's view both in the context of physical and regulatory takings. Thus, all that a plaintiff needs to show is that the government's action has the natural and probable consequences of interfering with the use of the land–not that the conduct was authorized. Had the Court adopted Justice Brandeis's reasoning, a taking would only occur when the government intended to initiate an eminent domain proceeding.

In *Barnes v. United States*, the Court of Claims examined what might constitute a natural and probable consequence.[105] This case concerned the government's construction of the Fort Randall Dam. Whenever the government discharged accumulated water from the dam, the plaintiffs' land flooded, their pasturelands became unusable, and their crops were destroyed. The

102. *Id.* at 330.

103. Of course, the disruption would have to still be substantial. In fact, the Court had previously dismissed the plaintiff's case several years earlier because the government had fired a gun over its property twice. The Court noted that the interference was so minimal that no taking occurred. Peabody v. United States, 231 U.S. 530, 539 (1913).

104. *Portsmouth*, 260 U.S. at 338 (Brandeis, J., dissenting).

105. Barnes v. United States, 538 F.2d 865, 871 (Ct. Cl. 1976).

court found that the plaintiffs had a viable taking claim of a flowage easement because, by constructing the dam, the government caused the flooding that occurred on the plaintiffs' land.[106] In reaching its conclusion, the court noted that the plaintiffs "need not allege or prove that [the government] specifically intended to take property. There need be only a governmental act, the natural and probable consequences of which effect such an enduring invasion of plaintiffs' property as to satisfy all other elements of a compensable taking."[107] Thus, in *Barnes*, the court applied the natural and probable consequences doctrine to events that were not visually apparent, but were certain to happen as a direct result of the government's conduct.

Zoning regulations also can have the natural and probable consequence of taking land. *Benenson v. United States* deals with the Pennsylvania Avenue Development Corporation, which was charged with developing the area around the White House.[108] One building within its jurisdiction was the famed Willard Hotel, which had fallen into a state of disrepair by the late 1960s. The owners of the Willard ceased using the property in 1968 and it remained empty.[109] Due to an advisory commission's restrictions, the plaintiffs could not alter the façade of the building. The owners also found that the property had no economically viable use and planned to raze the property and construct a new office building, but they were stymied by these regulations. Similarly, the plaintiffs could not sell the property because public concerns regarding an eminent domain action dampened any interest in the property. After lawsuits were filed in D.C. Superior Court and federal district court, the plaintiffs sought money damages from the Court of Claims, which granted their claim.[110] The

106. *Id.* at 871-72 (citing Cotton Land Co. v. United States, 75 F. Supp. 232 (Ct. Cl. 1948)). In King v. United States, 427 F.2d 767, 769 (Ct. Cl. 1970), the court pointed out that the Army Corps of Engineers conducts a study prior to the construction of a dam. As a result of that study, the government is able to forecast the effect of the proposed construction on the property. In *King*, however, the plaintiff contested the initial study as inadequate and won. Thus, a plaintiff may introduce findings of their own that demonstrate that the government's actions were certain to flood their land. The fact that the government did not realize this due to their erroneous study did not bar the plaintiff from recovering under a taking theory.

107. *Barnes*, 538 F.2d at 871. *See also* Baird v. United States, 5 Cl. Ct. 324, 328 (1984) ("[A]lthough the plaintiffs need not prove that the government intended to take their property, the flooding must be the natural and probable consequence of the government's action.").

108. Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977).

109. *Id.* at 943.

110. *Id.* at 947-48.

Court of Claims explained that the public discussion of eminent domain coupled with the total prohibition against any changes in the structure effectively created a taking.

> The net effect of the acts of the Government is that plaintiffs cannot use their property for any income-producing purpose; they cannot sell it and thus far, the lack of Congressional appropriations has denied them compensation for it. Consequently, plaintiffs are forced to preserve the structure for the benefit of the Government, which bears no financial responsibility.[111]

As a result of these government regulations, the property lacked a "viable economic use and [had] in fact a negative market value."[112] *Benenson* demonstrates that the natural and probable consequence of zoning laws can be a taking even if Congress declines formally to condemn the property.

Another example of the natural and probable consequences doctrine is evidenced in *Pete v. United States.*[113] In that case, the plaintiffs owned three barges on their own property. The plaintiffs used the barges as hotels until Congress passed the Wilderness Act. The Wilderness Act, which preserved four million acres of wilderness area, banned all commercial enterprises and private buildings, including floating living quarters, on this acreage, which included the plaintiffs' property. As a result of the Wilderness Act, the plaintiffs' floating barges had to be removed. At trial, the plaintiffs demonstrated that they could not remove the barges without their complete destruction. As a result, the plaintiffs were not able to use their property for its initial purpose.[114] Thus, the court found that the passage of the Wilderness Act, and its subsequent regulations constituted a compensable taking. Even though the government did not intend to appropriate the barges, the interference with plaintiffs' exercise of its property rights was seen as a "foreseeable consequence of a de-

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111. *Id.* at 947. Several other courts have also recognized this "condemnation blight." *See, e.g.*, Foster v. City of Detroit, 254 F. Supp. 655, 665-66 (E.D. Mich. 1966) ("[T]his court now holds that the actions of the defendant which substantially contributed to and accelerated the decline in value of plaintiffs' property constituted a 'taking' of plaintiffs' property within the meaning of the Fifth Amendment, for which just compensation must be paid."), *aff'd* 405 F.2d 138 (6th Cir. 1968)); Washington Market Enter. v. City of Trenton, 343 A.2d 408, 416 (N.J. 1975) ("[W]here the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, then there has been a taking of property within the meaning of the Constitution.").

112. *Benenson*, 548 F.2d at 947.

113. Pete v. United States, 531 F.2d 1018 (Ct. Cl. 1976).

114. *Id.* at 1033.

liberately conceived governmental program."[115] Such action, the court found, "constitutes a substantial, direct and immediate interference with plaintiffs' use and enjoyment of the boats, and is, therefore, a taking within the meaning of the Fifth Amendment."[116]

B. *Foreseeable but Unintended Events*

Identifying cases where a compensable taking has occurred is significantly easier than recognizing cases where the plaintiff is not entitled to remuneration as a constitutional right. In many factual settings, government conduct may destroy property, but a plaintiff may only be entitled to money under a tort remedy, which is subject to a waiver of sovereign immunity and hence not compensable because of the discretionary function exception. The natural and probable consequences doctrine is a much less forgiving rule than the negligence standard of proximate cause.

Although a tortfeasor's actions may be foreseeable, the natural and probable consequences doctrine addresses certainty. In all of the above-cited cases, the destruction of the plaintiffs' property could be ascertained to a certainty before the government engaged in its authorized conduct. The fact that something *could or might happen* never ipso facto rises to the level of conduct compensable under the Fifth Amendment. Rather, a Fifth Amendment taking will only occur if the government's actions are a direct and certain cause of the taking—not a foreseeable one. Thus, in addressing whether a taking occurred, a court must examine the "likelihood of the outcome."[117]

This concept may have harsh consequences, but it has remained in effect for over one-hundred years. For example, *Hayward v. United States*[118] involved the construction of a dam on the Muskingum River. Because the construction of the dam was "faulty," the "hydrostatic pressure of the water" flooded and substantially destroyed the plaintiff's land. Nonetheless, the Court of Claims found that the plaintiff's claim "sound[ed] in tort and c[a]me within the inhibited jurisdiction of the court."[119] In

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115. *Id.* at 1035

116. *Id.* at 1035.

117. Baird v. United States, 5 Cl. Ct. 324, 330 (1984) (citing Bettini v. United States, 4 Cl. Ct. 755, 760 (1984) and Berenholz v. United States, 1 Cl. Ct. 620, 628 (1982)).

118. Hayward v. United States, 30 Ct. Cl. 219, 220-21 (1895).

119. *Id* at 221.

Keokuk & Hamilton Bridge Co. v. United States,[120] the plaintiff owned a bridge that was damaged by blasting work done by the government. The Supreme Court, reviewing a decision of the Court of Claims, noted that the damage was "incidental damage which if inflicted by a private individual might be a tort but which could be nothing else. In such cases there is not remedy against the United States."[121] Similarly, in a Little Tucker Act case filed in a federal court in Oklahoma, the plaintiffs' cotton crop had been destroyed by the federal government when the pesticides it sprayed on adjoining federal land spread onto the plaintiffs'. The plaintiffs filed suit under both a tort and a taking theory in a federal district court.[122] On appeal, the Tenth Circuit rejected the plaintiffs' tort claim as falling within the discretionary function exception.[123] The court also rejected the plaintiff's taking theory by explaining: "a single destructive act without a deliberate intent to assert or acquire a proprietary interest or dominion is tortious," and not a taking.[124] Thus, the plaintiffs were without remuneration. Although the result was unjust, the court explained "[i]f the result leaves a wrong by the sovereign without a judicial remedy, the deficiency lies in the limited scope of the government's tort liability."[125]

In each of these cases, the conduct for which the plaintiff or plaintiffs sought compensation was a one-time occurrence which was at best foreseeable, but definitely not direct and certain. This rule remains vital today. In *Bettini v. United States*,[126] the plaintiff owned property that was damaged when a federally owned road collapsed on his property. The plaintiff, relying on several California cases, argued that the collapse was due to negligent construction of the road. The court disagreed with the plaintiff's use of those cases. The court noted that the California Constitution provides that "private property shall not be taken

120. Keokuk & Hamilton Bridge Co. v. United States, 260 U.S. 125 (1922).

121. *Id.* at 127. *See also* Sanguinetti v. United States, 264 U.S. 146 (1924) (noting that a government-constructed canal that was unable to carry away flood waters and, as a result, overflowed and damaged the neighboring property owners' crops, was consequential in nature and did not create a compensable taking).

122. Harris v. United States, 205 F.2d 765 (10th Cir. 1953). The Tenth Circuit had jurisdiction to hear this claim because the Little Tucker Act granted U.S. Courts of Appeals appellate jurisdiction over taking claims that were less than $10,000. *See id.* notes 14-17.

123. *Id.* at 767.

124. *Id.* at 767.

125. *Id.* at 768.

126. Bettini v. United States, 4 Cl. Ct. 755 (1984).

or damaged for public use without just compensation."[127] The court explained that the California Constitution's eminent domain clause broadens the compensation clause to include instances where

> a public improvement proximately causes, i.e., is a substantial cause of, damage to private property and if the public improvement was built and maintained as planned and designed, liability can exist without regard to whether the damage was a "natural consequence" or foreseeable result of the project.[128]

In California, the government is liable under its state constitution for negligent conduct. The court, in contrast, noted that under federal law the government is liable only when its conduct will undoubtedly interfere with the value of the property. Nevertheless, the court allowed the plaintiff to proceed, but it established a higher legal standard: "Despite defendant's assertion that a road collapse is never the 'natural consequence' of a highway project, the facts may prove otherwise."[129] Thus, at trial, the plaintiff had the burden of showing that the government knew or should have known that the plaintiff's property would be destroyed by this project. If the government could show that it was merely negligent, it would prevail.

The converse of this is also true. Even if the government exercises due care, it cannot avoid liability if its results were the natu-

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127. *Id.* at 759. This rule is generally, but not universally, accepted. *Compare* Myers v. United States, 323 F.2d 580 (9th Cir. 1963) (transferring a case to the Court of Claims where the damages plaintiffs asserted appeared to be merely property damage) *with* Teegarden v. United States, 42 Fed. Cl. 252, 257 (1998) ("[A] random event induced more by an extraordinary natural phenomenon than by Government interference cannot rise to the level of a compensable taking, even if there is permanent damage to property partially attributable to Government activity.") (citations omitted).

128. *Bettini*, 4 Cl. Ct. at 759 (citing Albers v. County of Los Angeles, 398 P.2d 129, 137 (Cal. 1965), and Yee v. City of Sausalito, 190 Cal. Rptr. 595, 597-98 (Ct. App. 1983)). Other states have not read similar state constitutional provisions as broadly. *See, e.g.*, Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d 1241 (Utah 1990) (recognizing that inverse condemnation damages . . . must "grow out of" a public use rather than being merely the result of a negligent or wrongful government act even though the state constitution provides just compensation for damaged property) (citation omitted).

129. *Id.* at 760. In Boling v. United States, 41 Fed. Cl. 674, 680 (1998), *rev'd on other grounds*, 220 F.3d 1365 (Fed. Cir. 2000), the court also allowed plaintiff to present evidence to show that negligent conduct could be a natural and probable consequence of the construction of a dam. In that case, the government built a dam that eroded the plaintiff's property. The court allowed the plaintiff to present evidence that the erosion was a natural result of the construction of the dam. The government had argued that the plaintiff was merely arguing that the government was negligent.

ral and probable consequence of the taking. In *Pashley v. United States*, the government erected a dam near the plaintiffs' property.[130] According to the court, the government knew that by constructing the dam, the plaintiffs' property would be flooded. In fact, the government "went to great pains to prevent the water from seeping through [the dam]."[131] Nevertheless, despite the government's exercise of due care, a taking occurred. As the court remarked,

> Since the land was in fact taken, whether or not defendant endeavored to prevent this, defendant is liable to pay just compensation, if defendant's act of building the dam was the cause of the taking. Defendant's liability depends not on its want of care, but on the fact of taking as the natural consequence of defendant's acts.[132]

Similarly, in *Thune v. United States*,[133] the Court of Federal Claims found that a taking did not occur when the plaintiff's property was accidentally destroyed by the U.S. Forest Service during a controlled burn. In that case, the Forest Service attempted to burn several acres of sagebrush in order to "increase herbaceous forage production for elk."[134] Although the Forest Service had initially received a forecast showing favorable weather conditions, wind conditions changed, thereby spreading the fire to the plaintiff's hunting camp and destroying it. The court, in denying the plaintiff's claim against the United States, explained that "negligent or improper implementation of an authorized project sounds in tort."[135] As a result, the court ruled for the government because:

> [The] plaintiff has not stated a taking claim because his allegations do not show that the government intended to take his property or do an act the natural consequence of which was to take his property. Instead, [the] defendant asserts . . . negligence intervened causing the fire to escape and destroy plaintiff's hunting camp. Alternatively, . . . wind changes caused the fire to escape. Either way, defendant reasons, the destruction of [the] plaintiff's property was not a direct consequence of any authorized government act and, therefore, no intent to take can be inferred.[136]

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130. Pashley v. United States, 156 F. Supp. 737 (Ct. Cl. 1957).
131. *Id.* at 738.
132. *Id.* at 738.
133. Thune v. United States, 41 Fed. Cl. 49, 52 (1998).
134. *Id.* at 50.
135. *Id.* at 52 (citing Hayward v. United States, 30 Ct. Cl. 219, 221 (1895)).
136. *Thune*, 41 Fed. Cl. at 52. Even a one-time occurrence of a deliberate governmental action does not constitute a taking, *see* Bowditch v. City of Boston, 101 U.S. 16, 18 (1879).

Again, the court applied the natural consequences doctrine more stringently than the concept of proximate cause. As a result, the negligence resulting from the accidental burn was not a compensable taking even though it substantially interfered with the plaintiff's property. In *Thune*, the plaintiff had previously filed a Federal FTCA claim in district court, but that claim had been denied since the court found that the controlled burn fell within the discretionary function exception.[137] Like the plaintiffs in *Harris*, the plaintiff in *Thune* was also denied remuneration under the FTCA because of the government's limited waiver of sovereign immunity.

Finally, in *United States v. Gaidys*,[138] the court again declined to apply the Fifth Amendment to negligent activity. In that case, the plaintiff's home was partially destroyed when an Air Force plane crashed on neighboring land. The government's plane had been flying below the federally required altitude. As a result, the court agreed with the plaintiff that the government had trespassed. The court's analysis suggested that one overhead flight, which caused significant damage, was tortious, and not a trespass—like the wrongful application of pesticide in *Harris*.[139]

Two cases at odds with *Harris*, *Gaidys*, and *Thune* are *Clark v. United States* and *Beverly v. United States*.[140] Both cases involved plaintiffs whose land was harmed by tortious government conduct and who were able to recover under the FTCA suit. Subsequently, judges on the Court of Federal Claims recognized that the plaintiffs had viable taking claims but denied them recovery because the parties had already recovered under a tort theory. In light of the government harm that these plaintiffs suffered, it is doubtful that they suffered compensable takings under the Fifth Amendment.

In *Clark*, the plaintiff owned land near a U.S. Air Force base. The government dumped toxic waste material at landfill sites and burn pits on the base. As a result of the dumping, the plaintiff could not use the well water on her land.[141] The plaintiff first filed her complaint in the Claims Court. She subsequently filed a

137. *See* Thune v. United States, 872 F. Supp. 921, 924 (D. Wyo. 1995).

138. United States v. Gaidys, 194 F.2d 762, 764 (10th Cir. 1952).

139. *Id.* at 764. *See* Harris v. United States, 205 F.2d 765, nn.122-125.

140. Clark v. United States, 19 Cl. Ct. 220 (1990); Beverly v. United States, 24 Cl. Ct. 197 (1991), *aff'd*, 972 F.2d 1354 (Fed. Cir. 1992) (Table). The taking analysis appears in Clark v. United States, 8 Cl. Ct. 649 (1985).

141. Clark v. United States, 660 F. Supp. 1164 (W.D. Wash. 1987), *aff'd* 856 F.2d 1433 (9th Cir. 1988).

tort claim in federal district court, and the Claims Court stayed its proceeding until the district court had adjudicated the tort claim. The district court found that the government's dumping of chemicals on the Air Force base constituted negligence per se and that as a result the government had committed a tort.[142]

Once the matter was resolved in district court, the Claims Court revisited Clark's taking claim. The court found that the plaintiff was entitled to summary judgment on her taking claim.[143] Nevertheless, the court "was constrained" to enter judgment for the defendant because a plaintiff cannot recover for both a taking under the Tucker Act and a tort claim under the FTCA. As a result, the court reluctantly granted the government's motion for summary judgment, but not before noting that a compensable taking had occurred.

In *Beverly v. United States*, the plaintiffs owned farmland that was damaged by "unauthorized helicopter training exercises."[144] The plaintiffs had previously filed a FTCA action in which he had received money for costs incurred in pursuing several cattle and livestock that escaped as a result of the helicopter intrusion.[145] Despite the unauthorized nature of the conduct, and despite the fact that no substantial interference with the plaintiffs' property occurred, the court found that the plaintiffs alleged a viable Fifth Amendment taking claim.[146] The court, however, stated that the plaintiffs were barred by the doctrine of res judicata from pursuing both a tort and a taking claim.[147]

Both *Beverly* and *Clark* are unique in that the Claims Court found, in both cases, that the plaintiffs suffered both a tort and a taking. The court recognized that a taking had occurred even though the acts did not fall within the scope of the natural and probable consequences doctrine. Nonetheless, both courts suggested that, since the plaintiffs had recovered under a tort theory, it was largely irrelevant if a Fifth Amendment taking had occurred. A persuasive argument could be made that neither set of plaintiffs suffered a compensable taking. In truth, both suffered tort injuries and both recovered accordingly. In *Clark*, the gov-

142. *Clark*, 660 F. Supp. at 1177-78.

143. *Clark*, 19 Cl. Ct. at 222.

144. *Beverly*, 24 Cl. Ct. at 198.

145. That case resulted in an unpublished disposition. *See* Beverly v. United States 902 F.2d 32 (6th Cir. 1990) (Table).

146. *Beverly*, 24 Cl. Ct. at 198.

147. The Federal Circuit has subsequently rejected this conclusion. Golden Pac. Bancorp v. United States, 15 F.3d 1066 (Fed. Cir. 1994).

ernment's conduct did not take the land, but it created a nuisance. The plaintiff suffered a one-time harm that was proximately caused by negligent government conduct. In none of the reported decisions, do the plaintiffs allege that the government's conduct was certain to destroy her property. Rather, at best, the plaintiffs alleged that the dumping proximately caused their property damage. As a result, the plaintiffs cannot meet the rigors of the natural and probable consequences test, and so they did not suffer a compensable taking.

Similarly, the plaintiffs in *Beverly* alleged that the conduct was unauthorized, which should itself have barred a taking claim. Furthermore, even if the conduct had been authorized, the overhead flights neither substantially interfered with their use of the land nor was the escape of their cattle a natural and probable consequence of the flights. As a result, the plaintiffs could not show that they suffered a Fifth Amendment taking, and so their claim should be barred as well. Of course, since both sets of plaintiffs had already recovered under a tort theory, the issue was largely moot.

IV.
THE SUBSTANTIAL INTERFERENCE TEST: THE INTERSECTION BETWEEN INTENTIONAL TORTS AND TAKINGS

The last section of this article will focus on what is called the substantial interference test. As the previous section demonstrated, an unintentional tort cannot, by definition, be a compensable taking. The only conduct that can potentially be both a Fifth Amendment taking and a tort are trespasses and nuisances. Thus, under certain factual settings, a plaintiff may plead either a tort in the district court or a taking in the Court of Federal Claims.[148] Although both remedies are available to a plaintiff, the theoretical underpinnings of the two differ.

The rationale of taking differs from that of tort. The Restatement (Second) of Torts defines a private nuisance as a "nontrespassory taking invasion of another's interest in the private

148. *See, e.g.*, Drury v. United States, 902 F. Supp. 107, 110 (E.D. La. 1995); Palm v. United States, 835 F. Supp. 512, 516 (N.D. Cal. 1993) (Stating that, "[i]n fact, because of this gray area, the same set of facts may, under certain circumstances, constitute viable claims under both theories."), *aff'd sub nom.* Bartleson v. United States, 96 F.3d 1270 (9th Cir. 1996).

use and enjoyment of land."[149] The Restatement's definition of liability with regard to private nuisance provides:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional or unreasonable, or (b) unintentional or otherwise actionable under the controlling liability for negligent or reckless conduct, or for abnormally dangerous activities.[150]

Similarly, the Restatement (Second) of Torts defines trespass as

> caus[ing] harm to any legally protected interest of the other, if he intentionally . . . enters the land in the possession of the other, or causes a thing or a third person to do so.[151]

The Restatement's definitions which require only "an invasion in the private use and enjoyment of land" or an intentional entrance are easier to prove than the requirements of a Fifth Amendment taking. One Federal Circuit judge quipped that a federal "truckdriver's parking on someone's vacant land to eat lunch" would never be a compensable taking, but merely a trespass.[152]

When a plaintiff asserts a Fifth Amendment taking claim, it is based on a recognition that the governmental entity is taking a servitude or an easement over the property. The effect of this "taking" significantly diminishes the value of the property. Ultimately, in the context of the Fifth Amendment, the tortious conduct must be repetitive enough that it effectively diminishes the use of the property so that the conduct takes the easement. Although the diminishment in value may be temporary, such as overhead airplane flights that occur for a period of six months, the intrusion must significantly impact the value of the property. As such, the fact that a plane flies overhead once a week would likely not be consequential enough to constitute the taking of an easement.

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149. Restatement (Second) of Torts § 821D.

150. Restatement (Second) of Torts § 822.

151. Restatement (Second) of Torts § 158. Some courts hesitate to award damages against the government when its conduct creates a trespass resulting from an ultrahazardous activity. *See* Western Greenhouses v. United States, 878 F. Supp. 917, 928 (N.D. Tex. 1995) (citing Laird v. Nelms, 406 U.S. 801-03 (1972) (denying liability for disposal of hazardous chemicals)). *But see* O'Neal v. Dep't of Army, 852 F. Supp. 327 (M.D. Pa. 1994); Trail v. Civil Eng'rs Corps, 849 F. Supp. 766 (W.D. Wash. 1994); Clark v. United States, 660 F. Supp. 1164 (W.D. Wash. 1987), *aff'd*, 856 F.2d 1433 (9th Cir. 1988).

152. Hendler v. United States, 952 F.2d 1364, 1377 (Fed. Cir. 1991).

Palm v. United States[153] rings forth with a familiar set of facts: the plaintiffs owned a ranch neighboring a military installation and their ranch was infrequently victimized by errant artillery shells. Unlike the plaintiffs in *Portsmouth Harbor* or *Eyherabide*, the plaintiff filed a tort claim under the FTCA. The government filed a motion to dismiss in which it asserted that the plaintiff was actually alleging a taking. The court denied the motion, noting that "[t]he cluster of facts that constitute a claim for an unconstitutional taking and those that indicate the torts of nuisance or trespass are similar in many respects."[154] The court suggested that there is a theoretical continuum in which a tort becomes a taking. The court elaborated:

> In evaluating the nature of the action, one thing seems certain: on a sliding scale, a taking often involves factual circumstances that would tend to indicate more extreme governmental intrusiveness, permanent infringement, or, even if temporary, an exercise of domain and control over a private party's property interests; whereas nuisance and trespass generally seem less so.[155]

The court also noted that older cases, such as *Portsmouth* and *Causby*, both predated the FTCA. Thus, it reasoned the fact that these plaintiffs alleged takings, not torts, was not dispositive of any legal issue.

To solve the conundrum posed in *Palm*, the Supreme Court has posited the "substantial interference test."[156] The test provides simply that the more repetitive and substantial the act, the more likely the act will be a taking. The application of the substantial interference test, however, is not a bright-line rule, but hinges on the application of the facts in each case. Nevertheless, the test is relatively versatile as it has been administered in a variety of contexts, such as flooding and overhead air flights.

A common application of the substantial interference test is when a plaintiff is the victim of sporadic flooding. In *National By-Products, Inc. v. United States*, the plaintiff was a property owner whose property abutted a river.[157] The government constructed a levee on one side of the bank, but not on the side

153. *Palm v. United States*, 835 F. Supp. 512 (N.D. Cal. 1993), *aff'd sub nom.* Bartleson v. United States, 96 F.3d 1270 (9th Cir. 1996).

154. *Palm*, 835 F. Supp. at 516.

155. *Palm*, 835 F. Supp. at 516. *See also* BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 282 (1998) (recognizing a sliding scale between torts and takings).

156. United States v. Causby, 328 U.S. 256 (1946); United States v. Sanguinetti, 264 U.S. 146 (1924).

157. Nat'l By-Prods., Inc. v. United States, 405 F.2d 1256 (Ct. Cl. 1969).

where the plaintiff's property was located. As a result, the plaintiff's property flooded intermittently. According to the court, some of the flooding would still have occurred on the property even without the levee, but the construction of the levee just made the flooding more frequent.[158] Further, the court noted that the plaintiff only suffered about six floods over a period of twelve years. Thus, the court found that no compensable taking occurred, writing: "the essential inquiry is whether the injury to the claimant's property is in the nature of a tortious invasion of his rights or rises to the magnitude of an appropriation of some interest in his property permanently to the use of the Government."[159] Subsequent courts have also recognized that the flooding must "substantially interfere" with the use of the property.[160]

Another illustration of this point can be seen in *Holmes Herefords, Inc. v. United States* when the government constructed a missile site on land neighboring the plaintiff.[161] The plaintiff alleged that the government constructed the work negligently and during the pendency of the construction illegally "enlarged the use of right of way, drainage, and security easements; and that the defendants and their agents trespassed on plaintiff's property."[162] The court agreed that the plaintiff stated a compensable claim under the FTCA. Further, the court cautioned that "care must be taken to discern between those claims, which are accurately designated trespass and those which are asking the Court for compensation for a permanent taking of land."[163] Thus, the court parsed claims by examining the nature of the intrusion. On

158. *Id.* at 1262.

159. *Id.* at 1273-74.

160. *See, e.g.*, Turner v. United States, 901 F.2d 1093, 1095 (Fed. Cir. 1990) ("To show a servitude has been imposed through a taking by flooding, a plaintiff must prove that the land is subject to permanent or inevitably recurring floods."); Hartwig v. United States, 485 F.2d 615, 620 (Ct. Cl. 1973) (holding that, even though plaintiff's property was seriously damaged by a flood, since the plaintiff could not show that the flood would reoccur, plaintiff did not suffer a Fifth Amendment taking); B Amusement Co. v. United States, 180 F. Supp. 386, 389 (Ct. Cl. 1960) (stating that "one flooding does not constitute a taking"); Singleton v. United States, 6 Cl. Ct. 156 (1984) (concluding that, because flooding has one-percent chance of reoccurring each year, plaintiff did not suffer a compensable taking); Berenholz v. United States, 1 Cl. Ct. 620, 631 (1982) (holding that permanent flooding as a result of a broken dike constitutes a compensable taking); Scroggin v. City of Grubbs, 887 S.W. 2d 283, 289 (Ark. 1994) (stating that the "de minimis increase in water elevation [was] caused by the proposed levee" not a taking).

161. Holmes Herefords, Inc. v. United States, 753 F. Supp. 901 (D. Wyo. 1990).

162. *Id.* at 904.

163. *Id.* at 911.

that land which the plaintiff alleged the government exceeded the scope of its easement, the court refused to hear the claims—citing the Tucker Act as a bar. But, with respect to those claims that the plaintiff asserted with respect to excess drainage that occurred from flooding due to the construction, the court recognized the minimal nature of the alleged intrusion under the FTCA and allowed the plaintiff to proceed with his trespass claims.[164]

As noted above, a taking and a tort may occur when the government discharges guns on or near private property. In these cases, the courts have applied the substantial interference test to determine if a taking or a tort has occurred. In *Portsmouth Harbor & Hotel Co. v. United States*, the government fired several guns over the plaintiff's property.[165] The Supreme Court recognized that the government's action imposed a servitude over the plaintiff's land and that the plaintiff was entitled to compensation for that servitude. Ten years earlier, the Court had dismissed the plaintiff's complaint because the government had fired its guns so sporadically, that its conduct did not take a servitude.[166] The Court explained in the earlier case that

> [t]he contention of the petitioners, therefore, is plainly without merit so far as it rests upon the mere fact that there is a suitable, or the most suitable, field of fire over their property. Land, or an interest in land, cannot be deemed to be taken by the government merely because it is suitable to be used in connection with an adjoining tract which the government has acquired, or because of its depreciation in its value due to the apprehension of such use. The mere location of a battery certainly is not an appropriation of the property within the range of its guns.[167]

In these cases, the Court directed the fact-finder, typically the Court of Claims, to examine the exact nature of the interference.[168] As a result, the government must actually take the servi-

164. *Id.* at 911.

165. Portsmouth Harbor & Hotel Co. v. United States, 260 U.S. 327 (1922).

166. Peabody v. United States, 231 U.S. 530, 539 (1913).

167. *Id.* at 539.

168. *See, e.g.*, Citizens of Accord, Inc. v. The Town of Rochester, 2000 WL 504132, at *10-12 (N.D.N.Y. 2000) (noting that the construction of a race track which was operated approximately two percent of the year could not create a compensable taking under the Fifth Amendment); Knight v. City of Missoula, 827 P.2d 1270 (Mont. 1992) (noting that traffic and dust from state roads could create a compensable taking if the plaintiffs suffered a diminishment in the value of their property).

tude or easement; its conduct cannot simply be a tortious invasion.

Perhaps the case that is most identified with the concept of substantial interference is *United States v. Causby*.[169] In that case, the plaintiffs lived on and operated a chicken farm near an airport runway by the United States. As a result of the frequent flights over the plaintiffs' property, six to ten of the plaintiffs' chickens flew into the walls of their coop every day and the plaintiffs themselves were deprived of sleep and often frightened. In analyzing the plaintiffs' case, the government dismissed the notion that ownership of the land extended to the sky, noting that "[w]ere that not true, every transcontinental flight would subject the operator to countless trespass suits."[170] Still, the Court noted that even the government conceded that if the use of the airspace rendered the land uninhabitable, there would be a compensable taking. In creating a viable balancing test, the Court explained: "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines whether it is a taking."[171] Thus, in this case, the Court remanded the matter to the Court of Claims for further fact finding, but it also noted that "[f]lights over private land are not a taking, unless they are so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land."[172] In summary, the Court concluded that the facts as alleged constituted the taking of an easement over the plaintiffs' land.

Causby and subsequent cases with similar facts in the Court of Claims have created a jurisprudence of overhead flights.[173] Subsequent decisions in the Court of Claims and its successor courts weigh the nature of the intrusion to determine if the government took an aviation easement. Of import, the court looks to identify a substantial interference. For example, in *Speir v. United States*, the court noted that

> [T]he evidence shows that helicopter flights at altitudes of less than 500 feet over the farmhouse on the Tipperary Tract interfered with television reception there, causing the TV picture to "jump" and

169. United States v. Causby, 328 U.S. 256 (1946).

170. *Id.* at 260-61.

171. *Id.* at 265-66 (citing United States v. Cress, 243 U.S. 316, 328 (1917)).

172. *Id.* at 266. *See also* Griggs v. Allegheny County, 369 U.S. 85 (1962).

173. *See, e.g.*, Stephens v. United States, 11 Cl. Ct. 352, 358-59 (1986) (citing cases).

> drowning out the sound from the TV set; that a telephone conversation at the farmhouse was impossible when a helicopter was flying overhead at an altitude of less than 500 feet; that a conversation face-to-face anywhere on the Tipperary Tract was impossible when a helicopter was flying overhead at a height of less than 500 feet; that the noise from helicopters flying overhead caused doves to leave the Tipperary Tract, and thus ruined the dove hunting on the tract; and that the noise from helicopters flying overhead also seriously interfered with the quail hunting on the Tipperary Tract. The noise from helicopters flying over the Tipperary Tract at low altitudes was variously described as "bad," "rather piercing," "weird," "annoying," "most definitely bothersome," "very irritable [irritating]," and "unbearable."[174]

A substantial interference may still be a temporary taking if the flights continue for a period of time, but the period of time must be somewhat extended and the number of overhead flights significant.

Until recently, the courts also looked to the exact altitude of the flights to determine whether a compensable taking occurred. The courts relied on a federal regulation that defines "navigable airspace" as commencing at 500 feet.[175] Thus, the courts usually held that, as a per se rule, flights that occurred below 500 feet were compensable while those that occurred above 500 feet were not compensable.[176] The underlying tenet of these cases was that flights above the 500-foot demarcation line occurred in superadjacent airspace and created only consequential damages.[177]

The courts, however, soon realized the rather arbitrary nature of that rule. In *Branning v. United States*, the government flew "racetrack pattern" flights over the plaintiff's property.[178] Al-

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174. Speir v. United States, 485 F.2d 643, 647 (Ct. Cl. 1973). *See also* Brown v. United States, 73 F.3d 1100, 1102 (Fed. Cir. 1996); A.J. Hodges Indus., Inc. v. United States, 355 F.2d 592, 594 (Ct. Cl. 1966); Davis v. United States, 295 F.2d 931 (Ct. Cl. 1961); Highland Park, Inc. v. United States, 161 F. Supp. 597, 598 (Ct. Cl. 1958).

175. 14 C.F.R. § 91.119(c), *cited in* Argent v. United States, 124 F.3d 1277, 1281 (Fed. Cir. 1997).

176. *See, e.g.*, Lacey v. United States, 595 F.2d 614 (Ct. Cl. 1979); Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964); Aaron v. United States, 311 F.2d 798, 801 (Ct. Cl. 1963); Batten v. United States, 306 F.2d 580 (10th Cir. 1962); Matson v. United States, 171 F. Supp. 283, 286 (Ct. Cl. 1959); Hero Lands Co. v. United States, 1 Cl. Ct. 102, 105-06, *aff'd*, 727 F.2d 1118 (Cl. Ct. 1983) (Table); Powell v. United States, 1 Cl. Ct. 669, 673 (1983) (stating that "it is the general rule that 500 feet above ground level in uncongested areas is the dividing line between the upper airspace in which aircraft have the right of free passage, and the lower air space in which the owner of the subadjacent land is protected against the intrusion of aircraft.").

177. Batten v. United States, 306 F.2d 580 (10th Cir. 1962).

178. Branning v. United States, 654 F.2d 88, 90 (Ct. Cl. 1982).

though these flights occurred above the required 500-foot space, the frequency of the flights was such that they substantially interfered with the plaintiff's use of his land, so the court recognized that a taking had occurred.[179] Although the *Branning* court seemed to suggest that its holding was limited on its facts, the Federal Circuit has further expanded this rule. In *Argent v. United States*, the court noted that a mere disturbance could constitute a taking.[180] In *Argent*, the plaintiff owned land that was located near a naval airfield. As in *Branning*, the Navy flew planes around and sometimes above the plaintiff's property in the racetrack pattern. The court explained that the noise from the nearby airfield placed a special burden on the plaintiffs.[181] The court likened the noise to the smoke emitted from the tunnel. As a result, "this activity [served as] a peculiar burden imposed on [the plaintiffs]."[182] Thus, the court recognized that the plaintiff stated a cause of action for a taking even though "most of [the government's] flights do not pass over the [plaintiffs'] land."[183]

Overhead flights may also be compensable torts. In *Western v. McGehee*, a tort claim alleging trespass from overhead Air Force flights, the court explained:

> Of course, frequent flights over property, at low altitudes, may cause injury and damage, for which the landowner is entitled to just compensation or damages, or may be so low and so frequent as to constitute a taking of property by the government for public use. If such flights do not amount to a taking, but cause physical injury or damage, an action for damages may be maintained under the Federal Tort Claims Act.[184]

Finally, if the plaintiff is able to persuade the government to alter its flight patterns, the government may evade liability. For example, in *Wilfong v. United States*, the plaintiff, who incidentally was also a North Carolina chicken farmer, was victimized in

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179. *Id.* at 98-100 (citing Thornburg v. Port of Portland, 376 P.2d 100 (Or. 1962), and Henthorn v. Oklahoma City, 453 P.2d 1013 (Okla. 1969)). The court also noted that "[o]ther states have constitutions which grant broader relief to property owners than the Federal Constitution; they provide a right to compensation when property is taken *or damaged*." *Id.* at 100 n.17 (emphasis added) (citing Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964)).

180. Argent v. United States, 124 F.3d 1277 (Fed. Cir. 1997).

181. *Id.* at 1284.

182. *Id.* at 1284.

183. *Id.* at 1284.

184. Western v. McGhee, 202 F. Supp. 287, 289 (D. Md. 1962) (citing Weisberg v. United States, 193 F. Supp. 815 (D. Md. 1961)).

the same manner as the plaintiffs in *Causby* by overhead flights.[185] In that case, the flights were coming from an air base that was "many miles distant from plaintiff's . . . farm."[186] When the plaintiff complained, the government rerouted the flights and raised the flights' altitude. As a result, detection was difficult.[187] Accordingly, the court found that the government "abate[d] the nuisance" in a timely fashion and thus the plaintiff's taking claim was dismissed.[188] Although the government did not immediately abate the overhead flights, the court suggested that the three-month delay in implementing the plaintiff's request "represented nothing more than a tortious invasion of plaintiff's airspace rather than a compensable taking in a Constitutional sense."[189] In all of the above-noted cases, the court applied the substantial interference test to determine whether a taking of an easement had occurred.

The analysis is similar in the small number of nuisance cases that have been filed. For example, in *Huffman v. United States*, the plaintiff owned an inn which he was unable to use due to a government nuisance.[190] The government constructed a post office adjacent to the plaintiff's land. During the evening hours, the post office loaded and unloaded packages, thereby creating noise which caused the guests at the inn to complain. As a result, the plaintiff was unable to use the inn because the noise so disrupted his guests. The court found that the plaintiff had asserted a valid nuisance claim under Kentucky law and allowed the plaintiff to proceed with his claim.[191]

The analysis in *Huffman* is remarkably similar to the analysis in *Richards v. Washington Terminal Co.*[192] This pre-FTCA case involved what would be, in the context of the private sector, a garden-variety nuisance, but since the defendant was the government, the plaintiff had no legal remedy besides the Court of Claims, which did not have jurisdiction over claims "sounding in tort." The plaintiff had owned a home in Washington, D.C.,

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185. Wilfong v. United States, 480 F.2d 1326 (Ct. Cl. 1973).

186. *Id.* at 1327.

187. *Id.* at 1328.

188. *Id.* at 1331. *See also* Kirk v. United States, 451 F.2d 690, 693 (10th Cir. 1971).

189. *Id.* at 1331.

190. Huffman v. United States, 82 F.3d 703 (6th Cir. 1996).

191. *Id.* at 706. In this case, whether the plaintiff's claim was time-barred turned on whether the post office constituted a temporary or permanent nuisance. Nonetheless, regardless of the final determination, the court still recognized that this conduct could be a tort.

192. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

which was located approximately one hundred feet from a newly constructed tunnel that housed two sets of railroad tracks. Trains frequently stopped on the tracks near the tunnel. Further, the government constructed a fan which "caused the gases and smoke emitted from engines while in the tunnel to be forced out" toward the plaintiff's property.[193] As a result of the tunnel, the plaintiff was unable to rent the property and the property decreased in value by $1,500. The plaintiff filed a taking claim. On appeal, the Supreme Court ruled for the plaintiff, but it parsed the damages he sought into two categories: damages stemming from common burdens versus those stemming from private burdens. The Court noted that "[a]ny diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a 'taking.'"[194] In this case, the Court noted that by operation of law, an authorized railroad is immune to nuisance liability. Thus, the plaintiff could not recover from the noises and vibrations that burdened the public. Nevertheless, the Court also noted that the tunnel and ventilation system had the effect of imposing special damages on the plaintiff.[195] Accordingly, the Court granted the plaintiff damages under the Fifth Amendment for this unique harm. *Richards* effectively helps property owners because it awards damages for nuisances, but it also hampers them because it requires that the plaintiff suffer a special burden.

Ultimately, as the facts in *Richards* indicate, a plaintiff must suffer a special harm to assert a valid Fifth Amendment taking claim against the United States. Whether a plaintiff can assert a valid nuisance claim against the government will turn on the application of state law. Nonetheless, because the theoretical underpinnings of intentional torts and taking are similar, a plaintiff may be entitled to damages under either theory.

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193. *Id.* at 549.

194. *Id.* at 554.

195. *Id.* at 556-58. The requirement of suffering a special harm (i.e., suffering from a public nuisance rather than a private nuisance) is a unique requirement of Richards v. Washington Terminal Co. Subsequent federal cases seem only to focus on the magnitude of the harm, not whether the harm disparately impacts the plaintiff. One state court denied a plaintiff compensation under its state constitution because he did not suffer special damages. The court noted that the plaintiff's property, which abutted an expressway, was not impacted any more severely than other neighboring property. *See also* Spiek v. Michigan Dep't of Transp., 572 N.W.2d 201 (Mich. 1998).

V.
CONCLUSION

The authorization requirement of the Fifth Amendment serves to create a distinction between takings and torts. The requirement has served as a pivotal part of the Just Compensation Clause's jurisprudence. Although courts have struggled to apply the differing concepts of unauthorized actions and authorized but illegal actions, the issue may become moot in light of the Supreme Court's recent holding in *Eastern Enterprises*. Ultimately, in light of the discretionary function exception, only by broadening the judicial interpretation of the Just Compensation clause will aggrieved plaintiffs recover for both illegal and unauthorized government conduct.

As the law currently stands, a Fifth Amendment taking must result from a natural and probable consequences of the government's action. The conduct must not just be foreseeable. Further, the conduct must substantially interfere with the use of the property. A temporary trespass will not constitute a taking precisely for that reason. Although these guidelines are somewhat murky, unless Congress provides additional clarification, the jurisprudence in this area will remain uncertain.