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Constitutional Law - Eminent Domain - Extension of Fifth Amendment "Taking" to Include Destruction of Lien Right by the Doctrine of Immunity of Government Property from Attachment

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CONSTITUTIONAL LAW — EMINENT DOMAIN — EXTENSION OF FIFTH AMENDMENT "TAKING" TO INCLUDE DESTRUCTION OF LIEN RIGHT BY THE DOCTRINE OF IMMUNITY OF GOVERNMENT PROPERTY FROM ATTACHMENT — Upon default of the contracting shipbuilder, the United States acquired title to certain materials in accordance with a contract provision. Petitioners, who had previously acquired materialmen's liens on these materials, claimed that assertion of the doctrine of immunity of government property from attachment resulted in a "taking" of their liens in violation of the fifth amendment. This was rejected by the Court of Claims.[1] On certiorari to the United States Supreme Court, *held,* reversed, three Justices dissenting.[2] Since the builder had title at the time the materials were furnished, the property was not a "public work" and thus the liens attached. The right to resort to specific property for the satisfaction of a debt is a compensable property interest and its destruction constitutes a "taking" within meaning of the fifth amendment.[3] *Armstrong v. United States,* 364 U.S. 40 (1960).

In its first consideration of the fifth amendment "taking" clause,[4] the Supreme Court in the *Legal Tender Cases*[5] held that "taking" referred "only to a direct appropriation, and not to consequential injuries resulting from the exercise of a lawful power."[6] Under the "consequential injuries" limitation compensation is not required where the property damage is an incidental result of the exercise of an ordinary governmental power[7] or

1 Armstrong v. United States, 169 F. Supp. 259 (Ct. Cl. 1959). The Court reasoned that since these boats were being built under contract with the United States, they were a "public work" immune from materialmen's liens; therefore the liens never attached and no property of petitioners was taken.

2 Justices Harlan, Frankfurter and Clark. The dissent argued that "the very nature of the [governmental immunity] doctrine . . . precludes regarding its interposition as a Fifth Amendment 'taking.'" Principal case at 50.

3 Principal case at 48. In addition to the expansion of the "taking" concept, the Court also held that the mere prospect that property will later be owned by the United States does not make it a "public work" immune from materialmen's liens and that a lien-holder's right to resort to specific property for satisfaction of a debt was a compensable property interest. The latter is an extension of a 1935 decision holding that the right to resort to specific *land* was a compensable property interest. See Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

4 U.S. CONST. amend. V: "[N]or shall private property be taken for public use, without just compensation."

5 79 U.S. (12 Wall.) 457 (1870).

6 *Id.* at 551.

7 Kauper, *Basic Principles of Eminent Domain,* 35 Mich. S.B.J., Oct. 1956, p. 10, 18.

where remote and incidental damage results from a compensable "taking."[8] The scope of this limitation was, however, restricted by *United States v. Causby*[9] where the repeated landing and taking off of war planes with a glide path extremely close to private property was held to constitute a "taking" of an easement over the land. Arguably, under the *Legal Tender* test this was merely an incidental injury resulting from the lawful exercise of the war power. But in *Causby* the governmental action involved direct interference with the use and enjoyment of the property in contrast to the regulatory scheme present in the *Legal Tender Cases.* The traditional tort remedy for trespass or nuisance would have been available to *Causby* but for the doctrine of sovereign immunity. It is likely that the Court limited the scope of the "consequential injury" limitation in order to give to plaintiff some form of relief, for although the federal government had waived its immunity regarding constitutional claims, it had not done so regarding tort claims.[10] Similarly, in the principal case, the petitioners' loss of security rights seems to be an incidental result of the exercise of the federal government's power to contract. However, since the doctrine of immunity of governmental property from attachment prevents the assertion of petitioners' security interest in specific property, the principal case, by substituting fifth amendment relief for a traditional remedy here unavailable because of governmental immunity, presents no substantial departure from the rationale of *Causby.*

Another limitation on recovery under the fifth amendment is illustrated by *Omnia Commercial Co. v. United States*[11] where the government requisitioned a steel manufacturer's total output thereby preventing performance of petitioner's contract for steel. The Court held that a property owner is entitled to compensation when his property interest is used by the government for a public purpose but not when the property interest is merely destroyed.[12] In practice this distinction has become quite tenuous. For example, compensation was required for land flooded by governmental navigation improvements[13] but not for a bridge destroyed by rising water resulting from similar improvements.[14]Although compensation was required when the government took over a ship construction contract under which

[8] Comment, *Consequential Damages and "Just Compensation" in Federal Condemnations,* 18 U. CHI. L. REV. 349 (1951); Comment, *Consequential Damages in Federal Condemnation,* 35 VA. L. REV. 1059 (1949).

[9] 328 U.S. 256 (1946).

[10] Provision was made for claims based upon the Constitution by 24 Stat. 505 (1887), as amended, 28 U.S.C. § 1491 (1958). Provision was made for torts claims by 60 Stat. 842 (1946), as amended, 28 U.S.C. § 1346(b) (1958).

[11] 261 U.S. 502 (1923).

[12] *Accord,* United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952), where the Court held that compensation was not required for property destroyed to keep it from falling into enemy hands.

[13] United States v. Cress, 243 U.S. 316 (1917).

[14] Union Bridge Co. v. United States, 204 U.S. 364 (1907).

performance had commenced but final delivery had not occurred,[15] no compensation was required in the *Omnia* case. While the critical language of the fifth amendment — "taken for public use" — would not appear to compel compensation where there is destruction without present or future governmental use, the distinction is less persuasively applied when, as in the principal case, the government not only effectively destroys a property interest but also takes possession of the property in which the interest existed. To deny recovery because the security interest had not been perfected into a possessory right would ignore the well-established doctrine that although the security interest does not represent the totality of rights normally associated with property ownership, a lien is an interest in specific property.[16] In contrast to the principal case, in *Omnia* the government never used the contract rights which constituted the petitioner's only property interest in issue.[17] Thus even under the *Omnia* test the governmental action in the principal case could reasonably have been considered a "taking" of property for public use. Nevertheless, the result in the principal case is reached by the majority of the Court under a much broader analysis of the problem. Mr. Justice Black, speaking for the majority, discussed the elements of a fifth amendment "taking" present in the principal case. He found controlling here the elimination of a compensable property interest which existed before the governmental action[18] and the destruction of the value of liens for a public purpose — action which a private person could not have done without subjecting himself to suit.[19] Further, he negatived certain defenses by noting that neither sovereign immunity nor power to contract relieves the government of its fifth amendment obligations[20] and observed that the fifth amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[21] While these broad considerations have a prima facie validity and appeal, all were present in *Omnia* and implicity rejected when the Court developed the distinction between mere destruction and a taking for use.[22] Thus, although on its facts the principal case does not appear to be a major departure from the prior law, the broad language in the opinion, if not questioned in later cases, might lead to the demise of the distinction developed in *Omnia*.

Henry J. Price

15 Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924).

16 Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).

17 However, it may be argued that the principal case is very close to *Omnia* since both involved "executory" interests which were rendered unenforceable by the federal government. There seems to be little difference between rendering a contract unenforceable by requisitioning the supplier's total output and rendering a materialmen's lien unenforceable by taking title to the property in which the lien interest existed.

18 Principal case at 48.

19 *Ibid.*

20 *Id.* at 49.

21 *Ibid.*

22 Omnia Commercial Co. v. United States, 261 U.S. 502, 508.