



Protecting Property Rights from the Army Corps of Engineers

The Supreme Court prepares to hear a major Takings Clause case.

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Unfortunately for American property owners, the U.S. Supreme Court has seen fit to whittle away at those protections. In *Penn Central Transportation Co. v. New York* (1978), for example, the Court allowed New York's Landmarks Preservation Commission to seize the lucrative air rights above Grand Central Station without providing any form of compensation to the owner. Since it was only air, the Court reasoned, no "taking" had actually occurred. Meanwhile, the public got to reap the aesthetic benefits of Grand Central's historically-preserved exterior while the owners of the building were left holding the bill. Not exactly just compensation for a public use.

To make matters worse, in *Kelo v. City of New London* (2005), the Court opted to ignore the public use requirement entirely. In that case, the Supreme Court upheld New London, Connecticut's controversial use of eminent domain even though the property in question had been seized for the express purpose of handing it over to a private developer working in cooperation with the powerful Pfizer Corporation. That wasn't public use, it was private gain.

All of which raises the question: Does the Takings Clause still have any teeth left at all? We may soon learn the answer. On October 3 the Supreme Court will hear oral argument in the case of *Arkansas Game & Fish Commission v. United States*. At issue is whether a series of recurring floods sanctioned by the U.S. Army Corps of Engineers qualifies as a Fifth Amendment taking.

Between 1993 and 2000, the Army Corps of Engineers purposely and repeatedly allowed floodwaters to escape the Clearwater lake and dam in southeast Missouri. Among the areas flooded by that water was the 23,000-acre Dave Donaldson Black River Wildlife Management Area in northeast Arkansas, which is managed by the Arkansas Game & Fish Commission.

Charging that its property had been irreparably damaged by the actions of the federal government, the Arkansas commission filed suit under the Fifth Amendment. The Court of

Federal Claims weighed the evidence and agreed that a taking had indeed occurred. After observing that the government's flooding had "so profoundly disrupted certain regions of the Management Area that the Commission could no longer use those regions for their intended purpose, i.e., providing habitat for wildlife and timber for harvest," Judge Charles F. Lettow awarded \$5.7 million in compensation.

The federal government successfully appealed that ruling to the United States Court of Appeals for the Federal Circuit, which voided Judge Lettow's ruling. The Arkansas Game & Fish Commission now turns to the Supreme Court in search of just compensation for its damaged property.

For its part, the federal government argues that because the floodwaters ultimately receded the property was never actually taken in the first place. In fact, under the government's theory of the case, "temporary" flooding can never trigger the Fifth Amendment. As an authority for this claim, the government's brief cites the Supreme Court's 1982 decision in *Loretto v. Teleprompter Manhattan CATV Corporation*, which "distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion...on the other." As the Court put it, "A taking has always been found only in the former situation."

That certainly sounds bad for the Arkansas Game & Fish Commission. But consider what else the Court said in *Loretto*. In an effort to illustrate the reach of the Takings Clause, the Court in *Loretto* pointed to its 1946 precedent in *United States v. Causby*. In that case, the Supreme Court held that damage to a farmer's livestock caused by repeated military overflights qualified as a taking under the Fifth Amendment. As the Court explained, "If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete." Indeed, *Causby* continued, "it would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."

In other words, the government need not squat forever on a piece of land in order for a "permanent physical occupation" to occur. "It is the character of the invasion," the Court explained in *Causby*, "that determines the question whether it is a taking." As the joint friend of the court brief filed in Arkansas Game & Fish by the Pacific Legal Foundation, Cato Institute, and Atlantic Legal Foundation puts it, "The fact that the government's fly-over of *Causby's* property was of limited duration did not deter this Court from concluding that a compensable taking had occurred."

In the present case, repeated flooding over six consecutive years by the U.S. Army Corps of Engineers caused severe injury to the property of the Arkansas Game & Fish Commission, including the destruction and degradation of 18 million board feet of timber. That damage did not magically disappear just because the floodwaters happened to recede.

The Army Corps of Engineers took this property for a public use. We'll see if the Supreme Court forces the Corps to pay the price.