When Congressional Legislation Interferes with Existing Contracts: Legal Issues

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Summary

Laws enacted by Congress on occasion interfere with contracts entered into before enactment, prompting suits against the United States by disappointed contract parties. In a few of them, courts have awarded billions of dollars to the United States' contracting partners. This report surveys the legal theories invoked in such suits. Note that litigation on the grounds covered herein can be avoided entirely if the congressional enactment is construed to apply only to *future* contracts.

Two competing interests underlie this report's topic. On the one hand, protection of settled expectations, at least to some degree, is essential to ordered society. Contract law has this goal for expectations embodied in contracts. On the other hand, government needs latitude to address new problems, so contracts generally are said to confer no immunity against future legislation. The balance struck by the case law is that while Congress legitimately can thwart performance under existing contracts, the United States may in some instances have to pay compensation.

The United States cannot be sued unless it waives sovereign immunity and vests jurisdiction to hear claims against it in a court. This the United States has done with regard to the legal theories at issue here. Once past these procedural thresholds, courts accord different treatment to legislative interference with existing contracts depending on whether the interference is with a "public contract," defined as one where the United States is a party, or with a private contract, defined as one between two non-federal parties. Broadly speaking, challenges to the former are more likely to win.

For public contracts, breach of contract is the main theory on which challenges to congressional interference with existing contracts are litigated. The United States is as bound by its contracts as are individuals, so the same breach rules apply. Some special situations that have occupied the courts in recent years have been (1) breaches of the implied covenant of good faith and fair dealing; (2) the addition by Congress of new hurdles for the private party to a contract with the United States; and (3) breach by congressional *inaction*.

In addition to sovereign immunity, which as noted has been waived, there are other "sovereign defenses" that the United States can invoke when sued for breach. One is the sovereign acts doctrine, which holds that the United States is not liable for its "public and general" acts as sovereign. This defense seeks to ensure that the United States is no worse off than a private contracting party when acts of the United States as sovereign impede contract performance. Another sovereign defense flows from the unmistakability doctrine, which states that a federal agency may not contract away Congress's sovereign power to regulate unless Congress has unmistakably empowered the agency to do so.

For private contracts, the main legal theory is the Fifth Amendment Takings Clause. Plaintiffs argue that since contract rights generally are deemed "property" under the Takings Clause, a congressional enactment that thwarts performance under a contract in essence takes property, requiring compensation. The government's defense is often the *Omnia* rule, a Supreme Court holding under which government actions that only incidentally interfere with performance of private contracts are deemed to constitute but a frustration, not a taking, of contract rights. Per this definition, the *Omnia* rule does not apply when the congressional action expressly "targets" an existing contract right, though even here the taking claim usually is rejected.

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Introduction

Congress, when it enacts a new law, generally does not operate on an empty slate. The new law likely affects relationships, expectations, rights, investments, and other arrangements that already exist. In particular, the statute may interfere—either as its express purpose or incidental byproduct—with contracts entered into prior to its enactment. Such contracts may be between the United States and a private party ("public contracts") or solely between private parties ("private contracts").

The range of factual settings in which legislative interference with existing contracts may arise is unbounded, and the recompense sought by disappointed contract parties from the United States can be quite large. Perhaps the most high-profile such interference arose under the 1989 "savings and loan bailout statute."[1] In that law, Congress forbade thrift institutions from counting "supervisory good will" toward minimum capital requirements, after such thrifts had acquired failing thrifts on the federal contractual promise that supervisory good will could be so used. This federal reversal resulted in numerous thrifts falling below minimum capital requirements and being liquidated. Thus far, the United States has paid out $2.28 billion on the roughly 125 claims filed by acquiring thrifts, out of $34.34 billion sought (two cases remain to be resolved).[2] Separately but also related to the savings and loan crisis, a 1993 congressional enactment undercut agreements premised on acquiring thrift institutions being able to take tax deductions for certain losses, by eliminating those deductions.[3]

Other illustrations abound. A bill now in Congress would demand renegotiation of existing collective bargaining agreements between the Postal Service and its employees if such agreements contain a specified provision.[4] Under the Troubled Asset Relief Program,[5] the United States required Chrysler and General Motors to terminate certain dealership contracts as a condition of obtaining financial assistance.[6] Following 9/11, Congress enacted the Aviation and Transportation Security Act under which security screening at U.S. airports was transferred from private to federal hands, indirectly negating security services contracts between private security services and airlines.[7] In 1988 and 1990, Congress statutorily blocked prepayment of certain mortgage contracts on low-income housing, which prepayment had been expressly allowed in

[1] More formally, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, P.L. 101-73.

[2] These claims are known as "*Winstar* cases" after the Supreme Court decision addressing certain sovereign defenses raised by the United States in them. United States v. Winstar Corp., 518 U.S. 839 (1996). The text numbers are current as of May 17, 2012, and are from Jeanne E. Davidson, Director, Commercial Litigation Branch, Dep't of Justice, *Lessons Learned from the Winstar and Spent Nuclear Fuel Cases: What Do the Available Data Suggest?* (May 17, 2012) (prepared for United States Court of Appeals for the Federal Circuit Judicial Conference).

[3] Omnibus Budget Reconciliation Act § 13224 ("Guarini amendment"), P.L. 103-66. *See* Centex Corp. v. United States, 395 F.3d 1283 (Fed. Cir. 2005).

[4] H.R. 2309 (Postal Reform Act of 2011) § 304.

[5] 12 U.S.C. § 5211.

[6] The two lawsuits resulting from these terminated dealer contracts are now pending: Colonial Chevrolet Co., Inc. v. United States, No. 10-647C (Fed. Cl. filed February 27, 2012), and Alley's of Kingsport, Inc. v. United States, No. 11-100C (Fed. Cl. filed February 27, 2012). Plaintiffs seek a total of between $400 million and $1 billion.

[7] P.L. 107-171 (codified in scattered sections of 5 U.S.C. and 49 U.S.C.). *See* Huntleigh USA Corp. v. United States, 525 F.3d 1370 (Fed. Cir. 2008).

those contracts.[8] And in 2008 amendments to the Medicare statutes, Congress terminated a number of equipment and supply contracts previously entered into by the United States.[9]

This report surveys the legal theories that may be invoked by aggrieved contract parties to obtain redress in these situations—that is, when new federal statutes interfere with contracts entered into pre-enactment. The effort is to give Congress some advance warning as to when such interferences, in bills before Congress, may result in legal challenge. For public contracts, the usual legal challenge is via a breach of contract claim, though claims that contract rights have been "taken," requiring compensation under the Fifth Amendment Takings Clause,[10] are often joined. For private contracts, the breach theory is not available since by definition the United States is not a party to the contract. Here, takings claims predominate.

One point warrants spotlighting. Breach, takings, and similar claims have no place if the federal statute applies only to contracts entered into *after enactment*. In the case of a statute whose application becomes clear only after regulations construing it are issued, claims based on contract interference have no place when the contract is entered into *after the regulations take effect.* In either case—post-enactment or post-regulation—the decisive principle is that parties are presumed to contract with knowledge of the law existing at the time.[11] Congressional drafters can ensure a prospective-only interpretation of a statute by explicitly so stating in bill text. Absent an explicit statement, a prospective-only reading of a statute *may* be adopted, but is not guaranteed, under the general presumption that, lacking clear indication otherwise, statutes should be read to apply prospectively only.[12]

The Competing Interests in Protecting Contract Rights

Protection of settled expectations is essential to ordered society, certainly to the conduct of business.[13] Thus, contract law protects the settled expectations of parties to contracts. At the same time, government must have latitude to address new problems, even if that means interfering with settled expectations in existing contracts. Thus, contracts generally are said to confer no immunity against future legislation. Stated the Supreme Court: "Contracts, however express, cannot fetter the constitutional authority of Congress."[14] Or as the Court also noted: "[P]arties by entering into contracts may not estop the legislature from enacting laws intended for the public

[8] Emergency Low Income Housing Preservation Act, P.L. 100-242 (1988); Low-Income Housing Preservation and Resident Homeownership Act, P.L. 101-625 (1990). Roughly a dozen suits challenging the blocking of these prepayments by the statutes were filed. *See, e.g.*, CCA Assocs. v. United States, 667 F.3d 1239 (Fed. Cir. 2011), *petition for cert. filed*.

[9] Medicare Improvements for Patients and Providers Act of 2008, 42 U.S.C. § 1395w-3. *See* Cardiosom, L.L.C. v. United States, 656 F.3d 1322 (Fed. Cir. 2011) (remanding for trial on the merits).

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

[11] *See, e.g.*, In re Doctors Hospital of Hyde Park, Inc., 337 F.3d 951, 959 (7th Cir. 2003).

[12] *See, e.g.*, Landgraf v. USI Film Products, 511 U.S. 244, 272-273 (1994).

[13] *See, e.g.*, *id*. at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."); Alliance of American Insurers v. Chu, 571 N.E.2d 672, 678 (N.Y. 1991).

[14] Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 642 (1993).

good."[15] However, the fact that Congress can legitimately thwart performance under existing contracts does not alter the fact that disappointed parties to those contracts may be able to obtain monetary relief under the breach and takings theories mentioned earlier.

The need for balance between protecting settled expectations and allowing the government future legislative latitude also applies to contracts to which the government is a party. The right of the government to enter into contracts is not only an essential attribute of sovereignty, but also a practical necessity. The ability of the government to contract with private parties would be hindered if it were able to ignore its contractual commitments or seek to avoid contractual remedies simply because it is the sovereign. Thus, the Supreme Court admonishes, "[t]he United States are as much bound by their contracts as are individuals."[16] At the same time, this report notes certain defenses to breach of contract that the United States has, but private parties do not. These defenses—chiefly, the sovereign act defense and unmistakability doctrine—are well known and arguably form part of the expectations of a private party who contracts with the government. Courts are generally reluctant to expand these defenses or otherwise allow the government to escape its contractual obligations simply because it is the sovereign.[17] Conversely, when the government enters into a contract it is entitled to the same contractual protections as a private party.

The protection of settled expectations in the takings arena also invokes this distinction between the government acting in a sovereign versus proprietary capacity. When acting in a sovereign capacity, government may be held to have taken property, requiring compensation. When entering into contracts, however, government is often seen as acting in a proprietary capacity, in which capacity the application of a takings theory in the event of contract breach is disfavored.[18]

Waiver of Sovereign Immunity and Vesting of Jurisdiction

To sue the United States for congressional interference with a contract right (public or private), the United States must have waived its sovereign immunity: the United States is immune from suit except as it consents to be sued.[19] This waiver/consent precondition applies to both breach of contract claims and takings claims.[20] The consent to suit has been given, in both cases, in the form of the Tucker Act[21] and Little Tucker Act.[22] Actually, these acts do *two* interconnected

[15] Manigault v. Springs, 199 U.S. 473, 480 (1905). For still further authority, see *Norman v. Baltimore & Ohio Rd. Co*., 294 U.S. 240, 307-308 (1935) ("Contracts may create rights of property, but when contracts deal with a subject matter that lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.").

[16] Perry v. United States, 294 U.S. 330, 351 (1935); Lynch v. United States, 292 U.S. 571, 579 (1934). *Accord*, Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604, 607 (2000); United States v. Winstar Corp., 518 U.S. 839, 895 (1996) (plurality opinion).

[17] *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839, 883 (1996) (declining to expand the unmistakability doctrine in a manner that would place it "at odds with the Government's own long-run interest as a reliable contracting partner ….").

[18] See the discussion *infra* under "Judicial Preference for Breach of Contract Claims."

[19] Library of Congress v. Shaw, 478 U.S. 310, 315 (1986); United States v. Mitchell, 463 U.S. 206, 211 (1983).

[20] *See, e.g.*, Perry v. United States, 294 U.S. 330, 352 (1935) (breach of contract claims).

[21] 28 U.S.C. § 1491(a)(1).

things: they waive the sovereign immunity of the United States against suits based on breach and takings, *and* they vest jurisdiction over such claims in a particular court.[23]

The Tucker Act gives the U.S. Court of Federal Claims jurisdiction over "claims" against the United States "founded either upon the Constitution, … or upon any express or implied contract with the United States …." The phrase "upon the Constitution" plainly includes takings claims against the United States—important not only for jurisdictional reasons, but because the Takings Clause of the Fifth Amendment is not construed to contain its own waiver of sovereign immunity. The waiver comes only from the Tucker Act. As for breach of contract actions, the phrase "upon any express or implied contract" states the Tucker Act's coverage of such actions explicitly. However, the phrase "implied contract" has been limited by case law to contracts implied in fact, excluding contracts implied in law.[24]

The Little Tucker Act gives federal district courts the same jurisdiction over breach and takings claims against the United States as the "big" Tucker Act gives to the Court of Federal Claims—with one difference. In Little Tucker Act suits, the amount in controversy may be no more than $10,000. Reading the two statutes together, those wishing to sue the United States over a legislative interference with contract must, if pursuing a breach or takings theory, sue in the Court of Federal Claims if seeking more than $10,000, but may sue in either district court or Court of Federal Claims if seeking $10,000 or less.

Under either statute, the remedy available to the plaintiff is exclusively money. The "claims" referred to in the Tucker Act and Little Tucker Act are universally construed to mean monetary claims.[25] Thus, in the case of public contracts, the plaintiff cannot compel the United States to perform its end of the contract ("specific performance") through a declaratory, injunctive, or mandamus remedy; it can only seek money ("damages") for breach.[26] In the case of either public or private contracts, suits under a takings theory can only ask for the constitutionally promised "just compensation," not injunctive relief ordering the federal agency to rescind its allegedly contract-taking action. Also under either statute, any appeal taken, whether from the U.S. Court of Federal Claims or a federal district court, is to the U.S. Court of Appeals for the Federal Circuit.[27]

Due process claims cannot be heard in the Court of Federal Claims under the Tucker Act,[28] or in federal district courts under the Little Tucker Act, but must instead go to a federal district court under federal question jurisdiction.[29] Thus, appeal is to the appropriate regional circuit rather than the Federal Circuit.

(...continued)

[22] 28 U.S.C. § 1346(a)(2).

[23] United States v. Mitchell, 463 U.S. 206, 212 (1983).

[24] *See, e.g.*, Hatzlachh Supply Co. v. United States, 444 U.S. 460, 465 n.5 (1980).

[25] *See, e.g.*, Bowen v. Massachusetts, 487 U.S. 879, 914 (1988) (Tucker Act "has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States").

[26] Nor does the waiver of sovereign immunity in the Administrative Procedure Act extend to actions seeking declaratory relief or specific performance in breach of contract actions against the United States. Sharp v. Weinberger, 798 F.2d 1521, 1523-1524 (D.C. Cir. 1986).

[27] 28 U.S.C. §§ 1295(a)(2)-(3).

[28] Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

[29] 28 U.S.C. § 1331.

Federal Actions Interfering with *Public* Contract Rights

A "public contract," as noted, is a contract to which the United States is a party. These are contracts "where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals, or corporations also engage in among themselves."[30] However, the federal government's dual roles as sovereign and as contracting party often give rise to contracts that differ from traditional contracts between private parties. Types of public contracts include those that provide for (1) the purchase or sale of goods or services;[31] (2) government conferring a benefit;[32] (3) implementation of a statutory program;[33] and (4) the lease or sale of resources on public lands.[34]

Breach of Contract

The concept of breach of contract defies simple definition, though reduced to its essence it constitutes the failure of one party to a contract to perform a promised action so as to give rise to a right to relief (often in damages) from the other party.[35] Breach of contract is the main theory on which challenges to congressional interference with pre-existing public contracts are litigated. As earlier noted, the United States is as bound by its contracts as are individuals, save for the special "sovereign defenses" discussed below.[36] That is, the same breach rules apply to the United States as a contract party as to a nonfederal party.

Of course, the first step in determining if a federal enactment has effected a breach is to scrutinize the terms of the contract. If the United States can show that a later congressional enactment was contemplated by express or implied terms in the contract, there is obviously no breach. In *Mobil Oil and Producing Southeast, Inc. v. United States*, for example, the Supreme Court could not determine whether a federal statute was an anticipatory breach of pre-existing federal lease contracts with oil and gas producers until it determined whether a lease provision subjected the leases to only those laws existing when the lease was entered into, or later-enacted laws as well.[37]

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[30] Kania v. United States, 650 F.2d 264, 268 (Ct. Cl. 1981).

[31] *See, e.g.*, Freedman v. United States, 320 F.2d 359 (Ct. Cl. 1963) (involving government contract to sell surplus Army tanks).

[32] *See, e.g.*, Bowen v. POSSE, 477 U.S. 41 (1986) (describing agreements between the states and federal government pursuant to Social Security Act under which states could obtain Social Security coverage for their employees).

[33] *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839 (1996) (involving contracts under which the United States encouraged healthy thrifts to take over failing thrifts by promising the former they would be able to count "supervisory good will" toward meeting federal minimum capital requirements).

[34] *See, e.g.*, Mobil Oil and Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) (involving oil and gas leases entered into between oil companies and the United States under the Outer Continental Shelf Lands Act).

[35] This report is not a treatise on contract law. For that, the reader is referred to WILLISTON ON CONTRACTS (4th ed. 1999) and the RESTATEMENT (SECOND) ON CONTRACTS (1981).

[36] *See* note 16 *supra* and accompanying text.

[37] *Mobil Oil and Producing Southeast*, 530 U.S. 604 (construing lease terms to subject leaseholder only to laws existing when lease was signed, and accordingly finding repudiation of lease by later congressional enactment).

Special Cases

There are several breach of public contract situations worth special mention:

Implied Covenant of Good Faith and Fair Dealing

In a set of related cases, the United States was found liable for contract breach even though the congressional enactment did not run afoul of any *express* term in the affected contracts. During the savings and loan crisis of the 1980s, financial institutions had acquired failing thrifts in part based on a particular tax advantage: the deductibility of losses on the sale of certain assets of the acquired institution. Indeed, government agencies had actively promoted the availability of such deductions to encourage such acquisitions and thereby reduce the government's reimbursement obligation to depositors of the failed thrifts. In 1993, however, Congress enacted the "Guarini amendment," which abolished the loss deduction retroactive to 1991. This eliminated a major part of the benefit to acquiring institutions under the agreements they had entered into with the United States (acting as receiver of the failing thrifts).

The leading decision is *Centex Corp. v. United States*.[38] There, the Guarini amendment was held to have breached the implied covenant of good faith and fair dealing in the federal agreements with the acquiring institutions. This covenant imposes a duty "not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract."[39] The court found that Congress had been "keenly aware" of the deductibility benefit and had eliminated it retroactively to reduce what it regarded as the excessive costs of the acquisition transactions.[40] Moreover, the court noted, the Guarini amendment had not been aimed at taxpayers generally, which would have mitigated its unfairness. Rather, the amendment "had its sole impact on particular contracts that Congress regarded as being unduly favorable to the acquiring institutions …."[41]

Additional Requirements

The Supreme Court has held that Congress's imposition of additional requirements on an entity that has previously contracted with the United States may be regarded as tantamount to a breach. In *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*,[42] two oil companies paid the Department of the Interior $156 million in "up front bonus payments" for lease contracts allowing them to explore for and produce oil and gas off the North Carolina coast. The companies then submitted an exploration plan and certification of the plan's consistency with the state's coastal zone management plan. These submissions met the requirements of the Outer Continental Shelf Lands Act, which normally would have meant that under that statute, the Secretary had to approve the plan within 30 days. But a few days prior to the submissions, Congress enacted the Outer Banks Protection Act, which added significant new preconditions to the Secretary's approval of the exploration plan.

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[38] 395 F.3d 1283 (Fed. Cir. 2005).

[39] *Id*. at 1304. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

[40] 395 F.3d at 1305.

[41] *Id*. at 1306.

[42] 530 U.S. 604 (2000).

The oil companies claimed that the new act constituted a repudiation of their lease contracts,[43] entitling them to restitution of the $156 million in up-front payments. The Supreme Court agreed. The delays imposed by the new act, it held, violated the lease contracts, which made the lessees subject only to the requirements in those leases and, by incorporation, other law *existing when the leases were entered into.*

Congressional Inaction

In at least one circumstance, the courts have found the United States to have breached contracts as the result not of Congress's action, but of its failure to act. Under the Nuclear Waste Policy Act of 1982,[44] the Department of Energy has entered into contracts with nuclear power providers to gather and dispose of their spent nuclear fuel beginning in 1998 in return for regular payments by the power providers into a Nuclear Waste Fund.[45] The providers have made the payments, but to this day the United States has not begun the removal and disposal of the spent fuel because Congress has yet to authorize a permanent repository for it.

This congressional inaction has spawned 81 breach of contract claims against the Department of Energy since 1998, resulting in $2.1 billion in damage awards and settlements thus far out of $8.6 billion sought. As of August 9, 2012, 33 cases are still pending, including some on appeal to the Federal Circuit.[46]

Breach Defenses Unique to the Sovereign

One defense to breach claims that may be asserted only by the sovereign was described earlier. This defense, that the sovereign has not waived its immunity from suit, cannot be asserted by the United States in breach cases in light of the broad waivers of sovereign immunity in the Tucker Acts. Three other defenses unique to the sovereign are described here.

The sovereign act defense holds that the United States is not contractually liable for its "public and general" acts as sovereign. Stated the Supreme Court in its seminal decision on the defense: "Whatever acts the government may do … so long as they be public and general, cannot be deemed specially to alter, modify, obstruct, or violate the particular contracts into which it enters with private persons …."[47] The doctrine "thus balances the Government's need for freedom to legislate with its obligation to honor its contracts."[48] Otherwise put, the doctrine levels the contractual playing field by ensuring that government contractors and private contractors are

[43] A "repudiation" of a contract obligation is a "statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach." RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981).

[44] 42 U.S.C. §§ 10101-10270.

[45] Nuclear Waste Policy Act § 302(a)(5), 42 U.S.C. § 10222(a)(5).

[46] For detailed statistics on the status of the Nuclear Waste Policy Act cases, see Department of Justice, Spent Nuclear Fuel Data August 9, 2012 (slide show on file with author). *See also* Jeanne E. Davidson, Director, Commercial Litigation Branch, Dep't of Justice, *Lessons Learned from the Winstar and Spent Nuclear Fuel Cases: What Do the Available Data Suggest?* (May 17, 2012) (prepared for United States Court of Appeals for the Federal Circuit Judicial Conference). For an overview of the legal issues, see CRS Report R40996, *Contract Liability Arising from the Nuclear Waste Policy Act (NWPA) of 1982*, by Todd Garvey.

[47] Horowitz v. United States, 267 U.S. 458, 461 (1925).

[48] United States v. Winstar Corp., 518 U.S. 839, 896 (1996).

affected the same way when the government, acting in its sovereign capacity through a "public and general" enactment, affects existing contract rights.

For example, in *Yankee Atomic Electric Co. v. United States*,[49] a nuclear utility claimed that congressional legislation requiring it to pay money into a fund created to clean up contaminated uranium enrichment facilities violated the government's pre-existing contractual agreement to supply enriched uranium to the utility at a specified price. The court rejected the breach claim, reasoning that the legislation was not enacted to retroactively increase the earlier contract price—that is, was not enacted for the benefit of the government as contractor. Rather, it was enacted to address contamination at enrichment facilities, and the need to decommission them—that is, for the benefit of the public. Hence, the government could assert a sovereign act defense.

Because of the "public and general" requirement, federal legislation found to specifically target existing contracts does not qualify for the sovereign acts defense. One example is found in *Winstar Corp. v. United States*,[50] where an accounting device placed in federal contracts to encourage thrift institutions to acquire failing thrifts was, after such acquisitions, specifically withdrawn by Congress. The United States, said the Supreme Court, could not invoke the sovereign acts defense. The fact that a substantial part of the impact of Congress's action fell on the government's own contractual obligations, not to mention the government's financial self-interest in the legislation, made the defense inappropriate.[51]

The unmistakability defense asserts that "sovereign power governs all contracts subject to the sovereign jurisdiction, and will remain intact unless surrendered in unmistakable terms."[52] Thus, a federal agency "cannot contract away Congress' sovereign power to regulate unless Congress has clearly and unmistakably empowered the agency to do so."[53] But although the unmistakability doctrine is easy enough to state, it is harder to apply, raising a number of questions. There is no doubt that the sovereign acts doctrine and the unmistakability doctrine overlap in that the application of both requires an examination of the nature and purpose of the governmental action alleged to have breached an existing contract. But the doctrines "proceed from independent lines of authority …."[54] Also, there is dispute as to whether, if the enactment of legislation affecting existing public contracts does not fall within the scope of the sovereign acts doctrine, the unmistakability doctrine still may apply. Most courts answer no,[55] but there is contrary authority.[56]

[49] 112 F.3d 1569 (Fed. Cir. 1997).

[50] 518 U.S. 839 (1996).

[51] *Id*. at 899 ("a governmental act will not be public and general it has the substantial effect of releasing the government from its contractual obligations"). *See also* Stockton East Water Dist. v. United States, 583 F.3d 1344, 1367 (Fed. Cir. 2009) (sovereign acts defense unavailable "where the governmental action is specifically directed at nullifying contract rights"). Another example of a legislative act being held not sufficiently public and general is *Centex Corp. v. United States*, 395 F.3d 1283, 1306 (Fed. Cir. 2005), discussed earlier in the report. There, however, the "targeted" aspect of the legislation was used by the court to support a holding that the implied covenant of good faith and fair dealing had been violated, not to reject a sovereign acts defense.

[52] *Winstar*, 518 U.S. at 872.

[53] Transohio Savings Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 622 (D.C. Cir. 1992).

[54] Cuyahoga Metro. Housing Auth. v. United States, 57 Fed. Cl. 751 (2003).

[55] *See, e.g.*, Allegre Villa v. United States, 60 Fed. Cl. 11, 17 (2004).

[56] *See, e.g.*, Adams v. United States, 42 Fed. Cl. 463, 484 (1998) (applying unmistakability doctrine despite finding sovereign act doctrine not applicable).

An example of the majority rule—that legislation outside the sovereign acts doctrine is outside the unmistakability doctrine—is *Cuyahoga Metropolitan Housing Authority v. United States*.[57] The case involved whether the United States breached certain Housing Assistance Payment contracts with the owners of low-income housing, entered into under the Housing Act of 1937, when it enacted legislation that changed the way rent subsidies were to be determined under that act and the existing contracts. The court found that the new law breached existing contracts because it was not protected by the unmistakability doctrine. In passing the law, the court noted, "Congress did not act to protect public safety, morals, or the economy through the exercise, for example, of its police powers. Rather, in an appropriations measure, it deliberately targeted, at HUD's behest, that agency's contractual obligations … in an effort to reduce outlays …."[58] Adjusting the price to be paid under existing contracts, concluded the court, "fails to invoke any of the sovereign powers implicated by the unmistakability doctrine and thus remains actionable."[59]

Termination for convenience of the government. Breach claims based on contract termination by the United States are precluded, on the ground that the government's contracts are "entered into subject to the power of Congress to enact legislation authorizing the government to … cancel them …."[60] This is a specialized sovereign defense, applicable to contract *termination* by the United States rather than, as the defenses above, contract abrogation. It generally arises in connection with federal procurement contracts. The private contract party, following termination by the United States, is obviously entitled to compensation for work already done; the party simply cannot insist on continuing to perform under the contract and receiving payment therefor. Congressional termination of contracts often comes in the form of an appropriations bill instructing that federal funds not be spent on future purchases under a particular procurement contract.

Being inherent in federal sovereignty, this defense is not dependent on being expressly stated in government contracts. Nonetheless, "termination for convenience of the government" clauses often are used in contracts under which the United States receives goods or services. Such clauses serve to notify the unwary government contracting partner of the inherent federal termination power, and to define the damages owed upon termination. The clauses assert the federal government's "broad right to terminate without cause and limit[] the contractor's recovery to costs incurred, profit on work done, and costs of preparing the termination settlement proposal."[61]

Takings

As mentioned, plaintiffs filing breach of contract complaints against the United States often add a takings claim under the Fifth Amendment Takings Clause. The Takings Clause is relevant because

[57] 57 Fed. Cl. 751 (2003).

[58] *Id*. at 777.

[59] *Id*. at 779.

[60] De Laval Co. v. United States, 284 U.S. 61, 73 (1931). What the Court actually said was that the contracts were entered into subject to the power of Congress to cancel them "as required by the necessities of war." *Id.* This apparent qualifier was left out in the text quote because commentators ignore it, reading the sentence more broadly. *See, e.g.*, 4A C. McBride, T.J. Touhey & W.A.I. Wilson, GOVERNMENT CONTRACTS: CYCLOPEDIC GUIDE TO LAW, ADMINISTRATION, AND PROCEDURE § 30.20[2] (2012).

[61] John Cibinic, Jr., Ralph C. Nash, Jr., and James F. Nagle, ADMINISTRATION OF GOVERNMENT CONTRACTS 1049 (Geo. Wash. Univ. 2006).

contract rights generally are deemed to constitute "property" as that term is used in the Takings Clause.[62] A breach by the United States, therefore, can be argued to constitute a taking of one's property in a contract right.

Reservation of Power to Amend

When Congress expressly reserves the power to amend a statute and agreements entered into thereunder, the contract rights arising under the statute will not be deemed property for takings purposes.[63] That being so, the exercise of the reserved power to amend cannot be deemed a taking of those rights. Even when only a power to amend *the statute* is stated, authority to amend agreements under the statute will be implied and thus no property rights will accrue.[64] Yet again, contract rights may be held to lack property status where reservation of a power to amend is contained solely in regulations and the agreements, not in the statute itself.[65] But although a reservation of a right to amend may need to be found somewhere to prevent a contract right from gaining Takings Clause protection, the reservation need not always be express but may be implied from prior actions of the government.[66]

Judicial Preference for Breach of Contract Claims

While breach of contract and takings claims against the United States are often brought in the same action, the Court of Federal Claims and Federal Circuit display a marked preference for litigating such actions under a breach theory—often ignoring the taking claim entirely. As seminally stated decades ago, takings theory "has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual rights generally gives rise to a breach claim, not a taking claim."[67] For example, all of the roughly 125 cases filed on account of Congress's withdrawal of an accounting technique in the S&L bailout statute (see page one) included both breach and takings claims, and all of them, except the two cases remaining, have been decided solely on breach grounds.

The explanations put forward by the Court of Federal Claims and Federal Circuit for this tilt toward breach adjudication have been several. One is that when the United States *enters into* a contract, it does so in its proprietary rather than sovereign capacity. Thus, remedies must arise

[62] *See, e.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken … provided that just compensation is paid."), and Lynch v. United States, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States."). There are exceptions to the general rule of property status, however. Thus, *Bowen v. POSSE*, 477 U.S. 41 (1986), held that minor provisions in public contracts that simply embody the private party's acceptance of a regulatory program "as is" are not property.

[63] *See, e.g.*, Democratic Central Comm. v. WMATC, 38 F.3d 603, 606 (D.C. Cir. 1994) (when government "acts to create property rights yet retains the power to alter those rights, the property right is not considered 'private property,' and the exercise of the retained power is not considered a taking ….").

[64] *Bowen*, 477 U.S. at 55.

[65] *See, e.g.*, South Carolina v. Cavazos, 897 F.2d 1272, 1275-1276 (4th Cir. 1990).

[66] *Democratic Central Comm.*, 38 F.3d at 607.

[67] Sun Oil Co. v. United States, 572 F.2d 786, 818 (Ct. Cl. 1978). *Accord*, Hughes Communications Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001).

from the contracts themselves.[68] Nor is there a taking when the government's action *in abrogating its contract* is viewed as proprietary.[69] Another explanation is that nothing has been taken where, as is typical, the plaintiff retains the full range of breach remedies.[70] And if there is no breach of the contract right, nothing was taken. Finally, courts tend to avoid, or at least defer, constitutional questions when there are non-constitutional grounds for resolving a case.[71]

The preference in Court of Federal Claims and Federal Circuit decisions for resolution on breach grounds takes two inconsistent forms.[72] Under one view, if a breach claim is made, the taking claim must be dismissed at the outset.[73] Under a second view, both theories may be pleaded, but the taking claim is held in abeyance until such time as the breach claim is resolved. The implication is that if breach is found, the taking claim is dismissed; if not, the taking claim may be litigated.[74] While the second view—that a plaintiff losing a contract claim may proceed with his taking claim—has been expressly rejected in some decisions,[75] a few recent decisions endorse it.[76] Research reveals no decisions in which the second view has yielded a no-breach ruling followed by a finding of a taking. Under either view, of course, "a party can obtain only one recovery for a single harm."[77]

One circumstance where a breach claim clearly should not void the taking claim is when the taking claim is based on a property right existing independently of the contract, even if created by it.[78]

The debate over which legal theory can be pursued—breach, taking, or both—is not merely a doctrinal nuance.[79] It can substantially affect the amount of plaintiff's recovery. For example,

68 *Hughes Communications Galaxy*, 271 F.3d at 1070; *Sun Oil Co*., 572 F.2d at 818.

69 An example is Janicki Logging Co. v. United States, 36 Fed. Cl. 338 (1996), *aff'd*, 124 F.3d 226 (Fed. Cir. 1997). In contrast, in *Scott Timber Co. v. United States*, 44 Fed. Cl. 170 (1999), a plaintiff alleging breach of a timber contract by the United States was allowed to plead a taking claim because, unlike in *Janicki*, the government appeared to have "suspended plaintiff's timber contracts by virtue of a sovereign act, for the public good." *But see* note 74 *infra*.

70 Castle v. United States, 301 F.3d 1328, 1342 (Fed. Cir. 2002). If the plaintiff does *not* "retain the full range of breach remedies," the conclusion arguably should be the opposite. As one commentator notes, the taking claim should remain available "when the government has not merely impaired or destroyed the value of a contract interest but abrogated the contract-holder's ability to pursue a judicial remedy or abolished the right altogether." John Echeverria, *Public Takings of Public Contracts*, 36 Vt. L. Rev. 517, 517 (2012).

71 *See, e.g*., Stockton East Water Dist. v. United States, 583 F.3d 1344, 1368 (Fed. Cir. 2009) ("trial court may properly defer the taking issue … in favor of first addressing the contract issue"); Century Exploration New Orleans, Inc. v. United States, 103 Fed. Cl. 70 (2012).

72 *See generally* Echeverria, *supra* note 70; David W. Spohr, *(When) Does a Contract Claim Trump a Takings Claim? Lessons from the Water Wars*, 2:1 Wash. J. Envtl. L. & Pol'y 125 (2012).

73 *See, e.g.*, *Castle*, 301 F.3d at 1342; *Hughes Communications Galaxy*, 271 F.3d at 1070.

74 *See, e.g*., Consolidated Edison Co. of New York v. United States, 67 Fed. Cl. 285, 291 (2005). *Compare* Henry Housing Limited Partnership v. United States, 95 Fed. Cl. 250 (2010) (proprietary/sovereign distinction blurs where government *targets* contract, so both breach and takings claims may be pleaded and considered, though doctrine of avoiding constitutional claims suggests that breach claim should be adjudicated first, which may make it unnecessary to reach taking claim).

75 *See, e.g*., PG&E v. United States, 70 Fed. Cl. 766, 780 n.14 (2006).

76 *See, e.g.*, Stockton East Water Dist. v. United States, 583 F.3d 1344, 1368-1369 (Fed. Cir. 2009); *Century Exploration*, 103 Fed. Cl. 70.

77 *Stockton East*, 583 F.3d at 1369.

78 Allegra Villa v. United States, 60 Fed. Cl. 11, 18 (2004). *See also* Integrated Logistics Support Systems Int'l v. United States, 42 Fed. Cl. 30, 34-35 (1998) (refusing to dismiss taking claim because unclear whether contract conferred rights at issue).

damages for a breach of contract may include incidental or consequential losses caused by the breach,[80] while such coverage is traditionally precluded in takings law.[81] On the other hand, courts generally disallow prejudgment interest in breach cases,[82] while prejudgment interest is constitutionally mandated in takings claims.[83] It is not unheard of for prejudgment interest in takings cases to be greater than the core component of the award, the value of the property as of the date of the taking. Finally, the sovereign act defense, discussed above, is available only for breach claims.

Substantive Due Process and Borrowing Clause

The Fifth Amendment Due Process Clause is worded solely as a *procedural* guarantee[84] but is read to impose *substantive* constraints on federal legislation also. However, for so-called economic legislation, substantive due process constraints generally are minimal. The Supreme Court requires only that economic legislation not be arbitrary and capricious—that is, that there be some minimum rational basis connecting the means employed by the legislation and a legitimate government end (not necessarily the one the legislature had in mind).[85] Plainly, this review standard is highly deferential. Note, though, that the justification for the prospective aspects of a piece of legislation may not suffice for the retroactive aspects—such as its application to existing contracts.[86]

Despite the famously lax nature of the substantive due process test for economic legislation, two Supreme Court decisions from the Depression indicate that when the United States abrogates its own contracts in order to enhance federal revenues, even in dire economic times, a much more searching scrutiny, and invalidation, will likely follow. In *Lynch v. United States*, a 1933 statute withdrawing the consent of the United States to be sued under contracts of war risk insurance from World War I was held to violate due process.[87] And in *Perry v. United States*, a 1933 joint resolution purporting to abrogate a clause in government war bonds calling for payment in "gold coin of the present standard of value" was held invalid.[88] Instead, the resolution allowed payment in dollars of the bond's face amount. Though bond holders alleged a due process violation, the Court based its decision on Congress's power "[t]o borrow Money on the credit of the United

(...continued)

79 *See generally* Echeverria, *supra* note 70, at 522-525.

80 RESTATEMENT (SECOND) OF CONTRACTS § 347.

81 United States v. General Motors, 323 U.S. 373, 379 (1945).

82 28 U.S.C. § 2516(a).

83 Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984). To be precise, interest is computed from the date of the taking to the date on which the United States tenders payment, not the date of judgment.

84 U.S. Const. amend. V: "No person shall … be deprived of life, liberty, or property, without due process of law …." Contract rights are deemed to be "property" under this clause, just as this report earlier noted the property status of contract rights under the Takings Clause.

85 As discussed *infra* in note 91, the Fifth Amendment Due Process Clause is held not to apply principles to the United States akin to those applied to the states under the Impairment of Contracts Clause.

86 *See, e.g.*, Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984) ("It does not follow … that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."), *quoting* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976).

87 292 U.S. 571 (1934).

88 294 U.S. 330 (1935).

States."[89] To say that Congress can withdraw that pledge of credit, explained the Court, "is to assume that the Constitution contemplates a vain promise …."[90]

Federal Actions Interfering with *Private* Contract Rights

Introduction

As noted, no breach of contract action can be filed against the United States when it interferes with an existing private contract. A breach action by definition would assert that the United States failed to honor a contractual duty, clearly impossible if the United States is not even a contract party. Thus, the chief legal constraints on congressional interference with existing private contracts flow from the Constitution—in particular, from the Takings Clause and Due Process Clause. The one constitutional provision specifically aimed at protecting contract rights from government action, the Impairment of Contracts Clause, applies only to the states.[91]

Court decisions regarding federal interference with contracts between private parties reveal two overarching precepts. First, Congress has greater constitutional freedom to impair private contract rights than contractual obligations of the federal government. This is unsurprising, since with private contracts there is no governmental self-interest to skew the government's decision making. That being so, courts can more readily assume that the government is acting as a neutral arbiter of competing societal interests whose decisions warrant deference. Second, within the realm of private contracts, Congress has greater freedom to impair contract rights than do the states. As the Supreme Court has said, the United States is subject to "less searching standards" than are the states under the Impairment of Contracts Clause.[92] The combination of these two principles has meant that successful constitutional challenges to federal interference with existing private contracts are rare.

Takings

Congressional interference with existing private contracts raises takings issues for the same reason that such interference with existing public contracts does: contract rights generally are

[89] U.S. Const. art. I, § 8, cl. 2.

[90] 294 U.S. at 351.

[91] The non-applicability of the Impairment of Contracts Clause to the federal government stems first from the Clause's textual reference solely to "State": "No *State* shall … pass any … Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10 (emphasis added). The adjacent constitutional section, setting out limits on *congressional* power, conspicuously lacks any such bar on impairment of contracts. U.S. Const. art. I, § 9. Non-applicability of the impairment clause to the United States stems second from the Supreme Court's holding that the Fifth Amendment Due Process Clause, which expressly applies to the United States, does not incorporate "principles … coextensive with provisions existing against state impairments of pre-existing contracts." *Pension Benefit Guaranty Corp*., 467 U.S. at 733. Indeed, said the Court, "we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses." *Id*. *Accord*, Concrete Pipe & Prods. Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 640-641 (1993); United States v. Winstar Corp., 518 U.S. 839, 875-876 (1996).

[92] *Pension Benefit Guaranty Corp.*, 467 U.S. at 733.

deemed property under the Takings Clause.[93] Still, the Supreme Court says that "Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties."[94] As the following sections show, a recurring question in the case law is whether the interference with the contract right is merely an incidental byproduct of the congressional legislation, or is instead its targeted purpose.

Omnia Rule for Incidental Interference

In *Omnia Commercial Co. v. United States*,[95] the Supreme Court handed the federal government a powerful, broadly applicable defense against takings actions based on interference with existing private contracts. The Court held that government actions that only *incidentally* interfere with performance of private contracts—rather than targeting them directly—constitute but a "frustration," not a taking, of those contract rights.

Omnia involved a plaintiff company with a contract to buy steel plates from a manufacturer at an under-market price. Plaintiff's plans were thwarted when the United States requisitioned the manufacturer's entire production of steel plate for 1918, during World War I, and directed it not to comply with its contract with Omnia. Omnia alleged an appropriation of its contract right to the steel plates, but the Supreme Court saw it otherwise. The government's requisition, it explained, did not appropriate the company's contract right; rather, it rendered performance under the contract impossible. "Frustration and appropriation are essentially different things," it said.[96] The government, reasoned the Court, acquired the steel, not the contract right; one must not confuse the contract (the promise of steel delivery) with its subject matter (the steel). The company's losses due to contract nonperformance are thus only a consequential loss, for which takings law affords no remedy.

Uses of *Omnia* to defeat takings claims against the United States are legion. In one case, Congress, after the 9/11 attacks, determined that airport security could better be handled by federal personnel than by the system then in place using private security services under contract to the airlines. So Congress enacted the Aviation and Transportation Security Act,[97] which transferred airport security responsibilities to a newly created federal agency. The effect of Congress's action was to eliminate the value of the security services' contracts. The Federal Circuit rebuffed the security services' takings challenge, however.[98] As in *Omnia*, it said, the losses suffered by the disappointed contract parties were caused indirectly; the United States only "frustrated," in *Omnia*'s words, the economic expectations of the security services. Such frustration, *Omnia* establishes, falls short of a taking.

In another case, a landlord asserted a taking of its lease contracts with Yugoslavia, after that country's offices in New York City were closed by the United States.[99] No taking was found, in part because of the *Omnia* rule: no taking occurs when a contract is frustrated by government

[93] *See* note 62 *supra* and accompanying text.

[94] Eastern Enterprises v. Apfel, 524 U.S. 498, 528 (1998) (plurality).

[95] 261 U.S. 502 (1923).

[96] *Id*. at 513.

[97] P.L. 107-171 (codified in scattered sections of 5 U.S.C. and 49 U.S.C.).

[98] Huntleigh USA Corp. v. United States, 525 F.3d 1370 (Fed. Cir. 2008).

[99] 767 Third Avenue Assocs. v. United States, 48 F.3d 1575 (Fed. Cir. 1995).

action not directed at the takings claimant. The United States' action was seen by the court to be directed at the lessee, Yugoslavia, not the landlord. In yet a third case, a nuclear waste transporter claimed a taking of its contract to deliver waste to a reprocessing facility, based on a federal moratorium on the reprocessor's operating license application.[100] Again, no taking by the United States was found. The moratorium had as its target the reprocessor, not the plaintiff-transporter, so the latter's loss was viewed as only a consequential, hence noncompensable, loss.

Omnia Limits

At least three limits to the *Omnia* rule exist.

First, and as the statement of the rule implies, *Omnia* does not apply when congressional legislation ***expressly "targets" an existing contract right***—rather than affecting contract rights only incidentally.[101] In targeting cases, the impact on the contract is assessed for a taking instead under the ubiquitous "*Penn Central* test," a multifactor balancing framework applied to regulatory interferences with property rights.[102] *Penn Central* requires a court to evaluate (1) the economic impact of the government action on the property owner; (2) the degree of interference with the property owner's investment-backed expectations; and (3) the "character" of the government action.[103] The precise meaning of these ill-defined factors is only now, 34 years after their debut, beginning to become clear, with the benefit of hundreds of lower court decisions construing them. Suffice it to say here that the *Penn Central* test is not an easy test to satisfy. Thus, even when the United States is divested of its *Omnia* liability shield, plaintiffs asserting takings claims based on targeted legislation almost invariably lose under *Penn Central*—though to be sure, the existing cases do not involve extreme facts.[104]

A few examples of this uphill climb for parties to private contracts make the point. In one Supreme Court case, a federal statute required employers quitting a multi-employer pension plan to make certain contributions to the plan, despite a pre-existing collective bargaining agreement setting out the employers' entire liability to the plan.[105] Applying the *Penn Central* factors, the Court found no taking of the rights under the collective bargaining agreement: the economic impact on the employer was not deemed out of proportion to its experience with the pension plan; the employer could have little expectation of congressional non-interference because pensions are a heavily regulated field; and the character of the government action was not an invasion or appropriation, nor did the United States take anything for its own use. In another case, a federal statute explicitly relieved Conrail of its contract duty to state and local agencies to operate commuter lines.[106] No taking of the agencies' contract rights, held the court. Under *Penn Central*,

[100] NL Industries, Inc. v. United States, 839 F.2d 1578 (Fed. Cir. 1988).

[101] *See, e.g.*, *Cienega Gardens*, 331 F.3d at 1335 ("*Omnia* refers to legislation targeted at some public benefit, which incidentally affects contract rights, not … legislation aimed at the contract rights themselves in order to nullify them.").

[102] The test was announced by the Supreme Court in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

[103] *Id*. at 124.

[104] *See, e.g.*, Burlington Northern Rd. v. United Transp. Union, 822 F. Supp. 797, 802 (D.D.C. 1991) ("In considering [the *Penn Central* factors], it should be noted that economic legislation that affects private contracts to which the United States is not a party has not been considered a taking."), *aff'd on other grounds*, 987 F.2d 784 (D.C. Cir. 1993).

[105] Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993). *Concrete Pipe* was an as-applied takings challenge. In a companion decision involving a facial challenge to the very same statutory requirement, the Court years earlier had also found no taking of any contract right, on similar reasoning. Connolly v. PBGC, 475 U.S. 211 (1986).

[106] Consolidated Rail Corp. v. Metro-North Commuter Railroad, 638 F. Supp. 350 (Sp. Ct. Reg. Rail Reorg. Act 1986).

the economic benefit of the government action is softened by benefits conferred on the agencies by the same statute; as above, the agencies could have little expectation of congressional non-interference because railroad labor disputes are a heavily regulated field; and the character of the government action was non-physical, suggesting the absence of a taking.

Second, *Omnia* does not apply where the United States ***takes over the contract right***, rather than merely affecting it. Taking over a contract right means putting oneself in the shoes of the contracting party—taking over its rights and responsibilities under the contract. That was not involved, *Omnia* noted, on the facts presented: "there was no acquisition [by the United States] of the obligation …" of the steel manufacturer to deliver. If the steel company had failed to deliver to the United States, the remedy, the Court pointed out, would have been on the statute, not on the contract.[107] *Omnia*'s inapplicability to direct take-over of contract rights by the United States was underscored soon after it was decided. The following year, the Court rejected *Omnia*'s relevance and found a taking when the United States "put itself in the shoes of the claimant and appropriated to the use of the United States all the rights and advantages that an assignee of the contract would have had."[108] Viewed as an appropriation rather than a regulatory interference, this category of legislative impairment of existing private contract rights would not be tested under *Penn Central*.

A third situation not reached by *Omnia* is where ***only one party to the contract has performed***, then a government action directly blocks transfer of the bargained-for consideration. In one case, U.S. sanctions against Libya explicitly barred Americans from working for Libyan enterprises.[109] The sanctions thus required plaintiffs to terminate their previously entered into employment contracts with a Libyan oil company. There was no taking of the employment contract, said the court. Among other reasons it cited: the economic impact on plaintiffs was slight, since the employment period had yet to begin. The court cautioned, however, that its conclusion would likely have been different had plaintiffs partly or completely performed and "the sanctions resulted in a loss of income for services previously provided but not yet paid for."[110]

Substantive Due Process

As noted earlier, substantive due process constraints on economic legislation are minimal, requiring only that such legislation not be arbitrary and capricious. This review standard is highly deferential. Moreover, when it comes to government interference with existing contracts, the interference has to be substantial. As summarized by the Supreme Court,

> If an impairment [of contract] is found, the reviewing court next determines whether the impairment is of constitutional dimension. If the alteration of contractual obligations is minimal, the inquiry may end at this stage. If the impairment is substantial, a court must look more closely at the legislation. *When the contract is a private one, and when the impairing statute is a federal one, this next inquiry is especially limited, and the judicial scrutiny quite minimal.* The party asserting a Fifth Amendment due process violation must overcome a

[107] 261 U.S. at 510-511.

[108] Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 120 (1924). *Accord*, Cienega Gardens v. United States, 331 F.3d 1319, 1334 (Fed. Cir. 2003) (describing *Omnia* rationale as "The government took steel from the steel company, but did not succeed to the plaintiff's rights under the contract.").

[109] Chang v. United States, 859 F.2d 893 (Fed. Cir. 1988).

[110] *Id.* at 898.

> presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way.[111]

Substantive due process review is minimal in the private contracts context in part because the concerns triggered by government abrogation of *its own* contracts are seen by the Supreme Court not to be present.[112]

Probably due to the highly deferential nature of the substantive due process review standard for economic legislation impairing existing private contracts, CRS is unable to find any successful substantive due process challenges to such legislation.

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[111] National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co., 470 U.S. 451, 472 (1985) (emphasis added).
[112] *Id*.