# Section 2212: A Remedy for Veterans—With a Catch

*Many veterans who participated in the atmospheric testing of atomic weapons suffered injuries as a result of exposure to dangerous levels of radiation. Unable to sue the United States under the Federal Tort Claims Act because of the* Feres *doctrine, some veterans have sued the private contractors who planned and carried out the tests for the government. In response to lobbying by the contractors, Congress passed a law, 42 U.S.C. § 2212, which permits the substitution of the United States as sole defendant in suits arising from the atomic weapons testing program. This law has led to the dismissal of the veterans' lawsuits, for the United States retains its defenses under the exceptions and limitations to the FTCA, including the* Feres *doctrine. Ostensibly enacted to provide a remedy, section 2212 thus bars a remedy for injuries caused by negligence in the atomic weapons testing program. This Comment argues that section 2212 is unconstitutional for two reasons: (1) the statute encroaches upon the judicial function by prescribing a rule of decision in pending litigation, in violation of the separation of powers; and (2) it takes property without providing just compensation, in violation of the fifth amendment of the Constitution.*

## INTRODUCTION

Between 1946 and 1962, the United States exploded 212 atomic weapons in the atmosphere. Hundreds of thousands of civilians and military personnel participated in these tests. The government hired private contractors to do much of the work, and the contractors hired the technicians and scientists needed to conduct the tests and evaluate the results.[1] These were tests not only of weapons but of people: The military was anxious to learn about the ability of soldiers to continue to perform their duties on a battlefield where atomic weapons were used. As a result, many participants were exposed to varying amounts of radiation.

In recent years, participants in those tests (or their survivors) have filed lawsuits against the government and against the private contractors, alleging that they were exposed to dangerous levels of radiation and suffered injuries (including leukemia, diabetes, prostate cancer, malignant blood disease, bone marrow cancer, and malignant lymphoma) as a result of negligence by the government and its private contractors.[2] Suits by veterans against the United States have generally been unsuccessful

1. H.R. REP. No. 124, 98th Cong., 1st Sess., pt. 1, at 28-29 (1983) [hereinafter H.R. REP. No. 124].

2. H.R. REP. No. 567, 99th Cong., 2d Sess. 2 (1986).

because of the sovereign immunity-based *Feres* doctrine,[3] which prevents military personnel from suing the government under the Federal Tort Claims Act. The private contractors, however, cannot rely upon sovereign immunity-based defenses; when suits were filed against them, they were obliged to defend on the merits.

In 1983, however, the private contractors persuaded the House Armed Services Committee to add an amendment to a Department of Energy bill.[4] The amendment defined a contractor involved in "atomic energy national defense activities" as an "instrumentality" of the federal government for the purposes of civil liability in connection with nuclear testing,[5] and would have extended sovereign immunity to the private contractors. The amendment, section 213 of the bill, was referred to the House Judiciary Committee.[6] Its Subcommittee on Administrative Law and Governmental Relations heard testimony from representatives of the two major contractors, the University of California and Western Electric Company.[7] Mr. Bernard W. Vance, Deputy Assistant Attorney General for the Civil Division of the Justice Department, also appeared before the subcommittee; and the General Counsel of the Department of Energy,

3. Feres v. United States, 340 U.S. 135 (1950). In *Feres*, the Court construed the Federal Tort Claims Act to "waive immunity from recognized causes of action and . . . not to visit the Government with novel and unprecedented liabilities." *Id.* at 142. Tort suits by military personnel for service-connected injuries or death due to negligence were not "recognized causes of action." The Court therefore held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146.

In support of its decision, the Court pointed out that the Veterans' Administration compensation system is "not negligible or niggardly, as these cases demonstrate." *Id.* at 145. However, the veterans of the atomic tests have not received such generous treatment. In 1984, it was reported that the V.A. had denied all but 17 of 3000 disability claims arising from exposure to radiation during the tests. Wash. Post, Nov. 11, 1984, at A3, col. 1. Justice Jackson also commented in *Feres* that the V.A. compensation system "normally requires no litigation." 340 U.S. at 145. It would be more accurate to say that litigation is virtually precluded, but this does not necessarily benefit the veteran. *See* Walters v. Nat'l Ass'n of Radiation Survivors, 105 S. Ct. 3180 (1985) (upholding statutory $10 limit on fee that may be paid to attorney representing veteran who seeks benefits from V.A.).

The Court recently reaffirmed the *Feres* doctrine in a case where the alleged tortfeasor was a civilian employee of the federal government. United States v. Johnson, 107 S. Ct. 2063 (1987). Justice Scalia, joined by Justices Brennan, Marshall and Stevens, sharply criticized this decision to "extend" the "clearly wrong" *Feres* doctrine. *Id.* at 2075 (Scalia, J., dissenting).

4. Department of Energy National Security and Military Applications of Nuclear Energy Authorizations Act of 1984, H.R. 2797, 98th Cong., 1st Sess. § 213 (1983).

5. H.R. REP. No. 124, *supra* note 1, pt. 1, at 1.

6. H.R. REP. No. 124, *supra* note 1, pt. 4, at 1.

7. Dr. George Dacey, president, Sandia National Laboratories; Mr. William Degarmo, laboratory counsel, Lawrence Livermore National Laboratory; Mr. W.R. Hughes, assistant director/laboratory counsel, Los Alamos National Laboratory. *Litigation Relating to Atomic Testing: Hearing on H.R. 2797 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. III (1983) [hereinafter *Hearing*].

Mr. Theodore J. Garrish, submitted a written statement.[8] The government witnesses supported the contractors' proposal but submitted an alternative version that would have permitted the substitution of the United States as defendant in suits brought against the private contractors. The suits would then have proceeded under the provisions of the Federal Tort Claims Act. The hearing focused on the government's proposal.

The government's proposed section 213 stated that "[t]he remedy against the United States provided by [the Federal Tort Claims Act]" should apply in the atomic testing litigation, "subject to the limitations and exceptions" applicable to actions under that Act.[9] Vance acknowledged that those "limitations and exceptions" included the *Feres* doctrine.[10] At the same time, he asserted that "the United States indeed is appropriately the sole defendant in this litigation" because the development and testing of nuclear weapons is a uniquely governmental activity.[11]

The Judiciary Committee issued an adverse report on section 213 because it appeared unconstitutional and unfair to plaintiffs,[12] and the proposal did not reach the floor of the House. The following year, however, the Department of Energy renewed its request in substantially the same terms. Neither the House nor the Senate Judiciary Committees considered the proposal in 1984, but the Senate Armed Services Committee responded by attaching it as an amendment to that year's defense bill. According to the Conference Report for the defense bill, the contractor liability provision would "provide a remedy" for those exposed to radiation during the atomic tests. The provision for substituting the United States as defendant in atomic testing litigation was then enacted into law as section 1631 of the Department of Defense Authorization Act, 1985.[13]

The new law, codified at 42 U.S.C. § 2212, states that a Federal Tort Claims Act remedy against the United States shall apply to those who suffered injury or loss due to exposure to radiation in the atomic weapons testing program.[14] It provides, however, that this shall be the plaintiffs'

---

8. *Id.*

9. *Id.* at 37.

10. *Id.* at 23, 36.

11. *Id.* at 20.

12. H.R. REP. No. 124, *supra* note 1, pt. 4.

13. Pub. L. No. 98-525, § 1631, 98 Stat. 2492, 2646-47 (1984) (codified at 42 U.S.C. § 2212 (Supp. III 1985)).

14. Subsection 2212(a)(1) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by the Act of March 9, 1920, . . . as appropriate, for injury, loss of property, personal injury, or death shall apply to any civil action for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.

exclusive remedy, and that the usual FTCA "limitations and exceptions" shall apply to actions brought under this law.[15] Section 2212 thus offers plaintiffs a remedy, but there is a catch: It is available only against the United States, because the United States, by the operation of the law, is the sole defendant. However, the United States is immune from suit by former military personnel under the *Feres* doctrine and is substantially protected from suits by civilian plaintiffs by the discretionary function exception to the Federal Tort Claims Act.[16] *The plaintiffs therefore have no effective remedy.*[17]

The House Judiciary Committee condemned the unfairness of the catch built into the 1983 version of section 2212 and pointed out that it might be unconstitutional.[18] This Comment argues that section 2212 is, indeed, unconstitutional. The statute's legislative history, combined with its effect in practice, reveals that it is an encroachment by Congress upon the judicial power, in violation of the doctrine of the separation of powers. In addition, the law effects a taking of property without just compensation, in violation of the fifth amendment of the Constitution.[19]

Part I of this Comment discusses the separation of powers and the

---

15. Subsection 2212(a)(2) provides:

> The remedies referred to in paragraph (1) shall be exclusive of any other civil action or proceeding for the purpose of determining civil liability arising from any act or omission of the contractor without regard to when the act or omission occurred. . . . [T]he civil action or proceeding shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of [Title 28] and shall be subject to the limitations and exceptions applicable to those actions.

Subsection (b) describes the procedures, including removal to federal court, to be followed for the substitution of the United States as defendant. Subsection (c) extends the time limit for administrative claims and specifies that § 2212 shall apply both to pending actions and to any future actions. Finally, subsection (d) defines the term "contractor" as any contractor or cost reimbursement subcontractor who participated in the atomic weapons testing program at any time from World War II (for the Manhattan Engineer District) to the present.

16. The leading case construing the discretionary function exception, 28 U.S.C. § 2680(a) (1982), is Dalehite v. United States, 346 U.S. 15 (1953).

17. Yossarian himself, a connoisseur in this field, might have admired the catch in section 2212:

> There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.
>
> "That's some catch, that Catch-22," he observed.
>
> "It's the best there is," Doc Daneeka agreed.

J. HELLER, CATCH-22 47 (1961).

18. "Section 213 may be grossly unfair to both current and potential plaintiffs and would raise constitutional questions." H.R. REP. NO. 124, *supra* note 1, pt. 4, at 4.

19. For arguments that section 2212 violates the fifth amendment by taking property without due process as well as without providing just compensation, see Note, *1985 Department of Defense Authorization Act: Leaving Atomic Veterans at Ground Zero,* 20 VAL. U.L. REV. 413 (1986)

Judiciary's role in enforcing that doctrine. The validity of retroactive legislation is an issue when a law affects pending litigation. This part analyzes the limited but important circumstances under which the courts will refuse effect to retroactive laws. After an examination of the legislative history of section 2212, Part I concludes that Congress encroached upon the judicial power by prescribing a rule of decision favorable to the United States in pending litigation where the United States was a party.

Part II turns to the question of a "taking," beginning with the threshold question whether a cause of action in tort may be a property interest protected by the fifth amendment. This part of the Comment demonstrates that plaintiffs' property has indeed been taken, and that there has been no just compensation for this taking.

## I
## THE SEPARATION OF POWERS

The passage of section 2212 followed a renewed request for the contractor liability law by the Department of Energy in 1984. General Counsel Garrish explained in letters to both houses of Congress that the proposal would "clarify the status of certain contractors that operate or operated Government-owned facilities relating to atomic energy national defense activities and are in litigation arising from those activities."[20]

On its face, section 2212 appears to be reasonable and fair. It gives no indication that its effect will be to deny benefits, rather than to grant them. The law begins by stating that "[t]he remedy against the United States provided by [the FTCA] . . . shall apply" in lawsuits brought by those exposed to radiation in the atomic weapons testing program.[21] Similarly, the 1984 Conference Report for the bill that included the future section 2212 explained that that section "would provide a remedy against the United States for injury, loss of property, personal injury, or death due to exposure to radiation on acts or omissions by a contractor carrying out atomic weapons tests under a contract with, and under the direction and control of, the United States."[22]

---

[hereinafter Note, *Atomic Veterans at Ground Zero*]; Note, *The Warner Amendment and the Rights of Atomic Weapons Testing Victims,* forthcoming in N.Y.U. L. REV.

20. H.R. REP. No. 724, 98th Cong., 2d Sess. 38 (1984) [hereinafter H.R. REP. No. 724]; S. REP. No. 500, 98th Cong., 2d Sess. 422 (1984) [hereinafter S. REP. No. 500]. The Senate Armed Services Committee later adopted that section of Garrish's letter to introduce its explanation of the contractor liability provision, which the committee had attached to the Department of Defense Authorization bill. S. REP. No. 500, *supra,* at 374. *See also* references to "clarifying" the status of the contractors in 1983: S. REP. No. 174, 98th Cong., 1st Sess. 374 (1983) [hereinafter S. REP. No. 174]; H.R. REP. No. 124, *supra* note 1, pt. 2, at 17 (1983); *Hearing, supra* note 7, at 34.

21. 42 U.S.C. § 2212(a)(1) (Supp. III 1985).

22. H.R. REP. No. 1080, 98th Cong., 2d Sess. 349, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4258, 4328 [hereinafter H.R. REP. No. 1080]. It was the Senate Armed Services Committee which first reported the proposal in the second session of the 98th Congress. Its report

However, the legislative history of section 2212 shows that the private contractors, initially, and then the Executive Branch, proposed the law in response to the proliferation of lawsuits against the contractors.[23] Their purpose was, quite simply, to extinguish those suits—and to do so quickly, before the cases went to trial; indeed, before discovery. Section 2212 has had the results that its proponents sought. In the leading case,[24] the United States was substituted as the sole defendant in the place of the private contractor-defendants and simultaneously won summary judgment based on FTCA exceptions and the *Feres* doctrine. These facts raise questions about the constitutionality of section 2212. Did Congress, in passing this law, encroach upon the judicial power? Does section 2212 thus violate the separation of powers?

### *A. The Separation of Powers Doctrine*

In *Buckley v. Valeo,*[25] the Supreme Court emphasized that the separation of powers is one of the "fundamental principles of the Government established by the Framers of the Constitution"[26] and a "vital check against tyranny."[27] The principle is worth safeguarding even at the cost of some inefficiency and friction between the branches of government.[28] The Court relied upon the separation of powers doctrine when it upheld the judicial subpoena of the President's papers during the Watergate Affair:

> Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.[29]

---

explained: "If there is a connection between nuclear testing and the harm alleged in these many law suits [sic], . . . the remedy should be uniform." S. REP. NO. 500, *supra* note 20, at 377.

23. *See infra* text accompanying notes 103-45.

24. *In re* Consolidated United States Atmospheric Testing Litig., 616 F. Supp. 759 (N.D. Cal. 1985), *aff'd,* 820 F.2d 982 (9th Cir. 1987) *cert. denied,* 56 U.S.L.W. 3590 (Feb. 29, 1988); *see also* Hammond v. United States, 786 F.2d 8 (1st Cir. 1986) (substitution of United States as defendant in suit against private contractors for radiation injuries arising from government weapons testing does not violate due process).

25. 424 U.S. 1 (1976) (per curiam).

26. *Id.* at 120.

27. *Id.* at 121.

28. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) ("The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.").

29. United States v. Nixon, 418 U.S. 683, 704 (1974); *see also* Hampton & Co. v. United States, 276 U.S. 394, 406 (1928) ("[I]t is a breach of the National fundamental law if Congress gives up its

The *Buckley* Court observed that "[t]his Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution."[30] The Supreme Court defended the separation of powers, and in fact denied *itself* power, when it established the doctrine of judicial review in *Marbury v. Madison.*[31] In *Youngstown Sheet & Tube Co. v. Sawyer,*[32] the Court demonstrated a willingness to enforce the separation of powers in a confrontation during time of war with a President invoking his power as Commander-in-Chief. In areas where political controversies abound, the Court has recently invalidated congressional actions that did not conform to the separation of powers.[33] In a decision that threatened nearly 200 statutes enacted over a period of five decades,[34] the Supreme Court confidently asserted that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[35]

While the Supreme Court has thus been willing to patrol the boundaries of the separated powers, showing real courage on occasion, it is generally reluctant to discover violations of the doctrine. By their nature, decisions that invoke the separation of powers doctrine bring the Court into direct conflict with a coordinate branch of the federal government. Indeed, the courts themselves must guard against that "hydraulic pressure" that drives a branch of the government beyond the outer limits of its power.[36] A holding by the Supreme Court that Congress or the President has violated the separation of powers may exceed the Judiciary's own power. The political question doctrine illustrates this element of judicial restraint in the enforcement of the separation of powers doctrine. There are "political questions" that, by their nature, are best left to the two political branches.[37] Moreover, the Judiciary should not intervene in a dispute between Congress and the Executive if the two political

---

legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power.").

30. *Buckley,* 424 U.S. at 123.

31. 5 U.S. (1 Cranch) 137 (1803) (power granted to Court by Judiciary Act of 1789 to issue writs of mandamus to public officials held unconstitutional).

32. 343 U.S. 579 (1952) (Executive Order seizing steel mills was unconstitutional exercise of legislative power).

33. Bowsher v. Synar, 106 S. Ct. 3181 (1986) (delegation in Balanced Budget and Emergency Deficit Control Act of 1985 [Gramm-Rudman Act] of executive power to an official removable by Congress intrudes into executive function); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (one-house legislative veto violates bicameral requirement and presentment clauses).

34. *Chadha,* 462 U.S. at 967 (White, J., dissenting).

35. *Id.* at 951.

36. *Cf.* Justice Frankfurter's observation 35 years ago: "At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes." *Youngstown Sheet & Tube Co.,* 343 U.S. at 594 (Frankfurter, J., concurring) (quoting THE ECONOMIST, May 10, 1952, at 370).

37. Baker v. Carr, 369 U.S. 186 (1962).

branches have not yet fully asserted their constitutional authority.[38]

The separation of powers doctrine is not an absolute or pure concept.[39] Although the three branches of the federal government exercise separate powers, they also check and balance each other by sharing certain tasks. "[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other,"[40] but the government is meant to function effectively as well. Justice Jackson's description remains the best summary of this dual process: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[41] One consequence of this is that the courts should not interpret the separation of powers rigidly or in a vacuum. This, too, inspires judicial restraint.

An important example of the interdependence and overlapping that exists within the overall scheme of separated powers is Congress' power to regulate the jurisdiction of the Supreme Court. The Constitution provides that the Court shall have original jurisdiction in a limited class of cases.[42] In most cases, however, the Supreme Court has appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[43] Article III places few, if any, limits on Congress' power to regulate the Supreme Court's appellate jurisdiction.[44] However, Congress cannot use this power to impose results in cases or to require the Court to decide a case in violation of the Constitution.[45]

### *B. Retroactive Laws and the Separation of Powers*

If Congress passes a law while a case is on appeal to the Supreme Court and the application of that law requires the reversal of an otherwise correct judgment, has Congress violated the separation of powers doctrine? Chief Justice Marshall provided an answer in *United States v. The Schooner Peggy:*[46]

38. Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring).

39. *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam) ("Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government.").

40. *Id.* at 122-23 (quoting THE FEDERALIST No. 51 (J. Madison)).

41. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring).

42. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2.

43. *Id.*

44. Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate,* 36 STAN. L. REV. 895, 901 (1984).

45. *Id.* at 910.

46. 5 U.S. (1 Cranch) 102 (1801). The schooner *Peggy* was a French vessel captured by an

> [I]f, subsequent to the judgment [below], and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. . . . [T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.[47]

Subsequent decisions have held that *Schooner Peggy* is to be read broadly. The intervening law need not state explicitly that it is to apply to pending cases;[48] an appellate court must simply apply the law in effect at the time it renders its decision.[49] There are, however, limits to the rule. A law that intrudes upon the judicial function may be unfair to the individual litigant. Thus, separation of powers is interwoven with due process. Laws that apply retroactively may unreasonably injure settled expectations; in addition, our notion of proper government prefers prospective legislation.[50] The constitutional bans on ex post facto laws[51] have been interpreted to apply only to penal legislation.[52] However, the courts will consider a variety of factors when confronted with retrospective civil legislation, and will occasionally refuse effect to the statute.[53]

A modern Supreme Court decision that analyzed and broadened the *Schooner Peggy* rule also proposed an equitable limitation on it: "[A] court is to apply the law in effect at the time it renders its decision, *unless doing so would result in manifest injustice.*"[54] In deciding whether the retroactive application of a law would be manifestly unjust, the Court has traditionally examined (1) the nature and identity of the parties, (2) the nature of their rights, and (3) the nature of the impact of the change in the law upon those rights.[55] Indeed, in *Schooner Peggy,* Chief Justice

---

American warship in April 1800. While the proceedings to condemn the *Peggy* as a prize were pending, the United States signed and ratified a treaty with France. This treaty provided for the mutual restoration of captured property which had not yet been "definitively" condemned. *Id.* at 107. Thus, although the circuit court had ruled that the *Peggy* and her cargo were lawful prize, *id.* at 106, the Supreme Court reversed, giving effect to the new treaty and restoring the vessel. *Id.* at 108.

47. *Id.* at 110.

48. Bradley v. School Bd. of Richmond, 416 U.S. 696, 714-15 (1974).

49. Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 281 (1969). The principle in *Schooner Peggy* would seem to apply a fortiori to a pending cause of action before trial.

50. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 456-563 (1978) (distinguishing between models of "settled expectations" and "governmental regularity").

51. U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

52. Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952).

53. *See* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 HARV. L. REV. 692 (1960).

54. *Bradley,* 416 U.S. at 711 (emphasis added). The Court noted that "statutory direction or legislative history to the contrary" could also indicate a different result. *Id.; see also Thorpe,* 393 U.S. at 282 & n.43; Greene v. United States, 376 U.S. 149 (1964) (petitioner's right to recover lost pay vested prior to change in law).

55. *Bradley,* 416 U.S. at 717; *cf.* Hochman, *supra* note 53, at 697: The factors governing a

Marshall considered similar factors. He noted the identity of the parties and the context in which the litigation arose, distinguishing between "mere private cases between individuals" and "great national concerns."[56] In the former, a court might "struggle hard" against retroactive application; in the latter, however, the courts have a duty to apply the supreme law of the land.[57]

An emergency justifies some disruption of settled expectations, even in a suit between private individuals. For example, during the Great Depression, the Supreme Court upheld a state mortgage moratorium law in *Home Building & Loan Ass'n v. Blaisdell.*[58] The Court noted the emergency confronting the state and the vital interests at stake. Yet these factors also limited the decision. The moratorium law was narrowly tailored to meet the emergency and did not ultimately impair the mortgage indebtedness.[59]

Under other circumstances, the public interest, without any showing of an emergency, will suffice to give retroactive effect to a law at the expense of the settled expectations of private parties. For example, in *Western Union Telegraph Co. v. Louisville & Nashville R.R.*,[60] the Supreme Court upheld the application to a pending case of a state law that repealed an earlier statute permitting a telegraph company to condemn a right-of-way along a railway. The Court pointed out that the legislation in the case at bar was "an exertion of power in the public interest of which the companies are the instruments or agents."[61] Thus, the litigation between the telegraph company and the railroad did not actually concern private rights and relations. This enabled the Court to distinguish state case law holding the enactment of laws that affect pending litigation to be legislative interference with judicial proceedings.[62] Finally, the Court pointed out that the original grant of power to the telegraph company was subject to legislative control and could be with-

---

decision whether a retroactive law is constitutional are "the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters."

56. United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 102, 110 (1801).

57. *Id.* The intervening change in law at issue in *Schooner Peggy* was the effect of a treaty, which gave greater force to Marshall's distinction. He noted, however, that although an individual could be required by a treaty to make a sacrifice for national purposes, he might nonetheless have a claim for compensation from the government. *Id.*

58. 290 U.S. 398 (1934).

59. *Id.* at 444-47. *But cf.* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) (distinguishing *Blaisdell* and holding that amendments to Municipal Bankruptcy Act that divested rather than stayed mortgagees' rights to resort to mortgaged property were fifth amendment takings).

60. 258 U.S. 13 (1922).

61. *Id.* at 20.

62. *Id.* at 19-20.

drawn prior to a final judgment in the pending litigation.[63]

The public interest may be served in another way by so-called "curative statutes."[64] For example, legislation may ratify the prior conduct of government officers who acted without authority. Courts have accorded particularly generous deference to enactments legalizing revenue raising.[65] If a law simply corrects mistakes of administration, it may not be unfair.[66] A retroactive law may actually restore, rather than upset, settled expectations.[67]

The nature of the rights affected by the law is also significant. The Supreme Court will refuse to "apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional."[68] For example, in *Coombes v. Getz,*[69] a provision of a state constitution created a contractual liability. While petitioner's suit to enforce that liability was on appeal, the state repealed the liability provision. The Court held that the repeal could not destroy the creditor's right to enforce his cause of action upon the contract once it had vested. "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision."[70]

---

63. *Id.* at 22; *cf.* Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (statutes of limitation are conferred only by legislative grace and are thus subject to legislative revision).

64. *See* Hochman, *supra* note 53, at 703-06.

65. Tax laws are a special category of legislation, with a wide scope for retroactive application. *Id.* at 706-11; *see, e.g.,* United States v. Heinszen & Co., 206 U.S. 370 (1907) (imposition and collection of tariff duties ratified by subsequent statute; mere commencement of suit for recovery of sums paid does not affect right of Congress to ratify executive acts). *But compare* Forbes Pioneer Boat Line v. Board of Comm'rs, 258 U.S. 338 (1922), where the Court prevented a state from retroactively validating the collection of tolls; it distinguished *Heinszen* by noting:

> A tax may be imposed in respect of past benefits .... But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. ... Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right.

*Id.* at 339-40.

66. Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 302 (1937).

67. For example, in 1947, Congress passed the Portal-to-Portal Act, based upon a finding that judicial interpretation of the Fair Labor Standards Act of 1938 had disregarded "long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities." Battaglia v. General Motors Corp., 169 F.2d 254, 259 n.11 (2d Cir.) (quoting § 1(a) of the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, 29 U.S.C. §§ 251-262), *cert. denied,* 335 U.S. 887 (1948). *Battaglia* upheld the retroactive effect of this law, extinguishing claims brought under the prior judicial interpretation.

68. Bradley v. School Bd. of Richmond, 416 U.S. 696, 720 (1974) (citing Greene v. United States, 376 U.S. 149, 160 (1964); Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944); Union Pacific R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)).

69. 285 U.S. 434 (1932).

70. *Id.* at 442; *see also* Ettor v. City of Tacoma, 228 U.S. 148 (1913) (statute creating rights may be repealed without violating contract or due process provisions of Constitution only where private rights to benefit have not yet vested). Such cases raise fifth amendment "takings" issues, a topic which this Comment addresses separately. *See infra* Part II.

On the other hand, the Court has permitted retroactive effect where the rights involved were what it called "legislative grace." One illustration of this is *Chase Securities Corp. v. Donaldson,*[71] where the state enacted a retroactive extension of the statute of limitations while the lawsuit at issue was pending. The Court decided that a state may repeal or extend a statute of limitation, even after a cause of action is barred, and thus restore to a plaintiff his remedy and divest a defendant of the statutory bar. The opinion emphasized that statutes of limitation "represent expedients, rather than principles . . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay."[72] No litigant may claim that protection from a statute of limitation is a "fundamental" right.[73] In short, such statutes exist by "legislative grace" alone and are "subject to a relatively large degree of legislative control."[74] This amounts to a judgment about the nature of the rights at stake: They are not so substantial as to bar the retroactive effect of the law.

The Court will thus sometimes sustain the application of a retroactive law to an accrued cause of action. One commentator has suggested that the rationale for these cases is "apparently that the expense and other changes of position involved in litigation are not sufficient to affect the constitutionality of a retroactive statute which would otherwise be valid."[75] A right which has been reduced to judgment would, of course, be entitled to greater protection,[76] although it has been pointed out that the Court has, on occasion, upheld a law that did upset a final judgment.[77]

---

71. 325 U.S. 304 (1945).

72. *Id.* at 314.

73. *Id.*

74. *Id. Cf.* Banco Nacional de Cuba v. Farr, 243 F. Supp 957, 977-79 (S.D.N.Y. 1965) (plaintiff acquired no vested right under Act of State doctrine announced in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); subsequent legislation by Congress reversiug that decision "merely lifted a bar to consideration of pre-existing questions of substantive rights and liabilities"), *aff'd,* 383 F.2d 166 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968).

75. Hochman, *supra* note 53, at 718; *cf.* Stimson, *Retroactive Application of Law—A Problem in Constitutional Law,* 38 MICH. L. REV. 30, 39 (1939) (mere bringing of a suit should not bar curative legislation).

76. *Cf., e.g.,* Western Union Tel. Co. v. Louisville & Nashville R.R., 258 U.S. 13, 22 (1922) (retroactive effect sustained where there was no "final and unreviewable determination" in petitioner's suit).

77. *See* Hochman, *supra* note 53, at 719. In Fleming v. Rhodes, 331 U.S. 100 (1947), landlords gained state eviction judgments during a brief interval in 1946 between the expiration of one federal price control statute and the enactment of a second statute. The Court, in sustaining an injunction against the enforcement of those judgments, seemed to conjure away the retroactive effect of the law: "Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution." *Id.* at 107. The retroactive provision upheld in *Fleming* (covering 25 days) might best be regarded as "curative" legislation. *See supra* notes 64-67 and accompanying text.

Finally, the nature of the impact of the retroactive statute upon a person's interests is a significant factor to be considered in conjunction with those discussed above. As the Court in *Bradley* pointed out, a law should not impose "new and unanticipated obligations . . . upon a party without notice or an opportunity to be heard."[78] A person cannot claim a vested right in a given rule of procedure. Yet it may violate due process to deprive that person of her remedy altogether.[79] There is an additional argument against retroactivity where a case involves the rights of individuals against the government. While modification of a remedy may be acceptable, repudiation of an obligation is not.[80] Cases illustrating this will, of course, often involve fifth amendment "takings."[81]

One may conclude at this point that *Schooner Peggy* supports the basic principle that laws with retroactive effect upon pending causes of action are not per se unconstitutional. On the other hand, the Supreme Court decisions in this area show that such laws must be subjected to special scrutiny, for their retroactive effects may so unjustly destroy private rights as to be an unconstitutional denial of due process. In addition, a retroactive law's encroachment upon the judicial function provides an independent ground upon which to find it unconstitutional.

### C. *Retroactive Laws That Infringe on the Judicial Function:* United States v. Klein

Section 2212 applies retroactively to any pending lawsuit filed as a result of exposure to radiation in the atomic testing program. The law's practical effect is to defeat claims against the United States. In *United States v. Klein,*[82] the Supreme Court struck down a similar retroactive law as a legislative infringement upon the judicial power. *Klein* provides the standard against which the impact of section 2212 upon the separation of powers must be judged.

*Klein* arose from the Civil War and its aftermath. The administrator of the estate of a merchant whose cotton had been seized and sold by Union forces during the war sued in the Court of Claims for the proceeds of the sale. The basis of the claim was an 1863 law that entitled an owner to recover property confiscated during the war upon proof that the owner

78. Bradley v. School Bd. of Richmond, 416 U.S. 696, 720 (1974).

79. *See* Crane v. Hahlo, 258 U.S. 142, 147 (1922); League v. Texas, 184 U.S. 156, 158 (1902). However, "the familiar statement that the legislature may modify the remedies for the assertion or enforcement of a right but may not abolish the right itself . . . is an oversimplification of the manner in which the Court weighs a statute's effect on previously acquired rights." Hochman, *supra* note 53, at 711. Hochman concludes that the Court determines if a preexisting right has been abrogated by weighing the extent to which the "legal incidents of a claim" were altered. *Id.* at 712.

80. *See, e.g.,* Ettor v. Tacoma, 228 U.S. 148 (1913).

81. *See infra* Part II.

82. 80 U.S. (13 Wall.) 128 (1872).

had "never given any aid or comfort to the present rebellion."[83] Klein's decedent had supported the Confederacy but had received a presidential pardon. In 1870, the Supreme Court held that such a pardon permitted a person to claim reimbursement.[84] The Court of Claims followed this precedent and ruled in Klein's favor. The United States appealed the judgment. While the appeal was pending, Congress passed a law[85] directing the courts to take no notice of a pardon in a claim for reimbursement[86] and requiring the Supreme Court to dismiss such a case for want of jurisdiction. "[I]n effect but not in terms, the Supreme Court was required to reverse cases like Klein's."[87]

The Supreme Court decided that the 1870 law was unconstitutional and affirmed the Court of Claims decision. The opinion explained how Congress had used its power to regulate jurisdiction to achieve a certain result:

> [T]he denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.[88]

The fact that the United States itself was a party to the litigation was also significant: Congress had granted the Supreme Court appellate jurisdiction over the Court of Claims, and Congress then attempted to limit that jurisdiction specifically to protect the government from claims such as Klein's.

> Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.[89]

Thus, concluded the Court, "Congress has inadvertently passed the limit

---

83. Act of Mar. 12, 1863, ch. 120, 12 Stat. 820.

84. United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870).

85. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

86. "[A]n acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it." *Klein,* 80 U.S. (13 Wall.) at 144 (summarizing relevant proviso in Act of July 12, 1870).

87. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited,* 1981 WIS. L. REV. 1189, 1208-09.

88. *Klein,* 80 U.S. (13 Wall.) at 146.

89. *Id.* at 147. In distinguishing Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856) (upholding congressional legalization of bridge formerly adjudicated a nuisance and denying motion to enforce prior abatement order), the *Klein* Court pointed out that "[n]o arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act." *Klein,* 80 U.S. (13 Wall.) at 146-47.

which separates the legislative from the judicial power."[90]

*Klein* clearly represents a landmark of separation of powers law, yet its scope remains open to debate. Hart and Wechsler would confine the case to its facts. They suggest that the case involved two specific intrusions by Congress upon the judicial function. The first was an attempt "to prescribe how the Court should decide an issue of fact (under threat of loss of jurisdiction);" the second was simply action by Congress requiring the Court to decide a case "in accordance with a rule of law independently unconstitutional on other grounds."[91] The authors dismiss the "broad language" questioning Congress' power to prescribe a rule of decision in cases pending in the courts and prefer to hew to the "ancient principle" of *Schooner Peggy.*[92]

Other authorities, including the Supreme Court, interpret *Klein* more broadly. For example, *Klein* occupies an important place in the modern debate about Congress' power to regulate the jurisdiction of the federal courts, particularly of the Supreme Court. As noted above, Congress' powers in the area are extensive; article III contains a broad grant of power without significant internal limits.[93] There are, however, external limits on Congress' power, and *Klein* indicates where some of them are located. Congress cannot use its power to regulate jurisdiction to dictate the outcomes of particular cases, nor can it require a court to decide a case according to an unconstitutional law. That, as Professor Gunther points out, is a significant limitation.[94] Section 2212 fails on both counts.

In a modern case, *United States v. Sioux Nation of Indians,*[95] the Supreme Court interpreted *Klein* more broadly than did Hart and Wechsler. The Sioux Nation had sued in the Court of Claims in 1920, alleging that the United States had, by an Act of 1877, taken the Black Hills (guaranteed to the Sioux by the Fort Laramie Treaty of 1868) with-

90. *Klein,* 80 U.S. (13 Wall.) at 147. The Court also held that the law infringed upon the Executive's pardon power. *Id.* at 147-48.

91. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 316 (2d ed. 1973) [hereinafter HART & WECHSLER].

92. *Id.* at 316 n.4. *See also* United States v. Brainer, 691 F.2d 691, 695, 698 (4th Cir. 1982) (citing HART & WECHSLER, *supra* note 91, with approval and holding that Speedy Trial Act does not encroach upon judicial function).

93. *See supra* note 44 and accompanying text.

94. Gunther, *supra* note 44, at 910. For discussions of the rule in *Klein,* see Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court,* 109 U. PA. L. REV. 157, 181 (1960); Rice, *Congress and the Supreme Court's Jurisdiction,* 27 VILL. L. REV. 959, 971-73 (1981-82); Sager, *The Supreme Court, 1980 Term—Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts,* 95 HARV. L. REV. 17, 70-71 (1981); Thompson & Pollitt, *Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on "Busing" Orders,* 50 N.C.L. REV. 809, 830-32 (1972); Young, *supra* note 87, at 1217-19; Note, *The Nixon Busing Bills and Congressional Power,* 81 YALE L.J. 1542, 1556-57 (1972).

95. 448 U.S. 371 (1980).

out just compensation. The Court of Claims dismissed the suit in 1942. Following the Indian Claims Commission Act of 1946, the Sioux resubmitted their claim. The Commission held that the 1942 decision was not res judicata, and that the 1877 Act had effected a taking; it therefore awarded damages. On appeal, the Court of Claims affirmed the damages award under the 1946 Act, but reversed on the res judicata question, holding that the 1942 decision had reached the merits of the taking claim. This meant that there would be no interest payable on the damages award.

In 1978, an Act of Congress provided for de novo review of the takings decision by the Court of Claims, without regard to res judicata. The Court of Claims then affirmed the Commission's decision, holding that the 1877 Act had indeed been a taking in the exercise of Congress' power of eminent domain, and that the United States owed compensation.

Before reaching the merits of the Court of Claims' taking decision, the Supreme Court considered whether the 1978 Act violated the separation of powers by impermissibly "prescribing a rule for decision that left the court no adjudicatory function to perform."[96] This required an examination of the rule in *Klein.* The Court identified the principal reason why the proviso at issue in *Klein* was unconstitutional: "[I]t prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor."[97]

The Court decided that the 1978 Act constituted a mere waiver of the res judicata effect of a prior judicial decision, and therefore did not violate the separation of powers.[98] *Klein* was clearly distinguishable: In *Sioux Nation,* the 1978 Act was grounded upon Congress' broad power to recognize and pay the Nation's debts, but "of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor."[99] Moreover, while the law at issue in *Klein* had attempted "to prescribe a rule for the decision of a cause in a particular way,"[100] the 1978 Act reviewed in *Sioux Nation* "made no effort . . . to control the Court of Claims' ultimate decision of that claim."[101]

96. *Id.* at 392. The Court also considered whether Congress had impermissibly disturbed the finality of a judicial decree. *Id.* at 391-92.

97. *Id.* at 404 (citing *Klein,* 80 U.S. (13 Wall.) at 146-47). The *Sioux Nation* Court also noted that the law in *Klein* was unconstitutional because it interfered with the President's pardon power. *Id.* at 404-05.

98. *Id.* at 407.

99. *Id.* at 405.

100. *Id.* (quoting *Klein,* 80 U.S. (13 Wall.) at 146).

101. *Id.*

### *D.* Klein *and Section 2212*

The question that must be answered with respect to the contractor liability law, section 2212, is whether it falls within *Klein's* prohibition or is just another retroactive law to which a court must give effect under *Schooner Peggy.* Before proceeding, it should be recalled that Marshall included a caveat in his opinion: A court should apply the law in effect at the time it renders its opinion *"[i]f the law be constitutional."*[102]

The retroactive law in *Klein* was unconstitutional because it encroached upon the Judiciary by prescribing a particular result in pending litigation. By enacting section 2212, Congress prescribed a rule of decision favorable to the United States in pending litigation. This brings section 2212 within *Klein's* prohibition. To show that this is true, it is necessary to examine the law's legislative history and practical effect.

#### *1. Legislative History*

If the rule in *Klein* is to have any vitality, it must reach substance and not be deflected by form. A law may appear reasonable on its face, yet still constitute an encroachment upon the powers of the Judiciary. One must examine the circumstances of the law's passage to determine whether the law was specifically intended to impose a rule of decision in a pending case. The legislative history of section 2212 is therefore an important component of the separation of powers analysis.

The congressional committee reports provide the basic information concerning the American atomic testing program. Between 1946 and 1980, the United States conducted 693 announced tests of nuclear devices. Of these, 212 were explosions in the atmosphere in 1946-1962. Approximately 150,000 civilians and more than 250,000 military personnel participated in these tests.[103] The litigation that led to the enactment of section 2212 concerns exposure to radiation suffered during the atmospheric tests.[104]

Veterans and their survivors attempted to sue the government for its negligence in organizing and conducting the atomic tests. These suits

102. United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 102, 110 (1802) (emphasis added). Note that *Schooner Peggy* was decided more than a year before the Court's first decision holding a law unconstitutional. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Subsequent decisions have also noted that retroactive laws must not be independently unconstitutional. *E.g.,* Fleming v. Rhodes, 331 U.S. 100, 107 (1947); *cf.* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied,* 335 U.S. 887 (1948) (Congress' control over jurisdiction is subject to compliance with fifth amendment).

103. H.R. REP. NO. 124, *supra* note 1, pt. 4, at 2.

104. *See, e.g., In re* Consolidated United States Atmospheric Testing Litig., 616 F. Supp. 759, 761 (N.D. Cal. 1985) (listing actions brought by or on behalf of servicemen, with the dates and locations of their radiation exposure), *aff'd,* 820 F.2d 982 (9th Cir. 1987), *cert. denied,* 56 U.S.L.W. 3590 (Feb. 29, 1988).

have generally failed, principally because of the *Feres* doctrine.[105] Only a few plaintiffs have managed to circumvent the rule in *Feres* by arguing that a duty to warn arose after a person's discharge from the military.[106] It should also be noted that the Veterans' Administration has resisted claims of disability resulting from exposure to radiation,[107] and the recently enacted Veterans' Dioxin and Radiation Exposure Compensation Standards Act[108] provides extremely limited coverage.[109] Unable to obtain a remedy from the government, veterans and their survivors sued the private contractors.

Everyone agrees that the private contractors employed by the government played an important role in the atomic testing. The House Armed Services Committee found in 1983 that the private contractors provided essential scientific, engineering, and technical support for the government's tests, and concluded that the atomic weapons program could not proceed, technically or economically, without their participation.[110] This is a foundation of the veterans' claims against the

105. Feres v. United States, 340 U.S. 135 (1950); *see* Bennett, *The* Feres *Doctrine, Discipline, and the Weapons of War,* 29 ST. LOUIS U.L.J. 383, 394-96 (1985) (describing cases brought by atomic veterans which have been barred by the *Feres* doctrine); Note, *The Cancer Spreads: Atomic Veterans Powerless in the Aftermath of* Feres v. United States, 6 CARDOZO L. REV. 391, 391-92 (1984); Comment, *Federal Tort Claims Act—Atomic Tests and the* Feres *Doctrine,* 32 U. KAN. L. REV. 433, 440-41 (1984) (examining theories used by atomic veterans attempting to avoid application of *Feres* doctrine).

The discretionary function and other exceptions to the Federal Tort Claims Act have also been held to apply in atomic testing litigation. This blocks suits brought by civilian participants. *See, e.g., Atmospheric Testing Litigation,* 616 F. Supp. at 771-74, 779-80 (dismissing actions on alternative grounds of discretionary function, foreign country and combatant activities exceptions to FTCA), *aff'd,* 820 F.2d at 999 n.20 (dismissal of claims by military and civilian personnel upheld under discretionary function exception without reaching *Feres* doctrine, foreign country exception, or combatant activities exception) *cert. denied,* 56 U.S.L.W. 3590 (Feb. 29, 1988).

106. *E.g.,* Molsbergen v. United States, 757 F.2d 1016, 1019-20 (9th Cir.), *cert. dismissed,* 473 U.S. 934 (1985); *see* Comment, *The* Feres *Doctrine: Will it Survive the Radiation Exposure Cases?,* 37 MERCER L. REV. 839, 851-61 (1986). Other theories of recovery are examined in Note, *Atomic Veterans at Ground Zero, supra* note 19.

107. By late 1984, more than 3,000 veterans had filed disability claims related to the atomic tests. The Veterans' Administration denied all but 17 of those claims on the grounds that it was impossible to prove that the veterans' cancers were caused by exposure to radiation. Wash. Post, Nov. 11, 1984, at A3, col. 1; *see also* Note, *Atomic Veterans at Ground Zero, supra* note 19, at 434 n.146 (V.A. has rejected 99.5% of all claims for radiation-related diseases).

108. Pub. L. No. 98-542, 98 Stat. 2725 (1984); *see* 38 U.S.C. §§ 219 note, 354 (Supp. III 1985).

109. *See* H.R. REP. NO. 592, 98th Cong., 2d Sess. 8-9, 11 (1984); Brief for Appellants at 22 n.13, *In re* Consolidated United States Atmospheric Testing Litig., 820 F.2d 982 (9th Cir. 1987) (Nos. 85-2842 and 85-5553); Note, *Atomic Veterans' Tort Claims: The Search for a Tort Remedy Dead Ends With the Veterans' Administration,* 61 NOTRE DAME L. REV. 819, 832-36 (1986) (describing how atomic veterans receive few benefits under the Act because causation is still very difficult to establish).

110. H.R. REP. NO. 124, *supra* note 1, pt. 1, at 29. This assessment accompanied section 213, the original, one-paragraph version of the contractor liability law. In adopting the government's more detailed version (as § 330 of S. 2723) the following year, the Senate Armed Services Committee repeated that assessment. S. REP. NO. 500, *supra* note 20, at 376. For a list of the private

contractors:

> Scientists from [the University of California's Los Alamos Laboratory and Radiation Laboratory at Berkeley] were responsible for planning and implementing radiological safety procedures for the [1946 Operation Crossroads] test participants. The record shows serious shortcomings and errors, including but not limited to: failure to prepare decontamination procedures in advance of the tests, shortage of radiation monitors and equipment, failure to adequately time radiation monitors, and inadequate training of military personnel in methods of coping with radiation hazards.[111]

Both the government and the contractors emphasized the "unique" role played by the private contractors: "They are not typical contract suppliers of commercially provided goods or services to the government. These contractors were and are utilized by the United States as instruments of national policy to assist in an entirely governmental task—nuclear weapons research, development and testing."[112] This, they argued, supported their proposal that the private contractors should not be subject to tort liability.

The contractual relationship was also unusual. From the beginning, the private contractors have had indemnification agreements with the government. They are to be "fully indemnified" for any damage awards against them (including legal fees); the coverage is "absolute."[113] Thus, section 2212 did not relieve the contractors of any financial burden, for they had none. The law did not increase the exposure of the government, for it was already committed to pay. And, of course, to the extent that section 2212 extinguished claims, it would *reduce* the government's costs.

This proposal, which in effect immunized the private contractors, bounced around Congress for a year and a half before finally emerging as

---

contractors involved in the government's atomic weapons programs, see H.R. REP. NO. 124, *supra* note 1, pt. 4, at 9-10.

111. Plaintiffs' Statement of Facts at 2-3, *In re* Consolidated United States Atmospheric Testing Litig., 616 F. Supp. 759 (N.D. Cal. 1985) (C-84-0022-WWS); *see also id.*, at 3-5, 11-16.

112. *Hearing, supra* note 7, at 34-35 (statement of Bernard W. Vance, Deputy Assistant Attorney General); *see also id.* at 42-43 (Dacey testimony).

113. S. REP. NO. 500, *supra* note 20, at 375; H.R. REP. NO. 124, *supra* note 1, pt. 1, at 29; *Hearing, supra* note 7, at 28-29 (Vance testimony), 43, 48 (Dacey testimony), 45-46 (Degarmo testimony), 47 (Hughes testimony). H.R. REP. NO. 124, *supra* note 1, pt. 4, at 11, provides an example of an indemnification clause:

> *Clause 16—Contingencies—litigation and claims*
>
> (a) . . . The DOE and the University recognize that, in part, this work involves unusual, unpredictable and abnormal risks.
>
> (b) In view of these circumstances, it is agreed that . . . the University shall not be liable for and the Government shall indemnify and hold the University harmless against any delay, failure, loss or damage (including personal injuries and deaths of persons and damage to property) and any expenses in connection therewith (including expense of litigation) arising out of or connected with the work, including any loss or damage and incidental expense for any alleged liability for patent infringement or any alleged liability of any kind, and for any cause whatsoever arising out of or connected with the work.

section 1631 of the 1985 Department of Defense Authorization Act.[114] There is no direct evidence in the record concerning the source of the original proposal. However, it seems (not surprisingly) that the private contractors sought the legislation. According to the House Judiciary Committee's 1983 report:

> The Armed Services Committee adopted section 213 to accommodate the concerns of the principal contractors who perform most of the research and development of nuclear weapons for the United States.
>
> . . . .
>
> Though the United States is contractually obligated to completely indemnify these contractors for any and all expenses arising from their contract activity, the contractors sought to have the United States directly assume the liability for any claims arising from their testing activity and to further assume the task of defending against any court actions brought to enforce such claims. The contractors therefore sought a statutory change which would result in their being treated as "Federal agents" for the purpose of tort liability arising from actions pursuant to their contracts.[115]

The Executive Branch did not propose the original section 213, but it supported the idea and proposed a substitute that was better calculated to achieve the desired result. Rather than make the contractors "instrumentalities" of the federal government (and thereby set a precedent which would appeal to many other contractors), the government proposed to substitute itself as defendant in a narrowly defined set of cases.[116] This alternative version, which remained unchanged in its essentials through its enactment the following year, was the product of consultations between the Justice Department and the Department of Energy.[117] The DOE then took the initiative in 1984 by including the contractor liability provision in its request for funds for national security

114. In the first session of the 98th Congress, the proposal appeared (in both its one-paragraph version and its final, detailed form) as § 213 of H.R. 2797 (the Department of Energy National Security Programs bill for 1984). Later in that session, the proposal was § 312 of S. 1107 (DOE National Security Programs for 1984) and § 332 of S. 675 (DOD and DOE, 1984, combined). In the second session of the 98th Congress, the same proposal returned as § 210 of S. 2459 (DOE National Security Programs, 1985) and as § 330 of S. 2723 (DOD and DOE, 1985, combined). Finally, it was enacted into law as § 1631 of H.R. 5167 (DOD, 1985, combined with DOE National Security Programs). Pub. L. No. 98-525, § 1631, 98 Stat. 2492, 2646-47 (1984). The law became known as the "Warner Amendment," because Senator John W. Warner, a member of the Senate Armed Services Committee, offered the amendment in 1984 at the request of the administration. *See* Wash. Post, Nov. 11, 1984, at A3, col. 1. Section 1631 is codified at 42 U.S.C. § 2212 (Supp. III 1985). This Comment refers to the law by its U.S. Code section except when discussion of its legislative history requires citation to the provision's earlier incarnations.

115. H.R. REP. No. 124, *supra* note 1, pt. 4, at 2; *see also Hearing, supra* note 7, at 24 (testimony by Vance, suggesting that the contractors, finding themselves "at a critical juncture in litigation brought against them," proposed the original § 213).

116. *See Hearing, supra* note 7, at 20, 23, 29, 34, 36 (Vance testimony and statement).

117. *Id.* at 22, 23, 25, 35-36 (Vance testimony and statement); *id.* at 37-38 (text of amendment

programs.[118]

The legislative history shows that the private contractors and the government proposed and supported section 2212 because of the lawsuits that had been filed against the contractors. Their goal was, quite simply, to stop these lawsuits. In reporting the bill that included the original section 213 in 1983, the House Armed Services Committee referred to the "litigious atmosphere that now pervades the United States, especially where atomic energy matters are concerned." It noted that "literally thousands of plaintiffs have filed suits against the operators of the government laboratories that have participated in the government's nuclear weapons tests. . . . Plaintiffs are seeking tens of billions of dollars in damages."[119] The witnesses who testified in the Judiciary Subcommittee hearing shortly afterward developed this theme in detail. They were not reticent about expressing their purposes in coming to Congress: Dr. Dacey complained of "endless suits by antinuclear people;"[120] Mr. Degarmo reported that the University of California was defending more than 40 suits involving approximately 3500 plaintiffs,[121] and Mr. Hughes warned of the immense number of suits that the future might bring.[122] When it became evident in the hearing that the proposed legislation would lead not only to the substitution of the United States as defendant but to the dismissal of the suits as well, one of the Congressmen pressed the witness:

> MR. FRANK. So your purpose then is not to prevent the university from being sued, but, in fact, to prevent many of these suits from ever being brought?
>
> MR. DEGARMO. If possible—[123]

The Executive Branch was eager to block these lawsuits but leery of setting a precedent that might appeal to other government contractors.

---

to § 213 of H.R. 2797); *see* H.R. REP. NO. 124, *supra* note 1, pt. 2, at 17 (letter from DOE General Counsel Theodore Garrish explaining consultation).

118. This was a major request, totalling $7,785,575,000. The one-page cover letter from General Counsel Garrish merely summarized the request for funds, but devoted three paragraphs to explaining § 210 (the contractor liability proposal). S. REP. NO. 500, *supra* note 20, at 422; H.R. REP. NO. 724, *supra* note 20, at 38.

119. H.R. REP. NO. 124, *supra* note 1, pt. 1, at 29.

120. *Hearing, supra* note 7, at 44 (Dacey testimony).

121. *Id.* (Delgarmo testimony).

122. *Id.* at 49 (Hughes testimony). The two government witnesses also referred to the extensive litigation in explaining their substitute proposal. *Id.* at 20 (Vance testimony), 40 (Garrish statement); *see also id.* at 34, 43, 45, 57 & 58. The Judiciary Committee's adverse report following this hearing noted that more than 50 tort actions had been filed, involving thousands of plaintiffs. H.R. REP. NO. 124, *supra* note 1, pt. 4, at 2. When the proposal reappeared in 1984, the Senate Armed Services Committee referred to "many suits" in its report. S. REP. NO. 500, *supra* note 20, at 374.

123. *Hearing, supra* note 7, at 54-55. *But see id.* at 56 (Dacey testimony that purpose is not to prevent suits from being brought).

Vance therefore emphasized that the administration's proposed substitute was "narrowly drawn to fit only this unique situation."[124] Thus, section 2212 was, from the start, designed to reach a very specific and limited class of cases. The suits arose from events that were long since complete, and many complaints had already been filed. The law's application to the pending suits was not the incidental by-product of legislation meant to deal with ongoing conduct and its possible legal consequences. Rather, the proposal was a deliberate and calculated attempt by the government and its contractors to protect themselves from pending and threatened suits based on completed conduct. The law that existed at the time of the events and when the suits were filed did not provide that protection. The proponents of section 2212 intended to change that situation retroactively; they were not concerned with the law's effect on future conduct.

It is important to recall that the defendants in these lawsuits had no financial exposure at all, because of their indemnification agreements with the government. One must look elsewhere to discover their motives and goals in seeking to extinguish the litigation. The testimony in the subcommittee hearing reveals that the contractors and the government were concerned about the bad publicity that the litigation directed toward the contractors and the nuclear program generally. For example, Dr. Dacey informed the Subcommittee:

> Speaking for the Bell System, we understand that we have complete dollar indemnification. What we don't have is indemnification of public perceptions of the role of the Bell System in nuclear testing. I can't imagine that the Bell System would be willing to associate itself with cancer deaths, if it were held that it was the Bell System that tested weapons in Nevada and killed 40,000 servicemen.[125]

Mr. Degarmo agreed that "this question of perception is extremely important," as did Mr. Vance, the government witness.[126]

The witnesses also complained that defending against the complaints was burdensome and inconvenient, apparently assuming that this entitled them to relief by an Act of Congress. Mr. Garrish and Mr. Hughes urged the passage of the bill in order to "alleviate the burden on these government contractors" and to prevent a "diversion of resources, both human and financial," from the main tasks of the nuclear program. Mr. Degarmo complained that, if trials took place, "our program people

124. *Id.* at 20; *see also supra* note 116 and accompanying text.

125. *Hearing, supra* note 7, at 48. The statement inevitably leads one to wonder whether the Bell System would object to being associated with 40,000 cancer deaths if there were no "public perception" of that association.

126. *Id.* at 49 (Degarmo testimony), 24 (Vance testimony); *see also* H.R. REP. No. 124, note 1, pt. 4, at 2-3.

would still be called upon for testimony, records and so on."[127]

Underlying both the fear of bad publicity and the concern about diverted resources was the assertion that these lawsuits jeopardized the nuclear weapons program. The witnesses were eager to persuade the Subcommittee that blocking the litigation might be essential to keep the program going. Dr. Dacey raised the spectre of the Bell System deciding regretfully that public perceptions made it impossible for the company to remain associated with the testing of nuclear weapons.[128] Similarly, Mr. Hughes worried that the "growing volume of this litigation" would have the unfortunate effect of stimulating "renewed debate in the courts and in the media and . . . in Congress," and thus have some "impact on national security policy."[129] Dr. Dacey agreed; for him, many of the lawsuits were "trumped-up" cases aimed at getting some money and disrupting the nuclear testing program.[130]

The testimony did not persuade the subcommittee. Congressman Barney Frank was skeptical about the government's proposal, in particular the insistence that the substitution of the United States should include full FTCA immunities and exceptions. He could understand the logic of substituting the government for the private contractors, but to do so under the conditions that would lead immediately to dismissal of the suits seemed perverse. "So you would allow suits that you know you're going to win," he told Vance, "but you're not sure about suits that might have to be contested."[131] He recognized the catch in section 2212.

The Judiciary Committee issued an adverse report concerning the contractor liability proposal.[132] The report mentioned the ambiguities and the uncertain consequences of the original, one-paragraph version of section 213. More generally, the report noted the effect of the FTCA exclusions and the *Feres* doctrine, as well as the elimination of the right to a jury trial, and concluded that stripping veterans of their remedies in this fashion was unfair and possibly unconstitutional. This, of course, applied to the government's substitute proposal as well as the original

127. *Hearing, supra* note 7, at 41 (Garrish statement), 47 (Hughes testimony), 54 (Degarmo testimony); *see also* H.R. REP. No. 124, *supra* note 1, pt. 4, at 2.

128. *See supra* note 125 and accompanying text.

129. *Hearing, supra* note 7, at 47; *see also* H.R. REP. No. 124, *supra* note 1, pt. 4, at 2-3; *cf.* Hammond v. United States, 786 F.2d 8, 14 (1st Cir. 1986) ("Congress has . . . perceived these lawsuits to constitute a threat to the continued participation of the private contractors in the nuclear weapons program because the contractors fear the bad publicity generated by the suits.").

130. *Hearing, supra* note 7, at 51 (Dacey testimony). Dr. Dacey continued: "Some people . . . may think they have genuine injuries. Other people, through their lawyers feel that there is some way of getting some money. It is kind of a popular thing nowadays among the antinuclear people to file cases just to disrupt the nuclear testing program." *Id.* at 51-52; *see also id.* at 55-56.

131. *Id.* at 28.

132. H.R. REP. No. 124, *supra* note 1, pt. 4.

version. Citing *Mullane v. Central Hanover Bank & Trust Co.*[133] and *Logan v. Zimmerman Brush Co.*,[134] the report pointed out that the plaintiffs had a property interest in their pending claims, and that the proposed section 213 would eliminate these claims in violation of the fifth amendment.

The adverse report appeared on June 15, 1983. Three weeks later, the government's contractor liability proposal reappeared—this time in the Senate as section 332 of S. 675, the Department of Defense authorization bill for 1984. There were no further hearings. The Senate Armed Services Committee report only briefly explained the provision. It stated that the section would "clarif[y] the status of certain contractors operating government-owned facilities relating to atomic energy national defense activities in litigation arising from those activities. . . . For the purposes of civil litigation arising from atomic weapons testing, the proper party defendant is the government—not these contractors."[135]

The Senate passed S. 675 with section 332 on July 26, 1983.[136] However, in conference, the House removed the Department of Energy matters from the defense bill,[137] and the contractor liability provision did not become law in 1983. In 1984, however, the Department of Energy renewed its request for a contractor liability statute.[138] The House Armed Services Committee did not act upon the request,[139] but its counterpart in the Senate responded by attaching the contractor liability provision to that year's defense bill.[140] In once more proposing the contractor liability statute, the Senate Armed Services Committee adopted verbatim most of the House Armed Services Committee's 1983 report.[141] Again, attention was drawn to the "litigious atmosphere that now pervades the United States, especially where atomic energy matters are concerned." Again, there was a warning about the "thousands of

133. 339 U.S. 306 (1950).

134. 455 U.S. 422 (1982).

135. S. REP. No. 174, *supra* note 20, at 374. The contractor liability provision was also attached (as § 312) to S. 1107, the Senate's DOE National Security Programs bill. That bill was later combined with the DOD bill and passed by the Senate as title III of S. 675. 129 CONG. REC. S10657 (daily ed. July 22, 1983), S10800 (daily ed. July 26, 1983).

136. 129 CONG. REC. S10882 (daily ed. July 26, 1983).

137. *Id.* at H6615-90 (daily ed. Sept. 12, 1983), S12092 (daily ed. Sept. 13, 1983).

138. *See supra* note 118 and accompanying text.

139. The committee's report accompanying the DOE national security bill, H.R. 5395, includes the request from Garrish, at 38, but there is no contractor liability provision in the bill. H.R. REP. No. 724, *supra* note 20.

140. *See* § 330 of S. 2723, the Omnibus Defense Authorization Act for 1985; *see also* § 210 of S. 2459, the DOE bill for national defense programs. As had occurred the previous year, the separate DOE bill was incorporated by the Senate into the DOD bill. 130 CONG. REC. S7855 (daily ed. June 11, 1984).

141. *Cf.* H.R. REP. No. 124, *supra* note 1, pt. 1, at 27-30, *and* S. REP. No. 500, *supra* note 20, at 374-77.

plaintiffs" seeking "tens of billions of dollars in damages." The report explained that, because of the indemnification clauses in the contracts, "the taxpayer will ultimately bear this burden."[142]

The Senate passed H.R. 5167, the House of Representatives' Defense Authorization Bill, in lieu of S. 2723, but added the contractor liability provision.[143] Neither Judiciary Committee had considered the proposal during that session of Congress, but the provision was retained in conference, emerging as section 1631 of the final bill. The conference report stated that the provision "would provide a remedy against the United States for injury, loss of property, personal injury, or death due to exposure to radiation on acts or omissions by a contractor carrying out atomic weapons tests under a contract with, and under the direction and control of, the United States."[144] This time, the House accepted the Senate amendment, and section 1631 was enacted into law with the Department of Defense Authorization Act, 1985.[145]

### 2. *The Application of Section 2212 to Pending Litigation*

The legislative history of section 2212 reveals that the purpose of the statute was to stop the lawsuits against the private contractors. This would save the United States money, since it would not be required to indemnify the contractors for any damage awards. More precisely, Congress prescribed a rule of decision in the pending litigation: While the veterans' lawsuits had been filed against private defendants, the law transformed them into suits against the government. As such, doctrines of sovereign immunity would control, and a judgment against the plaintiffs was assured.

Section 2212 has been applied to the pending litigation and has produced the intended results. In the leading case, brought against the University of California, American Telephone & Telegraph Co., and Reynolds Electrical and Engineering Co., the United States moved to be substituted as defendant and, simultaneously, for summary judgment based on the exceptions to its liability under the FTCA.[146] District Judge William W. Schwarzer decided that section 2212 was constitutional and granted the motion to substitute. He based his decision primarily on a finding that this retroactive legislation did not deny due

142. S. REP. NO. 500, *supra* note 20, at 376.

143. 130 CONG. REC. S7855 (daily ed. June 21, 1984).

144. H. REP. NO. 1080, *supra* note 22, at 349, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4328.

145. Pub. L. No. 98-525, § 1631, 98 Stat. 2492, 2646-47 (1984) (codified at 42 U.S.C. § 2212 (Supp. III 1985)).

146. *In re* Consolidated United States Atmospheric Testing Litig., 616 F. Supp. 759 (N.D. Cal. 1985), *aff'd*, 820 F.2d 982 (9th Cir. 1987) *cert. denied*, 56 U.S.L.W. 3590 (Feb. 29, 1988).

process.[147] In rejecting the takings claim, the judge pointed mainly to the absence of "investment-backed expectations."[148] Finally, with respect to the separation of powers, he asserted that section 2212 "does not mandate the outcome of particular cases," and that it "substitutes remedies."[149] He cited but did not discuss *Sioux Nation,* adopting instead Hart and Wechsler's narrow interpretation of *Klein*.[150] In granting summary judgment with the substitution, he relied upon several exceptions and limitations of the FTCA (discretionary function, foreign country, and combatant activities), plus the *Feres* doctrine.[151]

Section 2212 fits well within *Sioux Nation*'s description of what *Klein* forbids: By enacting this statute, Congress again "prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor."[152] Of course, the United States did not become a party to the litigation until the actual operation of the statute itself. However, the indemnification agreements made the United States the real party in interest in the lawsuits against the private contractors.[153] In addition, the arguments repeatedly advanced by both the government and the contractors, to the effect that theirs was a unique relationship and that the contractors were acting as instrumentalities of the government, reinforce the point that the United States was a party to the litigation that Congress sought to control when it passed section 2212. The results are perfectly clear: The law has led the courts to decide the controversy in the government's favor.

Attempts to defend section 2212 portray it as routine legislation with retroactive effect that the courts must apply, in adherence to *Schooner Peggy*.[154] The indemnification agreements and the nature of the atomic weapons program, which admittedly is a matter of national importance, preclude classifying the veterans' lawsuits against the private contractors as "mere private cases between individuals" that Marshall

147. *Id.* at 765-70.

148. *Id.* at 770.

149. *Id.* at 771. *But see infra* notes 257-59 and accompanying text (unlike the Swine Flu Act, § 2212 does *not* provide an effective alternative remedy).

150. *Atmospheric Testing Litigation,* 616 F. Supp. at 770-71.

151. *Id.* at 771-80. The First Circuit has also upheld the constitutionality of § 2212; however, once the panel had satisfied itself that a rational basis standard of review would apply, it dealt summarily with the constitutional issues. Hammond v. United States, 786 F.2d 8, 15 (1st Cir. 1986).

In affirming the *Atmospheric Testing Litigation* decision, the Ninth Circuit panel adopted most of Judge Schwarzer's opinion and drew, as well, from *Hammond. See In re* Consolidated United States Atmospheric Testing Litig., 820 F.2d 982, 984 & n.2 (9th Cir. 1987) *cert. denied,* 56 U.S.L.W. 3590 (Feb. 29, 1988).

152. United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980).

153. *See Hearing, supra* note 7, at 46 (Degarmo testimony).

154. *See* Brief for the Appellees at 22, *In re* Consolidated United States Atmospheric Testing Litig., 820 F.2d 982 (9th Cir. 1987) (Nos. 85-2842 and 85-5553).

held out as a possible exception in *Schooner Peggy.*[155] On the other hand, curative statutes and withdrawals of "legislative grace"—laws that the Court has little difficulty in applying retroactively—scarcely offer much support to section 2212. The nature of the rights at issue here (tort claims for personal injury and death) and the impact of section 2212 upon those rights (dismissal without a hearing on the merits) distinguish this law from those that extend a statute of limitations or reverse an unanticipated court ruling.

It is useful to apply the reasoning of the court in *Banco Nacional de Cuba v. Farr*[156] to the situation created by section 2212. In *Farr,* the retroactive effect of the Hickenlooper Amendment "merely lifted a bar to consideration of pre-existing questions of substantive rights and liabilities."[157] By contrast, the contractor liability provision operates to *impose* such a bar by preventing any consideration of the veterans' claims. Congress has left the courts no function to perform. In this way, section 2212 intrudes upon the judicial power to decide the claims, thereby violating the doctrine of the separation of powers.

More fundamentally, the contractor liability law, in offering veterans a remedy with a catch, is manifestly unjust.[158] In *Sioux Nation,* the Court pointed out that Congress, by waiving res judicata, exercised its broad power to recognize and pay the Nation's debts.[159] In contrast, section 2212, like the law at issue in *Klein,* relieves the government of a financial obligation. Part II will describe how section 2212 effects a taking of the veterans' property interests in their causes of action, reinforcing this sense of injustice. However, even without the support of the takings clause, there is something blatantly *unfair* in the spectacle of Congress reaching out and passing a law to dictate a result in pending lawsuits like these. One would expect more honorable and generous treatment of men and women who contributed to a government program considered by Congress so vital to the nation's security. While the government was quick to offer substantial settlements to the survivors of the 1986 *Challenger* disaster,[160] it has attempted to avoid paying compensation for radiation injuries suffered during the atomic testing program. The rights at stake are fundamental tort claims for personal injury and death, and the impact of the law upon those rights has been devastating.

155. United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 102, 110 (1801); *see supra* notes 56-57 and accompanying text.

156. 243 F. Supp. 957 (S.D.N.Y. 1965); *see supra* note 74.

157. *Farr,* 243 F. Supp. at 978.

158. *Cf.* Bradley v. School Bd. of Richmond, 416 U.S. 696, 711 (1974).

159. *See supra* note 101 and accompanying text.

160. *See* Nat'l L.J., Jan. 12, 1987, at 3, col 1.

## II
## THE TAKING OF PROPERTY WITHOUT JUST COMPENSATION

The plaintiffs in the atmospheric testing litigation claim compensation for personal injuries and wrongful death caused by exposure to radiation resulting from the private contractors' negligence. Part I of this Comment has described how section 2212 operates to convert those claims into suits against the government, followed inexorably by summary judgment for the government or dismissal of the complaint. This action by Congress violates the separation of powers. If we turn now from the integrity of the judicial function and assume no violation of the separation of powers, we discover that section 2212 also violates the Constitution by taking property without just compensation. This Part establishes that the plaintiffs' causes of action against the private contractors are property interests. Since section 2212 totally destroys those causes of action without providing any compensation, it effects an unconstitutional taking.

The fifth amendment of the Constitution commands that "private property [not] be taken for public use, without just compensation."[161] Professor Tribe has observed that "[m]ost people know a taking when they see one, or at least think they do."[162] The basic message of the "takings" clause is indeed straightforward. Yet one cannot cling to that message as a talisman. Oversimplifications of the takings clause serve equally well to inflate the guarantee or to eviscerate it: It is possible to label virtually any government action a taking of some property interest held by someone.[163] Similarly, one could claim that only the complete, physical takeover of land or a tangible object is within the protection of the fifth amendment. Justice Holmes merely stated the obvious when he commented in *Pennsylvania Coal Co. v. Mahon* that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[164] On the other hand, it has long been established that some government action short of the complete physical takeover of property may well constitute a compensable taking—a point also illustrated by *Pennsylvania Coal*.[165]

---

161. U.S. CONST. amend. V.

162. L. TRIBE, *supra* note 50, at 459.

163. *See, e.g.*, R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

164. 260 U.S. 393, 413 (1922).

165. *Pennsylvania Coal* has been regarded as the "leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.' " Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978). The Court recently distinguished *Pennsylvania Coal* and limited it to its facts

The question to be borne in mind in any takings inquiry is whether the government action is the "sort of publicly inflicted injury for which the Constitution requires payment of compensation."[166] Fairness is the fundamental principle that guides this inquiry: "[I]s it fair to effectuate this social measure without granting this claim to compensation for private loss thereby inflicted?"[167] The questions are simple, but the answers are complex; for the inquiry evokes the conflicting interests of the individual and the state that lie at the heart of the social contract in a democratic society. The Supreme Court itself has admitted that it is "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[168] The Court therefore conducts "ad hoc, factual inquiries" to determine if the "particular circumstances" of a given case establish a compensable taking.[169]

The threshold question in any takings analysis is whether the person claiming compensation has a property interest of the sort that is protected by the fifth amendment. The answer to this first question may determine the final result. A conclusory decision that a person has no protected property interest offers a judge an easy way out of the dilemmas of the takings clause, but the issue deserves more careful attention. This part of the Comment begins by considering whether a tort claim arising from the atomic testing program may be a property interest protected by the fifth amendment. Once it is established that a cause of action is a compensable property interest, we turn to the other relevant elements of the takings clause: Has the property been "taken"? Has the government paid "just compensation"?

### *A. The Nature of Fifth Amendment Property*

It cannot be claimed that a cause of action in tort fits perfectly within the traditional takings (or eminent domain) paradigm. This is not Blackacre, chosen by the county as the site for a new hospital. Nor is a cause of action quite like a chicken farm, rendered unsuitable for its nor-

in Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987). However, the principles enunciated by Justice Holmes remain as valid as ever—as is shown in *Keystone* itself by Justice Stevens' approach in assessing Pennsylvania's later subsidence regulation. *See infra* notes 224-31 and accompanying text. For a recent case where government regulation was held to effect a taking, see Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (commission cannot require uncompensated conveyance of easement granting public access across property as condition for issuing building permit).

166. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165 (1967).

167. *Id.* at 1172.

168. *Penn Central*, 438 U.S. at 124.

169. *Id.*

mal use by low-flying military aircraft, and therefore entitled to inverse condemnation.[170] There is no Supreme Court decision squarely on point holding that a personal injury suit is a fifth amendment property interest.[171] However, the decisions in this area support the idea that a cause of action is protected by the takings clause. Intangible interests that qualify for protection are not unusual, and courts have recognized various claims for compensation as property interests. The following discussion surveys those cases, drawing from them the principles and examples that support the view that a tort claim is a property interest.

Courts and commentators frequently cite the Supreme Court's decision in *United States v. General Motors Corp.*[172] in support of the proposition that the "property" that the fifth amendment protects is not just the "physical thing" but the "group of rights inhering in the citizen's relation to the physical thing."[173] Thus, the property may be intangible. The Court followed the implications of that decision in *Ruckelshaus v. Monsanto,*[174] when it held that trade secrets are a form of protected property. It noted that property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[175]

The *Monsanto* Court pointed out that previous decisions had held other intangible interests to be fifth amendment property interests.[176]

170. *See* United States v. Causby, 328 U.S. 256 (1946). On the other hand, the argument that a cause of action in tort is compensable property may be closer to the core values of the fifth amendment than is the proposition that a football team lies within a city's power of eminent domain. *But see* City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982) (professional football franchise is property that may be taken by eminent domain).

171. *See generally* Annotation, *Supreme Court's Views as to What Constitutes "Taking," Within Meaning of Fifth Amendment's Command that Private Property Not be Taken for Public Use Without Just Compensation,* 57 L. Ed. 2d 1254 (1979). *But cf. In re* Aircrash in Bali, Indonesia, 684 F.2d 1301, 1312 (9th Cir. 1982) (stating that wrongful death complaint is property protected by fifth amendment; decision whether Warsaw Convention effected a taking of that property left to Court of Claims).

172. 323 U.S. 373 (1945).

173. *Id.* at 377-78. The property at issue in *General Motors* was a leasehold. The government had exercised its powers of eminent domain to take temporary possession of property held by the respondent on a long-term lease. *Id.* at 375.

174. 467 U.S. 986 (1984).

175. *Id.* at 1001. Trade secrets have some of the characteristics of more tangible forms of property: they are assignable, they may form the res of a trust, and they pass to a trustee in bankruptcy. *Id.* at 1002. Personal injury suits do not share all of these characteristics. For example, in California, they are not assignable. Reichert v. General Ins. Co., 68 Cal. 2d 822, 442 P.2d 377, 69 Cal. Rptr. 321 (1968). However, a cause of action survives the death of a party to the suit and is maintained by or against the decedent's executor or administrator. CAL. PROB. CODE §§ 573, 591.6(j) (West Supp. 1987).

176. 467 U.S. at 1003 (citing Armstrong v. United States, 364 U.S. 40 (1960) (materialman's lien); Louisville Bank v. Radford, 295 U.S. 555 (1935) (real estate lien); Lynch v. United States, 292 U.S. 571 (1934) (contract)); *see also* Swimming Turtle v. Board of City Comm'rs, 441 F. Supp. 374, 377 (N.D. Ind. 1977) (holding that plaintiff's tax-exempt status is a vested right which cannot be taken without just compensation).

Among these, the decision in *Armstrong v. United States*[177] was particularly noteworthy. The petitioners were subcontractors for a shipbuilding company that had a contract to construct personnel boats for the Navy. The contract permitted the government, in case of default by the contractor, to take possession of all completed and uncompleted work, including all manufacturing materials acquired by the contractor. When the prime contractor defaulted, the government (having made progress payments in advance) exercised its option, took possession of the uncompleted hulls and materials, and transferred everything to out-of-state shipyards. The petitioners had not been paid for the materials they had supplied to the contractor. They claimed that they had valid liens on the hulls and materials, and that the government's action had destroyed those liens by making them unenforceable. This, they contended, constituted a taking of their property without just compensation, in violation of the fifth amendment.[178]

The Supreme Court agreed. As a preliminary matter, it decided that the United States had not gained some "inchoate title" to the materials before the default and transfer; a materialman's lien could, therefore, validly attach to those materials.[179] The Court then turned to the question whether petitioners' liens gave them compensable property interests within the meaning of the fifth amendment. It noted that state law entitled the materialmen to a lien when they furnished the supplies. The petitioners had not taken any steps to attach the uncompleted work before the default and transfer. "Nevertheless," ruled the Court, "they were entitled to resort to the specific property for the satisfaction of their claims. That such a right is compensable by virtue of the Fifth Amendment was decided in *Louisville Bank v. Radford.*"[180]

The fact that a lien is a fifth amendment property interest *before* any attachment of the property (or that a mortgage enjoys similar protection *before* a foreclosure suit is brought) supports the argument that an accrued cause of action in tort is also protected by the takings clause before the suit is filed. Since many lawsuits arising from the atomic testing program were already filed and were pending in the courts when sec-

177. 364 U.S. 40 (1960).

178. *Id.* at 41-42.

179. This reversed the decision of the Court of Claims below. *Id.* at 42-44.

180. *Id.* at 44. In *Radford,* 295 U.S. 555 (1935), the Court had ruled that § 75 of the Bankruptcy Act, added to the Act by the Frazier-Lemke Act of 1934, took property in violation of the fifth amendment. The bank held a mortgage which, under state law, constituted a lien enforceable only by a suit to foreclose. *Id.* at 590. The Frazier-Lemke Act, passed after the bank acquired the mortgage, deprived mortgagees of substantial incidents of their rights to resort to mortgaged property; it therefore constituted a taking. *Id.* at 590-94. The *Armstrong* Court summarized this holding and concluded that "[n]o reason has been suggested why the nature of the liens held by [materialmen] should be regarded as any different, for this purpose, from the interest of the bank held compensable in the *Radford* case." 364 U.S. at 44.

tion 2212 was passed, they qualify a fortiori for the protection of the fifth amendment.

### B. *Property Interests in Foreign Claims*

Judicial decisions in the area of American foreign relations provide further support for the argument that a cause of action is a fifth amendment property interest. Treaties often include settlements regarding conflicting private claims for compensation. When confronted with these international agreements, American courts have affirmed the principle that individuals whose property interests are sacrificed in the national interest have a claim for compensation from the government.[181] These decisions have depended upon a prior determination that the claims were property interests. Again, a court does not question the legitimacy or even necessarily the wisdom of the decision to yield a certain claim in diplomatic negotiations. Instead, the point is that society as a whole should pay for the benefits that the treaty presumably brings.

In a treaty of 1800, the United States abandoned a great number of private claims against France arising from the undeclared naval war between the two countries in the 1790's. (The American government had adopted and pressed those claims at the beginning of the negotiations.) It was recognized in the United States that the claimants might be entitled to compensation from the American government.[182] Those "French Spoliation" claims were pressed throughout the nineteenth century.[183] In 1886, the Court of Claims was called upon to give an advisory opinion concerning the validity of the claims. In *Gray v. United States,*[184] the court did not question the diplomatic bargaining that occurred in 1800. It asserted, however, that "the citizen whose property is thus sacrificed

181. The Peace Treaty with Great Britain in 1783 included a different but analogous sacrifice of American property interests. Both governments reaffirmed the prewar debts of their citizens to each other. However, during the war, Virginia had allowed its citizens to discharge their debts to British creditors by payment (in paper money) into a state loan office—in effect, a confiscation of British property within the state. In Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), the Court held that the treaty superseded the state law, and that the American debtor had not discharged his debt to a British creditor by paying money to the state. This was not, strictly speaking, a sacrifice by the national government of the debtor's claim on the high altar of foreign relations (though the debtor here might be forgiven for thinking so), for the United States did nothing to protect the states. The United States owed no compensation; and the state, because of sovereign immunity, was not legally bound to repay the debtor. Nonetheless, "the state, having received the money, is bound in justice and honor, to indemnify the debtor, for what it in fact received." *Id.* at 282.

182. The claimant in *Schooner Peggy* (which did not involve one of the "French Spoliation" claims) suffered a reversal because of the operation of the 1800 treaty with France. In his opinion, Chief Justice Marshall mentioned that the claimant might still be entitled to compensation from the American government. United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 102, 110 (1801).

183. *See* Note, *The French Spoliation Cases—An Unanswered Question,* 12 VA. J. INT'L L. 120 (1971).

184. 21 Ct. Cl. 340 (1886).

for the safety and welfare of his country has a claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given to him."[185]

This decision is also noteworthy for its characterization of the claims. These were actions in tort, not for contractual debts.[186] Such claims were not property

> in the ordinarily accepted or the legal sense of the word; but they were rights which had value, a value inchoate, to be sure, and entirely dependent upon adoption and enforcement by the Government; but an actual money value capable of ascertainment the moment the Government had adopted them and promised to enforce them.[187]

The bargain struck in 1800 thus fell within the takings clause, and the government owed compensation to the claimants.[188]

The argument that a claim for compensation is a fifth amendment property interest finds support in the modern case law. In *Shanghai Power Co. v. United States,*[189] the plaintiff filed a claim following the American treaty with China in 1979. The treaty included a settlement of claims arising from expropriations by the People's Republic of China after the Revolution. The Claims Court decided, first, whether the plaintiff had a property interest in its claim for compensation; and, second, whether the treaty had taken that property. The court distinguished between the plaintiff's original assets (a power plant in Shanghai) and the present claim for compensation deriving from the confiscation of those assets. Thus, "at the time of the alleged taking by the United States, plaintiff no longer owned these assets; instead it owned a claim for compensation against the PRC."[190] The court carefully assessed that claim and the legal precedents, and decided that the claim was indeed a fifth amendment property interest. Plaintiff's claim for compensation was not "devoid of a legally enforceable right;" nor would "recognition of a property interest . . . contravene public policy."[191] A similar analysis would justify finding a tort claim to be property.

The Iranian Revolution and its aftermath generated an enormous amount of litigation in the United States, and the Algiers Agreement that ended the hostage crisis again raised the issue of claims being "taken" by the government. (The United States agreed to terminate all legal proceedings in American courts involving claims against Iran. The agree-

185. *Id.* at 392-93.

186. *Id.* at 397.

187. *Id.* at 393.

188. *Id.*

189. 4 Cl. Ct. 237 (1983), *aff'd,* 765 F.2d 159 (Fed. Cir.), *cert. denied,* 106 S. Ct. 279 (1985).

190. *Id.* at 241.

191. *Id.* at 240. The court concluded that the plaintiff had not suffered a taking of its property when it received $20 million in settlement of its $144 million claim. *Id.* at 242-49.

ment established the Iran-United States Claims Tribunal to settle all claims through binding arbitration.) In its decision giving effect to that agreement, the Supreme Court found it unnecessary to decide whether there had been a taking, but agreed that the question was ripe for adjudication by the Claims Court.[192] This implicitly recognized that claims against Iran for compensation were, indeed, fifth amendment property interests. Justice Powell was particularly concerned about the takings issue in this case. He wrote separately to emphasize the principle that

> [t]he Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts. The extraordinary powers of the President and Congress upon which our decision rests cannot . . . displace the Just Compensation Clause of the Constitution.[193]

Finally, the Ninth Circuit has examined tort claims similar to those involved in the atomic testing litigation and decided that they are fifth amendment property interests. In *In re Aircrash in Bali, Indonesia,*[194] the plaintiffs sued for wrongful death and challenged the international liability limits imposed by the Warsaw Convention. The court of appeals had no difficulty upholding the constitutionality of the treaty and deciding that it preempted California's wrongful death law. However, the panel also decided that the Warsaw Convention might constitute a taking. The prerequisite for this was, of course, a finding that intangible state wrongful death claims are fifth amendment property interests. For the court, "[t]here is no question that claims for compensation are property interests that cannot be taken for public use without compensation."[195]

### *C. Fifth Amendment Protection for a Cause of Action in Tort*

The treaty cases have shown that various claims for compensation qualify as property interests protected by the fifth amendment, even where the government's interest is compelling. Moreover, those cases reaffirm the fundamental principle of *fairness,* the basis of the takings clause. Of course, purely domestic controversies have been the principal

192. Dames & Moore v. Regan, 453 U.S. 654, 688 n.14 (1981). Since the agreement with Iran provided for the establishment of the claims tribunal in The Hague, it could not yet be shown that claims against Iran had been taken without just compensation. *See* Brownstein, *The Takings Clause and the Iranian Claims Settlement,* 29 UCLA L. REV. 984 (1982); Note, *The U.S.-Iran Accords and the Taking Clause of the Fifth Amendment,* 68 VA. L. REV. 1537 (1982).

193. *Dames & Moore,* 453 U.S. at 691 (Powell, J., concurring in part and dissenting in part) (citation omitted).

194. 684 F.2d 1301 (9th Cir. 1982).

195. *Id.* at 1312. Whether there had, in fact, been a taking was "a difficult question." It depended on whether the treaty had unreasonably impaired the plaintiffs' claims and was a matter for the Court of Claims to decide. *Id.* at 1312-13.

source of law governing the takings issue. They, too, support the proposition that a cause of action is a property interest protected by the fifth amendment.[196]

Here, we often encounter the long-pedigreed dictum that "[a] person has no property, no vested interest, in any rule of the common law."[197] A return to the sources of that statement reveals that it refers to the unremarkable rule that governments legitimately exercise extensive police powers. The paragraph in *Munn v. Illinois* from which the dictum is drawn begins by stating that "a mere common-law regulation of trade or business may be changed by statute," and continues:

> A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, *unless prevented by constitutional limitations.*[198]

The Ninth Circuit was therefore correct in distinguishing *Duke Power* on this point when it stated that, for the purposes of the takings clause, a wrongful death action is property. The takings issue here is not a change in a rule of the common law, but rather "the limitation of an independently existing right under state law."[199]

Government actions that purport only to alter remedies may in fact infringe upon individual rights. In *Ettor v. City of Tacoma,*[200] the Supreme Court confronted a state law that withdrew the right to sue a municipality for damage caused by the city. The case involved a suit that was pending when the statute was enacted. This did not change a particular remedy, the Court decided; it took away an existing property right. Petitioners' claim against the city was "a claim assignable and enforceable by a common-law action for a breach of the statutory obligation."[201] It was "fixed by the law in force when their property was damaged for

196. *E.g.,* Edwardsen v. Morton, 369 F. Supp. 1359, 1379 (D.D.C. 1973) (Alaskan natives' claims based on right to be protected by federal government against unauthorized intrusions and right to due process "represent *accrued* causes of action for trespass and breach of fiduciary duty [and] are vested property rights" protected by fifth amendment).

197. *In re* Consolidated United States Atmospheric Testing Litig., 616 F. Supp. 759, 767 (N.D. Cal. 1985) (quoting Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n.32 (1978), in turn quoting Second Employers' Liability Cases, 223 U.S. 1, 50 (1912), finally quoting Munn v. Illinois, 94 U.S. 113, 134 (1877)), *aff'd,* 820 F.2d 982 (9th Cir. 1987) *cert. denied,* 56 U.S.L.W. 3590 (Feb. 29, 1988).

198. 94 U.S. at 134 (emphasis added). This relates to the point made by Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922): Government must be able to impose some burdens without paying compensation in order to function; at the same time, there are limits. These limits include the due process and the takings protection of the fifth amendment.

199. *In re* Aircrash in Bali, Indonesia, 684 F.2d 1301, 1312 n.10 (9th Cir. 1982).

200. 228 U.S. 148 (1913).

201. *Id.* at 156.

public purposes, and the right so vested cannot be defeated by subsequent legislation."[202]

The government's action and the injury to property may be more subtle. For example, in 1974, the Supreme Court sustained a takings challenge to the Regional Rail Reorganization Act of 1973 brought by the major creditors of the Penn Central Railroad.[203] The Act provided that the railroad would continue to operate, albeit at a loss, pending reorganization. This threatened to "erode" the claims of the creditors. The Court agreed that "compelled continued rail operations under these conditions . . . may accelerate erosion of the interests of the plaintiffs below through accrual of post-bankruptcy claims having priority over their claims."[204] This would be a compensable taking.

The argument that a cause of action is property within the meaning of the takings clause receives clear support from decisions holding that a cause of action is a due process property interest. The Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*[205] is remembered mainly for its holding on the sufficiency of notice in a judicial proceeding.[206] The premise of that decision was that a person's cause of action—a potential claim against the trustee of a "common trnst" that would be foreclosed by the decree at issue in the case—was property. Under the due process requirements of the fifth and fourteenth amendments, such property could not be taken without adequate notice and an opportunity to be heard. The premise in *Mullane* became the holding itself in *Logan v. Zimmerman Brush Co.*[207] Justice Blackmun's "controlling opinion"[208] stated that the "hallmark of property . . . is an individual entitlement grounded in state law."[209] A person's employment discrimination claim, "which presumably can be surrendered for value," was then held to be a "species of property."[210] The due process

202. *Id.* The Court appeared to assume that the city's liability was already established: "The obligation of the city was fixed. . . . Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damages to their property." *Id.* at 155-56. The court below, however, noted only that the trial was under way when the legislature passed the repealing statute. 57 Wash. 50, 52, 106 P. 478, 479 (1910). *Cf.* Coombes v. Getz, 285 U.S. 434, 442 (1932) (repeal of rule which created contractual liability could not destroy previously vested right of creditor to enforce cause of action upon the contract).

203. Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

204. *Id.* at 124.

205. 339 U.S. 306 (1950).

206. Some might share the reaction of Congressman Frank in the Judiciary Subcommittee Hearing, *supra* note 7, at 27: "I must say I haven't thought about [*Mullane*] since civil procedure."

207. 455 U.S. 422 (1982).

208. The Court's due process opinion, with a 6-3 majority, was the "controlling" opinion. A different 6-3 majority formed around opinions (including a separate one by Justice Blackmun) sustaining petitioner's challenge on equal protection grounds. *See id.* at 438.

209. *Id.* at 430.

210. *Id.* at 428-31.

holdings in *Mullane* and *Logan* therefore support by analogy the thesis of this Comment that a cause of action in tort is property within the meaning of the takings clause.

### *D. The Taking of Property*

The claims cases provide a rich diversity of factual situations, but the general theme that emerges is clear and important: Valid claims for compensation or accrued causes of action that arise under state law have value and, notwithstanding their intangibility, cannot be destroyed by the government without just compensation. They are property.[211] The next question is whether government action in a given case has "taken" that property. For example, where a cause of action has become vested by the satisfaction of conditions precedent to suing, "it would be unconstitutional to retroactively repeal a statute as to those persons who had vested causes of action under that statute."[212] The same reasoning applies to a defense made retroactively applicable, which is what section 2212 does: "A cause of action is a right to sue and prevail, and the retroactive application of a statutory defense would necessarily destroy that right."[213]

Most of the Supreme Court's takings decisions have concerned land-use regulations or the actual physical invasion of property. In those cases, there has been no dispute that some property interest was at stake,[214] but whether or not that property was "taken" was more problematic. The enactment and application of section 2212 present a problem that is the reverse of the land-use situation. Fifth amendment protection of causes of action may not be self-evident. However, once we accept that a tort claim is a compensable property interest, it becomes readily apparent that the contractor liability statute has taken that property without just compensation.

The Supreme Court's land-use regulation decisions provide a set of guidelines and principles that may be applied, *mutatis mutandis,* in the "ad hoc, factual inquiry" to determine whether a tort claim has been taken without compensation. It is appropriate to return to Justice

211. It is worth noting that the district judge in the leading atomic testing case did not deny that the plaintiffs' claims were fifth amendment property interests. Instead, he accepted that they were and then considered whether there had been a taking or a denial of due process. *In re* Consolidated United States Atmospheric Testing Litig., 616 F. Supp. 759, 766-70 (N.D. Cal. 1985), *aff'd,* 820 F.2d 982 (9th Cir. 1987) *cert. denied,* 56 U.S.L.W. 3590 (Feb. 29, 1988).

212. Jacklitch v. Redstone Fed. Credit Union, 463 F. Supp. 1134, 1139 n.2 (N.D. Ala. 1979) (quoting Black v. G.B. Enterprises, Inc., No. 75-890 (D.D.C. filed Jan. 6, 1977)).

213. *Id.*

214. Of course, even where all agree that there is property, there can be disagreement over the extent of the property that is subject to the government action: Is it just one "strand" or the whole "bundle"? Compare the majority and dissenting opinions in Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987); *see infra* notes 230-38 and accompanying text.

Holmes' seminal opinion in *Pennsylvania Coal Co. v. Mahon,*[215] where he discussed the various factors to consider in deciding whether a regulation has gone "too far"[216] and so must be recognized as a taking. Holmes stressed that the "extent of the diminution" of value was one such factor. He offered no scale for measuring that diminution, but merely opined: "When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[217] Holmes also analyzed the government's action and found that it was not a valid exercise of police power.[218] He questioned whether the public interest was sufficient to sustain this destruction of property rights.[219] At any rate, he concluded, the acquisition of property in the public interest must be paid for.[220]

The Supreme Court's modern case law has incorporated the principles Holmes expressed in *Pennsylvania Coal.* The factors that have "particular significance" in a takings inquiry were stated in *Penn Central Transportation Co. v. New York City,*[221] truly a landmark case: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action."[222] To some extent, these factors for consideration in a land-use takings inquiry are ill-suited to deciding a case that involves the taking of a claim. This is particularly true with respect to "investment-backed expectations." The decision whether a cause of action in tort has been taken by government action should not turn upon a formal or myopic application of such a commercially oriented test.[223] One could respond to that formalism by arguing that an

215. 260 U.S. 393 (1922) (state restrictions on coal mining to prevent subsidenee took petitioner's property without compensation, in violation of fifth amendment).

216. *Id.* at 415.

217. *Id.* at 413.

218. *Id.* at 414-15.

219. *Id.* at 414.

220. *Id.* at 415.

221. 438 U.S. 104 (1978).

222. *Id.* at 124 (citations omitted); *see also* Connolly v. Pension Benefit Guar. Corp., 106 S. Ct. 1018, 1026 (1986); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); PruneYard Shopping Center v. Robins, 447 U.S. 74, 82-83 (1980).

223. Investment-backed expectations are not the sine qua non of fifth amendment protection. For example, a person who acquires land by gift, descent, or devise ordinarily has no investment-backed expectations. Nonetheless, her rights in the property are protected by the takings clause. *See* Hodel v. Irving, 107 S. Ct. 2076, 2083 (1987) (Indian Land Consolidation Act, which abolished right to pass on certain property by descent or devise, is unconstitutional, although it is "dubious" whether owners had any investment-backed expectations in passing on property which they acquired by gift, descent or devise). However, the judge in the leading atomic testing case treated the absence of investment-backed expectations as dispositive of the plaintiffs' takings claim. *See In re* Consolidated United States Atmospheric Testing Litig., 616 F. Supp. 759, 770 (N.D. Cal. 1985) ("Unlike contract claims, the tort claims asserted here lack 'investment-backed expectations.' Not

injury is an "involuntary investment" in a tort suit. It makes more sense, however, to recognize that, where the property is a cause of action, the takings analysis may differ from the analysis in land-use regulation cases. This Comment contends that an inquiry into an alleged taking of a cause of action should focus on the impact of the government's action upon the tort claim and the public purpose served by that action.

The Supreme Court has recently returned to the Pennsylvania coal mines and reviewed a later subsidence law. Its decision in *Keystone Bituminous Coal Association v. DeBenedictis*[224] somewhat undermined the venerable *Pennsylvania Coal,* but the Court expounded principles that support this approach to the claims taking inquiry. In distinguishing *Pennsylvania Coal,* the Court recalled that the earlier decision had depended upon the "particular facts" of that case, whereas, "[n]ow, 65 years later, we address a different set of 'particular facts.' "[225] The Court then embarked upon an ad hoc, factual inquiry typical of takings jurisprudence. The decision that Pennsylvania's Subsidence Act did not take the mine owners' property rested upon two familiar pillars: (1) public purpose, and (2) diminution of values and investment-backed expectations.

Writing for the majority, Justice Stevens agreed that the public interest in protecting against the damage caused by subsidence was "genuine, substantial and legitimate."[226] For the majority, coal mining that causes subsidence is an "activity akin to a public nuisance."[227] It is well-established that the substantial public interest in preventing a public nuisance permits the government to act without offering compensation.[228]

Justice Stevens intimated that the public purpose/nuisance analysis was sufficient to sustain the Act,[229] but he went on to show that there had not been a diminution of value in investment-backed expectations sufficient to constitute a taking. Since the regulations accompanying the statute required the mine owners to leave only 2% of their coal in place,[230] "it [was] plain that the petitioners [did] not come close to satisfying their burden of proving that they [had] been denied the economically viable use of that property."[231]

---

only are they contingent by their nature, but they also arise in a field in which the law remains to be developed.") (citations omitted), *aff'd,* 820 F.2d 982 (1987), *cert. denied,* 56 U.S.L.W. 3590 (Feb. 29, 1988).

224. 107 S. Ct. 1232 (1987).

225. *Id.* at 1236.

226. *Id.* at 1242.

227. *Id.* at 1243.

228. *Id.* at 1245-46.

229. *Id.* at 1246.

230. The parties had stipulated to this effect. *Id.* at 1249.

231. *Id.*

Chief Justice Rehnquist dissented.[232] He questioned the expansive meaning given to the "nuisance exception." In addition, he would have found a diminution of value in investment-backed expectations sufficient to constitute a taking, given the complete destruction of petitioners' interests in that 2% of their property (amounting to 27 million tons of coal).[233]

Neither the majority nor the dissent seemed to question that the test for a regulatory taking requires a comparison of the property's value before and after the government's action.[234] However, as the majority stated, one critical issue in a takings inquiry is determining the unit of property "whose value is to furnish the denominator of the fraction."[235] Whereas the majority defined the unit of property as the total amount of coal owned by the petitioners,[236] the dissent claimed that "there is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property."[237] Given agreement on the unit of property, however, it seems clear that both sides would agree that the complete destruction of that unit, without sufficient public purpose,[238] constitutes a taking.

Section 2212 is a striking example of government action that completely destroys a cause of action. The statute provides that it shall be the "exclusive" remedy for all claims arising out of the atomic testing program.[239] Where the statute has been applied to pending litigation, it has extinguished the lawsuits. The plaintiffs are left with nothing after

232. The Chief Justice was joined in his dissent by Justices Powell, O'Connor, and Scalia. *Id.* at 1253.

233. *Id.* at 1254-61 (Rehnquist, C.J., dissenting).

234. The majority stated this explicitly. *Id.* at 1248. Chief Justice Rehnquist quarreled with the scope of the majority's implied distinction between regulatory takings and physical intrusions. *See id.* at 1258 (Rehnquist, C.J., dissenting). However, he acknowledged that his differing view of the diminution in value of petitioner's investment-backed expectations arose from his different definition of the relevant unit of property. *Id.*

235. *Id.* at 1248 (quoting Michelman, *supra* note 166, at 1192).

236. *Id.* at 1249.

237. *Id.* at 1259.

238. *Keystone* suggests that the abatement of a public nuisance is a sufficient public purpose for government regulation without compensation. *Id.* at 1246. *See also* Miller v. Shoene, 276 U.S. 272 (1928) (upholding uncompensated destruction of claimant's cedar trees because they endangered nearby apple trees that had greater value to the community). However, nuisance law is inapposite to the fifth amendment protection of a cause of action. The burden of showing an adequate public purpose to justify the uncompensated, complete destruction of property should be greater in the case of a tort claim.

239. "The remedies referred to in paragraph (1) shall be exclusive of any other civil action or proceeding for the purpose of determining civil liability arising from any aet or omission of the contractor without regard to when the act or omission occurred." 42 U.S.C. § 2212(a)(2) (Supp. III 1985). This precludes a suit in the Claims Court to ascertain the value of the plaintiff's claim for compensation. *In re* Consolidated United States Atmospheric Testing Litig., 616 F. Supp. 759, 770 n.11 (N.D. Cal. 1985), *aff'd*, 820 F.2d 982 (9th Cir. 1987) *cert. denied*, 56 U.S.L.W. 3590 (Feb. 29, 1988).

the operation of the FTCA exceptions and the *Feres* doctrine.[240]

The public purpose served by government action may, in a nuisance case, serve to insulate the government from a takings challenge. *Keystone* illustrates this. However, the public purpose is also related to the nature of the government action, and this may indicate a compensable taking. For example, in *Penn Central,* Justice Brennan emphasized "uniquely public functions": Government acquisitions that permit or facilitate such activities are more likely to be considered takings.[241] Professor Sax's original takings test is well-suited to this analysis of the public purpose.[242] He argued that the government owed compensation when it injured property interests in furtherance of the economic interests of some government enterprise. However, where the government mediated between private interests, compensation would not be required.[243]

In the case of atomic weapons testing, the government and the private contractors are, of course, eager to portray the program as the most unique of government functions.[244] They deny that there is a conflict between private parties, since the manufacture and detonation of nuclear weapons is a purely government enterprise. Section 2212 simply "clarifies" the situation: It precludes any dispute in the private sector by requiring the substitution of the United States as defendant. Not to be forgotten, either, is the economic benefit that the government gains by being able to extinguish the lawsuits brought against the contractors, since the United States would otherwise be obliged to indemnify the contractors for any damage awards.[245] Thus, the nature of the government's action and the total destruction of the plaintiffs' property combine to show that the contractor liability law effects a taking.

There are instructive parallels between this government action and

240. *E.g., In re* Consolidated United States Atmospheric Testing Litig., 820 F.2d 982 (9th Cir. 1987) *cert. denied,* 56 U.S.L.W. 3590 (Feb. 29, 1988); Hammond v. United States, 786 F.2d 8 (1st Cir. 1986).

241. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 128 (1978), citing as a leading example United States v. Causby, 328 U.S. 256 (1946) (overflights by military aircraft that destroyed the present use of the land). The duty to compensate stops short of the extreme case of military necessity, however. *Compare* United States v. Caltex, 344 U.S. 149 (1952) (no compensation for property destroyed in order to prevent it from falling into hands of the enemy) *with* Hohri v. United States, 782 F.2d 227, 243 (D.C. Cir. 1986) (only a showing of actual military emergency bars a takings clause claim), *vacated on other grounds,* 107 S. Ct. 2246 (1987).

242. *See* Sax, *Takings and the Police Power,* 74 YALE L.J. 36 (1964).

243. [W]hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.

*Id.* at 67.

244. *See supra* note 112 and accompanying text.

245. *See supra* note 113 and accompanying text.

the destruction of the materialmen's liens in *Armstrong v. United States.*[246] The *Armstrong* Court turned to the question whether there had been a taking after deciding that the materialmen's liens were fifth amendment property interests. The liens remained valid after the transfer of the materials, but they could no longer be enforced because of the sovereign immunity of the government and its property. "The result of this was a destruction of all petitioners' property rights under their liens . . . ."[247] The government argued that this operation of sovereign immunity could not constitute a taking. The Court acknowledged that it is difficult to draw the line between those destructions of property that are compensable takings and those that are merely "consequential" and not compensable. In this case, however, there was a total destruction of all value of the liens. This was no "mere 'consequential incidence' of a valid regulatory measure;" it had "every possible element of a Fifth Amendment 'taking.' "[248] The Court's explanation resonates powerfully in the context of section 2212:

> Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government *for its own advantage* destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. . . . Neither the boats' immunity . . . from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss *the Government was the direct, positive beneficiary.*[249]

In conclusion, the Court pointed out that the takings clause "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."[250]

It may well have been fair and sensible for the government to take possession of those unfinished hulls and construction materials in order to complete the boats, but it was wrong to victimize one small group in order to achieve that legitimate purpose. Part of the taxpayers' cost in obtaining those boats for the Navy was to pay the bill owing to the subcontractors. Similarly, in the case of atomic weapons testing, one might assume that the program was a legitimate, even a vital government activity. The question with respect to section 2212 is whether the risks of that program are public burdens that the government should not force the

246. 364 U.S. 40 (1960); *see supra* notes 178-81 and accompanying text.
247. *Armstrong,* 364 U.S. at 46.
248. *Id.* at 48.
249. *Id.* at 48-49 (emphasis added).
250. *Id.* at 49.

individual participants alone to bear. The government's assertion of the importance of nuclear testing to society as a whole should militate in favor of spreading its cost across the entire society.

### *E. The Obligation to Provide Just Compensation*

The discussion thus far has shown that the plaintiffs in the atomic testing litigation had a property interest in their causes of action and that section 2212 has taken that property. The final question is whether they have received the "just compensation" for that taking that the fifth amendment requires.[251] Justice Holmes warned against forgetting that changes introduced by government, however desirable they may be, must be paid for.[252] This is consistent with the premise of the takings clause that it is unfair to impose certain public burdens upon individuals. The standards that the Court has set concerning compensation give important insight into the policies of the takings clause.

In general, the standard set by the takings clause is a strict one. Not only must there be compensation; the compensation for a taking must be "just." This means that, at the time of the taking, there must be "reasonable, certain and adequate provision for obtaining compensation."[253] This may involve a comparison between the property interest which has been lost and that which is offered in its place.

Supreme Court decisions have indicated that the government does have considerable scope for fashioning an alternative remedy. For example, the rationale for upholding the Price-Anderson Act (which limits the liability of nuclear power plant operators) against both due process and takings challenges was the adequacy of the remedy that the Act substituted for common law tort claims.[254] The *assurance* that $560 million would be available to compensate those injured in a nuclear accident, plus the promise of congressional action to supplement that amount if necessary, convinced the Court that the Act provided a "fair and reasonable substitute for the uncertain recovery of damages."[255] In fact, this

251. The "public use" requirement, an additional element in takings clause analysis, is not an important issue in the assessment of § 2212. Public use is a constraint only after the government has taken property and offered compensation—which is precisely what § 2212 fails to do. Moreover, the public use requirement is the lightest of constraints. *See* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 239-41 (1984); Berman v. Parker, 348 U.S. 26, 31-33 (1954).

252. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922); *see also* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3150 (1987) ("California is free to advance its 'comprehensive program' . . . ; but if it wants an easement across the Nollans' property, it must pay for it.").

253. Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974) (quoting Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641, 659 (1890)); *see also* Dames & Moore v. Regan, 453 U.S. 654, 689 (1981); *cf.* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 150 (1978) (Rehnquist, J., dissenting) ("just" compensation should be a "full and perfect equivalent").

254. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88-92 (1978).

255. *Id.* at 90-91. Similar logic applies, of course, to worker's compensation statutes. *See, e.g.,*

statutory scheme possibly "would provide a more efficient and certain vehicle for assuring compensation" to those injured in a nuclear accident, since it included procedural guarantees and a secure source of funds from which to satisfy judgments.[256]

The district judge who examined the constitutionality of section 2212 in *Atmospheric Testing Litigation* began by asserting that the contractor liability statute "broke no new ground," because Congress has previously "substituted the FTCA remedy against the government for remedies available against private parties, and these acts have been uniformly upheld."[257] He offered as a leading example of such legislation the Swine Flu Act.[258] However, there is a crucial difference between that law and the contractor liability statute, which the district court did not mention and, perhaps, failed to see: The Swine Flu Act substituted the United States as defendant in place of vaccine manufacturers and distributors, but it expressly denied to the government the right to assert the sovereign immunity defenses available to it under the FTCA.[259] Under the Swine Flu Act, the government stood precisely in the shoes of the private defendants because it was able to assert only those defenses available to the private defendants it had replaced. The Swine Flu Act thus is not a precedent for the contractor liability statute; indeed, it illustrates what is *wrong* with section 2212.

It might have been reasonable to enact a genuine substitute remedy for the atomic veterans that operated in the way that the Swine Flu Act did.[260] However, that is not what section 2212 does. Rather, it offers a

---

Keller v. Dravo Corp., 441 F.2d 1239, 1242 (5th Cir. 1971) (upholding the exclusive remedy proviso of the Longshoremen's and Harbor Workers' Compensation Act and pointing out that the abolition of nonvested rights is especially innocuous when one remedy has been substituted for another), *cert. denied,* 404 U.S. 1017 (1972).

256. *Duke Power,* 438 U.S. at 89-90.

257. *In re* Consolidated United States Atmospheric Testing Litig., 616 F. Supp. 759, 766 (N.D. Cal. 1985). In affirming the district court decision, the Ninth Circuit adopted this analysis. 820 F.2d 982, 988 (9th Cir. 1987) *cert. denied,* 56 U.S.L.W. 3590 (Feb. 29, 1988).

258. Pub. L. No. 94-380, § 2, 90 Stat. 1113 (1976) (codified at 42 U.S.C. § 247b(j)-(*l*)), *repealed by* Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, § 202, 92 Stat. 3551, 3574. The law was upheld in Ducharme v. Merrill-National Laboratories, 574 F.2d 1307 (5th Cir.), *cert. denied,* 439 U.S. 1002 (1978).

259. The United States shall be liable with respect to claims . . . for personal injury or death arising out of the administration of swine flu vaccine . . . in the same manner and to the same extent as the United States would be liable in any other action brought against it under such section 1346(b) and chapter 171, except that . . . *the exceptions specified in section 2680(a) of title 28, United States Code, shall not apply in an action based upon the act or omission of a program participant.*

42 U.S.C. § 247b(k)(2)(A)(ii) (repealed 1978) (emphasis added).

260. Congressman Frank proposed this in the 1983 hearing. He saw merit in substituting the United States as defendant, but believed that this should be done in a way that would still permit the lawsuits to go forward. (For example, the law could bar the operation of the *Feres* doctrine.) When he proposed this to the witnesses, they were reluctant to give him a straight answer; but it became evident that they were opposed to a statute that would provide a genuine substitute remedy.

remedy with a catch, since the United States retains the full panoply of its sovereign immunity defenses. An assessment of section 2212 thus requires no difficult determination whether the compensation offered is or is not "just." The statute extinguishes the plaintiffs' causes of action and offers no compensation at all.

To summarize the takings issue: The veterans' tort claims are compensable property interests. The contractor liability law passed by Congress takes that property without providing just compensation. One may conclude, therefore, that section 2212 violates the takings clause of the fifth amendment. Considerations of fairness lead to the same conclusion. The very arguments that the government and the contractors used to push this law through Congress—that the atomic weapons program was a unique responsibility of the federal government and that it was of vital importance to the nation—support the proposition that the participants in the tests should not be required to pay the full price for the risks that were taken. The Supreme Court has frequently reaffirmed this element of equity in the fifth amendment, and its summary of the rule against uncompensated takings should apply to the contractor liability law: "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[261]

## CONCLUSION

This Comment has analyzed the constitutional defects of the atomic contractor liability statute, 42 U.S.C. § 2212. The principal objections to the law are that it intrudes into the judicial function, in violation of the separation of powers doctrine, and that it effects a taking of property without just compensation, in violation of the fifth amendment of the Constitution. These are two distinct problems, and it has been important to treat them separately in order to understand the different features of section 2212 and its operation. Yet closely related issues arise in both contexts: Retroactive laws that intrude into the judicial function may well take private property. Spanning both domains is the overarching notion that government should treat individuals fairly.

Perhaps the most important element which both the separation of

*Hearing, supra* note 7, at 28, 52-54. In 1986, the House of Representatives passed a bill that would have modified the operation of § 2212. The United States would still be substituted as defendant, but it would have only those defenses that were available to the private contractors. H.R. 1338, 99th Cong., 2d Sess., 132 CONG. REC. H2612-14 (daily ed. May 13, 1986). The administration opposed the bill. H.R. REP. No. 567, 99th Cong., 2d Sess. 7-14 (1986). The Senate did not pass H.R. 1338; it considered but did not pass a bill which would simply have repealed § 2212. S. 2454, 99th Cong., 2d Sess., 132 CONG. REC. S6047-53 (daily ed. May 15, 1986).

261. Agins v. Tiburon, 447 U.S. 255, 260 (1980).

powers and the fifth amendment issues share is the nature of the government's action here. The legislative history of section 2212 leaves a bitter taste; the statute emerges as a tawdry effort to shirk an obligation. The effort to gain an advantage for the government at the expense of relatively powerless individuals is the basis for bringing section 2212 within the rule of *Klein,* as articulated by *Sioux Nation:* Quite simply, Congress attempted to change the rules in pending litigation to force a decision of the controversy at issue in the goverument's favor.[262] This prescription of a rule of decision in a case pending before the courts violates the separation of powers. At the same time, the use of sovereign immunity to obtain a benefit for the fisc is an essential element of the "taking" effected by the statute. The contractor liability statute is reminiscent of the situation in *Armstrong,*[263] where, *for its own advantage,* the government destroyed the materialmen's liens. Bearing in mind the atomic contractors' indemnification agreements, it is clear that the government will be the "direct and positive beneficiary"[264] of this taking of the plaintiffs' property interests.

The catch in section 2212 resembles Catch-22, which so bedeviled Yossarian. It exhibits a "spinning reasonableness. There [is] an elliptical precision about its perfect pairs of parts that [is] graceful and shocking . . . ."[265] Section 2212 offers a "remedy" against the only proper defendant; it even extends the time for filing an administrative claim. Yet the plaintiff who pursues that remedy soon discovers that the only proper defendant in a suit for damages possesses a defense of sovereign immunity that defeats any claim for a remedy. Section 2212 does not provide a remedy. Instead, it eliminates a remedy by substituting a chimera for a pending cause of action. The courts should recognize the unfairness of the catch in section 2212 and refuse effect to this unconstitutional law.

*Carroll Dorgan**

262. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 404-05 (1980) (discussing United States v. Klein, 80 U.S. (13 Wall.) 128 (1872)).

263. Armstrong v. United States, 364 U.S. 40 (1960).

264. *Id.* at 49

265. J. HELLER, supra note 17, at 47.

* A.B. 1971, Harvard College; M.Sc. 1982, London Schiool of Economics & Political Science; third-year student, Boalt Hall School of Law, University of California, Berkeley.