10-1978

United States v. 564.64 Arces of Land, More or Less, Situated in Monroe and Pike Counties, Pennsylvania

Lewis F. Powell Jr.

PBS-11/8/78

Discuss
Grant

CA3 held that where the Gov't condemned a summer camp for children of indigents, it must pay "substitution costs" rather than market value.

The cost of acquiring a suitable new site and replacing the facilities will cost several times the market value of present Camp.

The "substitution cost" doctrine has not heretofore been applied to anything property except that of state & local govts - e.g. highways, bridges.

PRELIMINARY MEMORANDUM

November 22, 1978 Conference
List 1, Sheet 3

No. 78-488 Cert to CA 3
(Van Dusen, Rosen, Stern(dj))

UNITED STATES

v.

564.54 ACRES OF LAND Federal/Civil Timely

SUMMARY: The government seeks to reverse a ruling that private, non-profit organizations upon condemnation of their property can receive substitution costs instead of fair market value if the organization's property serves a "public benefit".

FACTS AND DECISION BELOW: The government initiated condemnation proceedings in 1970 against property owned by the

Dismiss - I would grant. Paul

Southeastern Pennsylvania Synod of the Lutheran Church of America and used as a summer camp for young people. The camp was operated on a non-profit basis, and one of its several functions was to permit inner-city children to spend some time in the country. The Synod, anticipating the proceedings, earlier had purchased a replacement site in the Poconos. The Synod offered to prove that the cost of developing new camps on the replacement site would be $ 5.8 million. The government contended fair market value did not exceed $ 485,000. A large part of this discrepancy apparently is due to environmental and other regulations which, because of grandfathering, do not apply to the existing facility but would to a new camp. The district court ruled that the Synod would be entitled only to the fair market value of the property, not the cost of obtaining a substitute facility. On an interlocutory appeal under 28 U.S.C. § 1292(b), the Third Circuit reversed. United States v. 564.54 Acres, 506 F.2d 796 (3d Cir. 1974) (Hastie, Gibbons, Weis). Although fair market value was the standard measure of damages in a condemnation proceeding, courts traditionally had applied substitution costs as an alternative measure when the condemnee was a government entity under a legal obligation to replace the facility condemned. More recent decisions also had allowed substitution costs even where the government entity was not obligated legally to provide the services, as long as the public benefits derived from the property were "necessary" to the community. The court saw no reason to distinguish private, non-profit entities from

governmental bodies, as both could provide public benefits. Accordingly, the Synod would be entitled to receive substitution costs if it could prove that the property condemned provided a community benefit.

The question whether the property provided a community benefit, thus entitling the Synod to substitution costs, was put to the jury, which answered an interrogatory to that effect in the negative. The jury also returned a verdict for the Synod of $ 740,000.

On appeal, a divided panel of the Third Circuit reversed. In arguing to the jury that the camp was not a non-profit facility, the government argued that, in light of the various religious facilities which the camp contained, the Synod was realizing a "religious profit" which rendered it ineligible to receive the higher valuation. Further, the jury was instructed that the camp could be regarded as "reasonably necessary" to a community benefit, and therefore eligible for the higher valuation, only if it fulfilled a community need that otherwise would go unmet. The government's argument was error, as pecuniary profit was the only criterion for non-profit status. The instruction was too restrictive, as property should qualify for the higher valuation if it provided any community benefit, even if not "necessary" in the sense of "indispensible". District Judge Stern concurred. He believed the earlier interlocutory decision was wrong and objectionable, but as he lacked the power to vote for a rehearing he felt constrained to follow the prior decision. Judge Rosenn

dissented, arguing that the government's improper remarks were cured by corrective instructions and that the instructions on community benefit were not erroneous.

CONTENTIONS: The government contends the application of the substitution costs standard to non-governmental entities by the court below is unprecedented and erroneous. The standard entails a substantial subsidy and windfall profits, inasmuch as depreciation of the condemned property is not deducted from the award. Hence the condemnee is able to replace depreciated facilities with new ones at public expense. This standard makes sense when the facilities are unique and nonmarketable, such as streets, highways, and bridges, and where the condemnee lies under an obligation, either legal or practical, to replace the facilities condemned. But private entities, unlike governmental bodies, are not so obliged and should not receive such a subsidy. Further, it is wrong to permit such a substantial difference in valuation to hinge on a jury determination of public benefit. Such an open-ended inquiry invites discrimination and unfairness. The inquiry is especially objectionable in cases such as this one, where the condemnee is a religious organization and its facility had a religious purpose. Inviting a jury to decide which religious functions provide a public benefit presents serious First Amendment problems.

The Synod argues that the indemnification principles applied here are well-settled and that the decision below does not represent a departure from prior law. There are no First

Amendment overtones, as the secular purpose of the facility, and not its religious sponsorship, is the only question for the jury. Finally, the decision below is interlocutory, and the government still might win after a new trial.

DISCUSSION: Contrary to respondent's assertions, the decision below constitutes a substantial extension of the substitute cost valuation method and lacks any precedent. Neither the court below nor respondent have cited a single case where a private party was allowed to benefit from the substitution costs standard. The first Third Circuit decision did cite Brown v. United States, 263 U.S. 78 (1923), as authority for the application of the substitution costs standard to non-governmental entities. Brown involved a challenge to the government's authority to condemn land needed to relocate a town which had been uprooted by the construction of a reservoir. The Court held that the condemnation power properly extended to the obtaining of property needed to substitute for private property condemned for a public purpose. There was no valuation issue in that case at all.

As the government points out, substitution cost is a fair measure of damages where, for one reason or another, the condemnee must replace the facilities. Among other things, the standard recognizes that an entity which must obtain new property at any cost does not have the same bargaining power as one which can wait until the price is right. In such situations, the standard simply provides an alternative means of arriving at the true value of property when market

distortions prevent the realization of fair market value. The decision below turned this rationale on its head and regarded substitution costs as a subsidy to be given to "good works", rather than as an evaluation method. Further, the standard applied is both unfair and potentially discriminatory. It is unfair because not only non-profit organizations provide benefits to the community. As Judge Stern's opinion points out, a factory that provides employment also renders a substantial community benefit. The standard is potentially discriminatory because it is so amorphous, and invites juries to favor functions they like. Contrary to respondent's contentions, relgious purposes will be a factor in this evaluation.

Finally, if review is granted now and the decision of the court below is reversed, the jury verdict can be reinstated and there will be no need for a new trial. In this sense, the case is not interlocutory and is ripe for review.

There is a response.

11/8/78 Stephan opns in petn

November 22, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 78-488

UNITED STATES

vs.

564.54 ACRES, PA.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.		✓											
Stewart, J.		✓											
White, J.		✓											
Marshall, J.		✓	✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										

P. 8

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: 8 MAY 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-488

United States, Petitioner,
v.
564.54 Acres of Land, More or Less, situated in Monroe and Pike Counties, Pennsylvania, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1979]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the proper measure of compensation when the Government condemns property owned by a private nonprofit organization and operated for a public purpose. In particular, we must decide whether the Just Compensation Clause of the Fifth Amendment [1] requires payment of replacement cost rather than fair market value of the property taken.

I

Respondent, the Southeastern Pennsylvania Synod of the Lutheran Church in America, operates three nonprofit summer camps along the Delaware River. In June 1970, the United States initiated a condemnation proceeding to acquire respondent's land for a public recreational project. Before trial, the Government offered to pay respondent $485,400 as the fair market value of its property. Respondent rejected the offer and demanded approximately $5.8 million, the asserted cost of developing functionally equivalent substitute facilities

[1] The Fifth Amendment of the Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation."

Out
I was absent (operation) when this was argued
T. F. P.

at a new site. This substantial award was necessary, respondent contended, because the new facilities would be subject to financially burdensome regulations from which existing facilities were exempt under grandfather provisions.

In a pretrial ruling, the District Court held that the "substitute facilities," or replacement cost, measure of compensation was available only to governmental condemnees, and that respondent therefore was entitled only to the fair market value of its property. App. 38–48. On interlocutory appeal, the Court of Appeals for the Third Circuit reversed. 506 F. 2d 796 (1974). Relying on other circuit court decisions,[2] the Court of Appeals determined that in condemnations of property belonging to States or their subdivisions, the Fifth Amendment requires an award of replacement cost "so that the functions carried out by or on behalf of members of the community may be continued." *Id.*, at 799–800.[3] Since the Fifth Amendment refers expressly to private but not to public property, the court reasoned that the Framers could not have "intended to impose a greater obligation of indemnification" toward public entities than toward private owners. *Id.*, at 801. Accordingly, the Court of Appeals applied standards governing condemnations of publicly owned property, and held that substitute facilities compensation was available to

[2] See, *e. g.*, *United States* v. *Certain Property*, 403 F. 2d 800 (CA2 1968); *United States* v. *Board of Education of Mineral County*, 253 F. 2d 670 (CA4 1958); *State of Washington* v. *United States*, 214 F. 2d 33 (CA9), cert. denied, 348 U. S. 862 (1954); *City of Fort Worth* v. *United States*, 188 F. 2d 217 (CA5 1951).

[3] This Court has not passed on the propriety of subetitute facilities compensation for public condemnees. Although the Court of Appeals cited *Brown* v. *United States*, 263 U. S. 78 (1923), as "the genesis of the substitution of facilities method of measuring fair compensation," 576 F. 2d 796, 802 (CA3 1977), that case addressed the scope of the Government's condemnation power, not the compensation requisite under the Fifth Amendment. In light of our disposition of this case, we express no opinion on the appropriate measure of compensation for publicly owned property.

private nonprofit owners if there was no "ready market" for the condemned property and if the facilities were "reasonably necessary to public welfare." *Id.*, at 800. The case was remanded to the District Court for consideration of whether respondent's property met this test.

After a 10-day trial, the District Court instructed the jury regarding the prerequisites for a substitute facilities award. In particular, the court charged that there was no "ready market" for respondent's facilities if "the fair market value of the condemned property [was] substantially less than the cost of constructing functionally equivalent substitute facilities." See 576 F. 2d 983, 992 n. 9 (CA3 1977). The District Court further instructed that the property was "reasonably necessary to public welfare" if it "fulfill[ed] a community need or purpose." See *id.*, at 995 n. 16. The jury found that respondent was not entitled to substitute facilities compensation, and after considering additional evidence, awarded $740,000 as the fair market value of the property.

A different panel of the Court of Appeals reversed. *Id.*, at 996. Although the court found that the jury instructions on the ready-market issue were not fundamentally in error,[4] it disagreed with the District Court's interpretation of the reasonable necessity requirement. Under the Court of Appeals' theory, this test was met if the facility "provide[d] a benefit to the community that [would] not be as fully provided after the facility [was] taken." *Id.*, at 995. Because the jury instruction had been framed in terms of necessity rather than community benefit, the court concluded that a

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[4] The Court of Appeals, however, did seek to clarify the ready-market criterion, holding that

"regardless of whether the Synod could have sold the camps, and regardless of whether the camps had fair market value, this condition . . . is met if the Synod could not have replaced the camps' facilities in the market place for a cost roughly equivalent to the fair market value of the camps." 576 F. 2d 983, 991 (CA3 1977).

new trial was required. One judge, concurring, agreed that the trial court's charge had not been consistent with the Court of Appeals' interlocutory decision, but argued that the prior opinion, although controlling, was incorrect. *Id.*, at 996–1000. The third member of the panel dissented on the ground that the District Court had adhered to the principles previously enunciated in the interlocutory opinion. *Id.*, at 1001–1010.

We granted certiorari, — U. S. — (1978), and now reverse.

II

A

In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property "in as good a position pecuniarily as if his property had not been taken." *Olson* v. *United States*, 292 U. S. 246, 255 (1934).[5] However, this principle of indemnity has not been given its full and literal force. Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. See *United States* v. *Miller*, 317 U. S. 369, 374 (1943); *United States* v. *Cors*, 337 U. S. 325, 332 (1949). The Court therefore has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *United States* v. *Miller*, *supra*, at 374; accord, *City of New York* v. *Sage*, 239 U. S. 55, 61 (1915); *United States* v. *Virginia*

[5] Accord, *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326 (1892); *United States* v. *Miller*, 317 U. S. 369, 373 (1943); *United States* v. *Virginia Electric Power Co.*, 365 U. S. 624, 633 (1961); *United States* v. *Reynolds*, 397 U. S. 14, 16 (1970); *Almota Farmers Elevator and Warehouse Co.* v. *United States*, 409 U. S. 470, 473–474 (1973).

Electric Power Co., 365 U. S. 624, 633 (1961); *Almota Farmers Elevator and Warehouse Co.*, 409 U. S. 470, 474 (1973).

Although the market value standard is a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole,[6] the Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property. Thus, we have held that fair market value does not include the special value of property to the owner arising from its adaptability to his particular use. *United States* v. *Miller*, *supra*, at 374–375; *United States* v. *Cors*, *supra*, at 332. As Justice Frankfurter explained in *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 5 (1949):

> "The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship."

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[6] The standard is most accurate with respect to readily salable articles, for example, merchandise, because the value of such property is ordinarily what it can command in the marketplace. See *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396, 404 (1949).

See 1 L. Orgel, Valuation Under Eminent Domain § 14 (2d ed. 1953). In short, the concept of fair market value has been chosen to strike a fair "balance between the public's need and the claimant's loss" upon condemnation of property for a public purpose. *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396, 402 (1949); see also *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 280 (1943).

But while the indemnity principle must yield to some extent before the need for a practical general rule, this Court has refused to designate market value as the sole measure of just compensation. For there are situations where this standard is inappropriate. As we held in *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 123 (1950):

> "[W]hen market value has been too difficult to find or when its application would result in manifest injustice to the owner or public, courts have fashioned and applied other standards. . . . Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" (Footnote omitted.)

See also *United States* v. *Cors*, *supra*, at 332; *United States* v. *Toronto, Hamilton, & Buffalo Navigation Co.*, *supra*, at 402; *United States* v. *Miller*, *supra*, at 374.[7] Hence, we must determine whether application of the fair market value standard here would be impracticable or whether an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment.

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[7] To be sure, the issue in these cases was whether the asserted market value exceeded the compensation necessary to indemnify the condemnees. But "the principle, as stated in the *Commodities Trading* opinion, must work both ways." *Matter of Valuation Proceedings*, 445 F. Supp. 994, 1031 (Sp. Ct. R. R. R. A. 1977) (Friendly, J.).

B

The instances in which market value is too difficult to ascertain generally involve property of a type so infrequently traded that we cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale of the condemned property. See *United States* v. *Toronto, Hamilton, & Buffalo Navigation Co.*, *supra*, at 402; cf. *United States* v. *Miller*, 317 U. S., at 374–375. This might be the case, for example, with respect to public facilities such as roads or sewers. But respondent's property does not fall in this category.[8] There was a market for camps, albeit not an extremely active one. The Government's expert witness presented evidence concerning 11 recent sales of comparable facilities in the vicinity, and estimated that respondent's camps could have been sold within six months to a year after they were offered for sale. Tr. 256–258, 263–264, 269–276. Indeed, respondent's own expert testified that he had prepared an appraisal of the camps' fair market value on the date of the taking. App. 143–144. And the Court of Appeals implicitly acknowledged that the market value of nonprofit property is ordinarily ascertainable since application of the court's "ready market" criterion requires assessment of fair market value. See n. 4, *supra*. Thus, it seems clear that respondent's property had a readily discernible market value. The only remaining inquiry is whether such an award would impermissibly deviate from the indemnity principle.

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[8] The jury's determination that the camps had a market value of $740,000 does not resolve the issue whether market value was in fact ascertainable. That issue depends on whether evidence could feasibly be obtained to present a jury question on the appropriate market value. Such an inquiry is related to the one an appellate court would undertake in reviewing the sufficiency of the evidence to support a jury's market value determination. However, in the latter circumstance, the issue would be whether evidence was *in fact presented* from which the jury could rationally arrive at its result.

Emphasizing that the primary value of the condemned property lies in the use to which it is put, respondent argues that ~~market compensation~~ would be unjust in the present context. Because new facilities would bear financial burdens imposed by regulations to which the existing camps were not subject, an award of market value would preclude continuation of respondent's use. Brief for Respondent 5. Respondent therefore concludes that such a recovery would be insufficient to indemnify for its loss. See 506 F. 2d, at 798.

However, it is not at all unusual that property uniquely adapted to the owner's use has a market value on condemnation which falls far short of enabling the owner to preserve that use. Such a situation may often arise, for example, where a family home has been built to the owner's tastes, but is old and deteriorated, or where a structure, like respondent's camps, is exempt from regulations applicable to new facilities. Cf. 1 L. Orgel, § 14, at 172. Yet the Court has previously determined that nontransferable values arising from the owner's unique need for the property are not compensable, and has found that this divergence from full indemnification does not violate the Fifth Amendment. See *supra*, at ——.

We are unable to discern why a different result should obtain here. That respondent is a nonprofit organization may provide some basis for distinguishing it from business enterprises, since the uses to which commercial property ~~is~~ put can often be valued in terms of the capitalized earnings produced. See 506 F. 2d, at 799; 1 L. Orgel, *supra*, § 157. Cf. *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S., at 403. But there is no reason to treat respondent differently from the many private homeowners and other noncommercial property-owners who neither derive earnings from their property nor hold it for investment purposes. Unless the Just Compensation Clause mandates a Government subsidy for nonprofit organizations, a proposition we find patently implausible, respondent's nonprofit status does not require us to reject application of the fair market value standard.

Nor is it relevant in this case whether respondent's camps were reasonably necessary to the public welfare. In condemnations of property owned by public entities, lower courts have applied the reasonable necessity standard to determine if the entity has an obligation to continue providing the facilities taken. See, *e. g.*, 506 F. 2d, at 800; *United States* v. *Streets, Alleys & Public Ways*, 531 F. 2d 882, 886 (CA8 1976); *United States* v. *Certain Property*, 403 F. 2d 800 (CA2 1968). This duty may be legally compelled or arise from necessity; "the distinction has little practical significance in public condemnation." 403 F. 2d, at 803 (citation omitted). If the condemnee has such a duty to replace the property, these courts have reasoned that only an award of the costs of developing requisite substitute facilities will compensate for the loss.

Whatever the merits of this reasoning with respect to public entities, see n. 3, *supra*, it does not advance analysis here. For respondent is under no legal or factual obligation to replace the camps, regardless of their social worth. As a private entity, respondent is free to direct its resources to serve its own institutional objectives, which may or may not correspond with community needs. Awarding replacement cost on the theory that respondent would continue to operate the camps for a public purpose would thus provide a windfall if substitute facilities were never acquired, or if acquired, were later sold or converted to another use.

Finally, that the camps may have benefited the community does not warrant compensating respondent differently from other private owners. The community benefit which the camps conferred might provide an indication of the public's loss upon condemnation of the property. But we cannot accept the Court of Appeals' conclusion that this loss is relevant to assessing the compensation due a private entity. The court noted that "[o]ne rationale for the substitute facilities measure is to indemnify not only the owner of the condemned facilities, but those who have an interest in the continuing

existence of the facilities, in this case, according to the Synod, the general public." 576 F. 2d, at 989 n. 4. The guiding principle of just compensation, however, is that the *owner* of the condemned property "must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U. S., at 255. Respondent did not hold its property as the public's trustee and thus is not entitled to be indemnified for the public's loss. Moreover, many condemnees use their property in a manner that confers a benefit on the community, and there is no sound basis for considering this factor only in condemnations of property owned by nonprofit organizations. And to make the measure of compensation depend on a jury's subjective estimation of whether a particular use "benefits" the community would conflict with this Court's efforts to develop practical valuation standards.

In sum, we find no circumstances here that require suspension of the normal rules for determining just compensation. Respondent, like other private owners, is not entitled to recover for nontransferable values arising from its unique need for the property. To the extent denial of such an award departs from the indemnity principle, it is justified by the necessity for a workable measure of valuation. Allowing respondent the fair market value of its property is thus consistent with the "basic equitable principles of fairness," *United States* v. *Fuller*, 409 U. S. 488, 490 (1973), underlying the Just Compensation Clause.

The judgment of the Court of Appeals is

Reversed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 3, 1979

Re: 77-488 - United States v. 564.54 Acres of Land

Dear Thurgood:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 3, 1979

Re: No. 78-488 - United States v. 564.64 Acres of Land

Dear Thurgood:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 3, 1979

RE: No. 78-488 United States v. 564.54 Acres of Land

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

May 3, 1979

78-488 U.S. v. 564.54 Acres

Dear Thurgood:

Please show on the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 4, 1979

Re: No. 78-488 - United States v. 564.54 Acres of Land

Dear Thurgood:

Please join me.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 4, 1979

Re: 78-488 - United States v. 564.54 Acres of Land

Dear Thurgood:

Please join me.

Respectfully,

JPS

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 8, 1979

Dear Thurgood:

Re: 78-488 U.S. v. 564.54 Acres of Land, Etc.

I join.

Regards,

WEB

Mr. Justice Marshall

cc: The Conference

Have I written an Opinion in this case?

Due to my surgery I was out of this case

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 10 MAY 1979

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-488

United States, Petitioner, *v.* 564.54 Acres of Land, More or Less, situated in Monroe and Pike Counties, Pennsylvania, et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1979]

MR. JUSTICE WHITE, concurring in the opinion and the judgment.

The Court rejects the claim that the measure of compensation in this case is the cost of substitute facilities rather than the fair market value of the taken property, here a camp owned by a private, nonprofit corporation. I am in full agreement. The substitute facilities doctrine is unrelated to fair market value and does not depend on whether fair market value is readily ascertainable; rather, it unabashedly demands additional compensation over and above market value in order to allow the replacement of the condemned facility.[1] In those cases where it has been applied, primarily where public facilities have been condemned, the basic premise is that the condemnee is under some obligation to continue the functions performed on the taken property.[2] But I do not understand

[1] See 576 F. 2d 983, 991 (CA3 1977), quoted *ante* n. 4; *United States* v. *Streets, Alleys & Public Ways*, 531 F. 2d 882 (CA8 1976); *United States* v. *Certain Property in Borough of Manhattan*, 403 F. 2d 800 (CA2 1968); *United States* v. *Certain Land in Borough of Brooklyn*, 346 F. 2d 690 (CA2 1965); *United States* v. *Board of Education*, 253 F. 2d 690 (CA4 1958); National Conference of Commissioners on Uniform State Laws, Uniform Eminent Domain Code, § 1004 (b).

[2] See, *e. g.*, *United States* v. *Certain Land in Borough of Brooklyn*, *supra*, at 694; 576 F. 2d, at 992–995.

how a duty to replace the condemned facility justifies paying more than market value. Obviously, replacing the old with a new facility will cost more than the value of the old, but the new facility will itself be more valuable and last longer.[3] This is true with respect to condemnation of any facility, whether or not there is an obligation to reproduce it, and I had not understood ~~that~~ the just compensation clause to guarantee subsidies to either private or public projects. Similarly, if more demanding building codes or other regulations will enhance the cost of replacement, it is reasonable to assume that compliance itself will be of some benefit to the owner and hence need not be financed by the condemnor.

It may be that a condemnee's obligation to continue the function performed on the condemned property and hence to replace the facility taken will result in loss of value in that the condemnee does not have the option of investing his fair-market-value award in a project that will provide the condemnee with greater net benefits than would replacement of the taken facility. But the existing law imposing the obligation presumably embodies the policy judgment that alternative projects, from which the condemnee might or might not derive more benefits, should not be made available to the condemnee. Even if some incremental loss due to legal constraints on the obligated condemnee's options is thus imposed, it is sheer speculation to assume that this loss will be equal to the full increase in cost of the facility to be reproduced or replaced. It seems to me that the argument for enhanced compensation to the obligated condemnee is nothing more

[3] The substitute facilities measure applied by the Court of Appeals in this case appears to contemplate payment of reproduction costs, not replacement costs, see 576 F. 2d, at 999, and n. 2 (Stern, J., concurring); 506 F. 2d 796, 799–800 (CA3 1976) (*Acres I*). As noted in *United States* v. *Certain Property in Borough of Manhattan*, *supra*, at 804, courts applying the substitute facilities measure have taken different positions regarding whether depreciation should be deducted from the cost of a new facility.

than a particularized submission that the award should exceed fair market value because of the unique uses to which the property has been put by the condemnee or because of the unique value the property has for it.

I thus agree with the Court that the just compensation clause does not require payment of the cost of a substitute facility where the condemnee is a private organization, even if it could be said that such an owner is in some sense obligated to replace the property [4] or that the public has a stake in the continuance of the function that is being carried on the taken property.[5] I also have substantial doubt that the clause should be any differently construed and applied where public property is condemned, whether or not the function conducted on the property must be continued at another location. That issue, however, is not before the Court and is expressly put aside for another day.

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[4] The Court states that respondent "is under no legal or factual obligation to replace the camps. . . ." Although respondent, which is subject to the Pennsylvania Non-Profit Corporation Law of 1972, Pa. C. S. § 7549 (1975), apparently is not legally obliged to replace its camps, other private, nonprofit enterprises may be under a legal obligation—imposed by their own articles of incorporation, by the terms under which gifts are made to them, or directly by state law—to continue financing of certain facilities or functions. Indeed, private organizations operated for profit may be under contractual or other legal obligation to replace a condemned facility.

[5] For purposes of deciding whether an obligation to replace requires a condemnation award greater than market value, it is seemingly irrelevant to whom the benefits of ownership may be said to accrue, be this the "public" or private entities.

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
				4/27/79				
join TM 5/8/79	join TM 5/3/79	join TM 5/3/79	1st draft Cert in part + dissenting in part 5/10/79 2nd draft 5/11/79	1st draft 5/2/79 2nd draft 5/4/79	join TM 5/3/79	out letter 5/3/79	join TM 5/4/79	await decision 5/3/79 join TM 5/4/79
				78-488 U.S. v. 564.54 Acres				