

In order to combat terrorism, Congress enacted a statute authorizing the president to construct surveillance facilities on privately owned property if the president determines that the construction of such facilities is "necessary to safeguard the security of the United States." The statute provides no compensation for the owner of the land on which such facilities are constructed and provides that the surveillance facilities are to be owned and operated by the United States government.

Pursuant to this statute, the president has determined that the construction of a surveillance facility on a very small, unused portion of an owner's large tract of land is necessary to safeguard the security of the United States. The construction and operation of the facility will not affect any of the uses that the owner is currently making of the entire tract of land.

The owner has filed suit to challenge the constitutionality of the construction of a surveillance facility on the portion of land at issue without compensation.

How should the court rule?

- A. The construction and operation of the facility would not interfere with any use the owner is currently making of the entire tract of land, and therefore the owner would not be entitled to any compensation.
- B. The construction of the facility would be a taking of the owner's property for which the owner must be compensated.
- C. The construction of the facility would be valid without any compensation, because it has been determined to be necessary to protect a compelling government interest in national security.
- D. The construction of the facility would single out the owner for adverse treatment in violation of the equal protection component of the Fifth Amendment.

Explanation:

Fifth Amendment takings

Type	Attributes
Physical	<ul style="list-style-type: none">• Possession or permanent physical invasion of property
Regulatory	<ul style="list-style-type: none">• Deprivation of all economically beneficial uses• Restricts use under totality of circumstances:<ul style="list-style-type: none">– character of government action– economic impact– reasonable investment-back expectations
Exaction	<ul style="list-style-type: none">• Condition to obtain building/development permit
Destruction	<ul style="list-style-type: none">• Destruction of property or property interest (eg, easements, liens)

A **physical taking** occurs when the government **permanently and physically occupies** private property—regardless of the size of the property or how the owner has used it. And the Fifth Amendment **takings clause** bars the government from taking private property unless (1) the taking is for a **public use** and (2) the owner receives **just compensation** (ie, the property's fair market value).

Here, the federal government seeks to construct and operate a surveillance facility on the owner's land (permanent and physical occupation) to combat terrorism (public use). Although the facility will only occupy a small, unused portion of the owner's land and will not interfere with his use of the rest of the land, the government's action constitutes a taking (**Choice A**). Therefore, the court should rule that the owner is entitled to just compensation.

(**Choice C**) Almost all takings require just compensation—even when the taking is necessary to protect a compelling government interest (eg, national security). The only minor exception to this rule is an *imminent* public emergency. But since there is no indication that a terror attack is imminent, this exception does not apply.

(**Choice D**) This government action may trigger the **equal protection** component of the Fifth Amendment, which applies when the federal government treats similarly situated persons differently. But this component is not violated since the government action is rationally related to the government's legitimate interest in national security.

Educational objective:

The Fifth Amendment takings clause bars the government from taking—eg, permanently and physically occupying—private property for public use without just compensation, regardless of the size or use of the property.

References

- Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 434 (1982) (holding that a permanent, physical invasion of private property by the government always constitutes a taking).
- 26 Am. Jur. 2d Eminent Domain § 10 (2019) (explaining permanent and physical occupation).

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