

**DUE PROCESS AND EVICTION FROM PRIVATIZED  
MILITARY HOUSING—IS THE COMMANDER KING?**

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*[P]laintiffs have asserted that Mr. Adamski's interest in access to the Presidio of Monterey premises is that of a lessee's leasehold interest in real property. Such an interest is somewhat stronger than the interests at issue in Albertini I & II (interest as an invitee to open house at military reservation) and Cafeteria and Restaurant Workers Union (restaurant worker's interest in access to her place of employment). However, plaintiffs cite no cases that provide that a property interest outweighs the "substantial" interest of a base commander in maintaining control over who may enter a military reservation.<sup>1</sup>*

## I. Introduction

Does a commander have plenary authority to bar civilians from military installations? The Supreme Court has addressed this question in a variety of cases involving issues such as the right to free speech and

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<sup>1</sup> *Adamski v. Martis*, 2007 U.S. Dist. LEXIS 53160, at \*13 (order denying Petitioner's Application for Temporary Restraining Order).

employment rights.<sup>2</sup> In most of these cases, the Court has upheld the commander's authority to bar civilians from a military installation. There have been exceptions, however, where courts have found that the Government has limited or no authority to exercise its exclusionary authority.<sup>3</sup> Against this backdrop, recent litigation in the Northern District of California has brought to the forefront a contemporary issue that has yet to be addressed by the courts. During the past decade, the Department of Defense (DoD) has implemented the Military Housing Privatization Initiative (MHPI). The MHPI authorizes the government to lease land located on military installations to private contractors. The private contractors then construct housing units and lease those units to military personnel, DoD personnel, and private citizens. Due to the implementation of the MHPI, commanders must now craft appropriate procedures to exclude from the installation civilians who are leasing a home from a private contractor within the confines of the installation.

In May of 2007, Mr. Joseph Adamski, a civilian, was barred from the Presidio of Monterey installation by the Garrison Commander.<sup>4</sup> The Commander barred Mr. Adamski because he was a registered sex offender and his presence was affecting the "good order and discipline of the military community" and "the well being of other residents in the military housing community."<sup>5</sup> Although bar actions are an everyday occurrence throughout the military, this particular case is unique because Mr. Adamski resided in housing located within the confines of the military installation.<sup>6</sup> When the garrison commander barred him from the installation, she was in effect evicting Mr. Adamski from his residence.<sup>7</sup> Mr. Adamski's suit against the garrison commander alleged that the "eviction" violated the Constitution.<sup>8</sup> In support of his petition to the court, Mr. Adamski raised a variety of issues involving various aspects of the Fifth Amendment.<sup>9</sup>

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<sup>2</sup> See, e.g., *Greer v. Spock*, 424 U.S. 828 (1976) (holding that the commander has the authority to exclude political speech from the installation); *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961) (holding that the commander has the authority to summarily exclude civilians from the installation).

<sup>3</sup> See, e.g., *Flower v. United States*, 407 U.S. 197, 198 (1972) (holding that the commander had forfeited the right to exclude political speech from a thoroughfare that had been opened up by the military to public use).

<sup>4</sup> *Adamski*, 2007 U.S. Dist. LEXIS 53160, at \*4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*2.

<sup>7</sup> *Id.* at \*5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

The first portion of this article analyzes the court's denial of Mr. Adamski's Petition for a Temporary Restraining Order directing the commander to halt the "eviction proceedings."<sup>10</sup> This article focuses on the court's treatment of Mr. Adamski's assertion that his unilateral eviction from the installation violated his procedural due process rights. The second portion of this article places the constitutional issues raised in *Adamski* within the context of the MHPI. Problems with the MHPI have been identified in the past, most notably in a 2002 *Air Force Law Review* article.<sup>11</sup> With developments such as Mr. Adamski's suit arising, however, a closer look at the particular issue of barment, or exclusion from the installation, is needed.<sup>12</sup> It is probable, given the ongoing expansion of the MHPI, that Mr. Adamski's suit is not the last of its type and that future courts may disagree with the Northern District of California. Indeed, this article concludes that the procedures currently in place lack the prerequisite guarantees of due process for the potentially excluded civilian tenant. Finally, this article considers the constitutional principles that arose in *Adamski* and develops courses of action for commanders to remove unwanted tenants from privatized housing that will satisfy both constitutional and military operational concerns.

## II. The Commander's Power to Bar Civilians from Military Installations

### A. Authority of a Commander to Exclude

A commander's authority to exclude civilians from military installations is grounded in both statutory and case law.<sup>13</sup> The primary statutory authority is found in 18 U.S.C. § 1382.

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<sup>10</sup> *Id.* at \*1.

<sup>11</sup> Captain Stacey A. Remy Vest, *Military Housing Privatization Initiative: A Guidance Document for Wading Through the Legal Morass*, 53 A.F. L. REV. 1 (2002). This article addressed a number of MHPI issues including the history of the initiative, contract formation and contract performance issues. *Id.*

<sup>12</sup> *Id.* at 29.

<sup>13</sup> See *Cafeteria & Rest. Union Workers, Local 437 v. McElroy*, 367 U.S. 886, 890 (1961) (stating that the "control of access to military base is clearly within constitutional powers granted to both Congress and President," and Navy Regulations approved by the President are endowed with sanction of law, thus, commanding officer of a Naval installation has power summarily to deny access to such installation to any person because of determination by installation's security officer that such person fails to meet security requirements); *Greer v. Spock*, 424 U.S. 828 (1976) ("A necessary concomitant of the basic function of a military installation has been the historically unquestioned

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or **installation**, for any purpose prohibited by law or lawful regulation; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or **installation**, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—

Shall be fined under this title or imprisoned not more than six months, or both.<sup>14</sup>

This statutory authority has also been implemented in a variety of DoD and military service regulations.<sup>15</sup> A civilian who violates or ignores a commander's order not to enter the installation can be charged with trespassing.

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power of its commanding officer summarily to exclude civilians from the area of his command.”); *United States v. Floyd*, 477 F.2d 217 (10th Cir. 1973).

It is within the sole discretion of the commanding officer of a “closed base” to promulgate rational regulations excluding people from the military installation in the interest of the national security. He has practically exclusive and extensive power to exclude persons from the base in the interest of good order and military discipline.

*Id.* at 223.

<sup>14</sup> 18 U.S.C. § 1382(E) (2006).

<sup>15</sup> *See, e.g.*, U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM para. 3-22(d) (10 Oct. 2007).

*Bar from installation.* A commander of an installation in the United States has the inherent authority to permanently bar any civilian from entering the installation, regardless of whether or not the installation is generally open or closed to public access. A bar order can be imposed on a civilian spouse or parent whose continued presence on the installation represents a threat to the safety of any adult or child living on the installation. Violations of bar orders are crimes (18 USC 1382) which are separately punishable before a Federal magistrate or Federal district court judge.

*Id.*

Although the power of the commander to exclude is extremely powerful, it is not absolute. The presumption is that the commander has the authority to exclude persons from areas under his control. There are, however, three baseline requirements that must be met in order for the commander to exercise this authority. First, the area from which the person is to be excluded must be under sufficient military control.<sup>16</sup> Generally, courts make a factual determination as to whether the commander has the requisite control over an area in order to bar.<sup>17</sup> Second, a commander must also balance the military's interest in preventing entry against the interests of the civilian in entering the installation.<sup>18</sup> Finally, there must not be any infringement on the constitutional rights of the person seeking entrance to the military installation.

Most of the outstanding case law deals with the issue of control over the military installation. The general principle described in this line of cases is that the more the commander relinquishes his exclusive control of an installation, the less authority the commander has to exclude civilians from the installation. The seminal case in this area is the Supreme Court's holding in *Flower v. United States*.<sup>19</sup> In *Flower*, the petitioner had been barred from the installation for prior attempts to distribute leaflets in contravention of orders by the deputy commander.<sup>20</sup> He was later arrested by military police for distributing leaflets on a street within the Fort Sam Houston military installation.<sup>21</sup> Fort Sam Houston was an open post, without sentries or guards at the entrances.<sup>22</sup> The street on which he was distributing leaflets was an important traffic artery used by private vehicles, military vehicles, and public transportation.<sup>23</sup> The road also had sidewalks which were used extensively at all hours of the day by civilians as well as by military

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<sup>16</sup> Vest, *supra* note 11, at 30 (citing *United States v. Watson*, 80 F. Supp. 649 (D. Va. 1948)); *see also* *United States v. Mowat*, 582 F.2d 1194 (9th Cir. 1978) (holding that in a prosecution under 18 U.S.C. § 1382, the Government is required to prove as element of offense that it has absolute ownership or exclusive right to possession of property upon which violation occurred).

<sup>17</sup> Vest, *supra* note 11, at 30.

<sup>18</sup> *Id.* at 29. This requirement for a balancing test is cited in several cases, but its basis is not explicitly stated. It appears that this is a substantive due process test that is applied when the Fifth Amendment guarantees of procedural due process are not applicable.

<sup>19</sup> 407 U.S. 197 (1972).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 198.

<sup>23</sup> *Id.*

personnel.<sup>24</sup> Based on these facts, the *Flower* Court held that the commander had given up the requisite control of the area of the installation from which he sought to bar Flower.<sup>25</sup> By giving up that requisite control, the commander had converted the area into a First Amendment public forum, and he could not exclude speakers under his authority as commander of the installation.<sup>26</sup> This is very similar to the case of *United States v. Watson*, where the conviction of a civilian under 18 U.S.C. § 1382 was overturned.<sup>27</sup> In *Watson*, even though the civilian had been barred from traveling on a road owned by the military, the exclusion was found to be invalid because the road had been traditionally used as a public thoroughfare and the Government did not have exclusive control of the road.<sup>28</sup>

Despite the Court's holding in *Flower*, it is rare that the commander's authority to exclude from the installation is abridged or abrogated. The majority of cases have found that the asserted rights of the citizens seeking entrance to military installations were subordinate to the commander's authority to bar access to those installations. In this line of cases, individuals were attempting to enter the installation in order to exercise rights such as the right to employment,<sup>29</sup> the right to exercise political speech and activities,<sup>30</sup> and the right to enter the installation for attendance at an open house hosted by the Government.<sup>31</sup> In these cases, the individuals' asserted "rights" were trumped by the commander's authority to maintain control of his installation. A further review of these cases and the historical power of the commander to exclude are required to place the current issue into context. Does Mr. Adamski's situation line up with *Flower* and with *Cafeteria & Restaurant Workers Union v. McElroy* and its successors, or does it open up a novel area of jurisprudence?

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Vest, *supra* note 11, at 30 (citing *United States v. Watson*, 80 F. Supp. 649 (D. Va. 1948)).

<sup>28</sup> *Watson*, 80 F. Supp. at 651.

<sup>29</sup> *Cafeteria & Rest. Union Workers, Local 437 v. McElroy*, 367 U.S. 886 (1961).

<sup>30</sup> *Greer v. Spock*, 424 U.S. 828 (1976).

<sup>31</sup> *United States v. Albertini*, 472 U.S. 675 (1985).

## B. First Amendment Challenges to Commander's Authority

Most litigation involving access to military installations involves persons desiring to access installations in order to protest social and political issues or to distribute political materials.<sup>32</sup> The courts in these cases use traditional First Amendment analyses to reach their holdings.<sup>33</sup> In such analyses, the courts first look to see if the speech being restricted qualifies as “protected speech” and is therefore deserving of First Amendment protections.<sup>34</sup> If the speech is protected, then the court looks to the type of forum in which the speech is being conducted. If the forum is public, the court conducts a “time, place, and manner” analysis.<sup>35</sup> Under this analysis, if the speaker is in a traditional public forum, the restriction on speech must serve a compelling state interest and be narrowly drawn to achieve that end.<sup>36</sup> If the speaker is in a forum that is traditionally non-public, but that has been temporarily opened up

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<sup>32</sup> See, e.g., *Greer*, 424 U.S. 828; *Albertini*, 472 U.S. 675; *United States v. Quilty*, 741 F.2d 1031 (7th Cir. 1984).

<sup>33</sup> See, e.g., *Greer*, 424 U.S. 828; *Albertini*, 472 U.S. 675; *Quilty*, 741 F.2d 1031.

<sup>34</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*Id.* (citations omitted); *Times Film Corp. v. Chicago*, 365 U.S. 43, 47 (1961) (“It has never been held that liberty of speech is absolute.”).

<sup>35</sup> See *Cox v. Louisiana*, 379 U.S. 536, 558 (1965) (“It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials.”); *Greer*, 424 U.S. at 866 (“The imposition of prior restraints on speech or the distribution of literature in public areas has been consistently rejected, except to the extent such restraints sought to control time, place, and circumstance rather than content.”).

<sup>36</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

by the Government to speakers, the same compelling state interest and narrow restrictions apply.<sup>37</sup>

In contrast to the First Amendment protections given to speakers in public forums, in non-public forums speech may be restricted by the Government if the restrictions are reasonable and not for the purpose of silencing the speech merely because the Government opposes the speaker's viewpoint.<sup>38</sup> Except for the rare occasion, as in *Flower*, courts have consistently found military installations to be non-public forums for First Amendment free speech purposes.<sup>39</sup> Garrison commanders may thus refuse access to civilians seeking to exercise their First Amendment rights if the commander has a reasonable reason to do so other than his personal opposition to the content of the speech. Courts have explained this rule by consistently stating that "[t]he guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'"<sup>40</sup> Additionally, military commanders have the "power to preserve the property under [their] control for the use to which it is lawfully dedicated."<sup>41</sup> Thus, so long as a military commander has a reasonable purpose for excluding a speaker from post, and this purpose is not merely the commander's opposition to the speaker's viewpoint, the commander may do so.<sup>42</sup>

### C. Due Process (Fifth Amendment) Challenges to Commander's Authority

In the context of barring civilians from military installations, an analysis of Fifth Amendment cases is more complex than an analysis of First Amendment cases. The seminal Fifth Amendment case addressing the deprivation of access to military installations is *Cafeteria & Restaurant Workers Union v. McElroy*.<sup>43</sup> In *Cafeteria*, the commander revoked a contracted employee's security clearance.<sup>44</sup> This revocation

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<sup>37</sup> *Id.* at 46.

<sup>38</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (citing *Perry*, 460 U.S. at 46).

<sup>39</sup> *See Flower v. United States*, 407 U.S. 197 (1972).

<sup>40</sup> *Greer*, 424 U.S. at 836 (quoting *Adderly v. Florida*, 385 U.S. 39, 48 (1966)).

<sup>41</sup> *See id.* (quoting *Adderly*, 385 U.S. at 47).

<sup>42</sup> *Id.* at 834–36; *see also United States v. Albertini*, 472 U.S. 675, 690 (1985).

<sup>43</sup> *Cafeteria & Rest. Union Workers, Local 437 v. McElroy*, 367 U.S. 886 (1961).

<sup>44</sup> *Id.* at 888.



was, in effect, a bar from the installation and resulted in the person losing his job.<sup>45</sup> The *Cafeteria* Court held that it was well-settled that a commanding officer had the power to exclude civilians from the area of his command, and that depriving a person of his on-post employment by barring him from post does not entitle him to due process protection under the Fifth Amendment.<sup>46</sup>

The *Cafeteria* Court applied the traditional two-part due process test to determine if the worker's constitutional rights had been violated.<sup>47</sup> The first issue is whether the property interest in dispute is of such import as to be afforded protection under the Fifth Amendment.<sup>48</sup> If the

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 893.

This power has been expressly recognized many times. "The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand." 26 Op. Atty. Gen. 91, 92. "It is well settled that a post commander can, in his discretion, exclude all persons other than those belonging to his post from post and reservation grounds." JAGA 1904/16272, 6 May 1904. "It is well settled that a Post Commander can, under the authority conferred on him by statutes and regulations, in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline (1918 Dig. Op. J. A. G. 267 and cases cited)." JAGA 1925/680.44, 6 October 1925.

*Id.*; *id.* at 898.

But to acknowledge that there exist constitutional restraints upon state and federal governments in dealing with their employees is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed. We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract with M & M.

*Id.*

<sup>47</sup> See *Wallace v. Tilley*, 41 F.3d 296, 299 (7th Cir. 1994) ("In examining these claims, we first must determine whether there was a deprivation of a protected interest. If so, we then decide whether the procedures surrounding the deprivation were constitutionally sufficient." (citing *Forbes v. Trigg*, 976 F.2d 308, 315 (7th Cir. 1992)).

<sup>48</sup> *Cafeteria & Rest. Union Workers, Local 437*, 367 U.S. at 894.

property right is constitutionally protected, the second issue is whether the procedural safeguards that are in place are sufficient to ensure a fair and just outcome.<sup>49</sup> In *Cafeteria*, the worker lost her case because the Court held that employment was not a protected property right and thus she was not entitled to due process under the Fifth Amendment.<sup>50</sup> Because employment was not a protected interest, there was no requirement for the Government to provide the prescribed constitutional due process.<sup>51</sup>

The principles espoused in *Cafeteria* are directly applicable to Mr. Adamski's case. But, although the Northern District of California cites *Cafeteria* as precedent, the court's application of the *Cafeteria* Court's principles is questionable.<sup>52</sup> In particular, the court did not identify that the facts surrounding the Petitioner's case were matters of first impression that did not necessarily fit under the rubric of the existing case law.

### III. Legal Analysis of *Adamski v. Martis*

#### A. Fifth Amendment Guarantees

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*<sup>53</sup>

Due process is one of the primary protections that the U.S. Constitution gives to individuals. Although the Constitution does not

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Adamski v. Martis*, 2007 U.S. Dist. LEXIS 53160, at \*8, \*12 (N.D. Cal. July 9, 2007).

<sup>53</sup> U.S. CONST. amend. V (emphasis added).

define due process, courts have established a solid base of due process jurisprudence. Due process comes in both procedural and substantive forms.<sup>54</sup> The Constitution mandates that before the Government may take life, liberty, or property from an individual, it must go through certain steps intended to protect the interests of that individual. This is the procedural form of due process.<sup>55</sup> Under the concept of procedural due process, the mere taking of an individual's life, liberty, or property is not unconstitutional. What is unconstitutional is the deprivation of these interests without the proper safeguarding procedures.<sup>56</sup>

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<sup>54</sup> 16B AM. JUR. 2D *Constitutional Law* § 901 (2007).

In its present stage of development, the concept of due process of law has a dual aspect, substantive and procedural, for the Due Process Clause of the Fourteenth Amendment not only accords procedural safeguards to protected interests, but likewise protects the substantive aspects of liberty against impermissible governmental restrictions. The Due Process Clause of the Fourteenth Amendment provides distinct guarantees of substantive due process and procedural due process; substantive due process includes both the protections of most of the Bill of Rights, as incorporated through the Fourteenth Amendment, and also the more general protection against certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. Procedural due process guarantees that a state proceeding which results in a deprivation of property is fair, while substantive due process insures that such state action is not arbitrary and capricious.

*Id.* (citations omitted).

<sup>55</sup> *E.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972).

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

*Id.*

<sup>56</sup> 16B AM. JUR. 2D *Constitutional Law* § 890.

In addition to procedural due process, the Constitution provides the less explicit, judicially formulated, guarantee of substantive due process. Substantive due process guarantees that laws are essentially fair and reasonable and do not infringe upon an individual's fundamental constitutional rights.<sup>57</sup> Instead of being concerned with *how* the Government takes one's life, property, or liberty, substantive due process is concerned with whether the law that authorizes the Government taking is "in contravention of the fundamental principles of liberty and justice inherent to our Constitution and legal system."<sup>58</sup> If the law that authorizes the taking is fundamentally unfair, it violates the concept of substantive due process and no amount of procedural safeguards are adequate to protect the individual's protected interests. Finally, and closely connected to both types of due process, is the final section of the Fifth Amendment, commonly called the "Taking Clause." This section guarantees that if private property is taken from an individual for public use, the Government must reimburse that individual the value of that property.<sup>59</sup>

#### B. Procedural Due Process

Mr. Adamski argued that his due process rights were violated when COL Martis barred him from post.<sup>60</sup> He alleged that by barring him from post, COL Martis effectively evicted him from his home, thus depriving

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<sup>57</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.

*Id.*

<sup>58</sup> 16B AM. JUR. 2D *Constitutional Law* § 911.

<sup>59</sup> U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

<sup>60</sup> *Adamski v. Martis*, 2007 U.S. Dist. LEXIS 53160, at \*5 (N.D. Cal. July 9, 2007).

him of a property interest in that home.<sup>61</sup> Colonel Martis, the garrison commander, unilaterally decided this “eviction action” under her authority as a commander of a military installation.<sup>62</sup> Mr. Adamski did not challenge the authority of a commander to exclude civilians from a military installation. What he did challenge was that in the legitimate exercise of command authority, the garrison commander violated his right to due process.<sup>63</sup>

### 1. *What Is a Protected Property Interest?*

“When protected interests are implicated, the right to some kind of prior hearing is paramount.”<sup>64</sup>

Pursuant to the Fifth Amendment, if the Government takes constitutionally protected property from an individual, the minimum procedural due process requirements are the right to notice of the Government’s intent to deprive of a liberty or property interest, and the opportunity to speak and present evidence before the interest is taken by the Government. In *Adamski*, Mr. Adamski had neither the notice of a hearing nor the opportunity to present evidence.<sup>65</sup> The garrison commander unilaterally decided to prohibit Mr. Adamski from entering the installation.

Despite the absence of any procedural safeguards, the court held that Mr. Adamski’s due process argument had no merit.<sup>66</sup> The court found that even though Mr. Adamski held “a lessee’s leasehold interest in real property,” and that “[s]uch an interest is somewhat stronger than the interests at issue in *Albertini I & II . . .* and *Cafeteria and Restaurant Workers Union . . .*,” nonetheless, “no cases . . . provide that [such] a property interest outweighs the ‘substantial’ interest of a base commander in maintaining control over who may enter a military reservation.”<sup>67</sup> For the following reasons, the court failed to apply the appropriate due process analysis to support its determination.

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at \*4.

<sup>63</sup> *Id.* at \*6, \*11.

<sup>64</sup> *Bd. of Regents v. Roth*, 408 U.S. 564, 569–70 (1972).

<sup>65</sup> *Adamski*, 2007 U.S. Dist. LEXIS 53160, at \*8.

<sup>66</sup> *Id.* at \*14–15.

<sup>67</sup> *Id.* at \*13–14.

First, the court improperly concluded that Mr. Adamski's property interest was "somewhat stronger" than that of an invitee's interest in attending an on-post open house event, but did not rise to the level of a protected property interest.<sup>68</sup> The Supreme Court has given general guidance as to when deprivation of a property interest is entitled to the protection guaranteed by the Fifth Amendment. In *Board of Regents v. Roth*, the Court held:

To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.<sup>69</sup>

Numerous federal cases provide more specific guidance. These cases establish that ownership of real property is the epitome of the type of property interest that the Due Process Clause is intended to protect. In *Sentell v. New Orleans & Carrollton R.R. Co.*, the Court held that "[n]o property is more sacred than one's home,"<sup>70</sup> and in *United States v. Parcel I, Beginning at A Stake* that "[m]ost importantly, the Governmental interest in providing minimal due process is . . . scant when compared with the claimants' overriding interest in their homes."<sup>71</sup> The fact that *Adamski* dealt with a leasehold rather than a fee simple estate is irrelevant. Courts have found that leaseholds are as deserving of protection as fee simple estates.<sup>72</sup> The court erred by holding that Mr.

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<sup>68</sup> *Id.*

<sup>69</sup> *Roth*, 408 U.S. at 577.

<sup>70</sup> *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 704–05 (1897).

<sup>71</sup> 731 F. Supp. 1348, 1354 (S.D. Ill. 1990); *see also* *United States v. 850 S. Maple*, 743 F. Supp. 505, 510 (E.D. Mich. 1990) ("It is well settled that courts have traditionally drawn a distinction between personal property and a home, affording the latter far greater protection under the law.").

<sup>72</sup> *See Rucker v. Davis*, 237 F.3d 1113, 1125 (9th Cir. 2001) (public housing tenants have a property interest in their tenancy); *Greene v. Lindsey*, 456 U.S. 444, 451 (1982); *Geneva Towers Tenants Org. v. Federated Mortgage Investors*, 504 F.2d 483, 488–89 (9th Cir. 1974); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

Adamski's leasehold was not a significant enough property right to be afforded due process.

Second, the court improperly applied a weighing test to determine that no due process was required.<sup>73</sup> Due process is *required* when protected property is taken by the Government. Once it is determined that due process is required, then a weighing test that the Supreme Court describes in *Mathews v. Eldridge* is used to determine the *degree* of due process that is required.<sup>74</sup> In an error of reasoning, the *Adamski* court used the weighing test to determine that no due process was required.<sup>75</sup> *Mathews* described this weighing test as follows:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>76</sup>

The Supreme Court has given further guidance by stating that “[t]he relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. But *some* form of notice and hearing—formal or informal—is required before

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[P]roperty interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather “property” denotes a broad range of interests that are secured by “existing rules or understandings.” A person’s interest in a benefit is a “property” interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

*Id.*

<sup>73</sup> *Adamski*, 2007 U.S. Dist. LEXIS 53160, at \*14–15.

<sup>74</sup> 424 U.S. 319 (1976).

<sup>75</sup> *Adamski*, 2007 U.S. Dist. LEXIS 53160, at \*14.

<sup>76</sup> *Mathews*, 424 U.S. at 334–35.

deprivation of a property interest that ‘cannot be characterized as *de minimis*.’<sup>77</sup>

Appropriately applying the *Matthews* weighing test yields the following result. First, the possession and use of one’s home ranks at the top of an individual’s property interests.<sup>78</sup> This concept harkens back to the seventeenth century when, in 1644, English jurist Sir Edward Coke is quoted as saying: “For a man’s house is his castle, *et domus sua cuique tutissimum refugium*” (one’s home is the safest refuge for all).<sup>79</sup> James Otis, U.S. patriot, echoed Coke’s sentiments when in 1761 he argued against the English writs of assistance in Boston, Massachusetts: “Now one of the most essential branches of English liberty is the freedom of one’s house. A man’s house is his castle; and while he is quiet, he is well guarded as a prince in his castle.”<sup>80</sup> This emphasis on the sanctity of one’s home was permanently embodied in the Constitution. The Third Amendment’s prohibition of involuntary quartering of troops in one’s home, the Fourth Amendment’s proscription against unreasonable search and seizure, and the Fifth Amendment’s protections of property, all indicate the how much the Constitution values a person’s home.<sup>81</sup>

Second, application of the current procedures creates the risk of an erroneous deprivation of a constitutionally protected property interest. Commanders generally bar individuals from the installation based upon information such as subordinate commanders’ recommendations and military police reports. These sources are biased towards the exclusion of the alleged offender from the installation, as they are generally provided to the commander for that specific purpose. If the commander were to hear the other side of the story, she may come to a different decision. A pre-exclusion hearing would greatly reduce the risk of erroneous deprivation.

Finally, the Government’s interest is great in maintaining control over who has access to the installation. Good order, discipline, and morale are basic requirements for a functioning military. The exclusion of disruptive influences from the installation is important to the military

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<sup>77</sup> *Fuentes v. Shevin*, 407 U.S. 67, 90 n.21 (1972).

<sup>78</sup> *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 704–05 (1897); *United States v. Parcel I, Beginning at A Stake*, 731 F. Supp. 1348, 1354 (S.D. Ill. 1990).

<sup>79</sup> *Semayne’s Case*, 77 Eng. Rep. 194 (1604).

<sup>80</sup> JAMES OTIS, *AGAINST WRITS OF ASSISTANCE* (1761), available at <http://www.nhinet.org/ccs/docs/writs.htm>.

<sup>81</sup> See U.S. CONST. amends. III to V.



commander. The additional procedural requirement of a pre-exclusion hearing, however, would place a minimal administrative burden upon the command. These administrative burdens are already present in that the individual may appeal the commander's initial decision to bar (albeit the appellate authority is usually the barring commander himself). The additional procedural safeguard would simply require the administrative burdens to come before, rather than after, the decision is made by the commander.

The *Adamski* court failed in its application of the Supreme Court's holdings on due process by relying on these tests to conclude that no due process is required, rather than the degree that due process required.<sup>82</sup> The only time that no due process is required is when the property is not of the type that is protected by the Fifth Amendment. If the court had utilized the tests laid out in *Matthews*, it should have held that a pre-decisional hearing was necessary to satisfy due process requirements.

There are exceptions to the normal due process requirements for a prior hearing, but these exceptions are narrowly tailored. The *Adamski* court did not rely on any of these exceptions in its ruling. As the Supreme Court stated in *Fuentes v. Shevin*:

There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic

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<sup>82</sup> *Adamski v. Martis*, 2007 U.S. Dist. LEXIS 53160, at \*14–15 (N.D. Cal. July 9, 2007).

disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.<sup>83</sup>

Applying the *Fuentes* test to *Adamski* yields the following results. First, there was arguably an important governmental interest in excluding Mr. Adamski from the military installation. The good order, discipline, and welfare of the military are of paramount importance. This prong supports finding an extraordinary situation that weighs against providing extensive due process. Second, there was no need for immediate action. The actual actions taken by the commander demonstrate such a lack of imperative. In early May 2007, the landlord discovered that Mr. Adamski was a sex offender.<sup>84</sup> On 21 May 2007, the commander sent a letter to Mr. Adamski stating that effective 21 June 2007, Mr. Adamski was barred from the installation.<sup>85</sup> Thus, over thirty days passed from the discovery of the “threat” to good order, discipline, and welfare until the commander excluded Mr. Adamski from the installation. Obviously, there was no need for very prompt action. Rather, there was ample time to conduct a hearing prior to the decision to exclude. This prong supports the requirement for due process and does not support finding an extraordinary situation warranting a pre-hearing seizure of property. Finally, although there is a single government official, the commander, responsible for initiating the “seizure,” there does not exist a narrowly drawn statute with identifiable standards. On the contrary, the commander’s authority to exclude is purposefully vague and wide ranging. Also, this final prong does not support finding an extraordinary situation warranting a pre-hearing seizure of property. Given that *Adamski* fails to meet two of the three *Fuentes* factors, it is highly unlikely that a future court would find situations like this to be extraordinary and would therefore not require a hearing prior to the deprivation of property.

## 2. What Does “Due Process” Require?

The *Adamski* court correctly identified the relief requested by the petitioner in its recitation of the case background.

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<sup>83</sup> 407 U.S. 67, 90–92 (1972).

<sup>84</sup> *Adamski*, 2007 U.S. Dist. LEXIS 53160, at \*2.

<sup>85</sup> *Id.* at \*3.

Plaintiffs complain that defendant's actions have deprived Mr. Adamski of his property interest in a leasehold to his home . . . *without due process and without compensation* in violation of the Fifth Amendment of the United States Constitution.<sup>86</sup>

The petitioner alleges lack of due process and lack of compensation. Thus, the basis of the suit is not that the commander's decision was incorrect. It is, rather, that the petitioner had not been given the right to state his case prior to his leasehold being taken and that the petitioner must be made whole after the commander had unilaterally taken his leasehold.

The court held that "[i]t is well-settled that a commanding officer has the power to exclude civilians from the area of her command."<sup>87</sup> This holding resulted from an overly simplistic treatment of the plaintiff's complaint. The court failed to conduct any real formal constitutional analysis because it felt that the exclusion from the installation was warranted based upon the facts.

Further into its opinion, the court attempts to give several reasons why there is no requirement for due process. First, the court stated that the petitioner "cite[s] no cases that provide that a property interest outweighs the 'substantial' interest of a base commander in maintaining control over who may enter a military reservation."<sup>88</sup> Second, the court stated that the petitioner's false answer on the rental application should weigh against demand for due process.<sup>89</sup> Third, the court noted that the petitioner had not shown that the commander had acted capriciously or arbitrarily in issuing the bar letter.<sup>90</sup> These may be valid assertions, but they fail to meet the requirements of *Fuentes* and *Matthews*.

Mr. Adamski made no assertion that the garrison commander did not have a substantial interest in controlling access to the installation or that there were errors on the application, or that the commander acted outside the boundaries of her authority. Mr. Adamski's claim simply contends that the *manner* of the exclusion and eviction was unlawful.<sup>91</sup> He asserts

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<sup>86</sup> *Id.* at \*5 (emphasis added).

<sup>87</sup> *Id.* at \*8.

<sup>88</sup> *Id.* at \*14.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at \*11.

that the Government's procedure to extinguish his property rights lacked the substance to ensure that his property interest was not taken unfairly.<sup>92</sup> The *Adamski* court's reliance on the commander's historical authority to exclude civilians from the confines of the military installation is inapposite because the exclusion of a civilian tenant from privatized housing on a military installation is a case of first impression that does not lend itself to reliance on historical precedents.

The court also denied Mr. Adamski any due process protection because he failed to demonstrate that the garrison commander "acted capriciously or arbitrarily in issuing the bar letter."<sup>93</sup> The arbitrary and capricious test, however, is irrelevant to Mr. Adamski's request for relief. The arbitrary and capricious test is a lesser form of protection that comes into play only when no formal due process is required.<sup>94</sup> In all probability the court used the test because it had already erroneously concluded that the tenancy did not rise to the level of a protected property interest.<sup>95</sup> The court in *Adamski* should not have decided whether the commander acted in an arbitrary and capricious manner, but rather should have decided whether the process of barring Mr. Adamski from post was sufficiently robust to protect against an arbitrary deprivation.

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at \*15.

Finally, although plaintiffs contend that no one has asserted that Mr. Adamski has committed any illegal acts within the base, harassed anyone on the base, or committed any sexual offense on the base, it is not within the purview of this court to question a commanding officer's decision to issue a bar letter that is not otherwise capricious or arbitrary.

*Id.*

<sup>94</sup> *See, e.g.*, *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 348 (1935).

[W]hen the question is whether legislative action transcends the limits of due process guaranteed by the Fifth Amendment, decision is guided by the principle that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

*Id.* (citing *Nebbia v. New York*, 291 U.S. 502, 525 (1934)); *see also* *E. Enters v. Apfel*, 524 U.S. 498, 524 (1998) ("[T]he burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.")

<sup>95</sup> *Adamski*, 2007 U.S. Dist. LEXIS 53160, at \*14–15.

The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."<sup>96</sup>

Mr. Adamski had a significant property interest that he was deprived of when the military commander barred him from the installation. The commander unilaterally made the decision to exclude Mr. Adamski from the installation. There were few, if any, procedures in place to safeguard Mr. Adamski's constitutional rights. Specifically, the commander failed to establish those procedures that the Supreme Court has made mandatory when depriving individuals of protected property interests. These procedures are that the "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."<sup>97</sup> Furthermore, the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."<sup>98</sup> The established procedures in Mr. Adamski's case did not comply with these mandates.

The court's holding indicates that civilians in privatized housing have no Fifth Amendment protections and, as a consequence, in all future actions civilian tenants would have no due process protections. Such a circumstance would be particularly troubling when the civilian tenant has not violated his lease nor done anything wrong at all. For example, commanders have the potential to bar civilians from post because of elevated force protection concerns. Should this occur, civilian tenants would not be entitled to due process to adjudicate their

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<sup>96</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951).

<sup>97</sup> *Baldwin v. Hale*, 68 U.S. 223, 233 (1863).

<sup>98</sup> *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

exclusion nor would they be entitled to compensation should their exclusion from post be enduring or permanent.

### C. Substantive Due Process

For the typical civilian, the denial of entry onto a military installation does not raise any substantive due process issues. In *Adamski*, however, serious substantive due process concerns were raised. A law which summarily denies a tenant access to his home without due process and recourse could easily be found overly burdensome. The substantive due process issue is as follows: Is it fair that the Government leases a portion of the installation to a private contractor, allows that contractor to rent to private citizens, and then summarily denies that citizen, without any recourse available, access to his rental home? Property rights are so strongly protected that a law which allows for such a deprivation fundamentally offends our concept of justice and liberty.

### D. The Takings Clause

The Fifth Amendment to the Constitution prevents the Government from taking an individual's property for public use without compensating the individual.<sup>99</sup> The Government is also forbidden from taking the

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<sup>99</sup> U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”); *see also* *United States v. Russell*, 80 U.S. 623, 627 (1871).

Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent.

*Id.*; *United States v. Miller*, 317 U.S. 369, 373 (1943).

Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken.

private property of an individual for the private use of another individual.<sup>100</sup> What constitutes “property” has been highly litigated in our legal system. It has been determined that the concept of property enumerated in the Fifth Amendment includes more than only tangible, physical property owned outright.<sup>101</sup> The Fifth Amendment protection of property has been found to extend to items such as materialmen’s liens,<sup>102</sup> trade secrets,<sup>103</sup> and the airspace above one’s property.<sup>104</sup> Not all property, however, qualifies for protection under the Takings Clause. “Unilateral expectations” of economic benefit are not protected, nor are benefits or expectations that are shielded from arbitrary action by some form of procedural protection such as federal social security benefits.<sup>105</sup> Contractual rights and obligations are more than unilateral expectations and generally fall within the protections of the Takings Clause<sup>106</sup>:

An enforceable contract right can provide the necessary property right in support of a Fifth Amendment takings claim. Valid contracts are property protected by the Fifth Amendment against taking by the federal government, and by the Fourteenth Amendment against taking by a state, unless just compensation is made to the owner. Therefore, where contract rights are taken for the public use, there is a constitutional right to compensation in the same manner as when other property rights are taken, provided the interest or estate created by the contract is not so remote as to be incapable of valuation.<sup>107</sup>

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*Id.*; Nat’l Educ. Ass’n–R.I. v. Ret. Bd. of the R.I. Employees’ Ret. Sys., 172 F.3d 22, 30 (1st Cir. 1999).

<sup>100</sup> *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

<sup>101</sup> *United States v. Willow River Power Co.*, 324 U.S. 499, 502–03 (1945).

<sup>102</sup> *Armstrong v. United States*, 364 U.S. 40, 44 (1960).

<sup>103</sup> *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

<sup>104</sup> *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110, 1119 (Nev. 2006).

<sup>105</sup> *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (unilateral expectations); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (social security benefits).

<sup>106</sup> *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (“Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.” (citing *Contributors to Pa. Hosp. v. Philadelphia*, 245 U.S. 20 (1917))).

<sup>107</sup> 26 AM. JUR. 2D *Eminent Domain* § 160 (2007).

Mr. Adamski alleges that the Government took his property, in the form of his leasehold, without just compensation.<sup>108</sup> Additionally, by barring him from the installation, the Government effectively abrogated Mr. Adamski's contract with his landlord. In its order denying the Petitioner's request for relief, the court does not directly address these assertions, apparently because the court found petitioner's property interest not to be of significance in its procedural due process analysis. If so, then the court's reasoning was faulty. The Takings Clause analysis under the Fifth Amendment is separate and distinct from the due process analysis. The *Adamski* court failed to determine whether the petitioner is due compensation pursuant to the Fifth Amendment for the taking of his property.<sup>109</sup>

A Fifth Amendment Takings Clause analysis is a three-step process.<sup>110</sup> First, was there a protected property interest? Second, was the property taken by the Government? Third, was the taking for a private or a public use? In *Adamski* the first question is answered by a wealth of case law that leaves little doubt that Mr. Adamski's leasehold was indeed a protected property right under the Fifth Amendment. Courts have specifically found that leases are a protected form of property.<sup>111</sup> "It is settled law that a leasehold is 'property' and,

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<sup>108</sup> *Adamski v. Martis*, 2007 U.S. Dist. LEXIS 53160, at \*5 (N.D. Cal. July 9, 2007).

<sup>109</sup> Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U.L. REV. 899, 900 (2007) ("Lingle stands for the proposition that both asserted government *takings* of property, and asserted government *deprivations* of property without due process of law, raise separate, legitimate legal issues to be resolved using different legal standards." (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005))).

<sup>110</sup> The facts of each case determine the precise issues required to be analyzed. For example, in *Buse Timber & Sales, Inc., v. United States* the appropriate Fifth Amendment test was stated as follows: "In order to determine whether the complaint states a claim under the Fifth Amendment, this court must first define the plaintiff's property interest and then determine whether, according to the facts alleged in the complaint, the government interfered with plaintiff's use of that property." 45 Fed. Cl. 258, 262 (Ct. Cl. 1999).

<sup>111</sup> *See United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

*Id.*; *see also* *Air Pegasus of D.C., Inc. v. United States*, 60 Fed. Cl. 448, 456 (Ct. Cl. 2004).



accordingly, that if realty under lease is taken by the Government for public use, just compensation must be paid to the leaseholder.”<sup>112</sup> In addition to the leasehold being a protected property right, the underlying contract may also be a protected form of property.<sup>113</sup> In any case, the contract or the leasehold itself is property that is protected under the Fifth Amendment’s Taking Clause.

The second question is whether the Government did, in fact, take Mr. Adamski’s protected property.<sup>114</sup> The Supreme Court in *Pennsylvania*

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Leases are compensable property interests within the meaning of the Takings Clause of the Fifth Amendment. As the United States Supreme Court has stated, property deals with what lawyers term the individual’s “interest” in the thing in question. That interest may comprise the group of rights for which the shorthand term is “a fee simple” or it may be the interest known as an “estate or tenancy for years” . . . .

*Id.*; Dep’t of Natural Res. v. Thurston County, 92 Wn. 2d 656, 668 (Wash. 1979) (“Lake Lawrence, Inc., as lessee of the land, has a private real property interest which entitles it to raise the question whether its leasehold has been taken for public use without compensation.”); Foster v. United States, 221 Ct. Cl. 412, 423–24 (Ct. Cl. 1979) (“Initially, we note that plaintiffs’ leasehold interest in the reserved mineral rights is compensable. As an estate in real property, the Government must compensate for any taking.”); Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 303 (U.S. 1976) (“It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States.”).

<sup>112</sup> Pewee Coal Co. v. United States, 142 Ct. Cl. 796, 801 (Ct. Cl. 1958). “It is established that a leasehold interest is property, the taking of which entitles the leaseholder to just compensation for the value thereof.” Lemmons v. United States, 204 Ct. Cl. 404, 421 (Ct. Cl. 1974).

<sup>113</sup> See Buse Timber & Sales, Inc. v. United States, 45 Fed. Cl. 258, 262 (Ct. Cl. 1999). In this case, the claims court held that

[t]he “classic” takings cases deal with appropriations of tangible property by the government, especially the taking of land. In this case, however, the property taken was plaintiff’s right to performance under the contract. Thus, it was the contract itself that was the subject of the taking. Plaintiff is correct in stating that a contract constitutes property within the meaning of the Fifth Amendment. In *Lynch v. United States*, the Supreme Court explained that valid contracts are property which is protected by the Fifth Amendment, regardless of whether the obligor is a private party, a municipality, a State or the United States.

*Id.*

<sup>114</sup> See *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179 (1871) (“[A] serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and

*Coal Co. v. Mahon* stated that whether a particular governmental restriction amounted to a constitutional taking is a question properly turning upon the particular circumstances of each case.<sup>115</sup> The taking of property can be by the Government's acquisition of title (through eminent domain proceedings), or through the occupancy or physical invasion of the property whereby the Government has destroyed the owner's use and enjoyment of his property (inverse condemnation).<sup>116</sup> The manner in which the Government takes property is not, however, dispositive as to whether a Fifth Amendment taking has occurred. The courts have held that it is the loss by the owner, not the method used by the Government, which is the defining characteristic of a taking.<sup>117</sup> It does not matter that the Government does not acquire complete title or possession of the property. If its actions are so complete as to deprive the owner of all or most of his interest in the subject matter, the Government has accomplished a taking.<sup>118</sup> In *Adamski*, the commander had deprived Mr. Adamski of any use of his home and stripped him of any of his rights bargained for in his lease. The same line of cases that give leaseholds protection under the Takings Clause define what constitutes a taking of those leaseholds. These cases state that if the Government prevents the owner from the possession and use of his leasehold, then the Government has effectuated a taking.<sup>119</sup>

The final issue is whether Mr. Adamski's leasehold was taken for private or for public use. If it was taken for use by a private individual, the Government's action was per se unconstitutional. If the leasehold was taken for public use, the Government's actions are allowable under the Takings Clause, but require that compensation be made. The Supreme Court discusses the difference in *Lingle v. Chevron U.S.A. Inc.*<sup>120</sup>

The Clause expressly requires compensation where government takes private property "*for public use.*" It

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that under the constitutional provisions it is not necessary that the land should be absolutely taken.").

<sup>115</sup> 260 U.S. 393, 416 (1922).

<sup>116</sup> *Yuba Natural Res., Inc. v. United States*, 821 F.2d 638, 640 (Fed. Cir. 1987).

<sup>117</sup> *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

<sup>118</sup> *Id.*

<sup>119</sup> *See, e.g., id.* at 378 ("Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.").

<sup>120</sup> 544 U.S. 528, 543 (2005).

does not bar government from interfering with property rights, but rather requires compensation “in the event of *otherwise proper interference* amounting to a taking.” Conversely, if a government action is found to be impermissible—for instance because it fails to meet the “public use” requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.<sup>121</sup>

At first glance, it may seem as if the leasehold was not taken for public use. Indeed, after Mr. Adamski’s exclusion from the installation, the leasehold reverted back to the private contractor. The Supreme Court has adopted the principle that a “broader and more natural interpretation of public use [is] as ‘public purpose.’”<sup>122</sup> In *Adamski*, the exclusion from the installation was for a public purpose—the health, welfare, and morale of the command—even though the property itself (the leasehold) was given back to a private entity, the MHPI contractor.<sup>123</sup> It is not determinative that the Government did not actually acquire the property.

#### IV. Military Housing Privatization Initiative

The housing that Mr. Adamski was “evicted” from was leased and managed by a private contractor under the MHPI.<sup>124</sup> The housing was not leased by the tenant from the Government. The court, in its analysis, failed to take into account the anomalies created by MHPI. The following section will discuss the constitutional complications that the MHPI presents to the commander.

##### A. Overview of the MHPI

In 1996, the National Defense Authorization Act (NDAA) enacted the MHPI.<sup>125</sup> The initiative was later made permanent by the 2005

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<sup>121</sup> *Id.* at 543 (citations omitted).

<sup>122</sup> *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

<sup>123</sup> *Adamski v. Martis*, 2007 U.S. Dist. LEXIS 53160, at \*4 (N.D. Cal. July 9, 2007).

<sup>124</sup> *Id.* at \*2.

<sup>125</sup> National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, §§ 2801–2802, 110 Stat. 186, 544 (codified at 10 U.S.C. §§ 2871–2885 (2006)).

NDAAs.<sup>126</sup> This legislation was enacted because the DoD faced two looming housing problems: the extremely poor condition of DoD housing, and the shortage of affordable and quality housing in the private housing market to meet the needs of servicemembers and their families.<sup>127</sup> These issues were of such magnitude that Congress concluded that government resources were inadequate to address the problems. The MHPI, therefore, authorized public and private ventures in which real-estate developers could “own, operate, maintain, improve and assume responsibility for military family housing, where doing so is economically advantageous and national security is not adversely affected.”<sup>128</sup> The authorities given to DoD included the ability to make loan and rental guarantees, the conveyance or leasing of existing property and facilities, differential lease payments, direct loans to developers, and the authority to invest in non-governmental entities involved in the acquisition or construction of family housing.<sup>129</sup>

The primary mechanism for MHPI is the leasing of land on military installations for a term of years (typically fifty years).<sup>130</sup> The contractor agrees to renovate existing housing or to construct new housing. The contractor must lease to servicemembers and may lease to civilians if occupancy is low.<sup>131</sup> The contractor has an agreement with the DoD or

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<sup>126</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004).

<sup>127</sup> DoD Military Housing Privatization, <http://www.acq.osd.mil/housing/overview.htm> (last visited June 15, 2009) [hereinafter Mil. Housing Privatization].

<sup>128</sup> *Id.* (follow “FAQs” hyperlink).

<sup>129</sup> *Id.*

<sup>130</sup> Ernst & Young, LLP, Military Housing Privatization Initiative (MHPI) 101 (Sept. 2006), available at [www.acq.osd.mil/housing/docs/mhpi101.ppt](http://www.acq.osd.mil/housing/docs/mhpi101.ppt) (PowerPoint Presentation) [hereinafter MHPI 101].

<sup>131</sup> Mil. Housing Privatization, *supra* note 127 (follow “FAQs” hyperlink).

Priority to occupy homes is given to Service members assigned to the installation. However, if there is not enough demand for housing from military personnel and, as a result, occupancy rates drop below a certain level for a defined period of time, the developer can rent to other personnel. The developer must follow a priority list of other possible tenants as defined by the tenant waterfall. For example, the waterfall could be: (1) other military members not assigned to the installation or unaccompanied service members, (2) federal civil service employees, (3) retired military, (4) guard and reserve military, (5) retired federal civil service employees, (6) DoD contractors/permanent employees and then the (6) general public.

*Id.*

Service Department regarding construction and management of the housing units.<sup>132</sup> The contractor also has a lease agreement with the tenants regarding the rental.<sup>133</sup> There is no privity of contract between DoD and tenants of privatized housing.

## B. The Problems that MHPI has Brought to the Table

### 1. *Restating the Issue*

The goal of this article is to develop courses of action for commanders to remove unwanted tenants from privatized housing. The implementation of privatized housing has unintentionally muddied the waters as to what the procedures for such “evictions” should be. Currently, there is no set standard and the practice for excluding tenants from privatized housing on the installation varies from post to post. Most glaring is the lack of distinction between a commander barring a tenant from the installation vice a contractor removing a tenant from housing.

The MHPI contractor at Fort Carson uses the following eviction clause in his lease:

#### 23. EVICTION:

- a. The *Landlord may terminate this Lease and evict the Tenant* in accordance with applicable law for Tenant’s failure to pay rent or for one or more material violations by Tenant of this Lease or any other actions that:
  - i. affect or threaten to affect the health or safety of other residents in the community;
  - ii. substantially interfere with the right to quiet enjoyment of other residents of the community; or
  - iii. involve a violation of any applicable law or regulation; or
  - iv. *involve misconduct resulting in a situation in which Tenant would not be eligible for referral (such as, but not limited to, bar from the housing area by military authorities).*

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<sup>132</sup> *Id.*

<sup>133</sup> MHPI 101, *supra* note 130.

b. If the Tenant remains in possession without the Landlord's consent after termination of this Lease, the Tenant is deemed to be in breach of this Lease and the Landlord may commence an eviction action. An eviction action may be filed no earlier than the first day following the termination of this Lease. On retaining possession beyond the rental period without consent of the Landlord, the Tenant shall be obligated to pay the Landlord's attorneys' fees, court costs, and any ancillary damages due to the holdover by the Tenant.<sup>134</sup>

This clause of the lease raises several interesting issues. First, the landlord may initiate eviction proceedings for the violations listed. But in what court and following what law? Eviction is a legal proceeding through which a court of competent jurisdiction grants relief to a Landlord seeking to remove a tenant from the property due to a tenant's breach of the lease.<sup>135</sup> The legal action takes place in the jurisdiction in which the property is physically located. Second, the lease makes it clear that this is a tenancy between the contractor and the individual. Only the contractor may legally evict the tenant. The opening paragraph of the lease states, "This is a private business arrangement between the parties. The premises leased are not military housing. Landlord is a civilian corporation and not a part of the United States Government, the U.S. Army, or Fort Carson."<sup>136</sup> Hence, the Government is not the landlord. Any discussion of the Government enforcing the terms of the lease is an inaccurate application of law. Third, the lease specifically differentiates between being "barred from post" and being evicted from housing. The tenant must maintain access to the installation according to the terms of the lease. If the tenant is barred from post, the tenant has violated a term of the lease and the landlord has grounds for eviction. Being barred from the installation, however, does not equate to an immediate legal eviction. The tenant still has full rights to the housing unit, pursuant to the terms of the lease, until a court of competent jurisdiction issues an eviction order. Finally, the terms of the lease are very broad—perhaps overly broad and unenforceable. For example, a "violation of any applicable

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<sup>134</sup> Balfour Beatty Communities, Fort Carson, Forms & Guides, Lease Packet—Military available at <http://www.fortcarsonfamilyhousing.com/communityfiles/24/pdf/Lease%20Packet%20-%20Military%20.pdf> (last visited June 22, 2009) [hereinafter Balfour Beatty Mil. Housing Lease] (emphasis added).

<sup>135</sup> BLACK'S LAW DICTIONARY 555 (6th ed. 1990).

<sup>136</sup> Balfour Beatty Mil. Housing Lease, *supra* note 134.

law or regulation” is a term of the lease. What is an applicable law or regulation? How would a court interpret and apply this term?

The same contractor uses a modified clause for the lease at an Air Force installation:

26. EVICTION:

(a) *The Landlord may terminate this Lease and evict the Resident in accordance with applicable law for Resident’s failure to pay rent or for one or more material violations by Resident of this Lease or any other actions that:*

- (i) affect or threaten to affect the health or safety of other residents in the community;
- (ii) substantially interfere with the right to quiet enjoyment of other residents of the community; or
- (iii) *upon notice that Resident or a member of his or her family is or has been barred from entry onto the military installation by the Base Commander.*<sup>137</sup>

These leases make it quite clear that the leasing agreement is between the contractor and the individual. Yet, embedded in the contract is the right of the military commander to effectively terminate the lease by barring the individual from the installation. On most Army installations, the reality is that these eviction clauses are rarely utilized. Rather, the expedient method of barring the offending individual from the installation is the preferred method of terminating the tenancy. Thus, all the constitutional due process and takings issues are created.

These contractual, procedural, and constitutional concerns surrounding MHPI have never before been present on military installations. Although the commander’s power with regard to running his installation and military operations is held in the utmost regard, the commander is not exempt from complying with the law in the exercise of this power. Outside the context of privatized housing, the commander still has almost absolute power to exclude persons from the military installation. Statutes and regulations give him this power and there are

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<sup>137</sup> Balfour Beatty Communities, Altus AFB, Forms & Guides, Lease (Military Resident), available at <http://www.altusfamilyhousing.com/communityfiles/12/pdf/lease.pdf> (last visited June 22, 2009) (emphasis added).

few laws that restrict it. But because occupants of privatized housing are a different class of person than those individuals who live outside of the installation and seek to enter, these occupants have additional constitutional rights and protections under the law. Because of the structure of MHPI, the commander must now deal with due process and Fifth Amendment takings concerns, landlord/tenant law, and possible issues with contractual obligations with the contractor and interference with the contractual obligation between the contractor and its tenant.

## 2. *Landlord/Tenant Law*

Landlord/tenant law is a complex and diverse area of law.<sup>138</sup> The law is based on both common law and statutes. Each state has developed its own legal framework for defining the relationship between lessee and lessor. Typically, state law sets out detailed requirements and procedures for landlords who want to end a tenancy. The terms of a lease are subordinate to the requirements of the law. Because of the importance of the procedures, and the recognition of the important property rights involved, every state requires at least a minimal level of due process prior to the eviction of a tenant to include notice and the right to appear at a hearing. Typically, landlords are held to a high standard of performance when attempting to evict a tenant. The failure of a landlord to stringently adhere to state rules and procedures normally results in a failed eviction proceeding.<sup>139</sup>

The ever-present difficulty in practicing landlord/tenant law is that, despite legislatures' sincere attempts to delineate the law, state statutes are often incomplete. Courts, in these instances, rely on case law to fill the gaps. This application of the common law, however, presents its own difficulties. Over the last several decades, the legal environment has become much more protective of tenants and their property rights. New trends and developments in the law have replaced published case law that has not been formally overruled. Thus, practitioners and judges are often presented with cases and facts that statutes do not address and for which the common law is antiquated and inapplicable. This is the

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<sup>138</sup> See generally RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) (1983). The conclusions and statements of law contained in this section are based upon the author's practice of landlord and tenant law during his tenure as Chief, Legal Assistance at XVIII Airborne Corps, Fort Bragg, N.C.

<sup>139</sup> *Id.*



framework of the law in which the military commander and MHPI contractor may now have to operate. The challenge is to reconcile the requirements of the military with the required protections of tenants.

Do the concepts of landlord/tenant law and consumer protectionism apply on the military installation? Is the commander a landlord, despite what the lease states, or has he relinquished that role to the private contractor under MHPI? If future courts find that the command has maintained the authority of a landlord, then it is likely that those courts will insist upon some application of landlord/tenant protections when the tenant is excluded from the installation. This will entail at least a minimal amount of due process. If future courts find that the private contractor is the actual landlord, it is almost certain that the contractor will be bound by the body of landlord/tenant law.

One of the primary purposes of MHPI was to remove the Government from the property management business. Private contractors could more efficiently build and manage housing projects. Because the Government took this positive step in relinquishing control, it is unlikely that a court would find that the Government is a *de facto* landlord. Thus, the Government would not be bound by landlord/tenant law. The Government also, however, would have none of the rights to evict a tenant that belong to a landlord for a breach of the lease. We are back to the vexing situation where, by excluding a tenant from the installation, a commander would be effectively terminating a private lease and participating in a Fifth Amendment taking of property.

#### V. Courses of Action

Having identified many of the legal issues that now face a commander when deciding to exclude a civilian tenant from privatized housing located on a military installation, the difficult task is to recommend a course of action that addresses all of these legal concerns. There exists a spectrum of courses of action for future exclusions of tenants from their homes in privatized housing. The following are some options along that spectrum:

1. Maintain the status quo (i.e., commander has plenary authority to bar)
2. Hearing by commander *prior* to bar from installation

3. Hearing by neutral board prior to bar from installation
4. Formal eviction proceeding—federal magistrate
5. Formal eviction proceeding—state magistrate

Each of these options should be analyzed with the following concerns in mind. Does the method provide the necessary due process for the individual? Will the method be found to violate the substantive due process rights of the individual? Is the Government's action an interference with the contract between the contractor and tenant? Is the action a taking of the tenant's property that requires compensation? Who is the proper party to initiate an eviction proceeding, the commander or the housing contractor? Should any imposed procedures be administrative or judicial in nature? A quick comparison of the five courses of action show that the option of utilizing a neutral board prior to the bar from the installation comes closest to addressing the majority of the legal concerns while at the same time maintaining the commander's maximum level of control over the administration of his installation.

#### A. Military Retains Authority

##### 1. *Maintain the Status Quo*

For all of the reasons discussed, this course of action does the least to address the concerns voiced in the preceding sections. The primary advantage of the option is, of course, that it requires no change. Additionally, although this method may be questionable, no court has yet held that barring a tenant from the installation violates any constitutional, statutory, or common law legal principle. Given that the MHPI is still a relatively new program, it is highly likely that additional cases like *Adamski* will arise. It is also likely that the number of civilians who are tenants on the installation, with no military affiliation whatsoever, will increase in the future. The current method of a commander unilaterally barring tenants from the installation and their homes is almost certain to draw future legal criticism.

##### 2. *Hearing by the Commander Prior to "Bar-from-Post"*

A second course of action is for the commander to give notice and hold a hearing prior to initiating the bar from the installation. This

would, on its face, address the most disturbing of the identified problems—the deprivation of a property interest with virtually none of the required due process. But, while superficially addressing that issue, there remain outstanding legal concerns, along with some newly created military operational concerns.

Does the initiation of a pre-action hearing by the commander truly address the due process concerns? The primary purpose of the required hearing is a fair and open evaluation of the facts and a weighing of the costs and benefits to each party. The commander is being asked to adjudicate an issue in which he has a direct and pressing interest. Can the commander be objective enough to give the tenant's property interest in his home the proper weight when comparing it to his own interests involving the safety, welfare, morale, and operational concerns of managing the installation? It is likely that courts would frown upon the commander remaining the unilateral decision maker, even if an opportunity to be heard is provided pre-decision.

Even if the pre-decisional hearing meets due process requirements, some of the other problems remain. One of these problems is the Takings Clause. Should a commander bar the tenant because he feels that the tenant is a security risk, the commander has taken an action that has deprived the tenant of his property interest. The tenant has in no way, however, forfeited his property interest. Even if the tenant committed acts that were in violation of his lease, those actions would not terminate his property interest. That property interest was created through a contract between the tenant and private contractor and remains in existence until the lease naturally expires or until a court of proper jurisdiction rules that a breach of the lease entitles the private contractor (landlord) to possession of the property. Any action by the commander to exclude the tenant from the installation would be a unilateral termination of the leasehold by the Government. It is likely that courts conducting a proper Fifth Amendment analysis would require the Government to compensate the tenant for the taking of his property.

A final concern is the effect of a commander's exclusion of the tenant on the contractual obligations between the Government and the contractor, and between the contractor and the tenant. By barring the tenant from the installation, the Government is in effect unilaterally terminating the lease agreement. This action interferes with the rights of both the contractor and tenant. Since contract rights are property rights, if the Government takes these contract rights it is a taking under the Fifth

Amendment and must be compensated.<sup>140</sup> Additionally, although the Contract Clause of the Constitution at Article I, Section 10 (prohibition on the impairing of contracts) only applies to the states, the Court has ruled that the impairment of contracts by the federal government must comply with the Fifth Amendment's due process requirements.<sup>141</sup> It is important to remember that there are two contracts in play here: government-contractor and contractor-tenant. It is foreseeable that there are circumstances where the contractor would not want its contract with the tenant terminated by the commander's institution of a bar from the installation. If the situation was not covered by the MHPI agreement, the contractor would be entitled to some form of due process because of the Government's unilateral interference with the contractor's agreements.

The form and substance of this due process that the federal government must provide to the private contractor is convoluted. The Supreme Court has stated that there is a "clear distinction" between the Government interfering with private party contracts vice the Government acting to alter or repudiate its own contractual obligations.<sup>142</sup> In order to avoid these legal issues, the contractual concerns could be addressed with modifications of the terms of the contracts themselves. Indeed, MHPI contracts already give certain protections to the contractors regarding occupancy rates and guaranteed rental rates. It would be a small step to ensure that additional terms covering these issues are included.<sup>143</sup> It would be more difficult to make modifications to existing

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<sup>140</sup> See *Contributors to Penn. Hosp. v. Philadelphia*, 245 U.S. 20 (1917); see also *El Paso v. Simmons*, 379 U.S. 497, 533–34 (1965) (“[T]he Fifth Amendment forbids Texas to do so without compensating the holders of contractual rights for the interests it wants to destroy. Contractual rights, this Court has held, are property, and the Fifth Amendment requires that property shall not be taken for public use without just compensation.”).

<sup>141</sup> *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (“[W]e have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses.”); see also *id.* at 733 n.9.

It could not justifiably be claimed that the Contract Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government. Indeed, records from the debates at the Constitutional Convention leave no doubt that the Framers explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause.

*Id.*

<sup>142</sup> See *Perry v. United States*, 294 U.S. 330, 350–51 (1935).

<sup>143</sup> *Mil. Housing Privatization*, *supra* note 127.

MHPI contracts and the benefit of doing so may not be worth the cost of making those modifications.

### *3. Hearing by an Army Board Prior to “Bar-from-Post”*

Providing individuals a pre-barment hearing before a standing military administrative board goes one step further towards providing sufficient due process to withstand judicial scrutiny. Arguably, if the commander, who has a direct interest in the exclusion issue, is removed from the decision making, the hearing will be fairer than a decision made directly by the commander. Additionally, the creation of a board would remove from the commander the burden of conducting these exclusion hearings. Unfortunately, the creation of a barment board does not alleviate the other legal concerns discussed in the preceding section. The board is still a government actor that will be depriving tenants of property rights, depriving contractors and tenants of contractual rights, and acting as the decision maker for a dispute in which it has a direct stake in the outcome. But this option is a further step towards providing procedural due process entitlements in the form of a more impartial decision maker.

The first three courses of action retain military control over the decision to remove tenants from the installation. Removing the “eviction” authority from the commander and his representatives to truly independent bodies would make great strides in providing tenants both the appearance of and actual due process rights. It would also help to address the Fifth Amendment takings issue. Giving the authority to exclude to independent bodies is not, however, a simple solution. It is one thing to say that a court will resolve these issues; it is quite another to say how the court will resolve these issues. Of course, by relinquishing these decisions to an authority outside of the command, we would be abdicating the very power that the commander had been seeking to exercise—the authority to bar from the installation individuals who are disruptive to health, welfare, morale, security, and mission accomplishment. The following sections will discuss the implications of allowing courts to handle “evictions” in lieu of the commander taking action.

It is important to remember that this article is not concerned with the exclusion of “normal” individuals from the installation. Rather, it is solely concerned with the exclusion of individuals who have defined

property rights within the installation boundaries—tenants in MHPI housing. An exclusion from the installation is a de facto eviction from that housing or a governmental taking of property. These disputes that would be brought before independent courts would be “true” eviction proceedings.

#### B. Formal Eviction Proceedings by the Courts

There are three distinct areas of concern when considering authorizing courts to evict tenants residing in privatized housing on military installations. First, are the jurisdictional requirements of such legal proceedings. Would state courts have personal and subject matter jurisdiction over the dispute? Would federal courts have subject matter jurisdiction? Second, is the choice of law puzzle. If the case were brought in federal court, what law would be used? If the case were brought in state court, would federal law, current state law, or prior state law apply? Finally, one must consider the logistics of such legal proceedings. Who would bring the eviction suit—the Government or the contractor? What if the Government and contractor disagree? Has the contractor simply sublet the housing to the tenants, with the true landlord remaining the Government?

Why use the courts to remove tenants? By using the federal court system to evict MHPI tenants, one removes the eviction authority from the commander but retains that authority with the federal government. Action by a court would also successfully address all of the constitutional issues that have been raised in this article. Procedural due process requirements would be fully met with a pre-eviction court hearing. If the tenant is successfully evicted, any Fifth Amendment takings issue disappears because with the return of possession of the leasehold to the landlord, any of the tenant’s property rights are extinguished. The same benefits are true with hearing these cases in state court, but this option further removes the authority from federal control.

### 1. *Jurisdiction on Military Installations*

The quagmire involving jurisdiction on military installations is well-documented and discussed.<sup>144</sup> Military installations have historically been under the exclusive control and jurisdiction of the federal government. This is commonly referred to as the “state within a state” situation where the military installation is its own sovereign within the boundaries of a surrounding state.<sup>145</sup> The federal government solely owns and controls the installation. It is possible, however, to have situations where the federal government does not have sole and total jurisdiction over its installation.<sup>146</sup> This typically occurs where the federal government has acquired real estate from a state. The transfer/deed documents at the time of transfer states whether the state was reserving some sort of jurisdiction over the land or whether the state was ceding all jurisdiction to the federal government.<sup>147</sup> Generally, states ceded most jurisdiction to the federal government.

Additional shifting of jurisdiction over military installations has been accomplished through positive actions by the federal government. Over time, much jurisdiction and “control” has been retroceded back to local and state governments. This shift was accomplished by court rulings, statutory enactment, and executive action releasing issues from federal control into the jurisdiction of state governments.<sup>148</sup> As a result of this

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<sup>144</sup> See Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113 (Oct. 1997) (providing a contemporary discussion of these issues).

<sup>145</sup> *Howard v. Comm’rs*, 344 U.S. 624, 626 (1953).

<sup>146</sup> Castlen & Block, *supra* note 144, at 117.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 135. Congress has authorized the Secretaries of the military services to relinquish jurisdiction to states through the passage of 10 U.S.C. § 2683.

(a) Notwithstanding any other provision of law, the Secretary concerned may, whenever he considers it desirable, relinquish to a State, or to a Commonwealth, territory, or possession of the United States, all or part of the legislative jurisdiction of the United States over lands or interests under his control in that State, Commonwealth, territory, or possession. Relinquishment of legislative jurisdiction under this section may be accomplished

(1) by filing with the Governor (or, if none exists, with the chief executive officer) of the State, Commonwealth, territory, or possession concerned a notice of relinquishment to take effect upon acceptance thereof, or

(2) as the laws of the State, Commonwealth, territory, or possession may otherwise provide.

shift, many installations now have a mixture of exclusive federal jurisdiction, concurrent state and federal jurisdiction, and split or partial jurisdiction.<sup>149</sup> The jurisdiction attached to any particular piece of real estate is derived from the terms of the grant through which the property was obtained and by actions of the government following the acquisition.<sup>150</sup>

The type of jurisdiction attached to a military installation will determine the authority of a state or federal court to adjudge a complaint. As discussed above, the issue becomes complex because military installations have been acquired over many years through numerous devices.<sup>151</sup> One portion of the installation may be land with exclusive federal jurisdiction attached, while one block away may be land upon which federal and state authorities exercise concurrent jurisdiction. The determination of what jurisdiction is attached to various portions of a military installation entails a historical analysis of the acquisition of the property and of the various legislative measures taken since acquisition.<sup>152</sup> In addition to this historical analysis, however, the Supreme Court has also significantly eroded the concept of exclusive jurisdiction in a variety of holdings. In *Howard v. Commissioners*, the Court held that “[t]he fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is not interference with the jurisdiction asserted by the Federal Government.”<sup>153</sup> Thus, residents living in areas of exclusive jurisdiction on military installations are afforded the right to vote, hold public office, qualify for welfare, etc.<sup>154</sup> In addition to the *Howard* concept, Congress has seen fit to pass legislation that specifically gives states jurisdiction over certain matters located on military installations. These matters include personal injury laws, workers’ and unemployment compensation, and state income taxes.<sup>155</sup> There still are many areas of law, however, that have not been explicitly

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(b) The authority granted by subsection (a) is in addition to and not instead of that granted by any other provision of law.

10 U.S.C. § 2683 (2006).

<sup>149</sup> Castlen & Block, *supra* note 144, at 118.

<sup>150</sup> *See id.*

<sup>151</sup> *See id.* at 117–18.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 123 (citing *Howard v. Comm’rs*, 344 U.S. 624, 626 (1953)).

<sup>154</sup> *See id.*

<sup>155</sup> *Id.* at 123–24.



opened to the states in areas of exclusive jurisdiction, among which is landlord/tenant law.<sup>156</sup>

## 2. *Choice of Law on Military Installations*

Should federal courts be given the authority to exercise jurisdiction over eviction proceedings on military installations, they would have to decide what body of law to use. The choice of law is largely dependent on the type of jurisdiction present over the land on which the privatized housing is located. Choice of law could be particularly problematic on areas of the installation where the federal government has acquired land from the state and has gained exclusive jurisdiction over that land.

There is currently no federal law governing landlord/tenant issues, and current state laws do not govern in areas of exclusive federal jurisdiction. Thus, there appears to be a void in governing law. In this situation it is possible that the state law that was in existence when the federal government acquired the land is still attached to that land.<sup>157</sup> In the case of *Chicago, Rock Island & Pacific R.R. v. McGlinn*, the Supreme Court held that “whenever political jurisdiction and legislative power over any territory are transferred from one . . . sovereign to another, the . . . laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign.”<sup>158</sup> Thus, since the federal government has not legislated landlord/tenant law, the landlord/tenant law in existence at the time of the annexation from the state currently governs.<sup>159</sup> State laws that have been enacted since the annexation have no effect within the enclave.<sup>160</sup>

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<sup>156</sup> *Id.* at 124.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 125 (quoting *Chicago, Rock Island & Pac. R.R. v. McGlinn*, 114 U.S. 542, 546 (1855)).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

The *McGlenn* doctrine provides a particularly convoluted solution to the choice of law when portions of the military installation have been acquired over time. In this situation, there may be a different body of landlord/tenant law for each such portion of the installation. Even more troubling are the cases when there was no state law in effect when the transfer occurred. In this case, the common law at the time of the acquisition would govern.<sup>161</sup> Finally, there are instances where the federal government has always had ownership of the property. In these situations, there is no governing law. State law is inapplicable and the federal government has failed to enact its own appropriate legislation.

### 3. Federal Court Course of Action

The morass of jurisdictional and choice of law problems presented by adjudicating eviction proceedings in federal court could be addressed in several ways. The first option would be to allow the directives of *McGlenn* to take their natural course. For some installations located in states with longstanding landlord/tenant law, this option may be painless. Likewise, if the property on which the privatized housing is located is recently acquired from the state, it would be likely that modern landlord/tenant law is attached to the property. But in other, more convoluted situations, this option would simply be untenable. The Government could be left with a hodge-podge of law or with no law at all.

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<sup>161</sup> *Id.* at 125–26 (discussing *Orlovetz v. Day & Zimmerman, Inc.*, 848 P.2d 463 (Kan. App. 1993)).

When the plaintiff attempted to sue the defendant for breach of implied contract of employment and wrongful termination of a whistleblower, both the district court and the appellate court found that under the applicable Kansas law of 1942 (the time of the federal enclave's acquisition) the state did not recognize either of the plaintiff's causes of action. The plaintiff, a victim of a harm committed on a federal enclave, was without a remedy since the state ceded the property to the federal government in 1942, when protection from such contract violations was nonexistent. Furthermore, since Congress never passed legislation specifically adopting subsequently enacted Kansas law, the plaintiff only could obtain relief under the Kansas law in effect at the time the federal government acquired the property. That old Kansas law became the present federal law.

*Id.*

A second option would be to enact federal legislation that would expressly assimilate the current laws of the host state. Landlord/tenant law on exclusive jurisdiction areas of the military installation would then mirror the off-post law. Federal courts, however, would be administering the law rather than state courts. A primary issue with this approach is that state law does not take into account the unique needs of the commander in maintaining good order and discipline within the confines of his installation. State law would often be at odds with the operational concerns of the commander.

A third option could go a long way in remedying the conflict with operational priorities present in the first two options. Congress could legislate, in part or in whole, a new federal body of landlord/tenant law. The likelihood of Congress drafting an entire new body of landlord/tenant law is low, but there is an option that would not require the enactment of an entire new body of law. Congress could enact “gap-filler” eviction legislation in order to conform State law to the military commander’s special interests. Simply put, the legislation would have the federal courts adopt the local jurisdiction’s landlord/tenant law with certain additional provisions. These provisions could include the ability to evict tenants for reasons outside of the four corners of the lease. These provisions could include areas such as operational security, military necessity, and health, morale, and welfare of the military community. Federal law, through the Supremacy Clause,<sup>162</sup> would win out over state law in the event of conflicts. This would resolve many of the problems inherent in state landlord/tenant law by giving it a distinctly military flavor.

None of these options remedy the other major stumbling block of pursuing evictions in federal court. It is the contractor who is the landlord and will be bringing eviction actions in all of these instances. The commander would not have the ability to evict under the traditional application of landlord/tenant law—he is not the landlord. If the commander desires to evict the tenant but the contractor does not, the commander could not proceed under eviction laws. The commander would be left with barring the individual from the installation and we would be back at square one with our original concerns about due process. This problem could be remedied by making the Government a party to the lease agreement. The commander could then be considered a landlord and empowered to evict. But this involvement would contradict

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<sup>162</sup> U.S. CONST. art. VI, § 2.

the very purpose of the MHPI, which was intended to get the Government out of the landlord business.

#### 4. *State Court Course of Action*

If the Government retains exclusive jurisdiction on the enclave, it would still be possible, under *Howard*, for state courts to hear landlord/tenant issues arising on the enclave. *Howard* dictates that if there is no federal law on point, the state courts should apply the current local law since it would not be conflicting with federal law.<sup>163</sup> This adoption of state law, however, is not automatic. *Howard* also requires that the adoption of state law not create any “friction” with federal functions.<sup>164</sup> Under the “no friction” analysis it is possible that a court might come to the conclusion that local landlord/tenant law should not be used because it impedes the military mission too much. Scenarios are easy to envision where it is in the commander’s interest to have people removed from the installation simply because they are disruptive to the military community, but those people are not in violation of the terms of their lease. *Howard* would not allow courts to utilize state law to evict the tenant in these circumstances because of the friction with the federal function.

The most extreme fix to the MHPI problem is to retrocede jurisdiction of all MHPI eviction proceedings to the state courts. The Government could cede jurisdiction of the particular parcels of land upon which the privatized housing is located and create an area of concurrent jurisdiction. Congress could also chose to legislate the assimilation of state landlord/tenant law. State courts would then be free to utilize state law despite the friction it would create with military operations. This

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<sup>163</sup> *Howard v. Comm’rs*, 344 U.S. 624, 627 (U.S. 1953).

The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

*Id.*

<sup>164</sup> *Id.*

approach was recommended in a 1997 *Military Law Review* article.<sup>165</sup> It is also current Department of the Army policy to retrocede jurisdiction when exclusive federal jurisdiction is unnecessary.<sup>166</sup> The decision to retrocede is more than a legal issue. It is a policy decision on whether the maintenance of exclusive jurisdiction in the area of landlord/tenant law is necessary on the installation in order to safeguard the commander's responsibility to maintain good order and discipline.

## VI. Conclusion

The legal conundrum created by the MHPI is not satisfactorily addressed under current law or procedures. Three major areas need to be addressed by the Government: due process, Fifth Amendment takings, and military operational requirements. It is arguable which solution is "best," as all of the proposed courses of action have shortcomings. However, the implementation of a neutral review board to hear cases prior to barring tenants from the installation should be adopted as policy. Adoption of this course of action grants an additional level of due process that may stave off future court action. At the same time, this course of action retains military control over access to the installation.

In conjunction with the implementation of a review board, the government should consider restructuring MHPI agreements. The restructuring of these agreements could require private contractors to utilize leases that clearly outline what constitutes a breach of good order, discipline, and morale, and could result in an "eviction" from the installation. The leases currently in use are vague and overly broad in what constitutes a breach. Again, this restructuring would not remedy the identified constitutional shortcomings, but it would go a long way toward providing more concrete procedural and substantive due process.

Finally, the Government should be prepared to adopt the courses of action that utilize the court systems if required. It is possible that future courts will not show the extreme deference to the military that the *Adamski* court exercised. In that case, the use of the MHPI may require that the commander relinquish some of his control of the installation to the judiciary.

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<sup>165</sup> See Castlen & Block, *supra* note 144.

<sup>166</sup> *Id.* at 136.

A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken. “The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.”<sup>167</sup>

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<sup>167</sup> *Fuentes v. Shevin*, 407 U.S. 67, 92 n.22 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (citations omitted)).