

Reddall v. Bryan and the Role of State Law in Federal Eminent Domain Jurisprudence

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Article 2015

Keywords: Washington Aqueduct, City of Washington, Montgomery Meigs, Condemnation, Army Corps of Engineers, Montgomery County, The Potomac River, John S. Tyson

Abstract: Prior to 1875, the standard federal takings procedure had been for state governments to condemn property on behalf of the federal government. As a result, the majority of interpretative work in the early history of eminent domain jurisprudence was undertaken by state courts. In 1853, the Maryland General Assembly granted the United States Government the power to condemn land in Maryland for an aqueduct across the Potomac to supply water to two District cities. In Reddall v. Bryan, the Maryland Court of Appeals upheld the aqueduct supplying the city of Washington with water as a public use. The Court reasoned that any constitutional use by the United States was a public use of every part of the United States—and therefore in each one of the states. Securing an adequate water supply for the Capital of the Government of the United States was in the public interest, particularly at a time when public records were vulnerable to the threat of fire. States continued to condemn land for federal projects, even as the joint takings scheme became complicated, and was no more convenient than a direct federal taking, as the case of Reddall v. Bryan demonstrates. The Federal government did not assert its power of eminent domain in its own name in its own courts until 1875.

Discipline: Takings Jurisprudence, United States History, Riparian Property Rights

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I. Introduction

By 1852, the city of Washington, chartered only in 1791, was already tapped out. The worried 32nd Congress appropriated five thousand dollars to determine how to obtain “an unfailling and abundant supply of good and wholesome water.”¹ The Army Corps of Engineers, assigned to make the survey, had the commendable foresight to recommend drawing water from the Potomac River at Great Falls in the neighboring State of Maryland via an aqueduct. Smaller and more convenient sources of water could have satisfied the immediate demand—Great Falls was over ten difficult construction miles away from the first receiving reservoir—but it offered an intake that would meet the growing population’s demand for water far longer into the future.

The Washington Aqueduct, the District of Columbia’s first public water system, was built by the Corps of Engineers from 1853 to 1863. The Civil War, as well as political battles, delayed construction, and it was not until 1863 that the planned works were completed.² Chief Engineer Montgomery C. Meigs’ plan was to divert the water from the Potomac River into a brick conduit. Gravity and pumping stations would direct water through the conduit over land to retaining reservoirs, where it could then be pumped to the city’s pipelines. But, the Federal government did not own the Maryland land or buy it from the private owners. Instead, Maryland condemned the land, and then offered it to the Federal government. United States Attorney General Caleb Cushing had approved the arrangement, which was not without precedent.³

Nevertheless, William C. Reddall, who owned a plat of land near the Great Falls, challenged the taking in the Maryland courts, where Reddall’s attorney John S. Tyson complained in vain how “this little State” was “[s]o eager [...] to surrender to ‘The Monster

¹ Act of Aug. 31, 1852, ch. 108, 10 Stat. L. 92 (1910) (making appropriations for civil and diplomatic expenses).

² STAFF OF J. COMM. ON THE WASHINGTON METROPOLITAN PROBLEMS (APRIL 1958), 85TH CONG., WATER SUPPLY IN THE WASHINGTON METROPOLITAN AREA 1 (Comm. Print 1958).

³ Washington Aqueduct, 7 Op. Att’y Gen. 114, 118, 122 (1855).

Republic' her precious right of eminent domain.”⁴ The Maryland Court of Appeals held that any constitutional use by the United States was a public use of every part of the United States—and therefore in each one of the states, including Maryland—and an aqueduct supplying the city of Washington with water, though confined to a particular district, was a public use.

While at first blush Reddall’s loss appears to be an open-and-shut case—the land was taken for a public use through a commonly-used procedure—several layers of nuance appear upon closer inspection. *First*, the state-federal tension over which entity may control the management of the flow of the Potomac River is as old as the District of Columbia itself. The federal riparian interest is the same as any other within Maryland’s boundaries, and is subject to the substantive requirements of the state permit system.⁵ Under the Maryland riparian common law, which is a part of the permit procedure, all lower riparian interests, including out-of-state interests, are to be accommodated as integral parts of the management scheme for the entire river. To simply cede water to this new-fangled seat of Federal government is certain to have been an affront. *Second*, the case was instrumental in the formation of the District of Columbia’s identity as a conceptual, rather than merely geographical, place. A drastically difference scene would greet the more than 20 million annual visitors to Washington, D.C. today had the states never allowed the capital to grow beyond the ten square miles originally ceded for its formation.⁶ *Third*, the case offers an instructive lesson in legal professional responsibility: tell the whole truth. In its opinion, the Maryland Court of Appeals stops just shy of outright accusing Reddall of hiding the ball by stating it had grounds to refuse to hear the case. Thus, just as the once-

⁴ *Reddall v. Bryan*, 14 Md. 444, 451 (1859).

⁵ See Warren K. Rich, “The Water Rights of Maryland in the Potomac River Basin (ICPRB 1976).

⁶ “2014 Visitor Statistics, Washington, D.C.,” Destination DC (2014).

http://destinationdc.dmplocal.com/dsc/collateral/2014_Washington_DC_Visitor_Statistics.pdf

contentious Washington Aqueduct still supplies the people of Washington, D.C. with water today, the case of *Reddall v. Bryan* still serves a useful function in modern takings jurisprudence.

II. Creation of the District of Columbia

In the mid-19th century, Americans were still adjusting to the idea of a Federal capital. Even before the original States had ratified the Constitution, it became a matter of serious deliberation in Congress where the permanent capitol ought to be located.⁷ The Federal Congress, having held its sessions according to the exigencies of war in Philadelphia, Baltimore, Lancaster, York, Princeton, Annapolis, Trenton, and New York City, was ready to settle down.⁸ The new Constitution of 1787 declared that “Congress shall have power to exercise exclusive legislation over such a district, not exceeding ten miles square, as may, by the cession of States, become the seat of government.”⁹ Maryland and Virginia entered the race for the honor early—and won. For Maryland, the loss of territory for was outweighed by the prospective advantages from the proximity of the national capital.¹⁰ By Chapter 46 of the 1788 Laws (“the Maryland Act of Session”), the Maryland General Assembly ceded to the Congress of the United States a district of ten miles square to be used for “the seat of Federal Government.”¹¹ Virginia followed suit by Chapter 32 of its 1789 Session Laws.¹² Turf battles between Maryland, Virginia, and Pennsylvania ensued. For example, in response to passage of a House Resolution that the seat ought to have be on the Susquehanna River, Pennsylvania, James Madison purportedly said that, had this development been foreseen, Virginia may not have ratified the Constitution.¹³

⁷ John Thomas Scharf, *History of Western Maryland: Being a History of Frederick, Montgomery, Carroll, Washington, Allegany, and Garrett Counties from the Earliest Period to the Present Day; Including Biographical Sketches of their Representative Men* 691 Louis H. Everts (1882).

⁸ *Id.*

⁹ U.S. CONST. art. I, § 8, cl. 17.

¹⁰ Scharf, *supra* note 7 at 691.

¹¹ 1788 Md. Laws ch. 46.

¹² 1789 Va. Laws ch. 32.

¹³ Scharf, *supra* note 7 at 691.

Congress ended the debate on July 16, 1790, when it accepted the Maryland-Virginia territory, at “a site on the river Potomac, at some place between the Eastern Branch and the Conococheague,” through enactment of the Residence Act by a narrow vote of 32 in favor to 29 opposed. The Act prospectively selected a site on the Potomac River as the permanent capital in ten years’ time.¹⁴ Also, the Act designated Philadelphia as the temporary capital for a period of ten years, the result of a compromise reached between Thomas Jefferson, Alexander Hamilton, and James Madison concerning the permanent location of the Federal capital. In exchange for locating the new capital on the Potomac River, Madison agreed not to block legislation mandating the assumption of the States’ debts by the Federal government.¹⁵

Most of the territory composing the District of Columbia, including the city of Washington and the city of Georgetown, was originally a portion of Montgomery County.¹⁶ Separated from Prince George’s County in 1748, Montgomery County was settled early in Maryland’s history.¹⁷ The Potomac River comprises the southwest border of Montgomery County for approximately forty miles.¹⁸ The Maryland Cession Act, which ceded the territory accepted by Congress, also transferred Maryland’s ownership of a part of the Potomac River and its bed to the United States.¹⁹ Given the history of water rights in the Potomac River, the 1788 cession put the newly settled District on a collision course with Tyson’s “little State.”

III. Property Rights in the Potomac River

Securing an adequate water supply for the sprawling Washington metropolitan area was—and is—a major problem for the Potomac River Basin, further complicated by the

¹⁴ An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, ch. 28 (1790).

¹⁵ Scharf, *supra* note 7 at 691.

¹⁶ *Id.* at 691-670.

¹⁷ *Id.* at 640.

¹⁸ *Id.* at 647.

¹⁹ See Morris v. U.S., 174 U.S. 196, 234 (1899) (establishing the universal admission and acceptance of the existence of riparian rights as attached to water lots).

multiplicity of jurisdictions concerned. The various States and the District of Columbia have diverse laws and sometimes conflicting interests. West Virginia and Pennsylvania make minimal demands on Potomac waters, but as “upstream” states are in a position of advantage hydrologically.²⁰ For 383 miles, the Potomac River forms the interstate boundary between Maryland and Virginia on the upper portion, and Maryland and West Virginia on the lower.²¹ The Federal government felt renewed concerned with the allocation of Potomac waters after Congress tasked the Army Corps of Engineers with the responsibility of providing water to the District of Columbia, in addition to the Corps’ general authority as a regulator of navigable waterways and builder of dams.²²

Maryland, like most states in the eastern United States, is a riparian state, recognizing the riparian doctrine of water law, but it also administers a management program for its watersheds through a permit system. *Unlike* many states, Maryland owns the interstate riverbed to the opposite shore (whereas most states with riparian borders meet in the middle of the riverbed).²³ This anomaly dates to the 1632 grant from Charles I of England to Lord Baltimore, which included the Potomac River to the high-water mark on the Virginia shore.²⁴ In 1785, the low-water mark on the Virginia side was agreed upon as the boundary between the two States, and would become a survey line in 1877.²⁵ This language of ownership—“to the Virginia low-water mark”—connotes a right to use those waters, and to manage those waters so they may be preserved for future use.²⁶ The ownership concept applies to the river bottom, too.

²⁰ Conference, *Legal Rights in Potomac Waters* vii (ICPRB 1976).

²¹ Kenneth Lasson, “A History of Potomac River Conflicts” 2 (ICPRB 1976).

²² ICPBR, *supra* note 20 at viii.

²³ Potomac River Compact of 1958, Va. Code Ann. § 28.2-1001 (2013).

²⁴ Warren K. Rich, “The Water Rights of Maryland in the Potomac River Basin 179 (ICPRB 1976).

²⁵ *Id.*

²⁶ Rich, *supra* note 24 at 180.

Where there is no pre-existing federal appropriative right, or where the Federal government has not condemned an upstream riparian right, the federal interest is equivalent to any lower riparian interest subject to prevailing state law.²⁷ Because the allocation of water to the Washington Aqueduct is not subject to the limitations of a specific federal statute such as the Reclamation Act of 1902, Maryland's ability to manage the Potomac River as a state resource is largely unconstrained.²⁸ However, the inherent right of a lower riparian must be recognized, and Maryland's permit program does account for the uses exercised by the lower, federal interest.

A. The Federal Government as a Lower Riparian Interest

In 1853, by enactment of Chapter 97, Congress authorized the expenditure of an additional \$100,000 to bring water into the city of Washington. Congress enacted legislation concerning the Washington, D.C. water supplies under the authority of Article I, Section 8, Clause 17 of the U.S. Constitution, which states “[The Congress shall have Power] to exercise exclusive Legislation in all Cases whatsoever [...] over all Places purchased by the Consent of the Legislation of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”²⁹ However, Chapter 97 included a condition respecting Maryland's riparian rights: “provided that if the plan adopted by the President of the United States should require water to be drawn from any source within the limits of Maryland, *the assent of the legislature of that State should be obtained.*”³⁰ Emphasis added. In response, the Maryland General Assembly enacted Chapter 179 of the Laws of 1853, providing that:³¹

Be it enacted by the General Assembly of Maryland, That if the plan adopted by the President of the United States for supplying the city of Washington with

²⁷ See *U.S. v. Fallbrook Public Utility Dist.*, 165 F. Supp. 806 (S.D. Calif. 1958) Aff'd. 347 F.2d 48 (9th Cir. 1965).

²⁸ Reclamation Act of 1902, Pub. L. No. 57-161.

²⁹ U.S. CONST. art. I, § 8, cl. 17.

³⁰ Act of March 3, 1853, ch. 97, 10 Stat. L. 189 (1853).

³¹ Act of May 3, 1853, ch. 179, 1853 Md. Laws (giving the assent of Maryland for the federal plan to supply the City of Washington with water).

water, should require said water to be drawn from any source within the limits of this State, consent is hereby given to the United States to purchase such lands, and to construct such dams, reservoirs, buildings, and other works, and to exercise concurrently with the State of Maryland, such jurisdiction over the same as may be necessary for the said purpose.

The fact that the consenting legislation specifically provides for concurrent state-federal jurisdiction has led legal scholars to interpret Chapter 179 of the Acts of 1853 as a recognition of the federal entity—the District of Columbia—as a lower riparian user.³² This argument is bolstered by analogy to the city of Baltimore, which received the same treatment by the General Assembly through Chapter 376 of the Laws of 1853. Chapter 376 authorized Baltimore to “use and occupy forever or for a term of years, any land, real estate, spring, brook, water or water course which they may conceive expedient and necessary for the purpose of conveying water into the said city.”³³ Pursuant to this provision, the city constructed a dam on the Gunpowder River, above the city in Baltimore County, and a tunnel to convey the water to the city. Subsequently, the city sought injunctive relief against an upstream industrial polluter. In deciding the matter, the Court of Appeals defined the status of the municipality as “riparian proprietors.”³⁴ The similar content within the two Chapters of 1853 and the application of that language to almost identical hydrological situations—conveying Maryland water into the city—indicate that the Maryland legislature’s intended to recognize the Federal government, acting on behalf of the District of Columbia, as a lower riparian entity with the same rights as those enjoyed by the city of Baltimore or any other lower riparian interest.

This position of inferiority did not leave the Federal government powerless, however. On the contrary, Congress authorized the Corps of Engineers to manage the dams, aqueducts, and other appurtenances constructed above the Great Falls to convey water to the cities of

³² Rich, *supra* note 24 at 177.

³³ Act of May 27, 1853, ch. 376, 1853 Md. Laws (supplying the city of Baltimore with water).

³⁴ Baltimore v. Warren Manufacturing Co., 59 Md. 96, 107 (1882).

Washington and Georgetown.³⁵ In addition, the Corps was authorized to manage the physical pipes, drains, houses, and lands used to disperse the water to the two District cities. The Corps was also authorized to control the water works and regulate the manner in which Washington and Georgetown could tap the water works in order to supply water.³⁶

Within water law jurisprudence, there has been a progression of cases showing an expansion of federal jurisdiction over the appropriation of both interstate and intrastate waters. However, that jurisdiction is directly dependent upon whether there is a specific federal authorizing statute.³⁷ For example, in U.S. v. State of California, the Supreme Court held that Section 8 of the Reclamation Act of 1902 did not exempt the Federal government from obtaining a water appropriation permit from the State of California, but also declared that the State did not have the authority to deny the permit.³⁸ While states like California experienced this expansion, this is not likely to be case for Maryland, because Chapter 179 of the 1853 Laws of Maryland still requires the consent of the Maryland legislature for federal withdrawals of water to serve the District.

In fact, Maryland's adoption of its appropriation permit program in 1933 formalized a system wherein Maryland's sovereignty over water withdrawals within its territorial boundaries were recognized and assessed.³⁹ Though a water appropriation permit program may restrict the riparian right to use water, it has been held to be a proper exercise of a state police power.⁴⁰ The United States Supreme Court, while it has never decided an issue of state regulation of riparian

³⁵ Act of March 3, 1859, ch. 184, 11 Stat. 435 (1859) (placing money appropriated for the Washington Aqueduct under the direction of the Secretary of the Army).

³⁶ 40 U.S.C. § 45, et seq.

³⁷ See Arizona v. California, 373 U.S. 546 (1993) (holding that Section 14 of the Boulder Canyon Project Act, which established a reclamation project on the Colorado River, granted the Secretary of the Interior the right to allocate and make contracts for the distribution of water to both California and Arizona).

³⁸ U.S. v. State of California, 403 F. Supp. 874 (E.D. Cl. 1975).

³⁹ Act of Apr. 5, 1933, ch. 526, 1933 Md. Laws (declaring State policy to control the appropriation of Stat waters).

⁴⁰ Commonwealth v. Alger, 91 Mass. (7 Cush.) 53, 84-84 (1851).

rights, has suggested that “every State is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise.”⁴¹ The Maryland Court of Appeals likewise has not reviewed state regulation of water appropriation. However, the court has discussed riparian rights involved in the rights of riparian owners to fill land below navigable waters after passage of the 1970 Wetlands Act.⁴² In Board of Public Works v. Larmar Corp., the Court held that such rights were subject to the Act, as well as to “change and modification by the statute law of the State.”⁴³ The Court of Appeals has repeatedly recognized a broad scope of the state police power in the regulation of private property.⁴⁴

However, no matter how great, Maryland’s authority over Potomac River water withdrawals under a “riparian” permit system would not allow Maryland to deprive the District of Columbia or any lower riparian of a reasonable use of river waters, because an upstream state must recognize the rights of a downstream sovereign.⁴⁵ Maryland must ensure that an adequate supply of water is available to these competing interests within the framework of its sovereign authority to regulate the appropriation of Potomac River water within its boundaries. Maryland achieves this interest-balancing through its permit system, which is grounded in common law.

B. Maryland’s Modern Hybrid Permit System

Today, the Maryland Department of the Environment through its Water Management Administration (WMA) issues permits for surface and groundwater withdrawals.⁴⁶ This permit system blends elements of the pure riparian system. One of the deciding factors in issuing a permit is also a key element in defining “reasonable use” under the riparian system: the amount

⁴¹ See Connecticut v. Massachusetts, 282 U.S. 660 (1931).

⁴² Board of Public Works v. Larmar Corp., 262 Md. 24 (1971)

⁴³ *Id.* at 35-36.

⁴⁴ See A.H. Smith Sand and Gravel Co. v. Dept. of Water Resources, 270 Md. 652 (1974); Bureau of Mines of Maryland v. George’s Creek Coal & Land Co., 272 Md. 1043 (1974).

⁴⁵ See Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931).

⁴⁶ Md. Code Ann., Envir. §5-501–516 (2000).

of water relative to present and future users.⁴⁷ For example, a permit for water appropriation is granted where there is a determination that the applicant has shown the greatest feasible utilization of the waters of the State and that the public safety will be preserved and the general welfare promoted.⁴⁸ In addition, WMA's criteria for approval of water appropriation permits require that the applicant show the need for the quantity of water which is requested, that the withdrawal will not violate water quality standards, and that there is sufficient wastewater treatment which could be consistent with the preservation of the natural resources of the State.⁴⁹ Likewise, courts applying the reasonable use test to proprietors' conflicting common law claims have looked at the purpose of the defendant's use, the destination to which the water was taken, the extent of the use, and the problems such as pollution encountered as a result of the use.⁵⁰ Notably, WMA issues water appropriation permits to both residents of Maryland and out-of-state residents on the same basis. Implicit in this procedure is the recognition that citizens of the District have the same rights as Marylanders under Maryland State law.⁵¹

IV. "Worthy of the Nation:" History of the Washington Aqueduct

Until the beginning of the 19th century, the residents of the city of Washington carried their drinking water from the area's "many sweet rivers and springs," first described by Capt. John Smith.⁵² President Jefferson, in 1805, had granted authority to the city "to sink wells and erect and repair pumps in the streets."⁵³ The largest source was the Smith Spring, purchased by the Federal government in 1833.⁵⁴ The other major springs were located along the White House

⁴⁷ Rich, *supra* note 24 at 179.

⁴⁸ *Id.* at 181.

⁴⁹ Md. Code Regs. 26.17.06.06 (2015).

⁵⁰ See Richard R. Powell, *The Law of Property* (Vol. 5 Mathew Bender & Co., Inc. 1956).

⁵¹ Rich, *supra* note 24 at 181.

⁵² STAFF OF J. COMM. ON THE WASHINGTON METROPOLITAN PROBLEMS (APRIL 1958), 85TH CONG., WATER SUPPLY IN THE WASHINGTON METROPOLITAN AREA 1 (Comm. Print 1958).

⁵³ Act of May 5, 1805, The Corporation of the City of Washington (1802) (making appropriation for sinking wells).

⁵⁴ Harry C. Ways, *The Washington Aqueduct 1852-1992* 1 (1996)..

to the Capitol between Massachusetts and Pennsylvania Avenues: Old City Spring (1802-1870), Caffreys Spring (1809-1870), and Franklin Park Spring (1816-1904).⁵⁵ The Federal government purchased Franklin Park Spring in 1816 to pipe water into the White House and the Treasury, first in wooden pipes and later in cast-iron.⁵⁶ These lines were tapped by the citizens legally and illegally, which reduced the amount available to the Federal government.

Early schemes to increase the water supply included one by I. K. Skinner for a 600-foot long “Grand Basin” on the Mall between the Capitol and the Washington Monument, proposed to Congress in 1830.⁵⁷ While the basin would have been exposed to pollution, the fatal flaw in the design was that it would flood the basements of many Pennsylvania Avenue homes. Robert Mills, a Baltimore architect and designer of the Washington Monuments in both Baltimore and the District of Columbia, proposed a supply from Tiber Creek and Rock Creek, but Congress chose Smith Spring instead.⁵⁸

In the early 1850s, the ever-growing population of Washington and the memory of devastating fires forced Congress to acknowledge that the nation’s capital required more than the wells, springs, and cisterns which were its current sources of water. Between 1800 and 1852, the population of the cities of Washington and Georgetown increased from 3,000 to approximately 58,000 people—50,000 and 8,000 respectively.⁵⁹ On Christmas Eve, 1851, a fire started by a spark from a stove destroyed the room housing the library of Congress in the Capitol Building.⁶⁰

A. The Corps Surveys: Great Falls at Great Expense

⁵⁵ U.S. Army Corps of Engineers, History of the Washington Aqueduct 1-3 (Washington District 1953).

⁵⁶ *Id.*

⁵⁷ Ways, *supra* note 54 at 2.

⁵⁸ Mills also designed the Treasury Building, the Patent Office, and the Post Office buildings.

⁵⁹ Ways, *supra* note 54 at 2.

⁶⁰ *Id.*

In 1850, Congress appropriated \$500 to enable the War Department to “make such examinations and surveys” to ascertain the “best and most available mode of supplying the city of Washington with pure water.”⁶¹ In accordance with the Act, Secretary of War C. M. Conrad submitted to Congress the report of Lieutenant Colonel George W. Hughes of the Topographical Engineers on January 25, 1851.⁶² Hughes recognized the Potomac River at Great Falls as a potential but untenable source, given the limited funds. Hughes noted that the physical difficulties were exacerbated by the construction of the Chesapeake and Ohio canal, which took up much of the favorable ground. Besides, in Hughes’ estimation, Rock Creek was capable of furnishing 22 millions of galls on water per diem, and the present demands of Washington required only 1,200,810 galls per diem. Robert Mills again recommended procuring a supply of water from Rock Creek, which forms the dividing line between the city of Washington and Georgetown.⁶³ In his view, while the Great Falls project “would indeed be a work worthy of our Republic” that would place it on a footing with Rome, “we live in the age of economy and utilitarianism, rather than of extravagant advancement of waters which now thunder down the craggy rocks of the noble Potomac.”⁶⁴ Both Rock Creek proponents relegated Great Falls as Plan B: “And supposing at any future time, a large supply of water should be required for the city, there is the Potomac river still.”⁶⁵ Thus, the first study was confined to Rock Creek.

B. Capt. Meigs Tells Rock Creek to Kick Rocks

The 32nd Congress seemingly recognized that the modest appropriation had not yielded a comprehensive report, and in 1852 increased the amount for surveying tenfold to \$5,000.⁶⁶

⁶¹ Act of Sept. 30, 1850, 31st Cong. (appropriating money to enable the War Department to make surveys to determine a water supply for the city of Washington).

⁶² U.S. Army Engineer School, Occasional Papers Issues 1-19 181 (2d ed. 1905).

⁶³ Robert Mills, Water-works for the Metropolitan City of Washington 30 (Lemuel Towes, 1853).

⁶⁴ *Id.* at 31.

⁶⁵ *Id.* at 35.

⁶⁶ Act of Aug. 31, 1852, ch. 108, 10 Stat. L. 92 (1910) (making appropriations for civil and diplomatic expenses).

Alexander Stuart, Secretary of the Interior, drafted the appropriations bill with the help of banker William Corcoran and the Army's Chief Engineer, Colonel Joseph Totten.⁶⁷ Col. Totten initially advised President Millard Fillmore that Capt. F. A. Smith of the Corps of Engineers would lead the project, but Smith died shortly after his appointment. In his place, Col. Totten recommended Lieutenant Montgomery Cunningham Meigs, his assistant in the Engineers Bureau during 1849 and 1850. New Captain Meigs arrived in Washington and reported to the War Department to take charge of the work on November 3, 1852. Meigs also took over the assistant Smith had engaged, William H. Bryan, a civil engineer who remained with Meigs as his principal assistant during most of his work on the Aqueduct—and who would be the defendant in Reddall v. Bryan.

Just three months later, Capt. Meigs' final report was submitted to the Senate. The report discussed the water supplies of New York, Boston, Philadelphia, Paris, and London, as well as the ancient and modern Roman system with compelling rhetoric: "Let our Aqueduct be worthy of the Nation[.]"⁶⁸ On a practical level, Meigs estimated the population and the amount of water needed to meet the increasing demand more accurately than Hughes, down to listing every dwelling and shop in each ward of the city.⁶⁹ The report contained case studies of three possible sources: Rock Creek, Little Falls, and Great Falls on the Potomac River. The studies described the advantages and disadvantages for each source, as well as detailed estimates of cost, water quality, and filtering. Meigs recommended the Great Falls project over Rock Creek, which would supply 36 million gallons per diem via a 7-foot-diameter conduit at a cost of \$1,921,244.⁷⁰ Col. Totten recommended the \$350,000 modification of a 9-foot-diameter conduit, as per Meigs'

⁶⁷ Ways, *supra* note 54 at 4.

⁶⁸ Senate Doctrine No. 48, 32d Cong., 2d Sess. (1853).

⁶⁹ Meigs estimated that the city would require 22.5 million gallons per day (mgd) in 1900, and that the 9-foot conduit would meet demand for 200 years. In reality, consumption exceeded 50 mgd by 1900, and the supply had to be augmented with a second conduit from Great Falls in the 1920s. Ways, *supra* note 54 at 7.

⁷⁰ Senate Doctrine No. 48, 32d Cong., 2d Sess. (1853).

reconsideration. This fortuitous second-thought met the demand of the city until 1927; the 7-foot conduit would have been overwhelmed by unanticipated population growth as early as 1890.⁷¹

In response to the Report, in 1853, Congress authorized the expenditure of \$100,000 under the direction of the President in order to bring water into the city of Washington, “provided that if the plan adopted by the President of the United States should require water to be drawn from any source within the limits of Maryland, the assent of the legislature of that State should first be obtained.”⁷² As discussed above, Maryland’s assent was forthcoming. In June 1853, Capt. Meigs submitted his detailed plan for the Aqueduct to Col. Totten for passage to Secretary of War Jefferson Davis (future provisional President of the Confederate States of America during the Civil War), who forwarded it to President Franklin Pierce for final approval.⁷³

Using the \$100,000 authorization, Capt. Meigs began fine-tuning the plan and designing the facilities. The Aqueduct would begin at a small dam on the Potomac River at Great Falls, Maryland to divert the river flow into the conduit.⁷⁴ There, a gatehouse building with twenty sluice gates controlled the flow and maintained the proper water levels for ten miles of conduit, with a slope of 9.5 inches per mile. Near the District boundary, the conduit discharged to a Receiving Reservoir created by damming the Little Falls Branch for sedimentation. The water then traveled through a two-mile extension of the conduit to the Distributing Reservoir at Drover’s Rest on the Potomac Palisade above Georgetown for additional settling and storage controlled by a “taintor” floodgate. Two cast-iron mains carried the water into the city itself, crossing College Pond and the jilted Rock Creek and Tiber Creek to the Capitol and the Navy

⁷¹ Ways, *supra* note 54 at 7.

⁷² Act of March 3, 1853, ch. 97, 10 Stat. L. 189 (1853).

⁷³ Christ and Dix, *The Papers of Jefferson Davis* 169 (Vol. 6 1853-1855).

⁷⁴ John H. Walker, *History of the Water Supply* 12-14 (Washington, DC: Government Printing Office 1909).

Yard. The total length of the system was 18.6 miles. For the higher-elevation areas of Georgetown that could not be reached by gravity flow, Meigs designed a 2.5 million-gallon circular storage reservoir. Water was pumped up 145 feet to the reservoir by a hydraulic ram installed in the bridge over Rock creek at Pennsylvania Avenue, taking water from the main.

C. The “Sickly Season:” Practical and Political Constraints Slow the Project

On October 31, 1853, just four months after the President’s approval, and less than a year after his appointment to begin his original survey, Capt. Meigs broke ground on a parcel of land near Lock 20 on the C&O Canal, site of the hotel at Great Falls.⁷⁵ Meigs had ridden to Great Falls accompanied by William H. Bryan. But challenges in obtaining land and rights-of-way—such as from the likes of Mr. Reddall—as well as illness among the workers and the Civil War delayed completion. In addition, opposition to military supervision of civil works projects by some members of Congress resulted in a lack of regular appropriations of funds. President Pierce, at the urging of Secretary Davis, had transferred the authority for completion of major public works, including the Washington Aqueduct, from the Department of the Interior to the War Department.⁷⁶ By June 1854, the original \$100,000 was spent on only one section of the conduit and the start of three tunnels, and no further funds were appropriated until March 1855, when Congress approved an additional \$250,000.⁷⁷ These funds lasted until the following year, when Congress stipulated that the funds authorized for 1856 could only be used to pay for existing liabilities and preserving work already done.⁷⁸ These interruptions delayed completion and drove up costs, as crews were recruited, hired, and trained only to be dismissed and rehired.

⁷⁵ Annual Reports of the Chief Engineer of the Washington Aqueduct 1853-1950 (1854).

⁷⁶ Ways, *supra* note 54 at 10.

⁷⁷ *Id.* at 18.

⁷⁸ *Id.*

By 1857, with the conduit only 20% complete, Capt. Meigs developed a nemesis among the members of Congress opposed to the involvement military men in public works: Congressman Richard Stanton of Kentucky (and to a lesser extent, his brother Frank Stanton of Tennessee).⁷⁹ The Stanton brothers objected to Meigs' superintendence of the project, and a public feud developed, with Richard Stanton denouncing Meigs on the House floor and in the press.⁸⁰ Meigs' counter-lobbying for Congressional support included taking 25 members on a cruise to Great Falls to inspect the work in progress on April 12, 1856.⁸¹ Although Meigs' had the citizens, mayor, and council of the city of Washington on his side, it wasn't until the Stantons retired from Congress that adequate funds became available to pursue construction. Their exit coincided with the inauguration of President James Buchanan, who appointed Secretary of War John B. Floyd, another opponent of Meigs' plan. However, this set-back was balanced by Meigs' mentor and ally former Jefferson Davis' ascent to the Senate. Finally, in 1857, Congress appropriated \$1 million, followed by \$800,000 in 1858.⁸² But by 1859, the work was once again suspended for lack of funds.⁸³ With the help of Senator Jefferson Davis, now chair of the Senate Military Affairs Committee, Meigs successfully lobbied Congress for the \$500,000 Aqueduct Appropriation Act in June 1860.⁸⁴ .

Water via the Washington Aqueduct first became available in 1859 from the Little Falls Branch, and did not come from the Potomac at Great Falls until December 1863.⁸⁵ To accomplish this feat, the Corps of Engineers constructed a masonry dam across the Potomac, a

⁷⁹ Charles E. Fairman, *Art and Artists of the Capitol of the United States* 152 (Washington DC: Government Printing Office 1927).

⁸⁰ *See* Congressional Globe, June 14, 1854 House Proceedings 1392-1492 (vol. 33) (Stanton referring to Meigs: "He makes contracts with whom he pleases; he purchases materials when and where he chooses; he employs mechanics and laborers, and pays for all of them by his own check or order. I cannot see the authority for all this").

⁸¹ Meigs' Journal, 12 April (1856).

⁸² Christ and Dix, *supra* note 73 at 179.

⁸³ Annual Reports, *supra* note 75.

⁸⁴ Act of June 25, 1860, ch. 211, 12 Stat.106.

⁸⁵ Ways, *supra* note 54 at 6.

control gatehouse at Great Falls, a twelve-mile conduit, eleven tunnels, six bridges, pump stations, pipelines, and two reservoirs. Aqueduct water spilled into two reservoirs, Dalecarlia Reservoir at the District line and the Georgetown Reservoir two miles downriver. It was hoped that by allowing the murky river water to remain in these reservoirs the material carried in suspension would settle to the bottom before it was distributed to the city. Such was not the case. Washington City's public water had a muddy yellowish color until rapid-sand filtration was adopted in 1928. The muddy and "distasteful" quality of the unfiltered river water resulted in continued use of the preexisting wells and springs for drinking and bathing until filtration was introduced to the system in the early 1900's.⁸⁶ Some historians counter that it was the pollution of the wells and springs by open sewers and privies, and not the unfiltered Potomac water, that contributed to the high rates of typhoid fever in Washington City in the last half of the 19th Century.⁸⁷ In either case, rates declined significantly in the early 20th Century, as slow sand filtration techniques led to the abandonment at last of John Smith's wells and springs.

D. The Washington Aqueduct in 2015: Alive and (Not a) Well

Capt. Meigs would certainly be vindicated for his vigorous defense of his plan today. Despite the naysaying by Mills and Stanton, the Washington Aqueduct is still supplying the nation's capital with public water, nearly 150 years after construction.⁸⁸ Its capacity has been expanded many times, and modern filtration and fluoridation have been added. The Aqueduct produces drinking water for approximately 1.1 million citizens in the District of Columbia, Arlington County, Virginia, the City of Falls Church, Virginia, and all federal installations including the Pentagon, Fort Meyer, Andrews Airforce Base, the Defense Mapping Agency, and the National Airport.

⁸⁶ *Id.* at 2.

⁸⁷ Dept. of Sanitary Engineering, Brief History of the Water Division 3 District of Columbia (Aug. 1946).

⁸⁸ <http://www.nps.gov/choh/learn/historyculture/thewashingtonaqueductsystem.htm>.

In 1882, Congress gave the municipal government of the District of Columbia responsibility for distributing the water supplied by the Washington Aqueduct.⁸⁹ This pattern of joint responsibility continued and, today, the Washington Aqueduct performs the water supply operations that might be described as “wholesaling” and the District performs the “retailing” functions. A division of the Baltimore District, U.S. Army Corps of Engineers, the Aqueduct is a federally-owned and operated public water supply agency that produces an average of 155 million gallons of water per day at two treatment plants located in the District of Columbia. All funding for operations, maintenance, and capital improvements comes from revenue generated by selling drinking water to its jurisdictions.

V. The Case of Reddall v. William H. Bryan & Others

Reddall is about a state exercising its power of eminent domain on behalf of the Federal government. The historical context for this expansion in condemnation jurisprudence was the elegant Washington Aqueduct project conceived by Montgomery Meigs to carry water from the Potomac River in Maryland to the District of Columbia. Ironically, Maryland, after successfully lobbying for the permanent location of the Capital near it for the prospective benefits of proximity to the Federal seat, would be giving the District the benefit of water.

The Appellant, William C. Reddall, argued that Maryland could only take his land through eminent domain “for the uses of the public of Maryland”—not to give or to sell to the nation’s capital.⁹⁰ At the time, Washington was only one of several cities inside the District of Columbia, and Reddall further complained that the water would go only to residents in the city of Washington rather than to the District as a whole.⁹¹ Here, Mr. Reddall may have had a point—

⁸⁹ STAFF OF J. COMM. ON THE WASHINGTON METROPOLITAN PROBLEMS (APRIL 1958), 85TH CONG., WATER SUPPLY IN THE WASHINGTON METROPOLITAN AREA 1 (Comm. Print 1958).

⁹⁰ Reddall v. Bryan, 14 Md. 472, 451 (1859).

⁹¹ *Id.* at 455.

the District of Columbia Organic Act of 1871 replaced the municipal governments of the city of Washington, Georgetown, and Washington County with a single, unified government for the whole District.⁹² Nevertheless, the Maryland Court of Appeals held that the taking was lawful under state and federal law. The Supreme Court dismissed the ensuing writ of error issued under Section 25 of the Judiciary Act for lack of jurisdiction. Because the Court of Appeals remanded the case back to the Montgomery Circuit Court, the decree was an interlocutory order.⁹³ Such a decree is not such a final decree as will give the Supreme Court jurisdiction over the case. Even if there had been a final decree by the dismissal of the bill, the Court held that, in addition to the refusal of the injunction, there is no ground upon which the writ of error could be maintained under the 25th section of the Judiciary Act when an appellant is challenging the rights exercised by the Federal government, rather than the law, as Mr. Reddall does here.⁹⁴

A. Magruder's and Beall's (Dis?) Honesty

“Magruder’s and Beall’s Honesty” (spelled “Bell’s” in the original Court of Appeals opinion), a 1,726-acre tract of land, was granted to Daniel Magruder and Charles Beall on May 16, 1726.⁹⁵ According to John Thomas Scharf, a Confederate soldier, lawyer, historian, and antiquarian known for writing numerous local histories of Maryland, the plat extended from Leeke Forest to the southwest to the Potomac River, down the river to Edmond Brooke’s farm, then parallel with the plats “Friendship” and “Contention,” and around the farm of William Reading. The Chesapeake and Ohio Canal—and soon, the Washington Aqueduct—passed through it. The bill of complaint states “that certain individuals, (the defendants) contriving and

⁹² In 1874, Congress replaced the District’s quasi-elected territorial government with an appointed three-member Board of Commissioners. Direct rule by Congress would continue for nearly a century until the passage of the District of Columbia Home Rule Act in 1973.

⁹³ *Reddall*, *supra* note 90 at 422.

⁹⁴ *Reddall*, *supra* note 90 at 423. *See also* Stanton, Edward M. to John S. Tyson, Attorney General’s Office (Feb. 18, 1861) Edward M. Greenway Collection Ms. 23. Special Collections, Milton S. Eisenhower Library (The Johns Hopkins University).

⁹⁵ *See* Scharf, *supra* note 7.

confederating together, on the 1st of April 1857 [...] with force and arms, broke and entered complainant's said close or tract of land, tore down his fences, cut down and destroyed his crops, dug up and subverted the soil, and other great and irreparable damage to him then and there did, to his great injury."⁹⁶ In addition, the Appellant alleges, the defendants are "steadily and recklessly proceeding to plant and build thereon" a stone pillar or abutment forty feet wide and one-hundred feet deep, the pillar being, as they allege, intended for the support of a bridge or aqueduct across a stream of water called "The Cabin John Branch," adjacent to complainant's said land.⁹⁷ When completed, Meigs' Cabin John Bridge was the final link in the conduit, allowing the first delivery of Potomac River water in December of 1863. At 220 feet, the Cabin John Bridge would hold the record for the longest single span bridge in the world for forty years.⁹⁸

B. The Condemnation Action

The Maryland General Assembly granted the United States government the power to condemn land for an aqueduct along the Potomac in 1853. General Assembly (Laws) 1853, Chapter 179. Using these powers, the state government typically would have applied for writ of condemnation against the land owner in the Montgomery County Circuit Court.⁹⁹ The writer could not find documentation of the condemnation proceeding and seemingly Judge Brewer could not either—there are no exhibits in the original bill of complaint. If there were a condemnation proceeding, the authorization approved by the Maryland legislature required that condemned land had to be evaluated by a jury of at least twelve inhabitants of the county,

⁹⁶ Reddall, *supra* note at 445.

⁹⁷ Reddall, *supra* note 90 at 446.

⁹⁸ Phillip O. Macqueen, History of the Washington Water Supply 48-49.

⁹⁹ See U.S., to Use of Washington Aqueduct v. Great Falls Mfg. Co., 21 Md. 119 (1864).

summoned by the sheriff.¹⁰⁰ For example, a jury awarded the Great Falls Manufacturing Company \$150,000 for damages resulting from the construction of a dam for the Washington Aqueduct across the Potomac above the Great Falls. Judge Brewer on the Court of Appeals overturned the award because the tract was located in Virginia; it had no riparian rights in the Potomac River.¹⁰¹ Judge Brewer deemed the initial condemnation proceedings and award of damages invalid, and remanded for a second round of condemnation hearings. The proceedings were not resolved in the Montgomery Circuit Court because both parties agreed to submit to federal arbitration.

There is some evidence that Reddall was compensated—or at least evidence that Congress intended for him to receive compensation. In 1859, the 30th Congress made appropriations to the War Department “For payment, by the Secretary of State, to *William C. Reddall* and William C. Zantzinger, equally to be divided between them, the sum of seven hundred and seventy-one dollars and forty-three cents, which has been already appropriated for clerk hire in the State Department, but not drawn from the treasury.”¹⁰² Emphasis added. The question remains: was payment ever received?

It is possible that the condemnation case against Magruder’s and Beall’s Honesty was dismissed. However, dismissal seems improbable given that these papers have never been found for the Reddall v. Bryan decision, which when Shepardized, has thirty citing references. Capt. Meigs’ first Annual Report to Congress noted that “considerable delay was caused by there being no legally qualified sheriff in the county of Montgomery” to issue the necessary legal notices.¹⁰³ The delay prevented Meigs’ team from obtaining title to any land before the “sickly season,” a

¹⁰⁰ Christ and Dix, *The Papers of Jefferson Davis* 159 (Vol. V).

¹⁰¹ The Great Falls Condemnation Case, Judge Brewer’s Opinion, Senate Executive Document No. 42, 35th Cong. 2d sess.

¹⁰² Act of March 3, 1849. ch. 100 (making appropriations for federal civil and diplomatic expenses of 1850).

¹⁰³ Annual Reports, *supra* note 75.

period of contagion which essentially shut down the work during the summer months and forced them to do most of the work during the winter and spring, and may explain the disappearance of the condemnation papers (if ever they were filed). In either case, in his complaint, Mr. Reddall should have been explicit as to whether or not a condemnation action had been sought. In the order rejecting the complaint from which Reddall appeals in this case, Judge Brewer issues a warning, repeated by the Court of Appeals:

The right to an injunction is not *ex debito justitiæ*, but such application is addressed to the sound conscience of the chancellor, acting upon all the circumstances belonging to each particular case. He has the right to require a full and candid disclosure of all the facts, and if there appears in the proceedings, sufficient to show that this has not been made, he may properly refuse to exercise the extraordinary power of the court, through the instrumentality of a writ of injunction.

The Latin term means “as a matter of right.”¹⁰⁴ Thus, Judge Brewer is saying, this Court is not obligated to hear this claim, especially if it suspects that the complainant is not presenting the complete facts. The basis for his belief that Reddall is not being transparent appears to be “[t]he peculiar nature of the acts [which] would indicate that they complainant’s case was not fully stated, but was made out by the concealment from the [sic] facts having a very important bearing upon it, and which would act materially upon the conscious of the court.”¹⁰⁵ Specifically, these peculiarities are the manipulation of the facts as to indicate that the defendants were “acting in their individual capacity for their own benefit,” when the court believes they were really acting as public agents in the prosecution of some important work”—namely, the Washington Aqueduct.

There is other suspicious phrasing: “this bill positively avers that no attempt was ever made by or for the United States, to form an agreement with the complainant for the purchase of

¹⁰⁴ EX DEBITO JUSTITIAE, Black’s Law Dictionary (10th ed. 2014).

¹⁰⁵ Reddall v. Bryan, Montgomery Circuit Ct. (Jan. 1858).

his land with reference to said aqueduct. The appropriation, therefore, of the land of the complainant for the use of the aqueduct, was in direct violation of the Constitution of the United States.” It is almost as though the complaint states this for the record, not for its truth. Just because a bill avers a fact, does not make it so. The complaint further states that even “if such contract had been made by any member of the government with the appellant, the same not having been authorized by any law of Congress,” it would have been inoperative and void under the Act of 1820, ch. 52, and it “would have been equally void under the resolution of Congress, Sept. 11th, 1841, (5 Stat. at Large) which requires the assent to such purchase of the State of Maryland.” This too reads like base-covering—even if the Court discovers a proceedings the bill avers does not exist (i.e., one Reddall has concealed), it is no matter because the condemnation action too is unconstitutional. Here, the lower court beats the Appellant at his own game, finding that “It is to be presumed that the proper steps were taken to purchase or condemn the land in which the trespass has been committed. It is not alleged in the bill that they have not, and this land will obstruct a great public work, which we think this to be upon light grounds such as might induce it to grant an injunction in the case of a trespass by a mere private individual.”¹⁰⁶

C. In the Public Interest

Reddall’s attorney, John S. Tyson, a willful Baltimorean legislator and Free Mason, argued that Congress had no enumerated “power to purchase lands or water power in another State, for the construction of an aqueduct for the use of the city of Washington.” Yet, the first preliminary to any assent on the part of Maryland was the adoption by President Fillmore of the plan requiring water to be brought from some source within the limits of the state. Other preliminaries had been rendered necessary by a resolution of Congress, which requires that the land or location to be purchased in another state, should first be selected, the title approved by

¹⁰⁶ Reddall v. Bryan, Montgomery Circuit Ct. (Jan. 1858).

the Attorney General of the United States, and the assent to its purchase requested of that State by the Secretary of War, before any such assent could be given or received.¹⁰⁷ In response, the Maryland General Assembly “*kindly* dispensed with all these preliminaries,” by the voluntary passage of the Act of 1853, ch. 179.¹⁰⁸ So eager was this “little State” to surrender to “The Monster Republic” its precious right of eminent domain, laments John S. Tyson for the Appellant “that, in the uncertainty whether any or which Maryland fountain or fresh stream would be selected,” it offers to “to sacrifice them all to the President of the United States—peaceably, if it can be accomplished by the peaceable surrender of the citizen; if not, then by the intervention of all the powers of the State and of the United States.”¹⁰⁹

Robert Mills framed the public good of fire-safe Federal government buildings as one of moral compunction. Given the “combustible nature” of many of the building where records were kept, “the Government charged with the safety of those invaluable documents, are remiss in the onerous duty of preserving them from this evil,” particularly when the City of Washington’s water works lagged behind its sister cities, including Boston, Baltimore, Philadelphia, and New York.¹¹⁰ Four government buildings had already been burned to the ground (independent of those destroyed by the enemy during Civil War): the War Office, during the Presidency of John Adams and the Treasury, General Post Office, and Patent Office during that of President Jackson.¹¹¹ Washingtonians, Mr. Mills argued, were also charged with the responsibility of guarding the public property, and had a right to demand of their Legislature (Congress) to fund the water supply required to discharge this duty. “The people of the whole Union look to us as to watch over their property here, and to preserve their valuable documents deposited here; and

¹⁰⁷ Act of Sept. 11th, 1841, 5 Stat. at Large, 468.

¹⁰⁸ *Reddall v. Bryan*, 14 Md. 444, 450 (1859).

¹⁰⁹ *Reddall*, *supra* note 108 at 450.

¹¹⁰ Robert Mills, *Water-works for the Metropolitan City of Washington* 5 (Lemuel Towes, 1853).

¹¹¹ *Id.*

should we not say to them, instruct your Representatives to provide us with the facilities necessary to discharge the important duties you have imposed upon us?”¹¹² In Reddall, the Maryland Court Appeals agrees: “But the aqueduct is a public use. The supply of water is for the city of Washington, the capital of the government of the United States, where, as this court will judicially notice, all the offices of the government, executive, legislative and judicial, perform various of their most important duties and many of them reside.”¹¹³

D. Identifying the Appellees—the Others Who?

In Judge Bartol’s opinion, neither party identifies any of the defendants other than Bryan (“& Others”). But, the original bill of complaint filed in the equity side of the Circuit Court for Montgomery County lists all of the defendants: William H. Bryan, Alfred L. Rives, William H. Piles, John Cameron, James Paine, James Hutchinson, and John Moore. While Reddall would have the Court believe that when the trespass occurred, a group of men spontaneously banded together to wreak havoc on his property, in reality, supervision of the contracted work was divided into three geographic sections with the Cabin John Division under Alfred Landon Rives—the second named defendant in Reddall’s suit. In addition, overseeing the three assistant engineers was Capt. Meigs’ principal assistant, William H. Bryan—also the principle defendant.

The insinuation that Reddall knew the defendants’ object from the start is evidenced by the following statement by Judge Bartol:¹¹⁴

In 1853, the Maryland law on the subject was passed. Congress had before these alleged trespasses began, appropriated \$1,600,000 for the construction of this work, as it was being expended from 1852 to 1857. Now this complainant being presumed to know all these laws, must have known too, that these vast works, these excavations and embankments, and abutments, built at the expense of

¹¹² *Id.*

¹¹³ Reddall, *supra* note 108 at 464.

¹¹⁴ *Id.* at 462.

thousands of dollars, and stone and other materials brought on his land at the expense of tens of thousands more, were for this costly aqueduct.

The Court further denies the injunction because Reddall is a hold-out, “knowing all this, he makes no objection for twelve months, and after having thus induced the United States to expend on his land more than a hundred times its value, he then comes forward and files this bill for an injunction to arrest this great work in its progress.”¹¹⁵ This admonishment may explain why there is no record of the Circuit Court for Montgomery County hearing the case on remand—Reddall withdrew his complaint.

VI. Impacts of Reddall on Federalism

Prior to 1875, the standard procedure had been for State governments to condemn property on behalf of the Federal government.¹¹⁶ As a result, the majority of interpretative work in the early history of eminent domain jurisprudence was undertaken by state courts. In 1845, the Supreme Court articulated the theory of eminent domain advanced in Reddall. For nearly thirty years, judicial precedent made clear the fact that the Federal government could use eminent domain only in places where it had the powers of a local government. In the states, the Federal government relied on state cooperation.¹¹⁷ States frequently used their powers of eminent domain for the benefit of the Federal government, and such use has rarely been held unconstitutional.

However, in each situation in which the State’s use of eminent domain for the Federal government has been upheld, the Federal government itself had the power to accomplish the same result without the consent of the state. When the condemnation was clearly for a federal

¹¹⁵ Reddall, *supra* note 108 at 462.

¹¹⁶ See Gilmer v. Lime Point, 18 Cal. 229, 229 (1861) (“fort” was a “public use,” and a state may, for its own purposes, condemn land for a fort, or may authorize the land to be condemned for such purpose, for and on behalf of the federal government). See also United States v. Dumplin Island, 1847 WL 4543 (N.Y. Sup. Ct. 1847) (authorized the taking of land near Long Island for the United States to build a lighthouse).

¹¹⁷ See Pollard v. Hagan, 44 U.S. 212 (1845).

purpose, this use of power has been justified on the theory that it was not improper for the state to act when the Federal government could have condemned the land itself. To refuse to allow the state to condemn land, the reasoning goes, would serve no purpose but to force a second condemnation proceeding by the Federal government. However, the argument most often advanced for this use of eminent domain by a state is that its citizens still get the principal benefit while the Federal government only receives an incidental benefit. This is conclusive in a project for improvement of navigation within a state, or the construction of a federal fort to protect a harbor.¹¹⁸

States continued to condemn land for federal projects, and the Federal government continued not to even attempt any federal condemnations. This was true even as the joint takings scheme became quite complicated, and was no more convenient than a direct federal taking would have been, as the case of Reddall v. Bryan demonstrates. The Federal government did not assert its power of eminent domain in its own name in its own courts until 1875.¹¹⁹ State takings were not reviewed in federal courts until later still; the limitations of the Fifth Amendment on federal takings were applied to the states under the Fourteenth Amendment in 1896.¹²⁰ Accordingly, the law of eminent domain developed primarily in the state courts and only gradually thereafter did the federal bench begin to contribute.

VII. Conclusion

It is unlikely takings jurisprudence will see another Reddall v. Bryan, now that the Federal government has generated a body of precedent in asserting its own power of eminent domain. However, cases like Reddall remain important because they make up much of the

¹¹⁸ *The Power of A State to Condemn Land for A Federal Park*, 44 Yale L.J. 1458, 1459-60 (1935).

¹¹⁹ See Kohl v. United States, 91 U.S. 367 (1875).

¹²⁰ The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599 (1949). See Missouri Pac. Ry. Co. v. State of Nebraska, 164 U.S. 403 (1896).

“good” law today, particularly in areas where Congress has not enacted many specific federal statutes, such as water appropriations in the Potomac River. In addition, Reddall and other cases helped transform the states’ relationships with the District of Columbia into more of a “two-way street,” in which both the State and Federal governments may derive benefits from the other.

Appendix A: Biography of John S. Tyson

John S. Tyson, was born in the City of Baltimore in 1797. His father, Jesse Tyson, was the great-grandson of Reinert Tyson, the progenitor of the Tyson family in the United States. Reinert Tyson was converted to the Quaker faith by William Penn and emigrated from Germany to escape religious persecution in 1683.¹²¹ This ancestry likely was the basis for John S. Tyson’s religious tolerance, as he supported the enfranchisement of Jewish Marylanders.

I. Professional Life

John S. Tyson attended West Town College, located in West Chester, Pennsylvania, an Institution of the Society of Friends or Quaker institution.¹²² After gradation, he studied law in the office of Johnathan Meredith, and began practicing as member of the Baltimore Bar. In addition, John S. Tyson was made a Mason in Union Lodge, No. 60 around the year 1820.¹²³ He never held office, but remained a member in the Lodge until its dissolution in 1834. John S. Tyson was, however, elected to the House of Delegate of Maryland in 1825.¹²⁴ As a Delegate, he is best known for an eloquent speech on the untimely named “Jew Bill,” to abolish restrictions in the Maryland constitution preventing Jewish people from voting or holding office:¹²⁵

¹²¹ Edward T. Schultz, *History of Freemasonry in Maryland, of All the Rites Introduced into Maryland, from the Earliest Times to the Present* 751 (J. H. Medairy & Co. 1885).

¹²² *Id.*

¹²³ *Id.* at 752.

¹²⁴ *Id.*

¹²⁵ Speech of John S. Tyson, Esq., Delivered in the House of Delegates of Maryland, 1825 on the “Jew Bill” 16 (Press of O.D. Jenkins & Company, 104 W. Fayette Street, Baltimore 1876).

The clause, therefore, denying civil and religious freedom to the Jews is expunged from your constitution. The bill now on your table gives to that people no new rights, it merely preserves to them right which are immutably and inalienably theirs. The right to put up one religion, is the right to put down another—the right to put down one is the right to put down all; and the right to put down all, is the right to build *one* upon *their* ruins.

A gifted orator, John S. Tyson was often asked to deliver speeches before his Masonic Brethren. Tyson gained entry into the Independent Order of Odd Fellows this way, when the Order invited him to speak but discovered he was not a member.¹²⁶

Tyson also employed uglier language in several political kerfuffle. By mid-century, Maryland's political structure was substantially different from what it had been in 1800.¹²⁷ The trend toward a more democratic society had wrought fundamental changes to the political scene. Since the passage of the 1802 suffrage law nearly half a century before, the aristocratic features of Maryland's government and politics had disappeared. Gentry rule had given way to the professional politician and the party machine. The people had a voice in the selection of nearly every leader, with the notable exception of United States Senators, who were still chosen by the General Assembly. The locus of power had shifted to correspond with the democratic changes as the more populous areas now exercised more influence in the State government. In 1855, the Know-nothings arose out as a distinct party buoyed by the forces of sectionalism and nativism.

Against this background, Tyson wrote the "Barney letter" decrying the then-novel political principle of "to the victor go the spoils" in response to Major Barney's removal upon the election of Andrew Jackson as President.¹²⁸ Tyson was revealed to be the true author years after the sensational letter to the President had ostensibly been sent by Mrs. Barney. Formerly a Federalist, Tyson switched to the Democratic party, changing allegiance from General Jackson to

¹²⁶ Schultz, *supra* note 121 at 752.

¹²⁷ Walsh and Fox, Maryland: A History—1932 to 1974 306. (1968).

¹²⁸ Schultz, *supra* note 121 at 752.

Adams, for which he was lambasted by one Dabney S. Carr. On July 5, 1828, Carr publically addressed John S. Tyson, “than whom a dirtier scoundrel does not breath—a fellow, both MORALLY and POLITICALLY, CORRUPT and ROTTEN to the CORE” in a broadside. Poor Tyson had taken offense to an earlier letter published in the Republican involving Carr in which he is alluded to as “The Hero of the Nail.”¹²⁹ Tyson had responded to the insulting play on words in a handbill to Carr stating “You have without the slightest provocation, repeatedly assailed my character.”¹³⁰ Then again, Tyson proceeded to label Carr a “political assassin, an unprincipled villain, a liar and a coward—a disgrace to your party, and a stigma to the town.” Another political feud arose between John S. Tyson and the Honorable John V. L. McMahon, which incited McMahon to send Tyson a challenge to a duel.¹³¹ The principals and their seconds spent the night before the affair of honor in Bladensburg, Maryland, a town in Prince George’s County that was home of the “Bladensburg Dueling Grounds.”¹³² Dr. W. Handy, Tyson’s brother-in-law, learned of the duel and pursued the parties accompanied by a constable, with a warrant for Tyson’s arrest.¹³³ Handy found Tyson asleep in his lodgings, and locked him in his room. But the next morning, Dr. Handy opened the door to find “the bird had flown out the window and escape.” The combatants exchanged two shots, one of which “slightly” injured McMahon in the leg. The two men thereafter became “warm personal friends.”

II. Personal Life

¹²⁹ Dabney S. Carr, “A short history of a moral & political scoundrel,” Baltimore (1828). <https://www.loc.gov/item/rbpe.02902600/>.

¹³⁰ John S. Tyson, “To honorable men,” Baltimore (1828). <https://www.loc.gov/item/rbpe.02902700/>.

¹³¹ Schultz at 752.

¹³² Beyond the Battle: Bladensburg Rediscovered. Hornblake Library Special Collections (Univ. of Maryland College Park). <http://www.lib.umd.edu/bladensburg>.

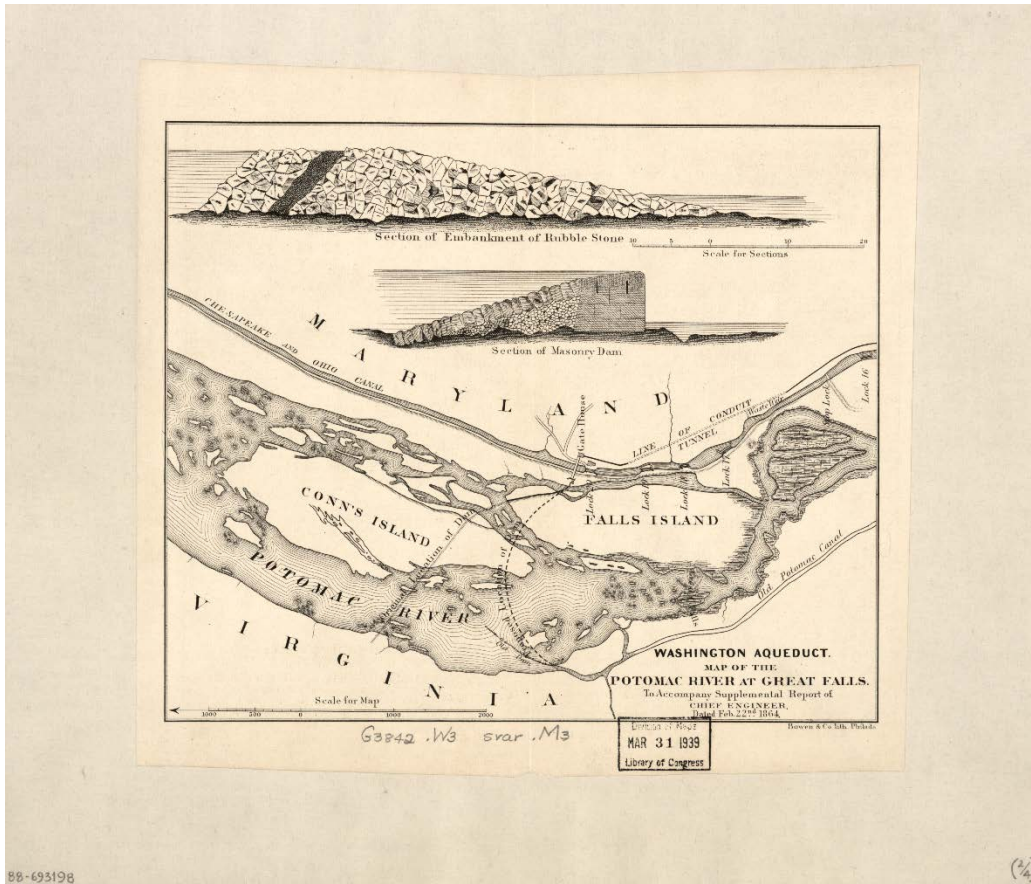
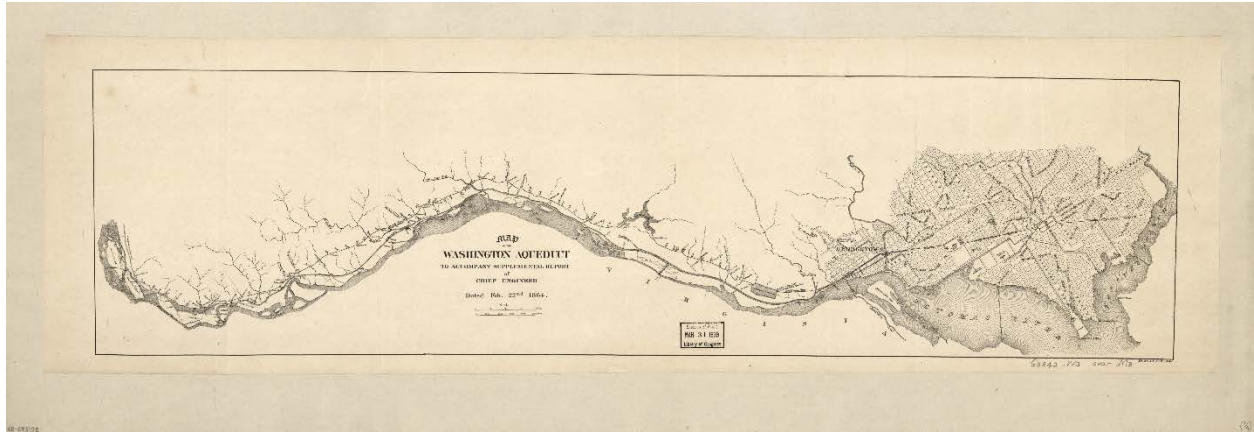
¹³³ Schultz, *supra* note 121 at 753.

Tyson married Rachel Snowden of Birmingham Manor, Anne Arundel County.¹³⁴ They had four children: three daughters and a son. John S. Tyson, Jr., who carried on his father's Masonic tradition, and was made Past Grand Master of Masons of Maryland. Tyson Sr. died October 3, 1864 at his home near Ellicott City.

¹³⁴ *Id.*

Appendix B: Illustrations.

1. These maps of the Washington Aqueduct, Md. and Washington D.C.: accompany the supplemental report of the Chief Engineer dated Feb. 22nd 1864. United States Senate, Library of Congress Geography and Map Division Washington, D.C. (Feb. 22, 1864). Digital Id <http://hdl.loc.gov/loc.gmd/g3842wm.gct00209>



2. This photograph shows the Cabin John Bridge built by Montgomery C. Meigs. "Distant view of Union Arch, Washington aqueduct, built by Gen. M.C. Meigs, span of 220 feet," Russell, Andrew J., photographer & Meigs, Montgomery C. (1861-1865), Library of Congress Prints and Photographs Division Washington, D.C. Digital Id <http://hdl.loc.gov/loc.pnp/ppmsca.07273>.



No. 255. - DISTANT VIEW OF UNION ARCH, WASHINGTON AQUEDUCT.
Built by Gen. M. C. Meigs. Span of 220 feet.

3. The plat features the land in question in the case of Reddall v. Bryan. Resurvey of Magruder's and Bealls' Honesty; William C. Reddall. Land Records JGH, 63-65 (March 9, 1855). [MSA C 2152-196](#).

