A federal statute bars nearly all claims against the federal government for flooding. Victims of flooding from Hurricane Harvey seem to have found a loophole by claiming that their property was taken without just compensation by flooding. The facts are unusual, but the case raises some deep questions about financial responsibility for flood control.

Here the facts. In the 1920s and '30s, major downpours in Texas revealed that Houston might face catastrophic risks from similar storms. Congress responded by funding the Addicks and Barker dam upstream the city. In order to keep costs manageable, the Army Corps didn't buy land that the dam would flood in the event of every possible storm. Thus, the Corps knew that some lands would probably be flooded once every fifty years or more. It considered the risk acceptable given the rural location of the land.

A series of decisions over later decades accentuated the problem in various ways. In the meantime, the government did its best to ensure that land developers and buyers were aware of the risk, although it's not clear that it was very successful in doing so. When Hurricane Harvey struck, the Corps closed the gates at the dam in order to protect downtown Houston from billions of dollars in damage. As a result, thousands of homes were flooded.

The federal court of claims held last Tuesday that the government had in effect taken a flood easement over the lands and had to pay compensation. (The Supreme Court has created a six-part test for deciding when flooding caused by a federal project constitutes a taking of property. The factor that carried the greatest weight with the court was that the government knew from the start that the dam would fund property and chose to go ahead anyway. The court is vague about when the taking occurred. Was it when the dam was built? When later decisions by the Corps made things worse? Or when the gates were closed to protect downtown Houston? That's not clear.

The court's decision isn't unreasonable. Neither is the government's side of the case. At each stage, the government made decisions that created some risk to these owners' property in order to prevent what it considered greater risks to others. Moreover, it did what it could to warn buyers of the risk, but the buyers chose to build on the land. It's not clear from the court's decision whether the government had any better options. Yes, it could have purchased easements when the dam was built, but that would have done the current owners of the property very little good — the money would have gone to the ranchers or farmers who

owned the land earlier.

It’s not clear what the right answer is as a matter of current doctrine. My own inclination would be to rule for the government, on the view that it ought to have the ability to balance risks to different owners in this situation. I worry that rulings of this kind will make it harder to do flood control projects in the future. But it’s not open-and-shut case: the current plight of the owners is due to systemic failures in land use planning and flood controls in Houston, not really anything they’ve done.