NLWJC- Kagan

Counsel - Box 008 - Folder 005

Takings - Materials [1]

To the Editor:

Jonathan Adler's recent commentary ("Protection for Property Owners", June 3) is so misleading a description of Senator Dole's bill, S.605, as to demand a response. Adler asserts that because of the bill's "nuisance" exception taxpayers won't have to compensate when government prohibits "truly harmful uses of private property." Not so. Nuisance doesn't begin to solve the problems this bill would create.

For example, The Treasury has explained that the bill would expose it to liability for enforcing customs laws, and for bank regulation that protect the safety and soundness of financial institutions for the benefit of depositors. The Attorney General reported that the bill would force taxpayers to pay compensation to lawbreakers for seizures and forfeitures of illegally held property. The Secretary of Health and Human Services says the bill would require compensation of medicare and medicaid providers who are found no longer qualified under new standards. The Department of Defense says that claims could be made under the bill that could force reduced military training operations "with potentially devastating national security implications." None of these matters are nuisances. Eleven Departments, from Agriculture to Transportation, have registered similar concerns. And the Office of Management and Budget has estimated that claims could mount to tens of billions of dollars over just the next seven years.

The fact is that S.605 is the most radical revision of property law ever put forward in the Congress. It would impose a standard that has never been the law in the United States over our entire 200 year history; that is not the law in any other country; that is not the standard set by the Fifth Amendment to the Constitution; and that is not the standard required by the U.S. Supreme Court. Ironically, the single case Adler mentions (that of Gaston Roberge) is one where the owner received compensation under the existing protection of the Fifth Amendment. He would have received no different compensation under S.605.

The Constitution has served us well for more than two centuries. As the Roberge case itself demonstrates, it provides the protection property owners need and deserve. S.605, on the other hand, would wreak chaos with uncounted programs that protect property owners from harmful uses by their

neighbors, such as the corporation that fills land for development, in the process flooding adjoining homeowners, a common problem that is often not a legal nuisance. Municipal officials see the threat in such legislation to protective local zoning. That is why voters in Arizona and Washington State repudiated such bills on the state level.

And that is why virtually every state and local government organization--such as the National League of Cities, the National Conference of State Legislatures, the U.S. Conference of Mayors, and many State Attorneys General--are on record as opposing the bill. It is why more than 140 constitutional and property experts at law schools ranging from Harvard to Hawaii, have written to counsel against enactment, saying the bill rests on "a fundamentally flawed understanding of the Fifth Amendment". And it is why the President, emphasizing his commitment to the constitutional principles that protect property rights--has announced he will veto S.605 or any similar compensation entitlement legislation that is presented to him.

THE WHITE HOUSE
WASHINGTON

Dole will bring others
like 605 to floor

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Amazement - why is he
going to?
Pawlen to have w/ to
Promise to Gramm

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Probably won't get to
floor at all.

Chafee - has said he'll join
demo filib.
Headcounts - At least 15 Repubs aft 605

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**Subject:** S 605 update
**Date:** 03 Jun 96 14:24:51 EDT
**From:** "MCGEE, KELLI" <MCGEEK@DCCMC.MHS.CompuServe.COM>
**To:** <socolow@worldweb.net>

Eric Sartorius, Legislative Assistant for Senator Kassebaum, said that the Senate Judiciary Committee was offering changes of S 605 to the Democrats. The proposed changes are as follows:

1. They want to move the compensation threshold to 50%.

2. They wish to limit the bill to real property and water rights.

3. Civil rights and ADA statutes will be exempted.

Eric also said that the bill will probably not move until there is a new Senate Majority Leader. However, the Republicans still don't expect the bill to get past a cloture vote.

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May 6, 1996

TO : Hon. Dianne Feinstein
Attention: Jamie Grodsky

FROM : American Law Division

SUBJECT : Issues Raised by S. 605, the Omnibus Property Rights Act, Other Than Those Related to the Compensation Threshold

You ask that CRS pinpoint issues raised by S. 605, the Omnibus Property Rights Act bill ("Dole bill"), other than those stemming from the compensation threshold of the bill. The compensation threshold, in section 204(a), states five alternative criteria for when the United States must pay a property owner for the reduction in property value caused by federal, or certain state, actions.[1] We understand your non-204(a) focus here to reflect the fact that the compensation provisions were extensively debated at congressional hearings, while the remainder of the bill was not.

Of course, a complex bill such as S. 605 serves up many issues and there is inevitably a measure of subjectivity in choosing the ones to be mentioned.

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[1] The compensation criteria are:

(A) such action does not substantially advance the stated governmental interest to be achieved by the legislation or regulation on which the action is based;

(B) such action exacts or affects the owner's constitutional or otherwise lawful right to use the property or a portion of such property as a condition for the granting of a permit, license, variance, or any other agency action without a rough proportionality between the stated need for the required dedication and the impact of the proposed use of the property;

(C) such action results in the property owner being deprived, either temporarily or permanently, of all or substantially all economically beneficial or productive use of the property or that part of the property affected by the action without a showing that such deprivation inheres in the title itself;

(D) such action diminishes the fair market value of the property or the affected portion of the property which is the subject of the action by 33 percent or more with respect to the value immediately prior to the government action; or

(E) under any other circumstance where a taking has occurred within the meaning of the fifth amendment of the United States Constitution.

Compensation need not be paid if the property use in question constitutes a nuisance.

The following issues appear worthy of being addressed, though some are far more important than others. Note that we confine ourselves to issues tied to specific provisions of the bill, and do not include broad questions as to the bill's fundamental policy choices.

The section headings below follow the order of the bill sections.

*Inclusion of "inaction" in definition of "agency action"*

Section 203(2) of the bill defines "agency action" for purposes of judicial compensation under the bill as including agency "inaction." Thus, agency inaction, if it satisfies one of the compensation triggers in the bill, could generate a federal duty to compensate. Inclusion of "inaction" may have been intended to conform this definition with the section 502(6) definition of "qualified agency action" in the administrative compensation title. The latter definition adopts the Administrative Procedure Act's (APA's) definition of "agency action," which includes "failure to act."[2]

But while there is some case law clarifying the APA phrase "failure to act," there is no guarantee that the courts would read "inaction" in section 203(2) to mean the same thing. Not only is the wording of section 203(2) different, but it makes no reference to the APA. Without any guidance, it is difficult to predict what bounds the courts will draw around "inaction."

Currently, constitutional takings law demands compensation when agency inaction -- as, for example, following a landowner's permit application -- amounts to "unreasonable" or "extraordinary" delay.[3] Query whether the undefined "inaction" in section 203(2) may require the United States to pay the property owner for delays that fall short of being "unreasonable" or "extraordinary"[4] -- assuming such a delay meets one of the bill's compensation criteria. One may ask, too, whether "inaction" in situations not involving delay could meet the compensation threshold.

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[2] 5 U.S.C. § 551(13).

[3] Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980).

[4] Here and elsewhere in this memorandum comparisons are made between the compensation standard in S. 605 and that in the Takings Clause of the Fifth Amendment. We do so solely because this juxtaposition has been a recurring feature of congressional debate on property rights bills -- in particular, on S. 605. It is well-settled that Congress is free to award *more* compensation to property owners than the Constitution requires. Whether it should do so is a question of policy, not constitutional law.

*Role of property owner's expectations in definition of "property"*

Compensation under S. 605 is for those who own "property."[5] For purposes of judicial compensation (title II), "property" is defined in section 203(5). An important issue is whether this definition is impliedly qualified by the reasonable expectations of the property owner at the time he or she acquired the property.[6]

The issue is significant in part due to the threshold role that property owner expectations have secured in the constitutional law of takings following the Supreme Court decision in *Lucas v. South Carolina Coastal Council*.[7] There, the Court asserted that takings jurisprudence is informed by "the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."[8] This and other statements in *Lucas* suggested that a property purchaser's expectations, based on the law existing at time of purchase, enter the takings case at the preliminary stage of determining if the claimant has "property" at all -- that is, before the takings test is applied. Since *Lucas*, the U.S. Court of Appeals for the Federal Circuit has embraced this two-tiered approach, rebuffing takings plaintiffs for their lack of "compensable expectancies."[9]

In practical terms, the idea of compensable expectancies means that one who buys property may not be able to challenge later government use restrictions that were foreseeable under, or implicit in, the legal regime existing when the property was acquired. If some such notion is implicit in S. 605's definition of property, it may narrow considerably the range of government actions subject to compensation.

Based on the limited legislative history so far, the courts would likely read the definition of property to include implicitly *some* sort of expectations qualifier. We refer to the committee report on S. 605, which strongly asserts that an expectations-based concept of property was intended.[10] On the other

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[5] S. 605 §§ 204(a)(1), 502(5).

[6] The same issue arises under section 502(5).

[7] 505 U.S. 1003 (1992).

[8] *Id.* at 1027.

[9] *See, e.g.*, M&J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir.), *cert. denied*, 116 S. Ct. 53 (1995).

[10] Sen. Rep. No. 239, 104th Cong., 2d Sess. 32 (1996). *See also id.* at 31 (asserting that bill's definition of property "does not expand the concept of private property in any way").

hand, the compensation criteria in the bill suggest that property-owner expectations apply in certain cases, but not others.[11]

Importantly, the committee report's conception as to what an expectations approach would mean is unclear. The report notes situations where, in its view, the expectations approach would defeat a constitutional taking claim, and others where, in its view, an expectations approach would not. However, the line between the two is difficult to discern, as with regard to the Endangered Species Act and wetlands programs.[12]

Congress may wish to clarify its intent in bill text. Doing so will not necessarily be simple, however. Any unadorned statement that a property owner's expectations are part of the definition of property could provoke objection from some members of Congress that construed broadly, such language might insulate federal actions under the Endangered Species Act and wetlands programs as to property acquired after some critical date -- e.g., the adoption of the currently effective wetlands delineation manual, or the listing of a species as endangered. Such purchasers, it might be argued, have no legitimate expectation of being free of future restrictions under these programs, hence no adversely affected "property."

*Selected items in definition of "property"*

*"[A]ll property protected under the fifth amendment."* Section 203(5) defines "property" to include "all property protected under the fifth amendment." However, the Fifth Amendment mentions "property" twice: in the Takings Clause and in the Due Process Clause. Courts have frequently asserted that the concept of property for due process purposes is much broader than for takings purposes. For example, the former includes many government benefits and privileges (e.g., social security, welfare) that the latter does not.[13]

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[11] See footnote 1 and compare compensation criteria (C) and (D). Criterion (C) mentions deprivations of economic use that "inhere[] in the title itself." This phrase should probably be read as comparable to the concept of a property purchaser's expectations. *See* Lucas v. South Carolina Coastal Council, 105 U.S. 1003, 1027, 1029 (1992). By contrast, criterion (D) contains no mention of expectations, arguably suggesting it does not embrace the concept.

[12] Hard to reconcile are the report's statement that under the Takings Clause "where property is subject to a preexisting regulatory scheme, there is no need for compensation," and its later assertion that "[w]etlands and endangered species land-use limitations in most cases do not fall in the preexisting law category since takings arise in these circumstances from denial of a permit after the property was purchased." Sen. Rep. No. 239, at 26-27.

[13] A familiar line of cases holds that a person has "property" in a government benefit for procedural due process purposes if he or she has a legitimate claim of entitlement to the benefit. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 601 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

However, research reveals no instance where such benefits, not grounded in contract, have been held to be property for takings purposes. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 605 (1987) (no property within scope of Takings Clause in continued receipt of welfare benefits).

*Contract rights.* Section 203(5)(D) says that "property," as used in Title II, includes "property rights provided by, or memorialized in, a contract ...." This definition presumably includes contracts between private parties as well as those between private parties and the federal government, and potentially implicates a very large number of contracts.[14]

To be sure, contract rights are "property" for purposes of the Takings Clause as well.[15] At the same time, it is rare, particularly in the case of purely private contracts, that courts find an actual *taking* of that contract-right property.[16] Various concepts, such as the "mere frustration" rule under the Takings Clause[17] and the "sovereign act" doctrine for breach of contract claims,[18] have been adopted by courts to reject contract-based claims against the United States for compensation. By contrast, the compensation triggers of bill section 204(a) do not expressly recognize these concepts,[19] and thus seem

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*Accord*, Kizas v. Webster, 707 F.2d 524, 534 (D.C. Cir. 1983) (rejecting takings claim based on FBI's withdrawal of preference system for hiring Special agents from its own support staff; noting that argument that takings and due process clauses protect same property rights is "fundamentally misconceived"), *cert. denied*, 464 U.S. 1042 (1984); Pittman v. Chicago Bd. of Education, 860 F. Supp. 495, 511 (N.D. Ill. 1994). *See generally* J. Sackman, The Law of Eminent Domain § 4.3.

[14] In addition, section 203(5)(A)(vii) brings "contracts ... in, or related to, real property" into the definition of property.

[15] Omnia Commercial Co. v. United States, 261 U.S. 502, 508 (1923); Concrete Pipe and Products of California v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2290 (1993), *quoting* Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 223-224 (1986).

[16] Our research reveals no instance where the courts have found a taking based on federal government interference with contracts between private parties.

[17] *See, e.g.*, Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 903 (Fed. Cir. 1986) ("[F]rustration of performance of even an existing contract is not a taking of contract rights."). The classic "mere frustration" decision is Omnia Commercial Co. v. United States, 261 U.S. 502 (1923), stressing the distinction between government frustration of contract performance and a government taking of a contract right for public use.

A recent Supreme Court decision where a contractual term was negated by federal action, and found not a taking, is Concrete Pipe & Products v. Construction Laborers Pension Trust, 113 S. Ct. 2264 (1993) (employer's taking claim against liability-imposing federal statute not aided by pre-existing collective bargaining agreement purporting to state employer's entire liability).

[18] Under the sovereign act doctrine, a private party cannot hold the United States liable for breach of contract when it was the Government's public or general acts as sovereign, rather than narrowly targetted acts, that obstructed the performance of the contract. The leading case for the doctrine is Horowitz v. United States, 267 U.S. 458, 461 (1925). Recently, the Federal Circuit limited the doctrine's scope -- that is, the range of circumstances in which it excuses the United States for breaching its contracts. Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 806 (1996).

[19] The committee report does note the existence of the sovereign act doctrine in a footnote, and appears to suggest that S. 605 impliedly incorporates it. Sen. Rep. No. 239, 104th Cong., 2d Sess. 28 n.44 (1996). It is speculative, of course, whether a court would be convinced thereby, in particular considering that the sovereign act doctrine is recognized only under breach of contract,

likely to give contract-based compensation claims under the bill a much higher chance of success.

In addition, the issue has been raised whether a federal action reducing benefits under a federal contract is immune from S. 605's compensation duty merely because the federal action is anticipated and excused in the contract. The issue has been debated with particular vigor as to water delivery contracts between the Bureau of Reclamation and local irrigation districts.[20] Such contracts typically excuse the United States for reductions in the amount of water delivered owing to "errors in operation, drought, or any other causes ...." Would such a reduction be compensable under the bill, perhaps on the argument that the contract term promising delivery was reduced in value by more than 33 percent?[21]

Finally, section 203(5)(D) contains an "except" clause the intention of which is unclear. Read literally, it seems to disclaim any intent to bar the United States from acting against certain contracts. More likely, the clause intends to state an exemption from *compensability*. Assuming the latter, section 203(5)(D) may mean that compensation is required whenever a federal action sufficiently affects a contract of a type not listed there. Again, this would be a departure from the state of affairs under the Takings Clause, where compensation is rarely required.

"*[C]ustom, usage* ...." Section 203(5)(F) sweeps into the definition of property "any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest." Unlike the other items in the bill's definition of property, this element contains several amorphous terms -- "custom," "usage," and "sufficiently well-grounded in law to back a claim of interest" -- that exist as continuous gradations, rather than existing all or none. And, there appears to be little law as to the requisite minimum for each term.

*Federal liability for certain state actions*

The compensation liability imposed on the Federal Government by section 204 attaches not only to actions of federal agencies, but also, under section 203(6), to specified actions of *state* agencies. This vicarious federal liability extends to any state agency that (1) enforces a regulatory program required under federal law, if directly related to a taking under the bill; (2) is delegated responsibility under a federal regulatory program, or (3) receives federal funds

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not takings, theory.

[20] The example of reductions in water under Bureau of Reclamation contracts is particularly apt. Separately from its listing of contract rights, the bill's definition of "property" also includes "the right to receive water."

[21] *See supra* note 1, compensation criterion (D). The argument would be that the delivery provision of the contract is the "affected portion of the property" under criterion (D).

in a state-established regulatory program, if such receipt is directly related to the taking.

Issues raised by these provisions are several. Items (2) and (3) at least, appear to contemplate federal liability for state actions over which the United States may have little control, and indeed may have sought to block. Further, would federal liability for state actions under federally delegated or federally funded programs discourage agencies of the United States from approving program delegations or funding? Would such agencies seek to recoup payments made on the basis of state actions they had sought to block? Does the bill intend that federal agencies pay for state actions which, though taken under a federally delegated program, are stricter than the federal standard? And what is the meaning of item (1), which seems to refer to a situation -- a state "regulatory program required under Federal law" -- that exceeds Congress' power and thus cannot constitutionally exist?[22]

*Whether civil foreiture is excluded*

The bill, through section 203(7)(B)(ii), puts criminal forfeiture of property outside its compensation scheme. However, that provision makes no mention of *civil* forfeiture. This may be interpreted in either of two ways. First, a court might hold straightforwardly that civil forfeiture is not exempted from the S. 605 compensation scheme.

Second, a court might construe the criminal forfeiture exemption broadly to include civil forfeiture, or find some other way to insulate it from compensability. The motivation for doing so is readily apparent. The large majority of federal forfeitures are civil, not criminal.[23] Plainly, requiring the government to pay for the forfeited property would seriously undercut the utility of forfeiture as an enforcement tool. Moreover, use of forfeiture is held noncompensable under the Constitution's Takings Clause, even when the owner of the property is entirely innocent.[24] A court may not be willing to presume that Congress intended to overturn so longstanding and accepted an enforcement technique without a more explicit declaration of its intentions than is contained in S. 605.

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[22] New York v. United States, 505 U.S. 144, 161 (1992) ("Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.").

[23] *See generally* Charles Doyle, *Crime and Forfeiture* 6-10 (CRS Rep. No. 93-826).

[24] See, most recently, Bennis v. Michigan, 116 S. Ct. 994 (1996).

*Burden of proof as to purpose-impact nexus*

Section 204(c) instructs that the United States bears the burden of proof as to demonstrating three elements of the compensation triggers in section 204(a). In so stating, the bill merely codifies the Supreme Court's reading of the Takings Clause as to *two* of these elements.

As to the remaining element, however, placing the burden of proof on the United States diverges from the general rule. Section 204(a)(2)(A) says that the United States must compensate when a covered action "does not substantially advance the stated governmental interest to be achieved by the legislation or regulation ...." Section 204(c)(1)(A), in turn, says that the United States bears the burden of showing this action/governmental-interest connection.

By contrast, in other legal settings it is generally the *plaintiff's* burden to demonstrate that the requisite rationality of the government act does *not* exist.[25] Such rule is but a special case of the broader principle that those challenging government action must overcome a presumption of the action's validity. Concededly, section 204(a)(2)(A) is concerned not with the validity of government actions, but only with their compensability. Still, a significant agency exposure to compensation liability may well have the same effect as a determination of invalidity -- in the future, the agency will avoid actions of that type.

*Aspects of nuisance exemption from liability*

*Scope of nuisance exemption.* Under section 204(d), the government need not pay the property owner, despite its action satisfying one of the bill's compensation triggers, if the prohibited property use would be a nuisance. Very likely, one of the important issues during any future floor debate on S. 605 will be the breadth of this "nuisance exemption." In particular, is it sufficiently broad to deflect the charge of S. 605's detractors that the bill would require federal agencies "to pay polluters not to pollute," or to compensate in any other circumstance that might offend general sensibilities?

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[25] *See, e.g.,* Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962) ("Our past cases leave no doubt that [the party challenging the government action] had the burden on reasonableness."); Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1959).

In a specialized context, the Supreme Court recently departed from this general rule, giving *government* the burden of showing that certain conditions on land development permits are related in degree to the landowner's proposed activity. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994). The departure from the burden-of-proof norm was noted by a dissenter. *Id.* at 2331 (Souter, J., dissenting).

At the outset, we assume the nuisance exemption to include both private and public nuisance, since the exemption is not expressly qualified.[26] Focussing on federal pollution-control laws, it appears that the S. 605 nuisance exemption might immunize the government from liability under the bill for many pollution controls. But it appears as well that for many other pollution controls, it might not. The reasons that the nuisance exemption might not cover certain constraints on polluting activity are as follows.[27]

First, federal pollution laws restrict the pollution from a source without the government's having to show that a particular person will be harmed by that pollution. Nuisance law, by contrast, is premised on proof of causation between the actions of defendant and the harm claimed by the plaintiff. Such proof is difficult when a large number of indistinguishable pollution sources are involved, as often occurs with common air and water pollutants. Second, federal pollution laws restrict pollution to levels below that which "may" cause injury.[28] Nuisance law, on the other hand, tends to demand significant and certain harm before judicial intervention is deemed warranted. Third, certain federal pollution laws aim to protect the non-human as well as the human environment. Nuisance law typically aims at harm to humans.

Moreover, nuisance law, private more so than public, has various technical requirements that might preclude a nuisance finding under the particular circumstances. Private nuisance, for example, does not cover instances where the pollution does not migrate off-site, as with a Superfund site far removed

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[26] *See, e.g.*, Sen. Rep. No. 239, 104th Cong., 2d Sess. 34 (1996) (asserting inclusion of both). Private nuisance is a centuries-old tort developed by the common law. As commonly defined, it consists of a substantial and unreasonable interference with the use and enjoyment of land by the owner or rightful occupier thereof. It is a civil wrong, based on a serious disturbance of *private* rights in a particular species of property: land.

In contrast, common-law public nuisance is chiefly not a tort, but is usually prosecuted by the government as a crime, and has no direct link to private property. As commonly defined, it consists rather amorphously of conduct that causes a significant interference with *public* rights in the community's health, safety, comfort, or convenience. It is a much broader concept than private nuisance.

[27] We do not address the antecedent, but critically important, inquiry as to how often future government regulation of polluting conduct actually will satisfy the compensation thresholds of S. 605.

[28] *See, e.g.*, Comprehensive Environmental Response, Compensation and Liability Act § 102, 42 U.S.C. § 9602 (EPA shall designate as hazardous those substances that "*may* present substantial danger"); Resource Conservation and Recovery Act §§ 3002-3004, 42 U.S.C. §§ 6922-6924 (EPA standards for the generation, transport, treatment, storage, or disposal of hazardous waste shall be such "as *may* be necessary to protect human health and the environment"); Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1) (national primary ambient air quality standards shall be such as are requisite to protect public health, "allowing an adequate *margin of safety*"); Clean Air Act § 112, 42 U.S.C. § 7412 (EPA shall list pollutants as toxic if they "present, or *may* present" threat of adverse human health effects or environmental harm). All emphases added.

from parcel boundaries.[29] The absence of off-site injury seemingly would mitigate against a finding of public nuisance as well. Nor does nuisance law protect persons of greater than normal sensitivity,[30] as do some federal environmental statutes.[31]

Uncertainty as to how many restrictions on polluting conduct would come within the bill's nuisance exemption also stems from questions as to its scope. The exemption covers "nuisance as commonly understood and defined by background principles of nuisance and property law ...." What are "background principles"? What principles of "property law," beyond those of nuisance law, are subsumed here? Might the exemption be read broadly to include nuisance-*like* conduct -- that is, might it apply regardless of whether every technical limitation of nuisance law is satisfied?

*Burden of proof.* Immediately following its statement of the nuisance exemption, section 204(d) says: "To bar an award of damages under this Act, the United States shall have the burden of proof to establish that the use or proposed use of the property is a nuisance."

Placing the burden of proof on the United States appears at first glance to parallel the current practice in constitutional taking cases. In the Supreme Court's landmark *Lucas* decision and lower-court takings opinions, courts have said or assumed that the burden is on the government to demonstrate nuisance, not on the property owner to show its absence.[32] Thus S. 605, in applying its burden of proof provision to takings under the bill, seems to merely parallel the constitutional jurisprudence.

The parallel breaks down, however. In regulatory taking cases under the Constitution, takings are rarely found on less than a 90% reduction in the entire parcel's value -- in those cases where value loss is the pivotal factor.[33] In adopting a much more property owner-friendly standard (33% loss in the

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[29] Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303 (3rd Cir. 1985); American Glue & Resin, Inc. v. Air Products & Chemicals, Inc., 835 F. Supp. 36 (D. Mass. 1993); Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93 (D. Mass. 1990); Borough of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039 (D.N.J. 1993); Amland Properties Corp. v. Aluminum Corp. of America, 711 F. Supp. 784 (D.N.J. 1989).

[30] Layton v. Yankee Caithness Joint Venture, 774 F. Supp. 576 (D. Nev. 1991); T.K. Stanley, Inc. v. Cason, 614 So. 2d 942 (Miss. 1992).

[31] *See, e.g.*, Sen. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970) (national ambient air quality standards under Clean Air Act should protect "particularly sensitive citizens").

[32] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Florida Rock Industries, Inc. v. United States, 21 Cl. Ct. 161, 166-167 (1990), *vacated on other grounds*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995); Bowles v. United States, 31 Fed. Cl. 37, 45 (1994).

[33] *But see* Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (resolution of taking issue not clear when government action reduces parcel value from $10,500 to about $4,000 per acre; remanding to trial court), *cert. denied*, 115 S. Ct. 898 (1995).

affected portion's value), S. 605 makes likely that the compensation threshold will be crossed much more often.[34] As a result, the United States may have to prove the nuisance nature of the claimant's proposed activity considerably more frequently than it now does.

For example, if EPA (or a state) denies a Clean Water Act discharge permit,[35] reducing by 33% or more the value of the affected portion of claimant's operation, compensability would hinge on whether the United States could show, under the specific facts of the applicant's situation, that a nuisance would otherwise result. Due to the amorphousness of the nuisance concept, this would appear to inject an element of uncertainty into the implementation of federal pollution-control programs.[36]

Placing the nuisance burden on the United States with greater frequency is also a reversal of the typical approach in federal environmental statutes, under which a person seeking to engage in an action of a type that has been deemed generally undesirable (by Congress or an agency) has the burden of showing it will *not* cause harm.[37]

*Role of "business losses" in measuring amount of compensation owed*

The amount of compensation that the United States must pay under S. 605 is specified as the difference between the fair market value of the property (or any affected portion thereof) before and after the property became the object of agency action.[38] Immediately following this formula is section 204(d)(2)(B), stating that "[w]here appropriate, the calculation of fair market value shall include business losses."

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[34] A critical assumption here is that despite enactment of S. 605, agencies are unwilling, or legally unable, to abandon implementation approaches that limit the use of private property.

[35] Clean Water Act § 402; 33 U.S.C. § 1342.

[36] *See supra* note 27.

[37] A few examples from the Clean Water Act (CWA) make the point: CWA § 301(c), 33 U.S.C. § 1311(c) (EPA may modify point-source effluent limitations upon proper showing by *source owner*); CWA § 301(g)(4)(E), 33 U.S.C. § 1311(g)(4)(E) (burden of proof for adding pollutant to list for which modification of effluent limitation is authorized is on *petitioner*); and CWA § 302(b)(2)(A), 33 U.S.C. § 1312(b)(2)(A) (EPA may issue permit that eases water-quality-related effluent limitations if *applicant* makes necessary showing).

Another example is the federal wetlands program under CWA § 404, 33 U.S.C. § 1344. The "404(b)(1) guidelines" state:

> Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged ... unless it can be demonstrated that such a discharge will *not* have an unacceptable adverse impact.

40 C.F.R. § 230.1(c) (emphasis added). *See* 45 Fed. Reg. 85336, 85338 (1980) (preamble to 404(b)(1) guidelines).

[38] S. 605 § 204(d)(2)(A).

Precisely how businesses losses are to be figured into the federal liability could be quite important, given that business losses in connection with some covered government actions may be large. The language of 204(d)(2)(B) itself states no departure from the longstanding, well-established rules by which appraisers and courts estimate fair market value, nor from the role of business losses in assessing such value. However, there are several issues that inject some doubt --

If no departure from traditional practice was intended, why, a court might reason, did Congress feel it necessary to insert 204(d)(2)(B) at all? What importance, if any, should be attached to the Senate committee report statement that "where it is appropriate, compensation shall include business losses"?[39] That statement suggests that business losses are to be included on a dollar-for-dollar basis, rather than merely as indirectly reflected in fair market value. And finally, what role is to be accorded the bill's separate definition of "just compensation," which includes "the full extent of a property owner's loss, including the fair market value ... taken ...."[40] This definition, whose role in figuring compensation liability under the above formula is unclear, appears to envision that "fair market value ... taken" is not the only sum the property owner is to receive.

*Funding of compensation awards*

Section 204(f) of the bill sets forth the funding mechanism for payment of judicial claims under the bill; section 508(f), the funding mechanism for administrative claims. Both of these provisions require that claims be paid from "currently available appropriations supporting the activities giving rise to the claims for compensation."

A key question is whether enactment of these provisions would guarantee that successful claimants are paid without further congressional action; note that the sections themselves do not make clear whether any of the agency's funds are "currently available". Appropriations "available" to an agency are based on budget requests prepared by the agency and modified by the House and Senate appropriation committees and the full House and Senate. To determine whether appropriated funds are available for a purpose the agency's budget request and congressional modifications (as reflected in committee reports and text of the appropriations acts) must be consulted.

If an agency has not sought an appropriation specifically for award compensation, or if Congress has denied such a request, could funds appropriated for the agency be said to be "currently available" for award compensation? There is a statutory requirement that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as

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[39] Sen. Rep. No. 239, 104th Cong., 2d Sess. 34 (1996).

[40] S. 605 § 203(3).

otherwise provided by law."[41] Do sections 204(f) and 508(f) rise to the level of exceptions that permit an agency to make funds available for S. 605 compensation even if the agency has not requested an appropriation for this purpose, or if Congress has declined one?

Assuming that the agency has *some* funds "available," what specific funds might that be? Sections 204(f) and 508(f), once again, say that awards shall be paid by the agency out of "currently available appropriations supporting the activities giving rise to the claim[]." Presumably this phrase embraces program funds, such as the budgetary account in EPA's appropriation for "Abatement, Control, and Compliance," but would it also include the account for "Salaries and Expenses"?

Other questions include what bearing the bill sections would have on an agency's *program* statutes? Would enactment constitute de facto amendment of those statutes and effectively force an agency to choose between requirements in its program statute to allow it to pay award compensation? In this connection, would these sections require an agency to sacrifice its other activities to yield amounts sufficient to pay awards? In an extreme case, would an agency have to go so far as to close its doors for a period to save enough money to pay compensation awards?

Finally, if Congress appropriates less than the amount needed to pay successful claimants the full amount of their awards, could an agency reduce award amounts pro rata? That is, could the agency give successful claimants a portion of their awards as satisfaction in full, in contrast with some receiving full payment and others nothing (or nothing for several years)?

*Reallocation of federal court jurisdiction*

Section 205 of the bill would rearrange significantly the jurisdiction of federal trial and appellate courts for suits involving property rights. At the trial level, section 205(a) would allow property owners to maintain suit in the U.S. Court of Federal Claims or the federal district courts, in each court either (1) challenging the validity of agency action, if it "adversely affects" the owner's property interest, or (2) seeking money damages for the effect on property rights under the Constitution's Takings Clause or under S. 605. Under section 205(b), exclusive jurisdiction over appeals from 205(a)-based actions in either the claims court or district courts would be vested in the U.S. Court of Appeals for the Federal Circuit.

This is a major change for the claims court. Since its creation in 1855, the court has addressed primarily money claims against the United States. Its jurisdiction to grant injunctive relief is limited. Section 205(a) would be a historical departure in vesting in the court a broad new injunctive jurisdiction to invalidate acts of Congress and federal agency actions. The issue also has

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[41] 31 U.S.C. § 1301(a).

been raised whether the Court of Federal Claims, as an article I "legislative court," can be vested constitutionally with jurisdiction to invalidate acts of Congress.[42]

The purpose of section 205 is to end the current bifurcation of jurisdiction under which a property owner wishing to both challenge the validity of a federal action, and obtain compensation if it cannot be invalidated, must file actions in two courts. As noted, the invalidation suit must be pursued in the district court; the compensation suit in the claims court.[43] However, this situation can be rectified without creating two courts with the same jurisdiction. One might, for example, simply give money-damages jurisdiction to the district court, without giving invalidation jurisdiction to the Court of Federal Claims -- or vice versa. In addition, bifurcation can be eliminated without giving the claims court jurisdiction over every invalidation suit "that adversely affects the owner's interest in property";[44] it need only have jurisdiction to invalidate when there is an accompanying compensation claim based on the same agency action.

Importantly, section 205 appears to override the "preclusive review" provisions contained in many federal regulatory statutes. These provisions were designed to, among other things, resolve legal disputes over new agency rulemakings and orders as quickly as possible, allowing both agency and regulated community to move expeditiously in making the commitments for addressing the underlying problem. To illustrate, the Clean Air Act limits judicial review of nationally applicable regulations under the act to the U.S. Court of Appeals for the District of Columbia, requires that petitions for judicial review be filed within 60 days of Federal Register notice, and provides that after such 60 days a regulation may not be challenged in an enforcement action.[45]

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[42] The article I status of the Court of Federal Claims is declared at 28 U.S.C. § 171(a). Federal district courts are created under article III of the Constitution.

[43] Under a Federal Circuit ruling in 1994, the two suits once again can be maintained simultaneously. Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (en banc). *Loveladies* reinstated a longstanding rule in the Court of Federal Claims, rejected by the circuit court only two years earlier, under which actions based on the same nucleus of fact can be maintained in district court and claims court concurrently if a different form of relief is sought in each court. This "if" is satisfied in our circumstance of concern here, where a plaintiff seeks invalidation relief in the district court (injunctive in form) and compensation in the claims court (monetary in form).

Section 201(3)(A) of the bill appears inconsistent with the previous paragraph. It asserts that "current law ... forces a property owner to elect between equitable relief in the district court and monetary relief ... in the United States Court of Federal Claims ...." This seems to be precisely contrary to the holding in *Loveladies*. To be sure, however, a plaintiff maintaining the two simultaneous actions should expect that the compensation suit will be stayed by the claims court until the validity of the underlying agency action is resolved by the district court.

[44] *Id.* at § 205(a).

[45] Clean Air Act § 307(b); 42 U.S.C. § 7607(b). Other preclusive review provisions in environmental statutes are: Clean Water Act, 33 U.S.C. § 1369(b); Safe Drinking Water Act, 42 U.S.C. § 300j-7; Resource Conservation and Recovery Act, 42 U.S.C. § 6976; Superfund Act, 42 U.S.C. § 9613(a); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2618; Federal Insecticide,

S. 605, by making its provisions apply "[n]otwithstanding any other provision of law," seems to supersede these preclusive review provisions. Under the bill, agency actions that "adversely affect" private property (which one presumes may include a good many of them) may be invalidated by any federal district court. Thus, at least where a preclusive review provision would have channelled all petitions for review to a single court (example above), S. 605 increases the chance of multiple, inconsistent rulings on agency actions -- though the bill intends that such inconsistency will be minimized by funnelling all appeals to a particular appellate court.[46] The bill's approach also means that agency actions for which original review jurisdiction now lies in the circuit courts may be heard initially by district courts, enhancing the likelihood that more time may be used in appeals.

In the same vein, S. 605's 6-year statute of limitations[47] may apply to at least some challenges to agency actions covered by preclusive review provisions, replacing the far shorter filing deadlines (often, 45 to 120 days from date of agency action) in those provisions.

*Taking impact assessments: public disclosure, reviewability*

Section 403 instructs federal agencies to do "private property taking impact analyses" (TIAs). These must be prepared before issuing any policy, regulation, proposed legislation, or "related agency action" that is "likely" to cause a taking (as defined under the bill).

The section codifies a portion of a Reagan-era executive order[48] -- with two significant departures. First, as to public disclosure of TIAs. TIAs under the executive order are treated by the executive branch as confidential, both on the ground of attorney-client privilege and due to Freedom of Information Act exemption 5.[49] The policy rationale is that while TIAs are solely risk assessment documents, not determinations of liability, they may be mistaken for the latter. If so mistaken, TIAs might be seen as providing landowners with a roadmap for pressing takings claims against the United States, and might constrain the legal positions that the Justice Department could take in takings

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Fungicide and Rodenticide Act, 7 U.S.C. § 136n, and Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276. Non-environmental examples include the Occupational Health and Safety Act, 29 U.S.C. § 660, and Consumer Product Safety Act, 15 U.S.C. § 2060.

[46] S. 605 § 205(b). *See* Sen. Rep. No. 239, 104th Cong., 2d Sess. 35 (1996).

[47] S. 605 § 206.

[48] Exec. Order No. 12,360, 3 C.F.R. § 554, *reprinted in* 5 U.S.C. § 601 note.

[49] 5 U.S.C. § 552(b)5) (exemption from disclosure requirement for intra-agency memoranda). Federal agencies are free to waive TIA confidentiality if they choose.

litigation. By contrast, S. 605 expressly requires public disclosure of TIAs and does not preclude their use in litigation.[50]

Second, judicial reviewability. The Reagan executive order says that it creates no rights enforceable against the United States.[51] By contrast, S. 605 contemplates that "action[s] ... to enforce the provisions of [title IV]" (containing the TIA requirement) may be filed. Presumably, "action[s] ... to enforce" would fall into two main categories: suits challenging the agency's failure to prepare a TIA, and suits challenging the legal sufficiency of TIAs that were prepared. Query whether such suits might be filed in large numbers.

Other comments about the bill's TIA provisions may be made in passing:

> While the executive order covers only takings under the Fifth Amendment, S. 605's TIA provisions embrace those takings *plus* federal actions that are "takings" solely under the bill.[52] The latter grouping may well be a large one, since the bill's takings criteria generally are broader than those under the Fifth Amendment.[53]
>
> The purpose of requiring TIAs to be prepared *following* emergency actions of federal agencies, when the impacts have already occurred, is unclear.[54] This requirement differs from the analagous rule on preparation of environmental impact statements (EISs) after emergencies, the usual effect

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[50] S. 605 § 403(c).

[51] Exec. Order No. 12,630, *supra* note 48, § 6.

[52] Section 402(3).

[53] *See esp.* criterion (D), creating a compensation trigger of 33% loss in the value of the affected portion of the claimant's property. *Supra* note 1. This trigger contrasts with the usual interpretation of the Takings Clause as requiring a much greater loss in property value, measured with reference to the property as a whole.

It is likely that the wider coverage of S. 605's TIA requirement means that more TIAs will be prepared under the enacted bill than under the executive order. We say likely, rather than certain, for two reasons. First, the bill's compensation provisions will dispose agencies, to the extent permitted by law, to eschew solutions that restrict private property use. Second, the bill appears, on its face, to use a higher TIA-preparation threshold than does the executive order, on its face. *Cf.* S. 605 § 403(a)(1)(B) ("*likely* to result in a taking") *with* Exec. Order No. 12630 § 2 ("*could* effect a taking"). However, this second factor may be largely negated by Justice Department interpretation of the executive order's threshold in a manner comparable to that in S. 605. *See* Attorney General's Guidelines for the Evaulation of Risk and Avoidance of Unanticipated Takings § IV.B. (definition of "takings implication").

[54] Section 403(a)(2)(H) of the bill relieves federal agencies of having to prepare a TIA before they act when there is a health and safety emergency calling for immediate response. But the TIA must be done after the emergency action is completed. In requiring after-the-fact preparation, S. 605 tracks section 4(d) of the executive order.

of which is to excuse after-the-fact preparation as serving no point.[55]

*Prohibition on final rules whose enforcement might require uncompensated takings*

Section 404(a) precludes the promulgation of any final rule if its enforcement could reasonably be construed to require an "uncompensated taking" of private property as defined under the bill.

The provision is ambiguous. One issue is whether it is intended to amend existing laws, which in many instances may impose a nondiscretionary duty on agencies to promulgate rules the enforcement of which effects a taking. Another issue is the meaning of "uncompensated": presumably *all* takings are compensable under the bill (at least where appropriated funds are available). That being so, it is unclear to what takings the section 404(a) edict refers.

*Minimization of takings as overriding consideration*

In two places, S. 605 requires that federal agencies implement statutes in a manner that minimizes takings of private property, as the term "taking" is understood under the bill.[56] The question arises whether these provisions intend to elevate the minimization of takings above all other considerations -- e.g., cost, effectiveness, workability, etc. -- that may properly be before the agency in choosing among alternative courses of action.

A pertinent comparison may be drawn with the National Environmental Policy Act[57] (NEPA), a conceptually similiar statute in this regard. NEPA requires federal agencies to consider the environmental impacts of their proposed actions on a par with, but not superior to, other valid agency priorities. Thus, while requiring agencies to *consider* the environmental impacts of their proposed actions, NEPA does not demand that the agency, following such

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[55] Council on Environmental Quality (CEQ) regulations say that where emergency conditions compel an agency to act before an EIS can be prepared, the agency should consult with the CEQ about "alternative arrangements." 40 C.F.R. § 1506.11. By "alternative arrangements," the CEQ regulations contemplate ad hoc negotiations, in part over the amount of environmental impact analysis that makes sense after the fact given that the prime purpose of an EIS is to inform agency decisionmakers *before* they act.

[56] Section 404(b)(1) says that agencies shall review, and, if appropriate, repromulgate all regulations so as to "reduce ... takings of private property to the maximum extent possible within existing statutory requirements." Section 503(a)(2) instructs agencies to implement the Endangered Species Act and Clean Water Act wetlands program "in a manner that has the least impact on private property owners' constitutional and other legal rights." *See also* section 102(4), stating as one purpose of S. 605 "the minimization, to the greatest extent possible, of the taking of private property by the Federal Government ...."

[57] 42 U.S.C. §§ 4321-4370d.

consideration, necessarily proceed with the most environmentally benign option.[58]

Also notable is section 404(b)(1), a "look back" provision that requires agencies to review *existing* regulations and, if appropriate, repromulgate them so as to minimize takings. Owing to S. 605's definition of "taking" in a manner considerably broader than under the Constitution, this could be a sizable enterprise for certain agencies.

*Limitation of Title V to the Endangered Species Act and wetlands programs*

As a matter of policy, it is unclear why title V of the bill (administrative compensation claims) was made applicable solely to the Endangered Species Act (ESA) and Clean Water Act wetlands programs, while the rest of the bill applies governmentwide. Historically, the reason is plain enough: title V is taken from a predecessor bill, S. 239 (104th Congress), which applied only to those two programs, while the other S. 605 titles were drawn from bills of unlimited scope. Nonetheless, if S. 605 is to contain a less-than-governmentwide portion, it would be useful to know if there is any objective basis for the narrowing.

One possible cue as to how often a government program constrains the use of private property is the amount of constitutional taking litigation the program generates. By this standard, there appears to be some reason for singling out the wetlands program. Roughly one-fourth of the takings actions now on the docket of the Department of Justice's Environment and Natural Resources Division arise under this program. By the same standard, however, there appears to be little basis for according special treatment to the ESA program, which has sparked only a handful of takings-related court decisions (decided or pending).

Interestingly, the hot new areas of takings litigation involving the United States have arisen in distinctly non-environmental contexts. Numerous takings decisions in recent years have involved the application of federal statutes to banks and savings and loan institutions.[59] Another well-stocked category of recent takings cases against the U.S. involves federally imposed liabilities on employers for funding of retired miners' health care benefits.[60] Thus, Congress

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[58] 40 C.F.R. § 1505.2(b). *See, e.g.,* Scenic Hudson Preservation Conf. v. Federal Power Comm'n, 453 F.2d 463, 481 (2d Cir. 1971) ("Act does not require that a particular decision be reached but only that all factors be fully explored"), *cert. denied,* 407 U.S. 926 (1972).

[59] Currently, about 120 of the 263 takings cases pending against the United States in the U.S. Court of Federal Claims concern the application of the "S&L bailout" statute provision to certain savings and loan institutions. Telephone conversation with Mr. David Lampen, Clerk, U.S. Court of Federal Claims (April 26, 1996).

[60] *See, e.g.,* Chateaugay Corp. v. Shalala, 53 F.3d 478 (2d Cir.), *cert. denied,* 116 S. Ct. 298 (1995); Barrick Gold Exploration, Inc. v. Hudson, 47 F.3d 832 (6th Cir. 1995); Templeton Coal Co. v. Shalala, 882 F. Supp. 799 (S.D. Ind. 1995); Blue Diamond Co. v. Shalala, 174 B.R. 722 (E.D.

may wish to address whether title V of the bill is delimited according to defensible criteria.

*Inclusion of government persons in title II; exclusion from title V*

Title II defines who is eligible to bring judicial claims for compensation without reference to any links such persons may have with government.[61] In contrast, title V defines who may press administrative compensation claims by specifically excluding officers, employees, or agents of the Federal Government, foreign governments, or state and municipal governments.[62] Only the latter (state and municipal) exclusion is expressly limited to persons acting in an official capacity.

Thus, the bill raises two issues. What is the reason for differential treatment of government employees as between the two titles? Also, do the federal and foreign government exclusions sweep in persons not acting in their official capacity -- and, if so, why?

*Requirement that ESA and wetlands programs comply with "applicable State and tribal government laws"*

Section 503(a)(1) says that in implementing the ESA and wetlands programs, federal agencies shall comply with "applicable State and tribal government laws, including laws relating to private property rights ...." The Senate report on S. 605 explains that this text requires that agencies implement the covered programs "without violating local law."[63]

There are significant questions of interpretation here. Does 503(a)(1) require ESA and wetlands program officials to comply solely with state and local laws that are not federally preempted? (Preemption might result, for example, because the state law is inconsistent with a federal law.) Otherwise put, is 503(a)(1) nothing more than a waiver of federal immunity from *valid* (non-preempted) state regulation?

Alternatively, section 503(a)(1) can be read to demand something much more substantial. It could require federal compliance with state and local laws regardless of whether, in the bill's absence, they would be preempted. That is,

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Tenn. 1994), *cert. denied*, 116 S. Ct. 64 (1995); Unity Real Estate Co. v. Hudson, 889 F. Supp. 818 (W.D. Pa. 1995).

[61] S. 605 § 203(4).

[62] *Id.* at § 502(3)-(4).

[63] Sen. Rep. No. 239, 104th Cong., 2d Sess. 37 (1996). The switch from "State" law in the bill to "local" law in the committee report may signify merely that the bill language embraces both state and local laws.

it could subordinate the federal endangered species and wetlands laws to state and local laws. Concededly, section 503(a)(1) says that federal agencies need comply only with "applicable" state laws. Yet the argument that "applicable" removes preempted state laws from the federal compliance mandate is not easily made. "Applicable" could well be read by courts to mean only that the state law must, on its face, apply to the situation in question.

The importance of the questions raised here is highlighted by the so-called "county movement": the effort by many Western counties, through enacted ordinances, to regulate federal management of natural resources and federally owned lands.

*Property owner consent for entry*

Section 504(a) says that agencies administering the ESA or wetlands program[64] may not enter private property to collect information unless the owner has consented in writing, and been notified that collected data is available to him or her. Section 504(b), designated "Nonapplication," exempts only entry for the purpose of obtaining such consent or providing such notice.

In light of the unqualified rule of 504(a) and its narrowly stated exemption, a question arises. Does section 504(a) prevent, absent landowner consent, the execution of search warrants and court orders involving the collecting of information to prove that an ESA or wetlands program violation has occurred? If so, enforcement of the ESA and wetlands programs would seemingly be hampered.

*Computation of fair market value "assuming no use restrictions" under ESA and 404 programs*

If a compensation trigger is satisfied, section 508(c) commands the pertinent agency head to offer the property owner a choice between (1) selling the affected portion of the property at market value "assuming no restrictions under the Acts" and (2) accepting compensation for the difference between the property's value with and without those restrictions.

The most natural reading of "no restrictions under the Acts" is that it refers to *all* restrictions under the ESA and Clean Water Act section 404, not merely the restriction that led to the compensation claim. If so, it seems that there is a windfall potential when a landowner who bought at a price discounted

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[64] Actually, section 504 is not expressly limited to the ESA and wetlands programs as are most other sections in title V of the bill. By literal terms, the section applies to *all* programs run by the agencies "with ... authority to take a final agency action" under the endangered species and wetlands programs. S. 605 § 502(2). Under this reading, EPA might be subject to section 504 in implementing the Superfund Act. Nonetheless, it seems likely that courts would supply an ESA/wetlands qualifier as implied by context.

for the ESA/404 restrictions at the time of purchase now becomes entitled, under 508(c), to compensation for that value reduction, even though it befell a previous owner.

Robert Meltz
Legislative Attorney
American Law Division

E X E C U T I V E  O F F I C E  O F  T H E  P R E S I D E

02-May-1996 03:03pm

TO: (See Below)

FROM: Charles S. Konigsberg
Office of Mgmt and Budget, LA

SUBJECT: NEED RESPONSE BY COB THURSDAY

Following is a REVISED Takings SAP (it's now substantially shorter--1 page) OMB (Rivlin, Katzen, Lew, Glauthier, Damus) and CEQ (McGinty) have signed off on the shorter version.

Please let me know by COB THURSDAY if the SAP is OK; Katie is requesting that we send the SAP Friday morning, since there's a possibility Dole might make a motion to proceed to the bill on Monday. Thanks.

[FYI--On Dec. 13, 1995, POTUS sent a letter to Hatch stating: "As the Senate Judiciary Committee begins consideration of S. 605, the Omnibus Property Rights Act of 1995, I am writing to let you know of my intention to veto this bill or any similar compensation entitlement legislation if it is presented for my signature."]

DRAFT-NOT FOR RELEASE

May 3, 1996
(Senate)

S. 605 - Omnibus Property Rights Act of 1995
(Sen. Dole (R) KS and 33 others)

The President will veto S. 605 or any similar compensation entitlement legislation that is presented to him.

The Administration is fully committed to just compensation for private property that is "taken" for public use. Under the Fifth Amendment, which guarantees the protection of private property, the Supreme Court has set a constitutional standard that balances the legitimate rights of property owners and important public needs. S. 605, however, is a radical departure from this standard.

The bill would establish a new entitlement program that could cost taxpayers tens of billions of dollars over the next seven years. It would also foster protracted and costly litigation, greatly expand the Federal bureaucracy, and seriously disrupt the implementation and enforcement of environmental, health, safety, and other vital laws.

Under the broad and ambiguous terms of S. 605, almost any Government action could expose agencies to liability: ensuring the safety of airplanes, trains, vessels, and automobiles; regulating the safety of children?s toys; protecting livestock from disease and pests; regulating the quality of food and drugs; enforcing civil rights; regulating financial institutions; and enforcing drinking and clean air standards, and other environmental protections which are designed to protect America?s 60 million homeowners.

In addition, claims could be made even when an agency action affects only a portion of property, as well as for anticipated property development where no actual loss has occurred. S. 605 would also grant the Court of Federal Claims, an Article I court, authority to invalidate Federal statutes or regulations, raising constitutional concerns.

In sum, S. 605 fails to address the harm that may result from irresponsible or dangerous uses of property and would seriously interfere with the Government?s obligation to protect the public interest.

Pay-As-You-Go Scoring

S. 605 would affect direct spending; therefore, the bill is

subject to the pay-as-you-go requirements of the Omnibus Budget Reconciliation Act of 1990. Preliminary estimates indicate that the bill's effect could be to increase the deficit by tens of billions of dollars during FYs 1996-2002.

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3/8/96

LEGISLATIVE REFERRAL MEMORANDUM

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goad_m@a1.eop.gov

SUBJECT: **REVISED** OMB Proposed Statement of Administration Policy RE: S605, Omnibus Property Rights Act

## DEADLINE: 10:00 A.M., Tuesday, March 12,1996

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

**Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: If you do not respond by the deadline, we will assume that your agency has no comment.

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March 8, 1996
(Senate)

S. 605 - Omnibus Property Rights Act
(Sen. Dole (R) KS and 31 others)

S. 605, though presented as an effort to protect private property rights, would instead create one of the most expensive new spending programs in recent history, cause a massive increase in litigation, and would effectively block implementation and enforcement of laws designed to protect public health, safety, and the environment. For these reasons, as set forth in the President's December 13, 1995 letter to Sen. Hatch, the President would veto S. 605 or any similar compensation entitlement legislation that is presented to him for his signature.

The Administration is fully committed to just compensation of property owners when private property is "taken" for a public use. Protection of property rights is guaranteed by the Fifth Amendment to the Constitution, which has served us well for over 200 years by permitting courts to balance important public needs against the legitimate rights of property owners.

S 605, however, would go far beyond a reasonable balancing of interests, as required by the Constitution. It would entitle property owners to compensation for any governmental action that diminishes by 33 percent the potential value of any affected portion of a property interest. This would cost the taxpayers tens of billions of dollars through 2002. These enormous costs do not reflect Fifth Amendment "takings" claims, which can be made under current law, but instead reflect the costs of implementing a radical, harmful, and expensive compensation scheme that would encourage unmerited claims against the Federal government for which the ordinary citizenry would have to pay. Specifically,

-- The bill's definition of property is extremely broad, encompassing not only land and water rights but also rights under contract and interests defined as property under State law. The bill would compensate lost business value, which goes far beyond what the Constitution requires.

-- In addition, the bill would mandate compensation even where the claim is filed for impacting only on an "affected portion" of a particular property rather than the property as a whole. For example, if a property, as a whole, has increased in value because of a Federal action, a person could still request compensation even if a small portion of the property decreased in value due to the action.

-- Moreover, property owners would not be required to document actual or clearly predictable losses in order to assert claims. Claims could be made for potential property development that may never have been attempted.

-- Finally, the broad scope of the bill would permit claims under virtually any Federal law and would also require Federal compensation for the actions of state governments.

In addition to exposing taxpayers to billions of dollars of compensation claims, this legislation would seriously interfere with the vital work of government agencies to protect public health, safety, and the environment. For example, under the bill, almost any EPA activity, from new drinking water protections to minimal pollution standards, would expose the EPA to countless lawsuits claiming compensation for diminished property value or business interests. Agency work would be interrupted by endless litigation, and agency funds would be decimated by speculative compensation claims.

Similar litigation burdens and financial problems would face government agencies charged with: protecting the safety of airplanes, trains, and automobiles; regulating the safety of children's toys; protecting the environment from oil spills; protecting agriculture from disease and pests; regulating the quality of food and drugs; managing the nation's water supplies and natural resources; regulating our financial institutions -- even closure of military bases. In each of these cases, taxpayers would in effect be required to compensate property owners for the consequences of simply complying with health, safety, environmental, and other laws. In so doing, S. 605 ignores the fact that harm may be caused to others by certain uses of property, and that government has an obligation to protect the public interest. It would therefore supplant the careful constitutional balance developed over 200 years of takings jurisprudence and replace it with an enormously expensive compensation scheme that elevates individual property interests -- no matter how speculative or unreasonable -- above the rights of others and the interests of our Nation.

Pay-As-You-Go Scoring

S. 605 would affect direct spending; therefore, the bill is subject to the pay-as-you-go requirements of the Omnibus Budget Reconciliation Act of 1990. Preliminary estimates indicate that the bill's effect would be to increase the deficit by at least several tens of billions of dollars during FYs 1996-2002.

* * * * * *

Brown Amendment

**AN AMENDMENT INTENDED TO BE OFFERED BY SENATOR BROWN TO S. 605:**

On page 13, line 14, strike "situated." and insert "situated, including any use or proposed use of the property which significantly interferes with the public health, public safety, or public morals."

**Amendment summary:**

**Section 204(d) of the Hatch Substitute to S. 605 states that no compensation need be granted under the bill if the owner's use or proposed use of property is a nuisance as defined by State law.**

**The Brown amendment is designed to make it clear that nuisance includes those uses of property which would be considered a public nuisance such as actions that would interfere with public safety, public health, or public morals.[1]**

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[1] A public nuisance is defined as: "[T]he doing or failure to do something that injuriously affects the safety, health, or morals of the public or works some substantial annoyance, inconvenience, or injury to the public." State of Colorado, Department of Health v. The Mill, 887 P.2d 993 (1994).

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# *RESPONSE TO CRITICS OF S.605*
# *ORRIN G. HATCH*
# *December 20, 1995*

## I. Is S. 605 A Radical Departure From Existing Takings Jurisprudence?

The argument that S. 605 represents a radical departure from existing takings jurisprudence is predicated on several contentions: (a) the bill requires compensation for all and any diminution of property value caused by Federal actions; (b) the "bright line" takings standards established by the bill contravene the "ad hoc" approach to takings established by the Supreme Court; (c) likewise, the bill's "partial takings" threshold amount of 33% is contrary to Supreme Court precedent which provides for compensation only where the Federal action substantially or totally diminishes the value of property; and (d) the bill "federalizes" and expands the definition of property interests beyond the state law definitions of property which courts traditionally employ for takings analysis. For instance, it is contended that because the bill defines contract rights as property interests, the bill would require compensation for breaches of Federal contracts awarding subsidies where Congress ended the subsidy, or simply for a breach for any reason of any Federal contract. These contentions are simply false.

**(a) Not all diminutions of value of property caused by Federal actions are compensable takings.**

S.605 does not require compensation for absolutely <u>any</u> diminution of the value of property caused by Federal regulation above the bill's 33 percent threshold requirement. This bill, unlike the House bill, incorporates case law construing both what defines a property interest and what constitutes a "taking" requiring just compensation.

Since the nineteenth century, courts have recognized that to constitute a regulatory taking, the <u>object</u> of the regulation must be the property itself.[1] In other words, indirect results of

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[1] *See Gibson v. United States*, 118 U.S. 269 (1897)(consequential damages to river landing due to construction of dike not compensable under Fifth Amendment); *Transportation Co. v. Chicago*, 99 U.S. 635 (1878)(building of tunnel under Chicago River that interfered with business did not amount to a taking since the object of action was not business). This is also true in state law cases. *See, e.g., C. Murphy M.D., P.C. v. Detroit*, 506 N.W.2d 5 (Mich App. 1993)(reduction of value of 75% of supermarket and medical facility caused by city's acquisition of adjacent residential property as part of urban renewal project, not a compensable taking because merely a consequential

federal action -- consequential damages -- are not compensable under a takings claim. Thus, as alluded to above, the market-based diminution of value of a home caused by the closing of a nearby military base by presidential order, is not compensable under this bill.[3]

Moreover, the Supreme Court has held that preexisting governmental restrictions on the use of private property are not "takings" vis-a-vis the new property owner.[3] The permissible scope of property rights, consequently, is defined by the constitutionally allowable legal constraints that exist at the time of acquisition or possession of the property even if the regulatory policy reduces the property values of a general class of property holders.[4] The Court has gone so far as to hold that where property is subject to a preexisting regulatory scheme, there is no need for compensation for loss of value for that property because the regulated entity has little or no "reasonable expectation" for unrestrained use of the property.[5]

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affect of city action).

[3] This is expressly made clear by a change made by the "Chairman's mark" to S. 605, which now defines a "taking of private property" to mean "any action whereby private property is the *object* of that action and is taken so as to require compensation under the fifth amendment ... or under this Act .... (emphasis added)." Section 204(7)(A).

[3] *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992)( such preexisting limitations on property use "inhere in the title itself."); *see Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1990).

[4] *See Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (Fed. Cir. 1993)(revocation of firearm import permits by BATF not a taking because expectation of selling semiautomatic rifles was not inherent in ownership of rifles, but subject to Federal regulatory power). This answers Senator Feinstein's question in the affirmative as to whether the bill would allow for a Federal prospective banning of firearms without paying compensation.

[5] *E.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-1008 (1983)(a key factor in determining whether a rgulation requiring disclosure of a trade secret amounts to a taking is whether the regulation interferes with reasonable investment backed expectations); *see also Mitchell Arms, Inc. v. United States*, *supra* note 6; *Colorado Dep't of Health v. The Mill*, 887 .2d 993, 1000 (Colo. 1994)("'Reasonable investment-backed expectations' of

Thus, the examples Senator Biden raises of a reduction of value of property the result of a decision by the FAA to ground an airplane for safety reasons, or the FDA to forbid the introduction of a drug into the stream of commerce for the protection of public health, probably are not compensable takings -- depending on the specific facts of those cases -- because those industries are subject to existing heavy regulation. Compensation in these situations, as explained below, may be denied as well as on a public nuisance theory. Note that wetlands and endangered species land use limitations in most cases do not fall in the preexisting law category since takings arise in these from denial of a permit after the property was purchased.[6]

(b) The "bright line" standards of the bill are consistent with recent Supreme Court precedent.

Critics of the bill complain that the essentially *ad hoc* approach used by courts to determine whether a regulatory taking occurs is

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regulated party is the dispositive factor in takings analysis when the regulated party is 'on notice' of the exent of the government's regulatory authority over the property." Although Colorado did not regulate uranium mill tailings prior to the state action regulating the tailings, the Colorado Supreme Court held that there was no taking because The Mill was "on notice" that radioactive materials on its property were highly dangerous and subject to extensive Federal and state regulation). It should be noted that at common law certain businesses and occupations, such as common carriers and inns, were subject to heavy regulation and strict liability for certain torts. Traditionally, and consistent with the more modern judicial "reasonable expectation" approach to the use of property interests in takings cases, courts have given great latitude to governmental regulation of businesses and occupations "clothed with the public interest." *See generally* C. Tiedeman, *A Treatise on the Limitations of Police Power in the United States* (1886), Chpt. IX(and cases cited therein).

[6] Courts have held that takings occur when the applicable Federal action directly affects the use of private property. Usually, this means that takings occur at the time of the regulations' promulgation. *See Williamson County Regional Planning Commission v. Hamilton*, 473 U.S. 172, 186-87 (1985); *Agins v. Tiburon*, 447 U. S. 255, 260 (1980). Because determination of whether property is a wetlands is a matter of a factual finding, courts have found that takings in a wetlands context occurs at the time a use permit was denied. *See Bowles v. United States*, 31 Fed. Cl. 37 (Ct. Fed. Cl. 1994).

contravened by the bright line standards of what constitutes a taking and the definition of property established by the bill. This is nonsense.

The essentially *ad hoc* approach established by the Supreme Court in *Penn Central Transp. Co. v. New York*[7] to determine a taking has been superseded by more recent Supreme Court decisions. For instance the Court in *Nollan v. California Coastal Commission*[8], established the test that there must be a substantial nexus between a governmental exaction and a particular problem the regulation was designed to redress. Similarly, *Dolan v. City of Tigard*[9], established a bright line test that there must be a demonstration of a "rough proportionality" between the "amount" or "degree" of the exaction and the extent of the restriction on property use needed to alleviate or prevent harm. The bill does nothing more than codify these recent types of cases that establish bright line standards.

Finally, as to the definition of property rights contained in the bill, the actual definitions were taken directly out of the case law establishing the particular property interest that was codified. For instance, the bill codifies contract rights as a property interest. This is predicated upon the Supreme Court case of *Lynch v. United States*,[10] which definitively established in 1934 that contract rights are property interests protected by the Fifth and Fourteenth Amendments.[11]

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[7] 438 U.S. 104 (1978). *Penn Central* looked to a number of factors to be balanced to determine the existence of a taking, including the character of the government action, the economic impact of the regulation, and whether reasonable investment-backed expectations were interfered with.

[8] 483 U.S. 825 (1987).

[9] 114 S. Ct. 2309(1994).

[10] 292 U.S. 571 (1934).

[11] This belies Senator Biden's argument that codification of contract rights as a protected property interest is a novel departure from existing law. His argument that such codification would force the Federal government to pay compensation when, for instance: (1) an agency cannot fulfill the terms of a contract to supply water because of a draught or (2) in a situation where Congress terminated a subsidy program to supply water at less than the market price, is simply wrong. In the first situation, there is simply no contract to enforce under the common law "Act of God" or *force majeur* doctrine, whereby the contract is

(c) The bill's "partial takings" threshold of 33% is not a radical departure from current law.

The *1992 Lucas* decision, cited below, rejects the argument that nothing less than complete destruction of value of property constitutes a taking. Indeed, following *Lucas*, a number of courts have recognized "partial takings" claims.[12] But there is no consistency in what constitutes a partial taking. In such a circumstance, Congress has a duty to clarify the law and the 33% threshold amount is a workable standard. This standard resolves the riddle, posed by Justice Holmes in 1922, when he stated that a regulatory taking occurs when the diminution of value of property caused by the regulation "goes too far."[13]

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vitiated because of a failure of consideration, in this case a draught preventing the delivery of water. *See Corbin on Contracts*, 343 (West Lawyers ed. 1976). The second situation falls under the so-called *sovereign acts doctrine* whereby the United States need not pay compensation when it acts to restrict contract rights and the use of property in its *sovereign* capacity, unless the general and public act or legislation restricting the contract and use of property is specifically directed to a single class of property holders. *E.g., Horowitz v. United States*, 267 U.S. 458 (1924)(United States cannot be held liable for an obstruction of a particular contract resulting from general and public acts as a sovereign; United States not liable for the losses resulting from an embargo placed on freight shipment of silk). *See Winstar Corporation v. United States*, 994 F.2d 797 (Fed Cir. 1993)(United States may not *ipso facto* abrogate contracts under the *sovereign acts* doctrine; it may do so only pursuant to general and public acts when acting in a sovereign capacity and not in a role the equivalent to a private contractor). Furthermore, the Supreme Court has held enumerable times that there exists no constitutional right to a particular subsidy. *See generally Lynch v. United States*, 292 U.S. 571, 577 (1933)( pensions, grants, and such are gratuities that may be eliminated by Congress at any time; there are no vested rights). *See U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175 (1980)(railroad benefits may be altered or liminated "at any time"); *Fleming v. Nestor*, 363 U.S. 603 (1960)(social security program benefits may be terminated without paying compensation);

[12] *E.g., Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994); *Bauer v. Waste Management of Connecticut*, 234 Conn. 221 (1995). These courts apply an *ad hoc* balancing test to determine whether the interfernce with property amounts to a partial taking.

[13] *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922).

## II. The Enactment Of S. 605 Will Not Hinder Environmental Law Enforcement -- The Nuisance Exception

The primary argument critics of S. 605 raise several objections to the bill's "nuisance exception." These are: (1) the nuisance exception is too amorphous or broad to be workable; (2) on the other hand, the nuisance exception is too narrow or restrictive to allow enforcement of Federal health, safety, and environmental statutes and regulations without the government having to pay compensation (the genesis of their slogan that the bill would require "paying polluters not to pollute"); and (3) because the bill's nuisance exception looks to state law for definition, the bill would establish fifty differing nuisance exception standards hindering uniformity, the necessary predicate for Federal legislation. These criticisms are misplaced. To answer these charge requires the following background discussion.

### (a) Common law nuisance and the Fifth Amendment's Takings Clause.

Section 204(d)(1) of S. 605 incorporates the common law nuisance exception to the payment of just compensation under the Fifth Amendment.[14] Actually, the nuisance exception is not an exception at all. At common law, property consists of a bundle of rights encompassing the possession, use (or "enjoyment"), and disposition of one's acquisitions; any limitation on those rights

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[14] Section 204(d)(1) provides:

> No compensation shall be required by this Act if the owner's use or proposed use of the property is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated. To bar an award of damages under this Act, the United States shall have the burden of proof to establish that the use or proposed use of the property is a nuisance.

This language codifies the approach taken by the Supreme Court in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2901 (1992), where the Court held that there is no regulatory taking if the regulation as applied is justified under state law nuisance principles, citing Restament of the Law Torts 2d, chpt.40.

was considered an unjustified interference with property.[15] It was universally understood that this definition of property did not encompass actions that deprive or disturb another in the enjoyment of his property, nor did it include the right to use property in a way that damages the property rights of a third party. Thus, property may not be used in a manner that constitutes a nuisance.[16]

At common law there are two types of nuisances, public and private. Private nuisance has been defined as an unwarranted interference with the use and enjoyment of property, particularly land.[17] Public nuisance, on the other hand, is an unreasonable interference with the rights and welfare of a community.[18] This type of nuisance is a criminal action, seeking injunctive relief and monetary compensation, brought by the state to protect public health and safety. Both types of nuisance actions require a demonstration of the existence of harm or an unreasonable risk of harm.[19]

The key problem for Democrats and critics of S. 605 is whether

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[15] *See* W. Blackstone, *Ehrlich's Blackstone* 51(J. Ehrlich ed. 1959)(original publication of Blackstone's *Commentaries on the Laws of England* was in 1765).

[16] *Id.* at 113. *See also* G. Jacob, *New Law Dictionary* (9th ed. 1772).

[17] *See generally* Prosser and Keeton, *The Law of Torts* 619 *(5th ed. 1984). See generally* R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). Professor Epstein concludes that the gravaman of private nuisance is the "physical invasion" of another's property by the tortfeasor. Such physical invasion could be by tresspass, pollutants, or noise waves.

[18] Prosser and Keeton, *supra* note 11, at 643.

[19] Please note that Senator Biden is simply mistaken when at prior hearings he concluded that the requirement to demonstrate that harm was caused by a particular tortfeasor necessarily means that nuisance is not broad enough to protect against a situation where several polluters collectively cause pollution, but one cannot prove that a single source of the pollution causes harm. In this situation *each tortfeasor is jointly and severally liable for the pollution.* See Prosser and Keeton, id at 634 (and cases cited therein).

the public nuisance exception is coextensive with the very broad governmental police power to protect health, safety, and the environment. Although the Federal government does not constitutionally possess a common law police power,[20] the Supreme Court historically has held that the Federal government has inherent authority to prevent "noxious" uses of property and need not compensate for restrictions on property use that amount to common law nuisances.[21] Nevertheless, whether restrictions on "noxious" uses of property fall under a broad police power authority or under a nuisance exception has been a matter of debate for almost a century.[22]

That debate has been settled by the recent Supreme Court *Lucas* decision,[23] which requires that regulation must abate nuisances, as defined by the state in which the property is located, in order to escape the just compensation requirement of the Takings Clause. Following *Lucas*, a number of subsequent court cases reject protection of largely police power general welfare or purely environmental values, such as protection of open spaces, aesthetic views, wildlife habitats, or wetlands, as a sufficient basis to justify the nuisance exception.[24] Courts now require that harm to health, safety, and the environment be factually demonstrated to justify a regulation being classified under the

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[20] Congress may legislate only pursuant to those specific amd implied powers delegated to it by Article I of the Constitution. *See, e.g., United States v. Lopez*, No. 93-1260 (U.S. April 26, 1995).

[21] *E.g., Mugler v. Kansas*, 123 U.S. 623 (1887)(Kansas shut down of brewery pursuant to statute held not to be a taking since operating the brewery was tantamount to a "noxious" public nuisance); *Miller v. Shoene*, 276 U.S. 272 (1928))(Virginia's destruction of red cedar trees to prevent spread of cedar rust disease to preserve apple crop, not a compensable taking).

[22] *See* Epstein, *supra* note 12, and cases cited therein. The key distinction is that the government need only show a rational basis for justifying regulations under a police power authority, but must show a factual basis of risk or harm to property to fall under a nuisance exception.

[23] *See supra* note 5.

[24] *E.g., Lucas v. South Carolina Costal Council*, 424 S.E.2d 484,486 (S.C. 1992)(building house on barrier island); *Bowles v. United States*, 31 Fed. Cl. 37, 51 (1994)(house on wetlands lot).

nuisance exception.[25]

Consequently, the argument that S. 605's nuisance exception is not broad enough to cover some environmental statutes (because it cannot be proven that harm will be ameliorated), is in a way besides the point. Plainly put, their argument is with the Supreme Court's *Lucas* decision and not our bill, which merely codifies the *Lucas* nuisance exception.

**(b) Is the nuisance exception either too restrictive or too broad and amorphous to be workable?**

As stated just above, this argument is more a criticism of the *Lucas* case than of this bill, which merely codifies that case's nuisance exception. Nonetheless, I believe this criticism to be highly exaggerated.

Their argument that the nuisance exception is too restrictive is based on an argument that certain environmental statutes prevent harms that are not easily demonstrable. For instance, Senator Biden raised the example of the Montreal Protocol's regulation of CFC emissions to protect the ozone layer. (At the time there was little evidence concerning what caused the depletion of the ozone shield).

First of all, there is now evidence that CFC emissions are harmful to the ozone layer, so the issue is moot -- use of CFC may be considered a public nuisance. But assuming that absolutely no harm can be demonstrated, the issue becomes what constitutional authority does Congress have to promulgate such legislation that merely prevents an hypothetical harm? Are these critics claiming that Congress may restrict legitimate uses of property based on mere speculation that there might be some injury? In any event, as long as Congress legislates pursuant to its delegated powers, Congress still may restrict property uses as long as it pays just compensation for the restriction. The Takings Clause requires compensation under this circumstance and the bill simply effectuates this constitutional provision. The critics' problem is really with the Fifth Amendment and not with our bill.

As to the issue whether the nuisance exception is too broad and amorphous, critics of the bill point to various state

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[25] *See, e.g., M&J Coal Co. v. United States*, 47 F3d 1148 (Fed. Cir. 1995)(applying *Lucas* rejected taking claim because prohibition on surface ubsidence mining prevented imminent danger to public health and safety); *State Dep't of Health v. Mill*, 897 P.2d 993 (Colo. 1994)(radioactive uranium mill tailings).

nuisance cases where state nuisance law does not protect against such things as oil spills or where different state courts faced with a similar nuisance factual patterns reach differing results. We have examined all these types of cases, which were cited by Joe Sax in his testimony on behalf of Secretary Babbitt and by Senator Biden in his various statements. In many of these cases the court found insufficient evidence of harm or risk to justify relief under a nuisance cause of action. In other cases, courts did reach different conclusions based on similar or identical factual pleadings. But that is not unusual. Reasonable minds do differ. What is important is that the courts employed virtually the same nuisance standards.

(c) Does the nuisance standard substantially differ from state to state?

As alluded to above, the answer is no. We studied the entire Restatement of Torts, 2d on nuisance and found that virtually all the states cited the nuisance standards found in the Restatement. In other words, state courts use the same nuisance standards. The result is a certain uniformity in the law. The fact those differing conclusions are reached by different state courts is no different from situations where Federal district and appellate courts apply the same law and reach different results.

Furthermore, it is not unusual for Federal statutes to look to state law for substantive standards. This is true for diversity cases (28 U.S.C. § 1332)under the *Erie* doctrine, the Federal Tort Claims Act (where the Act looks to the negligence standard of the state where the tort is committed), and the Tucker Act (where the interpretation of federal contracts is based on the law of the state where the contract is effectuated).

## III. The Cost Issue

Finally, a third myth is the canard that the compensation requirements of S. 605 will cost the treasury tens of billions of dollars thereby preventing the funding of needed social programs. In a letter by OMB Director Alice M. Rivlin dated June 7, 1995, addressed to Chairman Hatch, OMB estimated that the cost to the treasury of S. 605 to be "several times the $28 billion cost of the House-passed legislation." Director Rivlin also opined that these new costs would fall under the PAY-AS-YOU-GO requirements of the Budget Enforcement Act, which would contribute to sequester of other mandatory entitlement programs.

As to the PAYGO requirements, Ms. Rivlin conveniently ignored the findings of the nonpartisan Congressional Budget Office which concluded in a letter to me by CBO Director Robert Reischauer, dated February 6, 1995, that the bill "would not affect direct

spending or receipts. Therefore, PAY-AS-YOU-GO procedures [such as sequestration] would not apply." In other words, S. 605 has been scored "budget neutral."

Perhaps even more important, CBO recently completed a study of the costs to the federal agencies of implementing S. 605. Released October 17, 1995, the study concluded that (1) costs due to increased litigation under title II of the bill would not be substantial because large claims are already litigated under the Tucker Act and the majority of new lawsuits would involve relatively small claims. Moreover, litigation costs would deter many small claims; (2) administrative compensation costs under title V of the bill, however, will in the short run increase due to the increase in small claims made possible by the bill. CBO estimated these costs would, but only in the short run, amount to between $30 million and $40 million annually. This is a far cry from the tens of billions of dollars estimated by the White House; and (3) the reason compensation and administrative costs will decrease over time is that enactment of the bill would encourage agencies to avoid taking actions that would cause property owners to seek compensation. The fact that the bill draws "bright line" standards as to what constitutes a taking, requires agencies to conduct impact analyses before regulating private property, and mandates that compensation be paid out of agency appropriations, was crucial to CBO in its estimation. This is the purpose, after all, of any property rights measure -- the prevention of future violations of property rights.

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# 'Takings' bill is a solution in search of a problem

Colorado legislators are once again trying to take away the rights of local citizens to make purely local land-use decisions.

SB 69, by Senate President Tom Norton and Rep. Norma Anderson, is a remake of SB 149, last year's failed attempt to override local citizens on land-use questions. SB 69 makes it difficult and expensive for cities and counties to say "no" to developers. It shifts the burden of proof to the local government to demonstrate that denying a request for redevelopment is not a "taking" of property rights. It also imposes costly unfunded mandates on local taxpayers for compensation, hearings and regulatory processes.

In one particularly offensive section, SB 69 forbids local governments from requiring "the owner of private property, as a condition of permitting a use on such property, to dedicate any portion of such property to the public, to pay any money to the local government for the impact of the proposed use, or to expend any money in connection with such use unless there is an essential nexus between the exaction and a legitimate local government interest and the exaction is roughly proportional to the use being proposed."

"Essential nexus," indeed. What these pompous politicians are trying to say is that local governments shouldn't require developers to donate land or cash unless there is an "essential connection" between the donation and the purpose to which it is put. But, of course, local governments already follow that commonsense rule. When cities or counties require developers to donate land or cash equivalents, the land or money usually goes to build parks, schools or roads that directly serve the development in question.

ability of cities and counties to serve as mediators between the demands of developers and the concerns of local citizens. Responsible developers are well-acquainted with "the drill."

With the help of the city or county planning office, developers meet with homeowners and other concerned citizens and negotiate compromises — dedicating this open space, adding that noise buffer, paying for this overpass or relocating that parking garage.

In the end, the city council or county commission usually ends up ratifying a compromise that allows the development to go ahead while protecting critical interests of homeowners and existing businesses.

But SB 69 disenfranchises local citizens by ordering local governments to give the developers what they want, regardless of what citizens in Sterling or Grand Junction think. Besides mocking Colorado's tradition of local control, it hypocritically imposes an expensive series of unfunded mandates on cities and counties — while exempting the state government from those very same mandates.

One of the highlights of the new Republican Congress last year was that it honored the promise in the Contract With America to require Congress to live by the same rules it imposes on every else. But if SB 69 becomes law, the legislature will have imposed a costly bureaucratic nightmare on local taxpayers — while refusing to live by the same rules it wants to force local taxpayers to follow.

SB 69 could come up for a hearing as soon as Thursday in the Senate Local Government Committee. Citizens who cherish their right to local government should waste no

8-B THE PLAIN DEALER

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# Take it slow on takings

On first hearing, congressional Republicans make a plausible case that government should do more to compensate citizens whose property is devalued as a result of federal regulations. But this issue is not quite as simple as it seems.

A bill recently approved by the Senate Judiciary Committee, like another adopted last year by the House, could dramatically increase federal liability in so-called property "takings" cases. The cost of that liability to taxpayers could be enormous. Such high costs, in turn, could discourage government officials from imposing land-use and other regulations necessary to protect the public.

Advocates of the legislation are unhappy with the way federal courts have been interpreting the constitutional requirement that the government provide just compensation when confiscating private property. The courts generally require that property owners be compensated only when all or most of their property value is lost because of a government policy. That approach, critics say, has been insufficient to protect citizens from a government increasingly prone to impose regulations that reduce the value of private property.

Proponents of the new legislation cite striking examples of property owners hurt by federal regulations. But anecdotal evidence is not enough to warrant broad new legislation that could produce two worrisome results: a major drain on the already debt-ridden treasury, and a sharp limit on government regulatory powers.

The House bill would require compensation in cases when property is devalued by as little as 20 percent. The Senate bill would require compensation when owners lose 33 percent of property value. The Senate bill, however, is much broader than the House bill, which applies only to regulations involving wetlands, endangered species and Western water rights. The Senate bill could affect many regulations, possibly even those affecting food and airline safety.

Fortunately, the Senate is unlikely to approve intact the bill that emerged from the Judiciary Committee. Even some lawmakers who voted to release it from committee, including Ohio Republican Mike DeWine, took pains to indicate that their votes in committee did not mean they would support the measure on the Senate floor.

DeWine expressed "serious reservations" about the bill, including his fears that it could lead to excessive litigation and undermine public health and safety. Those are among the issues the Senate must consider as it begins the inevitable process of amending a bill that has little chance of becoming law without significant change.

Whether the Senate can change the bill enough to warrant support is uncertain. But there is no doubt it needs changing.

Working for the Nature of Tomorrow

# NATIONAL WILDLIFE FEDERATION

1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

TO: Tim Pauling
ORGANIZATION NAME: DOJ - ENRD
FAX #: 616-8543 PAGES: (incl. cover) 18

FROM: Glenn Sugamele DEPARTMENT:
FAX #: 797-6646 TELEPHONE: 797-6865
COMMENTS:



$H takings

ISSUE FOCUS: Dole Plan May Take Property-Rights Fight to Senate Floor

By Anna Hebner
LEGI-SLATE News Service

WASHINGTON (Jan. 5) -- The Senate floor may be the next battleground in the struggle between people who use land to make money -- including farmers, ranchers, developers, and timber companies -- and those who want to protect the environment by restricting people's use of land.

The Senate Judiciary Committee voted the week before Christmas to approve a bill [S. 605], sponsored by Senate Majority Leader Robert Dole, R-Kan., that would make it easier for property owners to win compensation when federal rules lower the value of their holdings.

Under the "takings clause" of the Fifth Amendment to the U.S. Constitution, the government must pay the owners of land that it seizes outright, for instance, to build a new highway.

But courts have given the government more flexibility to put limits on the use of a property, even if those restrictions reduce its value. For example, communities commonly use zoning rules to keep factories out of residential neighborhoods.

Dole's proposal would limit that flexibility, which property-rights advocates charge the federal government has abused.

Under the bill, whenever a federal agency's rules cause a 33 percent decline in the value of any portion of a property, the agency would have

at protecting wetlands bar a farmer from draining a soggy field, the farmer could demand compensation for the loss of that land.

"If the federal government continues to persecute and oppress people whatever the costs are, they're going to have to pay for it," Sen. Orrin Hatch, R-Utah, said during the Judiciary Committee's debate on the bill.

Opponents of the Senate measure use equally strong language.

"Most Americans are willing to obey the law for free," Sen. Joseph Biden, D-Del., told the committee. Repeating himself for emphasis, he added: "This bill would require us to pay people -- require us to pay people -- to obey legitimate -- legitimate -- environmental laws."

Many observers view Dole's property-rights proposal as a product of Republican presidential politics.

The first takings-compensation bill introduced in the Senate this year came from Texas Sen. Phil Gramm, Dole's rival for the GOP presidential nomination. The cause of protecting property rights draws ardent support from conservatives in the West, where many jobs depend on the use of natural resources.

But some Republicans have serious doubts about paying for so-called regulatory "takings" of property.

Sen. John Chafee, R-R.I., chairman of the Senate Environment Committee, opposes the idea. Sen. Mike DeWine, R-Ohio, a member of the Judiciary Committee who voted to move Dole's bill out of committee, nevertheless put on the record his "serious reservations" that the proposal might fuel litigation, undermine public health and safety, or create excessive costs.

"Whether or not Senator Dole will try to move the legislation will depend a great deal on whether he's still moving to the right to counter Gramm, or moving back to the center in an effort to win the general election," the National Audubon Society's John Echeverria predicted.

Members of both parties agree that certain federal rules have posed real problems for some landowners.

Many farmers recent rules aimed at preserving wetlands, which are moist areas that absorb floodwaters, filter pollutants from surface water and groundwater, and provide breeding grounds for fish and shellfish.

The complex system for protecting wetlands -- involving states, the Agriculture Department's Natural Resource Conservation Service and the Army Corps of Engineers -- has frustrated farmers seeking government permission for projects on their property.

More fundamentally, growers complain the regulations can limit their use even of lands that have been tilled for years and are not obviously wet.

During the committee markup of Dole's bill, Sen. Paul Simon, D-Ill., expressed sympathy with farmers but said the compensation proposal was not the answer.

"There is a wetlands problem, but let me tell you, we ought to deal with that problem with a scalpel and we're going after it with a chain saw," Simon said.

The Endangered Species Act is another target for criticism by property-rights activists.

Because endangered species are by definition rare, only a small fraction of landowners ever find legally protected plants and animals on their land. But where regulators have thought that planned activity on private land might damage an imperiled creature's habitat, they have sometimes intervened to keep property owners from, for instance, cutting trees or building houses.

The Clinton administration has sought to address these complaints with proposals to exempt small landowners from some species and wetlands rules.

In addition, the administration has promoted programs that give landowners more flexibility to use their property as long as they take steps to protect the rare creatures that live there.

However, those efforts do not go far enough, according to Nancy Marzulla, president of the advocacy group Defenders of Property Rights.

"There are lots of government actions and regulations which affect property rights that have nothing to do with endangered species or wetlands," Marzulla said.

Unless agencies pore through their rulebooks and eliminate every regulation that could limit property owners' use of their holdings -- an exercise that the Dole proposal would, in fact, require -- Marzulla says the government should face the threat of having to pay compensation.

But environmental groups, Democrats and some Republicans strongly oppose making the government pay compensation in such cases.

Dole's proposal would drain the federal Treasury and hobble the government's ability to protect civil rights and public health and safety, opponents charged during the Judiciary Committee markup.

The Congressional Budget Office has estimated that Dole's bill would cost about $30 to $40 million a year to implement. The CBO acknowledges that compensation payments are hard to predict, but estimates that they would be minimal, in part because agencies would avoid actions that could produce demands for compensation.

The White House Office of Management and Budget, by contrast, predicts that compensation costs could be several times higher than the $28 billion that OMB predicted from narrower property-rights language which passed the House in March as part of a broad regulatory-reform package [H.R. 9].

OMB also noted that agencies could find themselves in a legal and financial bind if they are required by statute or court order to take actions that would merit compensation under the Senate bill.

Marzulla, the property-rights advocate, argued that a broad takings-compensation law is needed precisely because property is more than just land.

Dole's bill would make the government pay when rules interfere with an owner's rights to land, profits from land, rents, water rights, contractual rights, or any other interest understood as property by custom or common law.

But Sen. Edward Kennedy, D-Mass., said that such a broad definition of property rights would let companies demand compensation if the federal government withdrew a dangerous drug from the market, required renovations to make a building accessible to the handicapped, imposed new worker-safety rules, or stopped releases of pollution into the air and water.

Supporters countered that the bill has been drafted to avoid such problems; the press secretary for the Judiciary Committee gave reporters an 11-page, footnoted summary of the legal arguments to that effect.

And Marzulla said warnings that the bill will have unintended consequences are just a distraction from the main issue.

"Once again, you come down to the fact that those who oppose S. 605 generally oppose the idea of paying for regulatory takings," she said.

Richard Stroup, a former Reagan administration Interior Department official now associated with the Political Economy Research Center in Bozeman, Mont., argued that paying landowners for regulatory encroachments on their property would actually help protect imperiled creatures.

"What the Endangered Species Act is primarily today is a huge penalty on anyone finding endangered species on your property," Stroup asserted. The federal government's heavy-handed approach not only violates property owners' rights but also discourages them from managing their land so it will be good species habitat, he said.

Most environmental advocates, however, say that restrictions on private holdings are essential to safeguarding the nation's ecological resources.

Some 75 percent of U.S. wetlands are privately owned, according to the Audubon Society's Karen Ilardo.

Environmental Defense Fund scientist David Wilcove said he thinks the conflict between property rights and environmental protection has been "exaggerated," but he insisted regulations still are needed to stave off the over-exploitation of natural areas.

"Bulldozing riparian [streamside] habitat that serves as critical habitat for endangered species is a garden-variety development activity that can happen to imperil an important public resource," Wilcove said.

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Washington Measure R. 48 and S. 605

R. 48, the Washington "property rights" proposal defeated by a 60% majority in November 1995, would, if enacted, have been unarguably more rigorous than any legislation that has been enacted by any state. In most important respects, however, it would not have gone beyond what is being proposed at the federal level in S. 605.

S. 605 is substantially broader in coverage than R. 48. R. 48 extended only to interests in real property. S. 605 would apply to all types of property, personal as well as real, including commercial and intangible property, and explicitly including some interests not recognized as property under state law or the Fifth Amendment.

In its compensation threshold, R. 48 misleadingly appears to be more sweeping than S. 605. In practice, however, the thresholds under the two proposals would be functionally identical. Although R. 48 mandated compensation for any loss in value, with no numerical threshold, and S. 605 ostensibly requires that the loss reach a threshold of 33%, the two are identical in measuring loss to any "portion" of property, and neither defines the meaning of "portion."

The term "portion" is so broad and malleable that allowing compensation for any affected "portion" of property would ordinarily make the numerical threshold meaningless. For example, an owner of a 100 acre property could identify one regulated acre as the "affected portion" and obtain compensation for a loss of 1%. Even more broadly, any owner whose property use is restricted in any way could claim that the "right" to use the property free of the restriction is the "portion" affected by regulation. As a result, there is little or no practical difference between the thresholds of S. 605 and R.48.

S. 605 and R. 48 are closely comparable in their narrow exemptions to the compensation requirement. The only exception under either is for regulation of activity that constitutes a "nuisance."

S. 605 and R. 48 are also similar in prohibiting most agencies from taking action without formally assessing the impact of that action on private property. Both also allow for judicial review of the required assessments, and direct that agencies make reducing impact on property the paramount goal in implementing their programs.

The assessment provisions of R. 48 are somewhat narrower than those in S. 605. R. 48 did not require that all agencies review their existing regulations, reissue those that affect property, and identify statutory changes to reduce property impacts even further. S. 605, § 404(b).

# Washington Voters Reject Budget-Busting "Takings" Bill; Public Message to Congress: Oppose "Takings" Legislation

FOR IMMEDIATE RELEASE
November 8, 1995

CONTACT: David Socolow
(202) 673-4143

**Washington state voters rejected Referendum 48 yesterday, which would have enacted far-reaching state "takings" legislation, by a margin of 60% to 40%** (with 92% of precincts reporting). The measure would have forced taxpayers to pay corporate and other land owners whose land value decreased by any amount due to public interest regulations and safety, health, and environmental standards. The initiative also would have required increased government bureaucracy to produce expensive "takings" impact studies prior to adopting regulations or imposing restrictions on land use.

This strong demonstration of the popular opposition to "takings" comes as the **U.S. Senate Judiciary Committee announced a mark-up of its similarly extreme "takings" bill, S. 605, for Thursday, November 16.** S. 605 was first introduced by Sens. Dole, Gramm, Hatch and others on March 23, 1995.

"Members of Congress should heed this clear expression of the will of the people," said David Socolow, director of the American Resources Information Network, a coalition of public-interest organizations opposed to "takings" legislation. "The public won't support a budget-busting, special-interest give-away program that would harm our health, safety, and communities. If they really want to protect Americans' property rights, Congress should reject 'takings' legislation."

Congress has considered "takings" legislation at several points during the 104th Congress. The House of Representatives passed a "takings" bill as part of the Contract with America (H.R. 925), and a "takings" provision was included in the Clean Water Act Amendments (H.R. 961) that passed the House earlier this year. In addition, "takings" language appears in numerous House and Senate proposals to alter the Endangered Species Act.

**Washington is the third state to consider the "takings" doctrine in a public referendum -- and is the third state to reject it.** In 1994, **Arizona** voters rejected a "takings" impact-assessment law by a 60% to 40% margin. And in 1986, **Rhode Island** citizens voted 67%-33% to amend their state constitution, adding the following language to reject radical interpretations of the "takings" clause: "Private property shall not be taken for public uses, without just compensation. The powers of the state and of its municipalities to regulate and control the use of land and waters in furtherance of the preservation, regeneration, and restoration of the natural environment, ... shall not be deemed to be a public use of private property."

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P.O. BOX 33048 WASHINGTON, DC 20033 HOTLINE: 1-800-846-2746 TELEPHONE: 202-673-4143 FAX: 202-673-4272

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# Referendum 48

## Economic Impact Study of the Property Rights Initiative

### Executive Summary

## Background of the Study

A team of researchers based at the University of Washington has just completed an economic impact assessment of the proposed property rights initiative. The proposal began life in 1994 as Initiative 164. It passed the Legislature in 1995 as House Bill 1026. It will be voted upon at the November 7 general election as Referendum 48. Its formal title is "The Private Property Regulatory Fairness Act." In the analysis that follows, the measure is called simply R-48.

The Institute for Public Policy and Management (IPPM) has undertaken an independent study of this proposal to provide voters with reliable information regarding its anticipated economic and legal impact. Members of the research team have included David Harrison, Glenn Pascall, Paul Sommers and Beth Goldberg of the University of Washington, Ken Dolbeare of the Evergreen State College and attorney Ellen Dial of the Perkins Coie law firm. Joining Dolbeare in carrying out the local government portion of this study were Curt Pavola, Dick Doane and Richard Rhine, recent graduates of Evergreen's Graduate Program in Public Administration.

The Institute sought broad-based funding from local foundations for this study. The research effort has been underwritten by the Bullitt, Brainerd and Wilburforce Foundations. To assure objectivity of the inquiry, findings were not shared with any funder or with any campaign for or against R-48 while the research was in progress.

## Research Methods

The IPPM research team concentrated its efforts in four areas:

A) *Review* of the measure's major provisions to develop scenarios regarding its probable interpretation and implementation if enacted. The study offers three scenarios, which vary on the basis of the number and type of land use actions that might fall within the law's scope.

B) *Assessment* of direct costs to local governments (cities and towns, counties, special districts) under each scenario. Cost estimates are focused on expenditures related to R-48's two major requirements: preparation of an economic impact statement (EcIS) when governments consider certain land use actions, and payment of compensation to owners when use or value of property is affected by land use regulations enacted for "public benefit."

C) Analysis of EcIS costs to selected state government agencies.

D) Examination of alternative approaches to considering economic costs as a dimension in land use decisions.

## The Property Rights Movement

The 5th Amendment to the U.S. Constitution provides that private property cannot be taken by government without compensating the owner. Courts have ruled that a taking occurs only when all or a very large part of total value or use is lost.

In recent years, land use regulation has become more complex. This has increased the number of what some consider to be "partial" takings - losses of value or use that are less than the level that triggers compensation, but are still significant. Nationwide, a property rights movement has arisen. Its goals are to expand the scope of actions that are considered takings and eligible for compensation and to deter governments from actions that create a taking.

Many states passed or considered property rights laws in 1994. Most of these laws direct the state Attorney General to develop guidelines for state agencies on what constitutes a taking. In some cases, impact analyses are required before government can act to take value or use from private land.

A few states have gone farther by adopting laws that compensate for takings. These laws are limited in one or more ways. They cover only certain *types* of land (i.e. timber), only *specified* categories (i.e. scenic corridors, flood plains) rather than any "public benefit" action, and/or only a *threshold* level of lost value (i.e., 20 to 50%) rather than *any* loss.

## Washington State: A Unique Situation

In Washington, a measure, R-48, is awaiting final action by the voters on November 7. It has four key components:

1) R-48 requires government entities and agencies at all levels within the state to prepare an "economic impact statement" (EcIS) on almost every action they take that might limit the use or development of property, whether the action is taken by statute, ordinance or regulation, or by the exercise of discretion in administering existing laws. Though this requirement is subject to a number of different interpretations, it may be broad enough to encompass routine land use actions such as the proposal of new comprehensive plans, zoning ordinances, building and fire codes, permitting regulations, forest practices regulations and the imposition of mitigation measures to protect the environment under the State Environmental Policy Act (SEPA).

   The EcIS must contain a "full analysis of the total economic impact on private property" of the regulation, and must "identify the manner in which the proposed action will substantially advance the purpose of protecting public health and safety against identified public health or safety risks created by the use of private property." It must also analyze the economic impact of *all* reasonable alternatives to the regulation or restraint. The jurisdiction must then select the regulation or restraint that has "the least possible impact on private property."

   While vague in terms of specific definitions, R-48 requires government entities to address a broader array of issues in an EcIS than the entities currently address when preparing Environmental Impact Statements (EIS) under SEPA. As a result, the preparation of EcISs will likely be more time-consuming and costly than the preparation of EISs.

2) R-48 requires a government entity to pay a private property owner for any "taking" of private property "for general public use" which is, generally, any regulation that imposes a "public benefit designation" on any interest in land. The language used to define a taking is extremely broad. It leads to a range of interpretations that may include not only all forms and types of wetlands and fish and wildlife habitat, but also designations under the Growth Management Act (GMA) of other types of critical areas, agriculture and forest lands, and possibly zoning and building codes. The jurisdiction must pay the compensation within 3 months of the adoption of the regulation or restraint, whether or not any particular development is proposed by the land owner and whether or not the regulation or restraint may be removed or modified before any development is undertaken.

3) R-48 requires a government entity to compensate the owner of any interest in land if a restriction on land use results in a lack of access to that owner's property. So, for example, if a land owner does not have access to its land because access that might otherwise be available is protected by shoreline or wetlands regulations, the state must either buy access rights for the owner or buy the owner's property.

4) R-48 requires a government entity to pay for any maps, studies, and plans it requires private parties to perform as a condition of project approval.

This mixture of provisions is unique in its scope and in its departure from current law. It reflects deep dissatisfaction with the current system. *It also proposes a degree of change that is sweeping and even radical compared to precedent and to actions in other states. Regrettably, this is not simply a matter of boldness. The drafting of R-48 is defective. Much of the measure's potential sweep is due to its vagueness and inconsistency, which appears to create large unnecessary costs, would require ongoing litigation to clarify and undermines R-48 as a vehicle for amendment.*

Litigation is an extraordinarily expensive method of clarifying ambiguities in legislation. The nature of litigation is to look only at a particular action and a particular set of facts. Courts generally cannot give "advisory opinions" — opinions on the result of a hypothetical set of facts or on a set of facts that is not directly involved in the specific lawsuit at hand. So, for example, courts cannot tell counties and cities generally when and how to do an EcIS. They can only tell if a particular city or county must do an EcIS in a particular instance and, if it has, whether it handled the particular matters raised by the parties to the lawsuit in a proper or improper manner. (For an in depth legal analysis of provisions of R-48, please refer to the supplemental legal analysis.)

## The Economic Impact of R-48

Proposals with the scope of R-48 carry significant public costs. R-48 seeks to change the behavior of government in ways that will produce large public benefits. Both dimensions are examined here.

Any proposed public action would be more likely to pass if there were no public cost. An objective attempt to estimate costs is part of informed decision-making by voters, especially in today's climate of fiscal conservatism.

High public costs tend to work against passage of a proposal. However, they are not in themselves the decisive argument. They simply suggest the need to compare proposed benefits with probable costs— just as R-48 would require.

## Estimating Costs: The Framework for Analysis

In this study, cost analysis rests upon legal analysis. Because of inconsistent language in R-48, there is a wide variation of opinion regarding the scope of land use actions it covers. Definitive clarification of the intent of R-48 cannot occur before it must be voted upon. Thus, the study uses three scenarios to display the potential range of impacts.

Each scenario is based on a set of *designations*: the type of proposed action (enacting, amending or implementing an ordinance or regulation) that would require an EcIS and/or would create a potential liability for taking potential development value, or access and use, from the owner.

Scenario I designations include wetlands, fish and wildlife habitat and buffer zones.

Scenario II designations include Scenario I *plus* recharge areas, floodplains and floodways, geologically hazardous areas, shorelines, open spaces, view corridors, environmentally sensitive areas, and similar designations from comprehensive state laws such as the Growth Management Act and the State Environmental Policy Act.

Scenario III designations include all of Scenarios I and II *plus* actions to enforce standards for development or building codes, and actions taken under public health and water quality laws. Scenerio III also includes actions denying permits, rezones, subdivisions, and variances and actions with respect to seasons and harvests.

The official literature of R-48 proponents closely reflects Scenario I. Scenario II is based on the study team's legal assessment of the more probable interpretation of R-48. Scenario III is a broader but still credible reading that excludes some claims of R-48 opponents regarding the scope of impact.

## Cost Estimates for Local Governments

Cost estimates for local government are in two parts: the required costs for EcISs and potential levels of exposure to liability for takings compensation. The two tables on the next page base their estimates on actual 1994 experience drawn from the public records of four counties and eight cities. Composite models of representative cities and counties were constructed from these data. In moving from specific examples to statewide totals, multiplier factors were discounted at numerous points to assure the conservatism of estimates, and state control totals were applied as a cross-check. (See supplemental reports for additional information on the methodology used to arrive at these results.)

Estimates for the exposure to takings liability were much more difficult to prepare due to data limitations, time constraints and the wide range of variables that might trigger compensation. Takings figures should not be considered as precise cost estimates but should be used to illustrate the order of magnitude of potential liability.

Table I: Annual Local Government Costs for EcISs and Studies
(based on 1994 experience)

| Sections and Jurisdictions | Scenario I | Scenario II | Scenario III |
|---|---|---|---|
| EcIS (R-48, Sec. 3) | | | |
| Cities | $165,943,100 | $230,990,300 | $448,334,900 |
| Counties | $102,869,000 | $199,319,000 | $423,259,000 |
| Districts | $ 9,547,750 | $ 12,779,750 | $ 27,381,250 |
| Total | $278,359,850 | $443,089,050 | $898,975,150 |
| Studies (R-48, Sec. 5) | | | |
| Cities | $ 16,594,310 | $ 23,099,030 | $ 44,833,490 |
| Counties | $ 10,286,900 | $ 19,931,900 | $ 42,325,900 |
| Total | $ 26,881,210 | $ 43,030,930 | $ 87,159,390 |
| Total, Sec. 3 and 5, All Local Governments | $305,241,060 | $486,119,000 | $986,134,540 |

Table II: Local Government Exposure to Potential Takings Compensation

| Sections and Jurisdictions | Scenario I | Scenario II | Scenario III |
|---|---|---|---|
| Takings (R-48, Sec. 4) | | | |
| Cities | $1,800,000,000 | $2,500,000,000 | $4,000,000,000 |
| Counties | $2,000,000,000 | $3,500,000,000 | $7,000,000,000 |
| Total, Section 4 Local Governments | $3,800,000,000 | $6,000,000,000 | $11,000,000,000 |

## Potential Impact on Selected State Agencies

Six state agencies were examined to illustrate the potential fiscal impact of R-48's EcIS requirements. Table 3 on the next page shows the team's estimates of the costs of preparing EcISs and paying for studies and maps to the Departments of Agriculture; Community, Trade & Economic Development; Ecology; Fish & Wildlife; Health; and Natural Resources.

Instead of examining all state agencies, the team selected a group of agencies that would demonstrate the range of impacts of R-48. The three natural resource-related agencies — Ecology; Fish & Wildlife; and Natural Resources — focus on activities that are clearly targeted by R-48. The three other agencies — Agriculture; Community, Trade & Economic Development; and Health — demonstrate the impacts of R-48 when its provisions are defined more broadly. The estimates presented in Table III are based on data that are available to the public. The number of relevant actions taken by the agencies in a given year — in some cases this year is 1994, in other cases it is an estimate of the average number of cases in a year — were assigned to the different scenarios and cost estimates were attached.

Clearly, the impact of these activities on the individual agencies varies considerably. The variation stems from the types and number of actions pursued by the agencies in a given year. For instance, R-48 has the most significant repercussions on the Departments of Ecology; Fish & Wildlife; and Natural

Resources. The effect on these agencies and the others tends to increase as the interpretations of R-48 broaden under Scenarios II and III. The more sweeping interpretations encompass more of the activities pursued by the agencies. For instance, the Department of Health's numerous licensing activities and the Department of Agriculture's many pesticide and harvest regulations become relevant under Scenario III.

The total impact for all six agencies under the three scenarios is quite significant. The costs of EcISs and studies to individual agencies would often add considerably to their budgets. For instance, the cost of preparing EcISs would have consumed 30% to 137% of the Department of Ecology's 1994 general fund budget.

Time and data constraints made the calculation of potential takings exposure to state agencies impossible. However, like the estimates presented for local governments, the exposure of state agencies to takings compensation could be considerable. (For additional information about the methods used to reach our conclusions and our analysis of the impacts on state agencies, please refer to the supplemental state report.)

Table III: Annual Costs for EcISs and Studies to Selected State Agencies
* based on 1994 experience
** based on estimated annual averages

| Sections and Jurisdictions | Scenario I | Scenario II | Scenario III |
|---|---|---|---|
| EcIS (R-48, Sec. 3) | | | |
| Dept. of Agriculture* | $0 | $0 | $724,612,200 |
| Dept. of Community, Trade & Economic Development* | $0 | $0 | $541,400 |
| Dept. of Ecology** | $8,025,000 | $19,680,000 | $36,320,000 |
| Dept. of Fish & Wildlife** | $5,234,500 | $43,405,200 | $46,112,700 |
| Dept. of Health* | $0 | $0 | $166,452,300 |
| Dept. of Natural Resources** | $175,987,600 | $ 235,637,800 | $235,637,800 |
| Total for Six Agencies | $189,247,100 | $298,723,000 | $1,209,676,400 |
| Studies (R-48, Sec. 5) | | | |
| Dept. of Agriculture* | $0 | $0 | $72,461,220 |
| Dept. of Community, Trade & Economic Development* | $0 | $0 | $54,140 |
| Dept. of Ecology** | $802,500 | $1,968,000 | $3,632,000 |
| Dept. of Fish & Wildlife** | $523,450 | $4,340,520 | $4,611,270 |
| Dept. of Health* | $0 | $0 | $16,645,230 |
| Dept. of Natural Resources** | $17,598,760 | $ 23,563,780 | $23,563,780 |
| Total for Six Agencies | $18,924,710 | $29,872,300 | $120,967,640 |
| Total, Sec. 3 and 5, Six State Agencies | $208,171,810 | $328,595,300 | $1,330,644,040 |

## Potential Mitigations of R-48 Economic Impact

Proponents believe the presence of R-48 in law would reduce cost impacts to levels below those cited here because the measure would deter government from applying land use restraints. If, for example, the proposed law had been in place in 1994 and caused a reduction in actions restricting development, this would slow the rate of payout for takings compensation. By the same token, proponents believe that over a period of years a declining number of EcISs and studies would be required as R-48's provisions make local governments averse to considering land use actions that would trigger the process.

Proponents also argue that the pace of development encouraged by less extensive regulation would ignite an economic boom, generating revenues that could more than cover the costs of R-48.

There are serious limitations to these arguments. First, the degree to which local government can suspend, repeal or fail to enforce existing land use laws is highly unclear. Dramatic reductions in the degree of regulation might well be strongly opposed by landowners adjacent to proposed developments. Further, such rollbacks may not be feasible without major changes in state (and in some cases federal) laws. In addition, if R-48's requirements are interpreted as closely tied to routine zoning and permitting reviews, ongoing costs would be virtually unavoidable.

Second, if land development restraints were lifted, this would nullify growth management policies designed to concentrate development and would create higher public and private costs for extending the infrastructure in transportation, utilities and other services. Ironically, it would also create a temporary supply glut, causing owners of currently permitted land to suffer a loss in value (not compensated by R-48).

Third, the current driver of growth in jobs and income is the technology sector, which depends on skilled personnel attracted by quality-of-life considerations. Washington state currently enjoys a comparative advantage in competing for this intellectual capital because many outstanding workers are drawn here by what they view as overdevelopment in other regions. This would not be likely to have positive effects, particularly in portions of the state which have a restricted land base, a strong economy, and an emphasis on balanced growth.

*Finally, since R-48 gives any property owner within a jurisdiction legal standing to challenge any governmental action or inaction under the statute, including the adequacy of any economic impact study, it is likely to cause massive process gridlock. The gridlock could significantly increase the time required and the costs involved for developers in carrying projects through the permitting process.*

## Completing the Regulatory Fairness Framework

R-48 focuses on protecting owners against loss of the full economic potential to develop or use property, first by providing a deterrent against actions of government that would result in a taking, and then by providing full compensation if a taking occurs.

However, the more comprehensive property rights issue is to ensure that land use policies *safeguard value*—a much broader focus than compensating losses created by restrictions.

R-48 provides no remedy for the following dimensions of property rights regulatory fairness:

- Loss of use or value on a property when there is undesirable development on a neighboring property.
- Loss of use or value on a property when the character of a community changes due to widespread development.

- Treating "windfalls" (value added by government action that creates land supply scarcity, provides amenities or builds infrastructure) as the initial basis to fund compensation for "wipeouts" (loss of value from regulation) as a way to minimize cost impacts on the general taxpayer.
- Applying windfalls as an offset against wipeouts on the same piece of property to determine net loss (if any) and minimize taxpayer costs for compensation.

Provisions such as these would carry the approach proposed in R-48 to its logical conclusion. They would also add even more cost and complexity. A huge technical bureaucracy would be required to compute windfalls and wipeouts and an elaborate system of compensating payments would create a flow of funds even larger than R-48.

## Reasonable Regulations and Case-by-Case Equity

There is widespread agreement, even among some proponents, that R-48's intent and terminology need to be more precise. Could this be achieved by clean-up amendments at the 1996 legislative session? High on the list of topics is the range of land use actions and designations covered by the R-48 process. Will reality follow Scenario I, II or III? Another priority issue is whether the measure applies only to actions based on new laws and is not retroactive. If it covers laws passed in prior years, costs would rise far beyond the levels estimated here.

Other potential amendments involve issues that are likely to prove highly divisive, including whether there should be a trigger level of loss in value or use that creates a basis for compensation, and whether property owners who have no intent to develop should be compensated for restrictions on development.

If voters are to rely on clean-up amendments as the basis for approving R-48, an ironclad guarantee would be required from proponents on specific changes that will be introduced and adopted at the next legislative session. It is in the nature of the political process that no one can provide such a guarantee.

There is a more basic problem. The intent of the property rights movement is to seek remedies that will relieve the plight of landowners, especially those of modest means, who face a significant loss in the use or value of their property as a result of government actions. *R-48, in the sweep of its requirements and the scope of its compensation, and in its impact on both taxpayers and communities, goes far beyond the widely recognized goals that have given the property rights movement its base of support.*

Is there a way out of the dilemma between today's system that often ignores the private costs and burdens imposed by land use regulation, and a system that would compensate private costs by imposing huge taxpayer costs and creating a complex bureaucracy?

There is a middle path. It focuses on how to serve those in real need of property rights protection at an affordable cost to the taxpayer and without the risk of disrupting community and neighborhood character currently protected by land use laws. The following actions have been widely discussed as potentially effective responses to landowner concerns regarding regulation.

1. Local government should improve the quality of information it provides to property owners regarding regulatory requirements and their rights within the process. Such information can help reduce uncertainty, frustration and unfounded expectations.
2. Within the system there should be an advocate who is knowledgeable about critical decision paths, detailed requirements, alternative procedures and individual personalities, who assists property owners in seeking development permits or in appealing permit refusals.
3. An ongoing review should be launched by a task force representing all stakeholder interests, to reform and streamline the land permitting process and to re-examine the standards that define takings.

4. Specific corrective legislation can be adopted. This has already begun. Laws passed by the 1995 legislature require assessors to immediately reduce taxable value to reflect any new restrictions on property, and place time limits on the permitting process. In 1994, the U.S. Supreme Court limited impact fees to increased demand directly linked to development and sustained the refusal of an Oregon property owner to fund an unrelated public amenity.

   Legislation could provide that property appraisals be based on the most probable or current use rather than on zoning, where full development is restricted or unlikely; that property owners receive a rebate for excess taxes paid in prior years on development rights that have since been rescinded; that lost development rights can be used to allow more intense development of other portions of the property or be sold to owners of other suitable properties; and that the trigger point of percentage loss in value or use that defines a taking be lowered.

5. Finally, a higher degree of individual equity could be sought by providing mediation to mitigate the impact of regulatory restrictions and/or to provide compensation by purchasing development rights. The goal would be to focus on authentic hardship cases.

## The Middle Ground is the High Ground

The five points described above provide the framework for a practical strategy. One of the 13 goals in the state Growth Management Act is to provide more effective protection for property rights. The Attorney General's office has been directed to assist local governments in implementing this provision. The Florida Property Rights Commission interviewed developers and landowners and found that people wanted a more rational and responsive government rather than cash compensation. Fairness and flexibility are key to solving these problems.

By comparison, *R-48 would create a legion of government staff members, economists and consultants to generate economic impact statements, leading to an unwieldy process and enormous costs. It would also force taxpayers to pay massive compensation costs based on the restriction of maximum development value, even where the owner has no intent to develop. And if its real intent is to suspend land use law - to end rather than reform regulation - then the issue of lifting restrictions on development needs to be more openly presented to the voters.*

Despite these defects, R-48 has performed a timely service in drawing attention to an important and neglected issue. This is not the first time that a sense of crisis within part of the state's political community has led to a sweeping measure which set the stage for reform. In 1990, Initiative 547 was defeated by a three-to-one margin because most voters judged it was too extreme an approach to growth management. Yet, many themes of the initiative found their way into law. Similarly, R-48 serves as a reminder that the current framework of property rights law and rulemaking needs to be re-examined.

# PROPERTY RIGHTS LEGISLATION IN THE STATES

by

Joseph L. Sax
Counselor to the Secretary and Deputy Assistant Secretary
U. S. Department of the Interior

## II. Property Rights Legislation in the States

Twenty states have enacted some form of property rights legislation, most either of the economic-impact assessment type, or providing for compensation. Some states have both assessment and compensation provisions. At least one state, North Dakota, has a hybrid statute with various elements.[1] The most common type of state law requires regulators to assess the likely impacts of prospective regulations on private property interests. Several states allow an owner whose property value has been diminished by a specified amount to seek relief from the regulation. A handful of states provide compensation in specified circumstances, and one state, Florida, provides for relatively broad-based compensation.

The Florida law is complex and far-ranging, and Bob Rhodes will discuss it in detail. I would highlight two of its facets: it contains no numerical compensation threshold, (requiring that a burden be "inordinate") and it explicitly acknowledges that it may result in compensation that would not be due under the Fifth Amendment. Although the federal proposals would also have that consequence, their texts and proponents do not always fully acknowledge this fact.

Perhaps the most significant state development is the progress of a Washington state law that has <u>not</u> been adopted, but will be the subject of a referendum election in November. That law arguably has a closer kinship with the federal legislation, particularly with S. 605, than any of the enacted state laws. It contains the most rigorous compensation requirement in the nation, with compensation for any loss in value, with no threshold, and with a narrow exception for actions to prevent a public nuisance. It precludes any regulation without a formal analysis of the total economic impact of the regulation on private property. The referendum will be the first popular test of mandatory compensation, and the second test of assessment; in 1994, the voters of Arizona rejected a broad assessment bill (with no compensation provisions) by a 3 to 2 margin.

### Assessment Bills

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[1] North Dakota has an assessment law that allows an affected landowner to request reconsideration of the need for a regulatory action that will work a taking. The law nominally defines an action that reduces the value of real property by more than 50% as a taking, but effectively negates that standard by exempting any action that "substantially advances legitimate state interests, does not deny an owner economically viable use of the owner's land, or is in accordance with applicable state or federal law."

The assessment concept had its genesis in Presidential Executive Order 12630, which requires federal agencies to assess the likelihood that proposed actions will cause takings of private property. Several unsuccessful proposals were offered in prior Congresses essentially codifying this Order. Although assessment proposals are no longer center stage at the federal level, fifteen states have some form of assessment law: Arizona, Delaware, Idaho, Indiana, Kansas, Louisiana, Missouri, Montana, North Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. These laws vary in the detail and formality of the assessment, whether an assessment is subject to judicial review, and the consequences of failure to conduct an adequate assessment. Three other states require takings assessments by executive order: California, Colorado, and Nebraska.

Three states have opted to study the property rights question: Maine and Rhode Island currently have study commissions, and Virginia's assessment law grew out of a prior study.

## Compensation-type Laws

In addition to Florida, five states (Texas, Louisiana, Mississippi, Colorado, and Oregon) have enacted compensation-type laws, although not all of them actually allow a property owner to demand compensation.

**Texas** allows landowners to challenge regulations that cause a 25% drop in the market value of any affected property. The remedy is relief from the regulation, and compensation is required if the state elects to maintain the regulatory restriction, with payment to come from funds appropriated to the agency imposing the regulation. This approach attempts to minimize the fiscal implications of broad mandatory compensation, and to force cutbacks in regulation.

**Louisiana and Mississippi** provide compensation for losses in value of, respectively, 20% and 40% of the value of the affected portion of agricultural or forestry property, with exemptions for certain actions that are harmful or constitute nuisances. An agency found liable for such a diminution has the option of rescinding or repealing the rule or regulation that caused the diminution and paying the property owner for damage caused by the application of the rule or regulation. Mississippi's law expressly provides that the property owner can recover compensation from the entity that imposed the regulation.

**Oregon's** governor vetoed an expansive compensation bill only a month or so ago, but has indicated he will sign a subsequent bill that establishes a two year pilot program under which owners of property reduced in value by 10% from forestry regulation can seek relief from the regulation.

**Colorado** provides for compensation in certain cases where a project that has been formally approved is subsequently prevented from proceeding.

# Public Responsibilities and Private Rights

## Introduction

One now hears it said, as if it were perfectly obvious, that every property owner whose land is reduced in value because of a specific law or regulation is automatically entitled in every case to be compensated by the public. Few propositions could be less obvious, or less accurate. Automatic compensation is not required by the Constitution, as interpreted by the U.S. Supreme Court. It is not required by fundamental principles of fairness. No automatic compensation rule has ever obtained in this country. Requiring automatic compensation would overturn a 200-year-old tradition to which every single Justice of our Supreme Court adheres: that whether the public has a duty to compensate an owner turns on a variety of factors, such as the owner's reasonable expectations, and the importance of the public purpose being achieved; and that diminution of value alone--except where regulation has denied all economically beneficial or productive use--is not enough to trigger entitlement to compensation out of the public treasury.

## The Social Compact

The reason for the rule is something fundamental: the Social Compact, the basic understanding upon which relations between citizens and the state are founded. The essence of that compact is the reciprocal relationship - the partnership if you will - between the government on the one hand, and property owners and enterprises on the other. Government helps to make property economically productive in a variety of ways, and owners in turn use their property in ways that benefit the larger community as well as themselves, giving up any claim to an unfettered right to use property in any way they please, without regard to the impact on others. For example, government provides infrastructure, such as roads and water supply, as well as sustaining stable markets through policies governing unemployment and labor unrest, bank and investment market security, assurance of safe water supplies; government also provides desired amenities such as parks, open space and museums.

To cite one example, the Department of Agriculture has estimated that federal programs nationwide have raised the average per acre value of farmland by 15% in the last decade alone. Government programs have increased agricultural land values in a wide variety of ways, through both direct and indirect subsidies, and through infrastructure investments. For example federal navigation improvements on the Mississippi River

have improved the international market for Midwestern grain and thereby increased the value of Midwestern cornfields.

All these, and many other governmental activities, provide benefits that are reflected both directly and indirectly in property values. In turn, owners are expected to moderate their activities so as not to undermine the general structure of community benefits that a productive private/public partnership provides. Limits on property use are imposed to make communities secure, stable, prosperous, and attractive, while protecting and enhancing property values for everyone. Thus government may impose restrictions on pollution, child labor laws, local land use zoning, regulation of the stock and bond markets, and a host of other limits on unrestrained efforts to maximize personal advantage to the possible detriment of the community. Such restrictions comprise the other half of the Social Compact.

In a well-functioning community, there is reciprocity in the large--burdens fall on everyone, with the specific burden depending on one's particular situation, and concomitant benefits are available to all: beaches in Honolulu, wildlife in Montana, museums in Washington and New York, historic structures in Boston, productive wetlands in Alaska, urban vistas in San Francisco.

Narrow reciprocity has never been required as a standard for restrictions the public imposes. President John Kennedy eloquently reminded Americans of responsibility as one-half of the social compact: "ask not what your country can do for you - ask what you can do for your country." Moreover, it would be fruitless and foolhardy to try to settle accounts for every dollar of benefit and burden that moves among property owners and citizens out of the myriad transactions of everyday life. Instead, owners are entitled to a general assurance of fairness. In terms of property rights, fairness has been understood to demand a mixture of respect for expectations, protection against physical invasion, and concern that regulation not be excessive in imposing demands that are disproportionate to the needs that gave rise to them.

**There Is Nothing New Under the Regulatory Sun**

Proponents of compensation, however, sometimes suggest that times have changed: that the modern era of environmental laws has brought an unprecedented new burden of regulation on owners that demands new rules. This is simply untrue. Every era has brought significant changes in the application of property rights, and in regulation of them. In fact, this generation is by no means the regulatory high point in American history.

The modern rules of compensation were set during the Progressive Era around the turn of the century, and during the New Deal, two eras during which new laws were enacted that impacted property owners more than any of the modern environmental laws. Those were the eras of anti-trust laws, shorter hours acts, minimum wage laws, blue-sky laws, banking laws, conservation easements, urban zoning, and a host of other regulatory innovations. All these far-reaching economic regulations were of course sustained against claims that they were so unfair to property owners that they amounted to constitutional takings.

A parallel revision of relations between the state and property owners has occurred in virtually every era of American history. Colonial America distrusted competition and extensively regulated contractual freedom, including food prices, interest rates, and wages. As their focus shifted from scarcity to opportunity, the colonists increasingly viewed commercial regulations as an impediment to growth, and later lifted them.

At one time the Kentucky Constitution held that "the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever." That inviolable property right disappeared, as did a wide range of others that 18th Century Americans abolished, such as feudal tenures, imprisonment for debt, primogeniture, entails, dower and curtesy (most of them property rights, once of great importance, that their late 20th century descendants have never even heard of).

In the 19th Century, to promote industrialization by hydropower mills, courts redefined the traditional rights of natural water flow that had obtained in a preindustrial economy. The rules changed again when log-floating was needed to get lumber to markets. And they changed yet again when the arid west was settled, and riparian rights were abolished (to the great dismay of riparian landowners) because they were found unsuitable to the physical conditions of states such as Colorado, Montana, Wyoming, and Utah. Even more dramatically, as the status of women changed, laws abolished husbands' property rights in their wives estates. Husbands were not compensated.

Contemporary environmental laws, like the Endangered Species Act and the Clean Water Act, are our era's response to its new knowledge and new circumstances, just as changes in womens' or debtors' rights were reflections of other times and their exigencies.

**Are Any Laws Unique?**

One familiar theme in the compensation debate is that a particular law, for instance the Endangered Species Act or

Section 404 of the Clean Water Act, somehow imposes special obligations on landowners, and calls for special treatment. The claim, apparently, is that under the ESA owners are compelled simply to leave some portion of their land alone, to maintain a public benefit, and that therefore the land should be viewed as 'taken' for public use, just as if it had been made into a wildlife refuge.

There is nothing unique about regulation under the Endangered Species Act. Many conventional laws require owners to leave some part of their land undeveloped in order to benefit the public. Open space zoning, now a commonplace in local land use law, is perhaps the most obvious example. On a smaller scale, landowners are routinely restricted from clearing all the trees from their land (though clearing was once commonplace in subdivision development). Modern land use laws also may require portions of tracts to be left as they are, imposing some form of cluster development in order to protect natural amenities on a property. Even more routinely, local zoning law demands that development be set back from the street and from adjacent properties--also a requirement that some portion of the property be left undeveloped and unused for public benefit. Indeed, height limitations are just a vertical version of the requirement that some portion of usable space be left as it is for public benefit.

Any one of these restrictions may be very minor in its economic impact on the owner (as setbacks and sideyards routinely are), or very substantial, as height limitations frequently are. Restrictions under the Endangered Species Act are as various as those under all these other laws. A few are highly constraining. Most, however, impose quite modest limitations on economic use, and a goodly number--despite owner complaints--turn out to enhance total value, because the presence of natural amenities such as wildlife or streams abundant with fish are highly valued in the real estate marketplace.

In each of these settings, however, the legal rule is the same. So long as the owner is left with an economically productive property, and so long as there is no physical invasion, compensation is not required.

**Physical Invasion Standard**

The physical invasion standard, incidentally, explains why restrictions on development of private land are not the same as establishment of a public refuge, or building a highway. Where physical invasion occurs, as when a wildlife refuge is established or a highway built, the land is publicly owned and is ordinarily open to the public. When land remains private, it is not open to public use. Similarly, on a refuge or a highway, all the uses are publicly determined. On private land, all available

uses are solely for the benefit of the owner. On a highway or refuge, no potential private opportunities remain. On restricted private land, the restrictions may be lifted, either because new knowledge or a new technology makes them unnecessary, or because the purposes of the restriction are no longer desired. All these differences have generated one of the firmest of all constitutional precepts regarding compensation. Physical invasion is a distinctive public act, and there is good reason why it calls for compensation, while ordinary public regulation does not.

**Why Me?**

Our regulatory systems have long recognized the practical impossibility of achieving perfect equity. Accordingly, our legal system has concluded that it is appropriate to regulate proposed developments, without regulating preexisting developments. The fact that the regulated development does not constitute the sole or principal "cause" of the problem has not been deemed to make the regulation unfair, so long as the development will contribute to the cumulative impacts that do cause the problem.

In zoning, this approach is reflected in the practice of "grandfathering," whereby existing uses are tolerated because they are already in place, even though identical uses will be prohibited in the future. Similarly, environmental regulatory programs generally treat existing sources less stringently than new sources. The alternative would be unfairness to existing uses, and an inability to impose disincentives to discourage others from contributing to the worsening of an existing problem.

The converse approach would have it that once anyone has been permitted to engage in an activity, no one else could be prevented from doing likewise. This would be a radical departure from existing practice, with profound effects. It would generally preclude government from addressing cumulative impacts, from correcting mistakes, or, indeed, from adjusting regulation in light of new knowledge.

**The Scope of Government Standard-Setting For Property Has Never Been Limited To Health and Safety**

Non-compensable regulation has never been limited to narrow categories of health and safety, or to conduct that constituted nuisance. Much traditional regulation, such as collective bargaining and landlord/tenant laws, were meant to produce economic justice. Laws abolishing slavery or providing economic autonomy for women were intended to produce social justice.

Among the most common local ordinances, both in this country and throughout Europe, are historic preservation laws, whose purpose is to maintain the community's cultural heritage by imposing special responsibilities of maintenance on owners who benefit from owning architecturally or historically important structures. Nor are laws protecting biological diversity and wildlife a novelty.[1] Owners have long been subjected to limits on the use of their lands for hunting, both as to seasons and bag limits,[2] and uncompensated restrictions on the use of private property have been sustained for over a century.[3] Migratory birds[4] as well as symbolically important creatures, like the eagle,[5] have been protected by statute to the detriment of both landowner and commercial interests. Owners of land adjoining wildlife refuges have been restricted in the uses they could make of their land.[6] As early as 1900, New York, in response to the virtual extermination of its beaver population, enacted a law prohibiting the hunting, molestation or disturbance of beaver--a law that was sustained against a property owner who claimed that the protected beaver were felling his trees and diminishing the value of his land. The New York Court made a very striking observation in upholding the beaver protection law:[7]

> The public authority is not to be limited to guarding merely the physical or material interests of the citizen... The eagle is preserved not for its use, but for its beauty... The same thing may be said of the beaver... Their preservation does not unduly oppress individuals... The prohibition against disturbing [the beaver] is no... different... from that assumed by the Legislature when it prohibits the destruction of the nests and eggs of wild birds even when the latter are found upon private property.

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[1] An exhaustive study of such laws appears in Oliver A. Houck, "Why Do We Protect Endangered Species...", 80 Iowa L.Rev. 297 (1995).

[2] See Lawton v. Steele, 152 U.S. 133, 138 (1894).

[3] Lawton v. Steele, 152 U.S. 133(1894)(a state may prohibit and destroy nets without compensation to protect fisheries).

[4] See 16 U.S.C. § 703 (1995 Supp.).

[5] Bald Eagle Protection Act, 16 U.S.C. §§ 668-668 . ss (1988 & Supp. V 1993).

[6] Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942).

[7] Barrett v. State, 116 N.E. 99 (N.Y. 1917).

## Regulation Fosters Innovation and Adaptation

Historically, whenever regulation has been imposed, it has involved a degree of initial economic dislocation for some property owners. Owners have responded with innovative responses, adapting to change so as to make inevitable societal transitions far less painful in retrospect than they appeared to be when new laws were first enacted. How would a region that had depended on slavery survive without it? How would child labor be replaced? How would agriculture and the chemical industry survive prohibitions on DDT?

Of course owners did survive, and in many instances the need for regulatory compliance has fostered changes that have led to new and better ways of doing things. Perhaps the most powerful lesson of regulatory history is just how adaptive and innovative owners and entrepreneurs can be. As a recent article in Business Week[8] notes, expected costs of regulation are frequently overstated, both because the methods of estimating these costs are very unreliable and because they understate the potential for innovative responses and adaptation. The article cites as examples the responses of industry to rules regulating worker exposure to formaldehyde and vinyl chloride. In both cases, assumptions that implementation would be costly proved incorrect. Further, lax regulation often serves to reduce the incentive to innovate and instead rewards economically inefficient behavior.

The banning of use of DDT as a pesticide spurred the development of safer and more effective substitutes. Similarly, industry and society adjusted painlessly to the removal of lead from such products as paint and gasoline. More recently, restrictions on the use of CFC-based cleaning solvents led to the discovery of superior substitutes and cost savings of as much as 80%. Restrictions on the use of harmful compounds in printing ink have led to the development of substitutes that have afforded overall cost savings of up to 50%.

Property owners also find other ways to benefit from the need for regulatory compliance. For example, the Monsanto Corporation has been able to cut toxic air emissions by ninety percent without excessive expense, partly because savings from the recycling of chemicals have offset the costs of pollution-reduction technology. When municipal solid waste, whose open dumping is unlawful, is incinerated, the heat produced by incineration is frequently used for cogeneration of electrical energy.

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[8]Are Regs Bleeding the Economy," Business Week (July 17, 1995), pp. 75-76.

## When Endangered Species Protection Enhances Property Values

Similarly innovative results are occurring with respect to endangered species under programs the Administration has put in place to encourage landowner participation in habitat conservation planning. In many places, land developers have found that the presence of rare and endangered species, or wetlands restoration, increases property values. Jack Turnell, a Wyoming cattle rancher, was obliged to change the way he managed his pasture land in order to protect the endangered black-footed ferrets. The result is that his land now provides habitat not only for cattle but for an expanding population of wildlife. "And," Turnell reports, he "makes more money because better quality grass puts more meat on his cattle. We're selling 300,000 more pounds of beef per year than we did in 1987. It makes sense to do it right."[9]

Advertising for the Harbour Ridge in Florida trumpets the fact that bald eagles, osprey and Florida Sandhill cranes feed and nest there, making it "a place where people live in harmony with nature." In Beaverton, Oregon, the Creekside Corporate Park reported higher returns on investment because of the development's orientation around wetlands. They were able to respond to corporate tenants who requested "a lot of open space and having nature around" because it gave the offices a higher image. Similar reports are common. Bayport Plaza in Tampa, Florida, noted that a hotel and office complex was fully leased in a very short time because tenants liked an adjacent restored wetland, formerly an urban dump, which was restored as a saltwater connector to Tampa Bay. A developer in Montgomery County, Virginia, promotes its maintained wetland in advertising: "Now everything you want is in one place," including "a wetlands preserve with 100 species of plants and animals."

## Regulatory Costs Are Typically Overstated

Because owners tend to calculate losses at the outset with no consideration of adaptive changes, regulatory costs are typically overstated. When pollution controls for cars were first proposed, in 1970, automakers predicted they would add about three thousand dollars to the cost of a new car. In fact, the added cost runs between five hundred and a thousand dollars per car, current models emit an average of 80% less pollution than new cars did in 1970, and gains in fuel efficiency have reduced the cost of using the newer cars enough to offset the increased purchase price. In 1990, new acid rain controls were

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[9]Washington Post, Aug. 2, 1992.

expected to cost about seven hundred and fifty dollars per ton of pollution avoided; the price today is a hundred and fifty dollars per ton. Pollution control program costs--as illustrated by oxygenated fuels, reformulated gasoline and auto tailpipe standards--are routinely far lower than industry predictions.

## Conclusion

To create an entitlement to compensation for every regulatory diminution, calculated at the outset, not only fails to take account of innovation, but actually stifles it, and rewards those who are least able, or least willing, to adapt to change. An owner who can simply collect from the public treasury whenever circumstances or knowledge change has no incentive even to try to find ways to comply with societal needs, while still making productive use of his property. Automatic compensation rules are certain to make the costs of social change as high as possible, for even those who could and would have found ways to adapt at little cost, would now be able simply to sit back and wait for their payment from the Treasury.

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During the October 18 Senate Judiciary Committee hearing on S. 605, the Omnibus Property Rights Act of 1995, Senator DeWine expressed concerns regarding the possible litigation that S. 605 could generate. Those concerns are well-founded. As the October 17 Congressional Budget Office Report on S. 605 recognizes, the bill would give rise to "many new claims ... involv[ing] conflicting interpretations of the statute that could take a number of years to resolve through the judicial process." p. 5.

In discussing how to determine, under the bill, when a regulatory action would trigger a compensation claim, witnesses favoring the legislation stated that the "triggers" for compensation are clearly defined, which would suggest that they are unlikely to become issues in litigation. In fact, however, the bill's triggers for compensation are amorphous and ambiguous and will generate substantial uncertainty and litigation.

By its terms, the bill allows compensation only for "agency action that occurs after" the bill's enactment. § 209. This provision, however, is not likely to impose meaningful limits on the bill's application, because the bill's two definitions of "agency action,"[1] are themselves so broad. Among the events that could constitute "agency action" under the bill would be: the adoption of regulations implementing a regulatory statute; the issuance of policy or guidance concerning the implementation of regulations; an assertion of regulatory jurisdiction over, or a grant or denial of a permit to undertake regulated activity on, a particular property; or the commencement of an enforcement action against a property owner for failure to comply with a statute, regulation, or permit. Thus even if a property has long been subject to a regulation, its owner could still compel an agency to take new "action" within the meaning of the bill, for example by applying for a new permit, or re-applying for a permit that has previously been denied. Reflecting this, the CBO Report predicts that a significant number of claims will be filed for "pre-enactment agency decisions." p. 3. Whether or not such claims are ultimately successful, the fact that they are likely to be filed would suggest that this issue will generate substantial litigation.

Similarly, many other aspects of the bill will also generate litigation to resolve a host of complicated and novel factual and legal questions. To cite a few illustrative examples: What is an "affected portion of ... property," § 204(a)(2)(D)? When has a law been administered "in a manner that has the least impact on private property owners' ... other legal rights," § 503(a)(2)? What is a "right to receive water," § 203(5)(B), as compared to a "water

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[1] Title II defines agency action as "any action or decision by an agency," § 203(2). Title V defines action as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." § 502 (6); 5 U.S.C. § 551(13).

right" as understood in ordinary water law parlance? When is property "directly taken [so] as to require compensation under the fifth amendment ... or ... this Act," § 203(7)? What constitutes "a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated," § 204(d)(1)? When does agency action "comply with applicable State and tribal government laws ... relating to private property rights and privacy," § 503 (a)(1)?

One particularly fertile source of litigation is the inclusion, in the bill's broad definition of "property," of "any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest." §§ 203(5)(F). Questions relating to this will be litigated endlessly, with wide variations in result, by state, locality, profession, and the like: What are "custom" or "usage"? When are interests "understood" to be property? What is the status of claims based on an activity sanctioned by custom or usage but not recognized by--or even prohibited by-- state law? What sorts of "understandings" are "mutually reinforcing" and "sufficiently well-grounded in law to back a claim of interest"?

Title IV of the bill, which requires agencies to conduct formal analyses of proposed actions, and creates a cause of action "to enforce [its] provisions," § 406, will also generate litigation. Such litigation could address an almost infinite range of questions: a decision whether to undertake an analysis; the reliability of the information supporting an analysis; the accuracy of the estimates or legal conclusions of an analysis; the adequacy of an agency's consideration of alternatives to a proposed action; agency compliance with reporting and public notification requirements; and the adequacy of an agency's review of its regulations and its recommendations to Congress for legislative changes. Moreover, such litigation could delay or invalidate agency action based solely on asserted non-compliance with this title, even if the action itself did not affect property rights.

Thus there can be little question that this bill, if enacted, would add significantly to the litigation that presently burdens our judicial system. Its creation of new claims and its ambiguous terms and provisions raise novel interpretive questions with which courts, agencies, and property owners will be forced to grapple for years, perhaps decades, under what has been put forward as a bright-line standard that simplifies compensation questions. This illustrative discussion is far from an exhaustive listing of the types of claims and legal theories the bill might support, and the ambiguities it creates.

## S. 605 is a Radical Departure from the Constitution.

The Constitution nowhere suggests that a property owner has an absolute right to use property without regard to the effect of the property use on others. Nor does the Constitution suggest that reasonable government efforts to protect the American people from harmful property use constitute a compensable taking. None of the Founders ever proposed such a radical and destructive theory. Yet S. 605 would effectively establish these extreme principles as the law of the land. Virtually every major concept in the bill is a radical departure from the Constitution.

**The Inflexible Loss-in-Value Trigger**

S. 605 contains a rigid, 33 percent loss-in-value compensation trigger. Under the Constitution, a partial loss in value by itself has never been sufficient to demonstrate a taking. Instead, the Constitution requires consideration of other factors as well -- such as the owner's reasonable expectations and the public interest -- to determine whether compensation would be fair. Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California (U.S. 1993). For example, reasonable zoning restrictions have long been upheld under the Just Compensation Clause even where they might reduce the value of certain property. Village of Euclid v. Ambler Realty Co. (U.S. 1926).

**The "Affected Portion" Standard**

S.605 uses an "affected portion" standard to determine whether the loss-in-value threshold is met. This directly conflicts with the Just Compensation Clause, which requires analysis of the affect of the challenged regulation on the parcel as a whole. See Concrete Pipe, supra; Penn Central Transportation Co. v. New York City (U.S. 1978).

**The "Nuisance" Exception**

The only exception to the compensation mandate in S. 605 applies where agency action prohibits land use that is already prohibited by state nuisance law. Under the Constitution, however, nuisance law is not controlling. Miller v. Schoene (U.S. 1928). The Constitution allows for many reasonable protections against non-nuisance activities without requiring compensation, such as the destruction of diseased trees (Miller v. Schoene), regulation of breweries (Mugler v. Kansas (U.S. 1887), and urban zoning (Village of Euclid v. Ambler Realty Co. (U.S. 1926)).

**Proportionality**

Under the Constitution, a permit condition that requires a physical dedication of real property should be roughly proportional to the anticipated impact of the proposed land use. Dolan v. City of Tigard (U.S. 1994). Section 204(a)(2)(B) of the bill radically expands the "rough proportionality" standard far beyond dedications of real property by applying it to any type of condition on agency action that affects any type of property.

## QUOTES THAT DEMONSTRATE THE FLAWS IN S. 605

### The One-Size-Fits-All Loss-in-Value Trigger

In the very case that established the concept of a regulatory taking, the Supreme Court was careful to emphasize that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon (1922) (Justice Holmes).

In 1993, every Member of the U.S. Supreme Court joined an opinion stating that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California (1993) (Justice Souter).

As staunch an advocate of property rights as Justice Scalia has recognized that the "understandings of our citizens" are such that "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." Lucas v. South Carolina Coastal Council (1992).

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In 1993, every Member of the Supreme Court joined an opinion stating: "[A] claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. * * * [T]he relevant question is whether the property taken is all, or only a portion of the parcel in question." Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California (1993) (Justice Souter).

"'Taking' jurisprudence does not divide a single parcel into discreet segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole * * *." Penn Central Transportation Co. v. City of New York (1978) (Justice Brennan).

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"We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to common law, or whether they may be so declared by statute. For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process." Miller v. Schoene (1928) (Justice Stone).

The Just Compensation Clause generally does not require compensation where the government "reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land * * *." Penn Central Transportation Co. v. City of New York (1978) (Justice Brennan).

In upholding a zoning ordinance under the Fifth Amendment, the Supreme Court made clear that nuisance law is not "controlling", and it emphasized the importance of accommodating new government protections to address new threats to the American people: "[P]roblems have developed, and are constantly developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. * * * Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable." Village of Euclid v. Ambler Realty Co. (1926) (Justice Sutherland).

OMB ESTIMATE OF CONGRESSIONAL COMPENSATION BILLS
( S. 605 AND TITLE IX OF H.R. 9)

OMB estimated that the cost of Title IX of HR 9 would approximate $ 28 billion dollars over a seven year period ( FY 1996-2002) to compensate claimants for alleged diminution in real property values.

- Title IX of HR 9 would allow claimants to receive compensation if land, or the right to use and receive water, was reduced in value by more than 20 percent, pursuant to agency action under six listed statutes.

- The OMB estimate is conservative, focusing only on compensation, but not including costs for:
  - administrative expenses,
  - expenses to manage lands that the U.S. had to buy,
  - interest on valid claims, and
  - non- Federal actions for which the Federal government has fiscal liability under this legislation.

- The OMB estimate assumed that agencies would continue their programs, i.e., statutory requirements and court ordered mandates would not be changed and agencies would be required to perform their duties.

- The OMB estimate assumed an average time of 24 months between a claim being received and payment made. This was based on averaging time frames for agency adjudication, arbitration procedures, or judicial resolution.

Since S. 605 is substantially broader in interpretation than Title IX of HR 9, OMB believes that S. 605 will cost "several times" more than the $ 28 billion estimated for Title IX of HR 9 because:

- S. 605 covers all laws, not just six listed laws.
- S. 605 applies to real and personal property, not just real property as does HR 9.

The OMB estimate is not the only cost estimate to assume that compensation bills will cost billions.

- In 1992, CBO estimated that the value of wetlands subject to a compensation bill was between $ 10 and $ 15 billion.

- In 1995, the University of Washington estimated costs, associated with a Washington State referendum on private property, at between $ 2.8 and $11.0 billion for the compensation provisions of the bill.

C. Long

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

December 5, 1995

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Congressional Budget Office (CBO) recently released a cost estimate for S. 605, the "Omnibus Property Rights Act of 1995." Because CBO's estimate differs significantly from OMB's, which I addressed in my July 12 testimony to the Senate Environment and Public Works Committee, I am writing to clarify the distinctions.

Put simply, CBO scored estimated administrative costs of this bill -- in fact, the administrative costs of just one title of it. By contrast, OMB believes that we must consider the much larger question of what U.S. taxpayers may have to pay in compensation claims under this bill.

With respect to administrative costs of Title V, OMB and CBO scoring are not far apart. Specifically, with regard to Title V, under which agencies would settle claims under the Endangered Species Act and Section 404 of the Clean Water Act (wetlands), CBO estimated the administrative costs of processing appeals and claims at $30-$40 million a year over five years. OMB does not greatly dispute that estimate; we believe comparable administrative costs would be about $30 million a year.

Those costs, however, are just a small portion of those that taxpayers could bear under this bill. What CBO did not estimate, and what we must focus on, is the much larger question of compensation.

As I noted in my testimony, these costs are highly uncertain. OMB has estimated the compensation costs of the House bill -- Title IX of H.R. 9 -- at potentially $28 billion over seven years (fiscal 1996-2002). That bill, however, restricted compensation to claims under six laws, and it only applied to land and the right to use and receive water. S. 605 is written more broadly, and applies to real and personal property and to *all* laws. Thus, the compensation costs of S. 605 could be several times higher than the $28 billion for Title IX of H.R. 9.

CBO did not score compensation costs under S. 605 in large part because it concludes that the 33 percent threshold (of diminished value) for determining whether a takings has occurred would mean that the government would have to compensate very few claims. We,

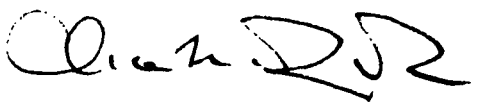
however, think that the threshold will permit many claims because the threshold can be applied to specific portions of property, at the discretion of the owner.

Finally, OMB disagrees with CBO's argument that Federal agencies could avoid paying compensation simply by modifying their regulatory activities. Many of these activities are required by statute or are mandated by court order.

As for how S. 605 would affect the budget process, we believe the bill authorizes direct spending, thus triggering pay-as-you-go (PAYGO) requirements. While CBO disagrees, OMB makes the final determination under the Budget Enforcement Act whether an across-the-board cut, or "sequester," of mandatory accounts is required. With that in mind, please note that S. 605 has no provisions to offset the costs of this bill. Thus, if enacted, this bill could potentially lead to an across-the-board sequester of mandatory programs.

I hope this explanation will be helpful as the debate on S. 605 continues.

Sincerely,



Alice M. Rivlin
Director

cc:
Honorable Joseph R. Biden
Ranking Minority Member
Committee on the Judiciary

Honorable Robert Dole
Majority Leader
United States Senate

Honorable Thomas A. Daschle
Minority Leader
United States Senate

## QUOTES THAT DEMONSTRATE THE FLAWS IN S. 605

### The One-Size-Fits-All Loss-in-Value Trigger

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## S. 605 WOULD UNDERMINE ALL MANNER OF PROTECTIONS

S. 605's confusing provisions make it difficult to predict how the courts would apply it, but plaintiffs' lawyers will undoubtedly seek the broadest possible application. Its impact would range far beyond environmental protection. The bill's broad and inflexible terms would allow lawyers to claim:

--compensation where the civil rights laws require a restaurant to make its restrooms accessible to wheelchair users. Under S. 605, the restaurant owner would not need to show a 33 percent loss in value of the entire restaurant, but only of the small affected portion of the restaurant;

--compensation where food-safety rules diminish the value of factories that produce unsafe food;

--compensation for virtually any federal action that might affect the complex water rights controversies in the West;

--compensation for a permit denial to build a pier or a wharf that would impair navigability and undermine Naval training or other Naval operations. Although the process requirements in Title IV contain an exception for military functions, and although there is an extremely narrow national security exception for compensation claims based on contract rights, there is no blanket exception to the compensation mandate for national security concerns.

--compensation where the Coast Guard establishes a phase-out of single hull tankers; or where the Federal Aviation Administration orders airlines to suspend use of commercial aircraft that raise safety concerns; or where the Federal Highway Administration directs motor carriers to cease using vehicles or drivers that pose an imminent hazard to safety.

--compensation where the federal government restricts the importation of assault rifles or explosives;

--compensation for a bank where federal regulators determine that the bank is no longer solvent and appoints a receiver;

--compensation for corporations where Congress adjusts federal legislation designed to stabilize and protect pension plans;

--compensation to manufacturers subject to prohibitions on the sale of dangerous medical devices;

--compensation for farmers subject to acreage allotments and marketing quotas for tobacco or other crops;

--compensation where legislation modifies terms regulating the receipt of government subsidies.

## S. 605 Harms State and Local Governments

**Compensation laws hurt everyone protected by federal laws, including states and local governments.**

Bills that go beyond constitutional requirements increase the cost of public protection. Cities and states would pay more to make drinking water safe or to prevent flooding damages.

**State and local actions under federal programs could be invalidated or require compensation under S. 605.**

S. 605 makes federal agencies liable to property owners for state or municipal action taken under federal regulatory or grant programs. Federal agencies made liable for local decisions would require greater oversight or refuse to delegate programs or provide grants. S. 605 also authorizes federal courts to hear claims to invalidate state or local action adversely affecting property under a program that is federally delegated or funded.[1]

Further, if courts adopted the compensation standards of S. 605 as "clarification" of the Fifth Amendment, as its proponents claim, resulting judgments could bankrupt state and local governments or force them to give up enforcement of local zoning laws.

**The voters have rejected similar laws at the state level.**

The voters of Washington recently rejected a burdensome compensation bill. The voters recognized that the compensation scheme would adversely affect state and local authority and threaten budgets. Previously Arizona voters also overwhelmingly rejected a less costly process bill.

**State and local officials oppose these laws.**

The National League of Cities, National Conference of State Legislatures, National Governors Association (1992), 33 state Attorneys General (1993), and state and local municipal organizations recognize these bills place local laws and government treasuries at risk and have opposed federal or state bills which go beyond the compensation requirements of the Fifth Amendment.

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[1]The definition of "agency action" in the Chairman's mark means "any action, inaction, or decision taken by an agency or state agency that . . . adversely affects private property rights. Sec. 203(2). Section 205(a) authorizes a property owner to file a civil action "to challenge the validity of any agency action that adversely affects the owner's interest in private property in either the federal district court or Court of Federal Claims (but all appeals are exclusively in the Federal Circuit).

## State and Local Examples

1) **Floodplain zoning** -- As a condition for eligibility for Federal flood insurance, property must be located in a jurisdiction with adequate flood plain management ordinances. The inability to obtain this insurance could substantially affect the market value of property determined to be in a floodplain.

a) Under S. 605 a honeowner might sue FEMA if a city determined the property was in the floodplain, claiming that the technical drawing of the floodplain constituted a taking.

b) Further, a landowner might sue FEMA if the city decided to restrict residential use in the floodplain because it does not want to commit resources to develop and implement evacuation plans.

c) A landowner might also sue if its application for flood insurance were rejected because of the city's failure to develop a flood management ordinance. (State and local inaction which adversely affects private property rights is also "agency action" under the bill.)

In each case, a federal agency would be potentially liable for decisions of a state or local body, for which that body is not liable, and for caring out reasonable federal eligibility requirements for a federal subsidy -- actions which are clearly reflect the manifest intent of Congress.

**Super-mandate**

S. 605 contains several non-compensation provisions which have far reaching implications. Section 404 contains certain "decisional criteria" which appear to be a "super-mandate." Section 404(a) states, "No final rule shall be promulgated if enforcement of the rule could reasonably be construed to require an uncompensated taking of private property as defined in this Act." As noted above, this Act defines "taking" very broadly indeed so that very many regulations might well result in a "taking" as defined in S. 605. However, the Act requires compensation for each such "taking" so it is difficult to see how this section would apply in practice. If section 404 were construed to invalidate a rule if someday someone's property would be adversely affected and that person might fail to seek and obtain compensation, then it is difficult to imagine a regulatory requirement which would pass muster under section 404.

Section 204(a) states, "No agency <u>or State agency</u> shall take private property except for public use and with just compensation to the property owner." "Take" is again used to mean anything which would require compensation under this Act. While the definition of "State agency" and other sections arguably impose financial liability for state actions only on federal agencies, there is likely to be litigation [in federal courts under section 205] concerning whether this and section 205 grant a private right of action to invalidate state agency action in federal court to any one whose property is adversely affected.

Section 503(a)(1) would require that federal officials comply with state and local laws when implementing federal law. While this section only applies to two statutes, this inversion of the Supremacy Clause raises significant issues -- for Congress and for law enforcement. The United States is now engaged in litigation to test whether Nye County, Nevada, can tell federal land managers what they can and cannot do to carry out federal laws. This bill invites state and local governments to nullify federal law enforcement authority, and that is a very dangerous precedent.

**Abdication of Congressional Power**
**Transfer to the Courts**

In the name of property rights, this bill gives one class of interests (property interests) the ability to judicially challenge any type of federal regulation. Sec. 204(a), 204 (c). Traditionally courts do not rigorously second-guess legislative judgments concerning the need for regulation; the traditional test for validity is whether the statute has a "rational basis." Further, Congress can make judgments of legislative fact concerning the need for regulation, and Congress is not limited to regulating activities which would be a nuisance at state law.

Under this bill, Congress would give courts the authority to require the government to compensate for practically every reduction in property values resulting from federal [and much state or local] regulation. To bar an award of compensation, the government would have to prove that the property is a nuisance under State law. Sec. 204(c). The property owner could also force the government to bear the burden of proving that there is a nexus between the governmental interest and the impact on the proposed use of the particular property, that the affect on the property is roughly proportional to the need for the limitation, or that the "deprivation of value inheres in the title to the property." Sec. 204(c).

S. 605 thus significantly limits Congressional power to regulate in the public interest. Instead, it requires compensation in most cases not already addressed by state nuisance laws. Even in nuisance cases, the government would have the burden of factually proving to a judge that the proposed use is a nuisance.

**Compensation for Pieces of Equipment**

S. 605 permits a property owner to segment property to meet the 33-percent-reduction-in-value threshold. Thus, a property owner can claim compensation for any regulation which significantly affects the value of any definable unit.

An OSHA regulation that requires replacement of obsolete equipment could result in a claim under S. 605. The property owner could obtain compensation upon a showing that the compliance requirements reduced the value of a building or piece of equipment by one-third or more.

Section 204(a)(1), (2)(D) provides:

> No agency or State agency shall take private property except for public use and with just compensation to the property owner. A property owner shall receive just compensation if -- (1) as a consequence of an action of any agency, or State agency, private property (whether all or in part) has been ...taken without the consent of the owner; and (2)(D)such action diminishes the fair market value of the property or the affected portion of the property which is the subject of the action by 33 percent or more..."

The definition of "take" is circular and does not assist in defining what is compensable under the Act. "Take" or "taking" "...means any action whereby private property is the object of that action and is taken as to require compensation...under this Act, including by physical invasion, regulation, exaction, condition, or other means..." § 203(7).

In our hypothetical the factory owner could meet the one-third reduction in value threshold by showing a reduction in the fair market value of the the specific equipment which must be modified or replaced. "Property" is defined to include a broad universe of interests. It could include real or personal property, any "property interest" entitled to protection under the Due Process Clause, and arguable new rights created by this Act. "'[P]rivate property' or 'property' means all property protected under the fifth amendment to the Constitution of the United States, any applicable Federal or State law, or this Act, and includes [6 categories listed]." § 203(5).

The anticipated cost of compliance or reduction in profitability can affect fair market value. If a very old piece of equipment must be junked or retrofitted at a cost greater than one-third of its market value in order to be used for its intended purpose, a willing buyer would take that into account in purchasing the piece of equipment. Thus the market value would be reduced.

The H.R. 925 exceptions to compensation are very narrowly drawn and do not provide a bright-line test for compensation.

**Public Health / Safety Exception**: Section 5(a) of H.R. 925 provides an exception to compensation for an agency action "the primary purpose of which is to prevent an identifiable hazard to public health or safety." Landowners will argue that the exception requires the agency to make a specific showing as to the time, place, and character of any such hazard.

Despite the clear public health and safety benefits of the laws to which H.R. 925 applies, it might be impossible to show that the **primary** purpose of any particular agency action is to prevent an **identifiable** threat to human health and safety.

**Exception for identifiable damage to specific property.** The bill would provide an exception for activities that harm others' property only when "the primary purpose" of the agency action is "to prevent identifiable damage to specific property other than the property whose use is limited." This would deny compensation if the primary purpose of a wetlands permit denial is to prevent known flooding on the Jones property next door, but arguably not if development would increase the risk of flooding generally.

This exception is limited to property other than that whose use is limited. This, and requiring compensation for Swampbuster limitations,[1] establish the novel premise that the United States cannot protect the land resource itself. Congress has previously acted to protect highly erodible croplands or wetlands, prevent excess soil erosion, and require reclamation of mined lands.

**State nuisance and local law exception**: The very purpose of federal regulation is to add needed protections to existing law. Many land-use activities pose risks to public health and safety without rising to the level of a nuisance. There would no longer be uniform, national standards for federal programs.

The scope of these exceptions would be even more inadequate in S. 605.

S. 605 encompasses the whole universe of federal (and much state) regulation; H.R. 925 was limited to certain environmental and reclamation laws. The scope of the House exceptions are woefully inadequate to address the gamut of purposes for federal regulation which would be rendered compensable under S. 605.

OMB estimates H.R. 925 would cost 4 28 billion over seven years. S. 605 with its much broader scope would clearly be a budget-buster, even with the same exceptions as in H.R. 925.

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[1]The Swampbuster program makes farmers ineligible for federal benefits, including crop subsidies, crop insurance, and loans, if the farmer illegally destroys wetlands.

**TALKING POINTS ON WASHINGTON STATE TAKINGS VOTE**

- On November 7, Washington state voters rejected a takings bill by a vote of 60-40.

- Like S. 605, the Washington bill required taxpayers to compensate corporations and others for simply following the law. Like S. 605, the Washington bill was a budget-buster that went far beyond the Constitution and required compensation regardless of fairness or the rights of others.

- The Washington voters rejected the bill even though the bill's special-interest supporters far outspent their opponents. The voters were able to see past the smokescreen and to see these bills for what they really are.

- The Washington vote demonstrates that these bills are special-interest giveaways backed by polluters and others who do not represent the views of the people.

- The American people recognize that these bills would actually hurt property owners and property values. These bills would strip away safeguards for clean air, clean water, safe neighborhoods, and other important laws that protect property owners and enhance property value.

- Unlike the special-interest supporters of takings bills, the American people know that no one has the right to use private property in a way that harms others. And the American people trust the Constitution to strike the right balance between property rights and basic protections.

- The Washington vote is the third time voters have rejected attempts to undermine basic protections under the guise of property rights:

  In 1994, the citizens of Arizona rejected a "process" takings bill 60-40.

  In 1986, Rhode Island voted 67-33 to amend its Constitution to provide that state and local land-use control and environmental regulation "shall not be deemed a public use of private property" under the state's constitutional takings clause.

- Supporters of S. 605 argue that the Washington bill was different because it contained no compensation threshold. But the threshold in S. 605 (requiring a reduction in value of 33 percent) does not really limit the bill because it applies to any "affected portion" of the property. Even where a tiny fraction of property is affected, claimants under S. 605 will be able to argue that the threshold is met for the portion of the property affected by the challenged rule.

12/1/95

# SUMMARY OF S. 605
## "THE OMNIBUS PROPERTY RIGHTS ACT OF 1995"
[Showing changes made by Chairman's mark]

**TITLE I -- PURPOSES**

- private property is an essential component of our free society and constitutional tradition
- the Federal Government has unfairly burdened property owners in violation of the Fifth Amendment
- the fact-specific approach to takings issues used by the courts is ineffective and costly
- the bill is designed to establish new takings claims and procedures to protect property rights, clarify jurisdiction, and minimize, "to the greatest extent possible," the taking of private property

**TITLE II -- "PROPERTY RIGHTS LITIGATION RELIEF" (MODELLED AFTER SEN. HATCH BILL -- S. 135)**

33% Loss-in-Value Compensation Trigger

- requires compensation where agency action reduces the value of the affected portion of property subject to the action by 33 percent or more

Other Grounds for Compensation

- greatly expands Supreme Court takings cases to require compensation where:

  -- agency action does not "substantially advance" the stated government interest; govt has burden of proof ( expansion of Nollan)

  -- agency action exacts a right to use property as a condition of a permit, license, or other action without a "rough proportionality" between the need for the dedication and the impact of the proposed use of property; govt has burden of proof (derived from Dolan which addressed only forced dedications of property) **[Chairman's mark expands this to encompass all permit conditions which "affect" property.]**

  -- agency action deprives the owner, temporarily or permanently, of substantially all productive use of the property, unless the limitation inheres in the property title itself; govt has burden of proof to show limit inheres in title (expansion of Lucas)

Definition of "taking"

The Act uses the term "taking" to encompass any agency action "whereby private property **is the object of that action** and is taken so as to require compensation" either under the Constitution or this Act. **[Added language from Chairman's mark may be intended to limit scope to preclude compensation for property indirectly affected by agency action; yet scope of "agency action" was expanded to expressly encompass inaction. "Agency action" is now defined to require adverse effect at the time of the action.]**

Nuisance Exception

- no compensation required where proposed land use is a nuisance under state law; govt has burden of proof

Federal Liability for State and Local Actions

- Federal agencies are vicariously liable for actions by state and local agencies that receive federal funds or implement federal programs, where the state action or federal funding is "directly related" to the statutory taking. **[Chairman's mark expands liability to include state agency "inaction."]**

Source of Payments

- paid from available appropriations supporting the program giving rise to the claim

Very Broad Definitions

- "Property" is broadly defined to include all property protected under the fifth amendment; all real property, whether vested or unvested; contracts or other security interests related to real property; the right to use or receive water; rents, issues, and profits of land; all interests defined as property under state law; all interests "understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest"

- Under section 204(d)(2), "compensation" would be either (1) business losses [**"where appropriate" in the calculation of fair market value, under the mark**] or (2) the difference between fair market value of the property before it became subject to the "agency action" and its value at the time of the action. "Just compensation" shall include compounded interest under section 203(3).

Jurisdiction

- confers concurrent jurisdiction on U.S. District Courts and the Court of Federal Claims for compensation claims <u>and</u> for challenges to the validity of "agency action" that adversely affects interests in property **[The Chairman's mark expands the definition of "agency action" to encompass action of a State agency so apparently this section would provide jurisdiction to challenge the validity of any state action, inaction, or decision under a federally funded or delegated program if that action adversely affects private property]**

  **[Chairman's mark confers <u>exclusive</u> appellate jurisdiction on the Federal Circuit over cases where jurisdiction is based in whole, or in part, on a challenge to the validity of agency action that adversely affects private party under sec. 205(a). Thus, a property owner could force an APA case or challenge to state action under federally funded programs from the regional circuit to the Federal Circuit.]**

- gives an administrative body, the Court of Federal Claims, authority to invalidate Acts of Congress and Executive Branch actions to implement federal law

- gives the Court of Federal Claims **supplemental** jurisdiction over tort claims

- gives the Court of Federal Claims jurisdiction for claims for invalidation of any statute or regulation of an "agency" "affecting private property rights."

**TITLE III -- ALTERNATIVE DISPUTE RESOLUTION**

- provides for ADR with the consent of all parties

- arbitration procedures are those used by the American Arbitration Association

- appeal from arbitration to U.S. District Court or Court of Federal Claims **[Chairman's mark provides that provisions of title 9, U.S.C., re arbitration, apply to the enforcement of awards under this section.]**

**TITLE IV -- PRIVATE PROPERTY TAKING IMPACT ANALYSIS**

Supermandate

- Title IV contains a "super-mandate" that applies to past as well as future rules:

  -- prohibits the promulgation of a final rule if enforcement of the rule could reasonably be construed to require an uncompensated taking of private property "as defined by this Act."

  -- requires agencies to review, and "where appropriate," re-promulgate all regulations that "result in takings of private property under this Act, and reduce such takings of private property to the maximum extent possible within existing statutory requirements..."

  -- requires agencies to submit budget requests consistent with the purposes of the Act.

  -- requires agencies to submit to Congress within 120 days a list of statutory changes necessary to meet the purposes of the title

Takings Impact Analysis (TIA)

- The TIA requirements for new agency actions are similar to, but much more onerous than, the takings amendment to the Safe Drinking Water Act bill passed by the Senate in the 103rd Congress.

  -- requires agencies to draft a "private property taking impact analysis" before issuing any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking under the bill or the Constitution

  -- provides for exceptions similar to those in the Reagan Takings Executive Order (e.g., law enforcement activities, emergencies, military actions, etc.), but does not include exceptions in the E.O. for actions which reduce federal restrictions on property, policies and actions taken in furtherance of pending or imminent litigation, judicial or administrative; enforcement actions seeking penalties, the collection of debts authorized by statute; and Inspector General activities.

  -- The TIA must analyze: the purpose of the agency action, the likelihood of a taking, whether it is likely to require compensation, alternatives that would achieve the intended

purpose and reduce the likelihood of a taking, and an estimate of potential liability if the action is found to constitute a taking.

Public Availability

- TIAs are available to the public; copies provided to affected property owners

Annual Reports

- Agencies must annually report to OMB and the Attorney General identifying each agency action for which a TIA report is prepared, as well as all takings claims and awards. A compilation of these reports would be published annually.

Judicial Review

- This title contemplates judicial review. It provides a six-year statute of limitations for actions "to enforce the provisions of this title," and it retains (from Dole's earlier S. 22) the confusing provision that there is a rebuttable presumption in any agency action or administrative or judicial proceeding that a TIA more than 5 years old is outdated and inaccurate.

**TITLE V -- PRIVATE PROPERTY OWNERS ADMINISTRATIVE BILL OF RIGHTS (MODELLED AFTER SEN. SHELBY/REP. TAUZIN BILLS -- S.239/HR790)**

Endangered Species / Wetlands Focus

- primarily addresses regulatory actions under the Endangered Species Act (ESA) and section 404 of the Clean Water Act

- bill asserts that while traditional pollution laws protect public health and physical welfare, current habitat protection laws protect the welfare of plant and animal species

Compliance with State and local law

- in implementing the ESA and the 404 program, "each agency head shall comply with applicable State and tribal government laws, including laws relating to private property rights and privacy * * *."

"Least impact" Standard

- the ESA and the 404 program shall be administered "in a manner that has the least impact on private property owners' constitutional and other legal rights."

Consent for Entry / Data Collection

- Section 504 prohibits specified agency heads from entering privately-owned property to collect information about the property unless the owner has consented to the entry in writing, has been provided notice of the entry after consent, and has been notified that any raw data collected from the property must be made available to the owner upon request at no cost.

  Unlike most provisions of this title, which focus on the ESA and the 404 program, section 504 applies to any "agency head," a term defined as the Secretary or Administrator with jurisdiction or authority to take a final action under the ESA or the 404 program. These "agency heads" include the Secretary of the Army and the EPA Administrator (for the 404 program), as well as the Secretaries of the Interior, Commerce, and Agriculture (for the ESA). Section 504 would apparently apply to the entry of property under any program administered by these agency heads, not just ESA and the 404 program. For example, CERCLA authorizes EPA to enter property to conduct remedial actions when EPA determines that "there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant." EPA is not required to obtain the owner's permission before entering the property under this provision. This bill would undercut this and similar authorities.

- Section 505 prohibits the use of data collected on privately owned property to implement or enforce the ESA or the 404 program unless the appropriate agency head has given the owner access to the information, a detailed description of the manner in which it was collected, and an opportunity to dispute the accuracy of the information.

- If the owner disputes the accuracy, the bill would require the agency head to specifically determine that the information is accurate prior to using it to implement or enforce the ESA or the 404 program.

Administrative Appeals

- Under the 404 program, an opportunity for an administrative appeal would be required for: (a) a determination of regulatory jurisdiction over a particular parcel of property; (b) the denial of a permit; (c) the imposition of terms and conditions in a permit; (d) the imposition of an

administrative penalty; and (e) the imposition of an order requiring a private property owner to restore or otherwise alter property. (In the comprehensive wetlands policy announced in August 1993, the Administration agreed to provide administrative appeals for (a), (b), and (d).)

- The bill would amend the ESA to require an opportunity for an administrative appeal of: (a) a determination that a particular parcel of property is a critical habitat of a listed species; (b) the denial of a permit for an incidental take; (c) the terms and conditions of an incidental take permit; (d) jeopardy findings on consultations; (e) incidental take statements issued in consultations affecting a particular parcel; (f) the imposition of an administrative penalty; and (g) the imposition of an order under the ESA limiting the use of property. The Interior Department has already provided for administrative review of (b), (c) and (f).)

Compensation

- requires compensation whenever a final agency action under the ESA or the 404 program deprives a private property owner of 33 percent or more of the fair market value of the affected portion of the property, as determined by a qualified appraisal expert.

- provides that such agency action "is deemed, at the option of the private property owner to be a taking under the Constitution of the United States" if the property owner either accepts the agency head's offer of compensation or submits to the arbitration process **[deleted from Chairman's mark]**

  **[Chairman's mark provides that property owner has the option to elect fair market value of the property before the date of "the final qualified agency action with respect to which the property or interest is acquired" or compensation under the standard in section 204(d)(2).]**

- requires the relevant agency head to stay the action and offer compensation to the owner upon the request of the property owner. **[Requirement for stay deleted from Chairman's mark.]** The agency would be required **["where appropriate, under the standards of this Act"]** (1) to offer to purchase the property at fair market value, assuming no use restrictions under the ESA and the 404 program; and (2) to offer to compensate the owner for the difference between the fair market value of the property with and without such restrictions.

- denies the agency the flexibility to tailor the challenged regulatory action in a manner that would alleviate its impact on private property. If a property owner requests compensation, the bill would require the agency head to make the requisite offers, thereby precluding less drastic responses that would reduce the impact of the regulation on property while simultaneously protecting the public fisc.

Arbitration

- the owner could reject both agency offers and submit the matter to binding arbitration

ESA Management Agreements

- requires Interior, when entering management agreements, to notify all owners and lessees of property subject to the agreement and to provide an opportunity for owners and lessees to participate

**TITLE VI -- MISCELLANEOUS**

- The bill contains a severability clause

- The bill is effective on date of enactment and applies to any agency action of the U.S. government after that date