

NLWJC- Kagan

Counsel - Box 008 - Folder 006

Takings - Materials [2]

PRIVATE PROPERTY RIGHTS AND TAKINGS RELATED LEGISLATION

**SUMMARY INFORMATION
VIEWS OF ADMINISTRATIVE AGENCIES
PREPARED STATEMENTS AND TESTIMONY**

PRIVATE PROPERTY RIGHTS LEGISLATION

SUMMARY INFORMATION AND TALKING POINTS

JULY 18, 1995

Talking Points on Property Rights

The House has passed a bill that would require compensation whenever an action under the wetlands programs, the Endangered Species Act, or (for water) federal reclamation or land use laws, diminishes the value of a portion of a property by 20%. An even broader bill is pending in the Senate which would require compensation for an agency action under any federal law where the value of a portion of a property falls 33%.

These proposals are a bad idea because -

- They ignore the interests of other property owners and of the public.
- They force a choice between imposing enormous costs on the taxpayer or foregoing protection of the community and the environment.
- They require payment for losses that are speculative.
- They ignore 200 years of Constitutional tradition.
- They will create a claims industry that will enrich lawyers and appraisers and generate huge new bureaucracies.
- They are a budget buster.

A property owner never has had an absolute right to use property without regard to the impact of that use on other landowners or the community. Over a hundred years ago, the Supreme Court said, "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

- The fundamental flaw in these bills is that in general, the only factor which triggers the compensation requirement is whether the value of property is decreased.
- This "one-size-fits-all" prescription for takings cases ignores the array of other considerations to which the courts have looked for over 200 years, including the merits of the government's action, whether limitations were in place or could have been

anticipated at the time of purchase, and the impact of the activity which the claimant wants to undertake on other property owners.

These bills will result in huge claims being made where the Constitution does not require compensation, where the losses are highly speculative or where payment is totally unwarranted.

- The bills are drafted in such a way that a property owner will be able to show a 20% or 33% reduction in the value of a "portion" of a property for countless types of government actions.
 - * If an owner of a 1,000 acre parcel of land is denied a permit to fill a wetland comprising only 1 acre of his property, he may file a claim under these bills with respect to only the 1 acre of land, thereby making the payment for a 20% or 33% loss in value thresholds almost irrelevant.
 - * This is contrary to decades of Supreme Court cases which have looked to the impact on the property as a whole to evaluate whether there has been a taking.
- Neither bill requires a claimant to show actual losses. Rather, simply showing that a government action prevented the claimant from undertaking some hypothetical activity at some time in the future could be sufficient to collect from the government.
- The government could be required to pay compensation under the Senate bill if a claimant loses a government subsidy as might occur if water deliveries are reduced to stop wasteful irrigation practices that cause excessive runoff resulting in water pollution.
- Exceptions to compensation requirements in the bills would not be sufficient to prevent unwarranted claims.
 - * The "nuisance" exceptions provided in the bills are technical and very limited, and ordinarily do not cover cumulative or long-term health and safety risks, civil rights protection or other vital protections.

- * Other exceptions in the House bill are vague, full of potential loopholes and would be subject to endless litigation.

If government is faced with the Hobson's choice of paying questionable claims or foregoing important health, safety and environmental regulations, neighboring property owners could be severely harmed. For example, prohibitively costly claims could be filed where -

- Government requires controls on a strip-mining operation to prevent toxic waste flowing in to adjacent rivers.
- Restrictions are imposed on the movement of animals and plants necessary to prevent the spread of dangerous disease.
- Government prohibits the siting of a toxic waste dump adjacent to a school.

Indeed, these bills are so poorly conceived that a property owner could claim that the value of his/her property interests has been reduced where government -

- Bans assault weapons (potential claimants include manufacturers of weapons or ammunition)
- Requires that a restaurant expand bathroom facilities to accommodate persons in wheelchairs (claims for lost table space)
- Re-routes aircraft to reduce noise in residential areas (or refusing to re-route traffic)
- Establishes acreage allotments and marketing quotas for tobacco crops

These bills are budget busters.

- The House bill alone would cost taxpayers over \$28 billion over the next 5 years.
- The Senate bill is much broader in scope and will cost many times that amount.

Contrary to popular belief, it is not the "little guy" that would be helped by these bills. The bills impose very sophisticated and complex legal questions that will create a business boom for lawyers and appraisers and provide large landowners and land speculators new opportunities to file claims against the government.

- Huge bureaucracies would be created to process claims.

While these proposals apply primarily to the federal government, it would only be a matter of time before they also spread to state and local government activity as well.

- Advocates will argue that if a 20% reduction in value standard is OK at the federal level, why not the state and local level as well?
- Basic zoning and other local land use planning functions of local government -- which represent more than 90% of governmental land use planning activity -- will become things of the past.
- Citizens will lose the ability to control the growth and development of their communities.

There is a better way.

- We need to examine federal laws to change those that unnecessarily burden landowners.
 - * The Administration already is taking steps to give relief to most homeowners from the requirements of the Endangered Species Act and wetlands regulation.
- We need to improve access to the courts for landowners who have suffered a "taking" as defined under the Constitution.
- The Administration has been working closely with the courts on approaches to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute techniques where appropriate.

June 13, 1995

PRIVATE PROPERTY RIGHTS LEGISLATION

**VIEWS OF THE
OFFICE OF MANAGEMENT AND BUDGET**

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

JUNE 7, 1995



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

THE DIRECTOR

JUN - 7 1995

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

Dear Mr. Chairman:

I understand that the Senate Judiciary Committee, in the near future, will mark up S. 605, the "Omnibus Property Rights Act of 1995" -- the so-called "takings" legislation. Preliminary estimates of the Office of Management and Budget indicate that this legislation would significantly increase Federal spending. Accordingly, if this legislation were presented to the President, I would join the heads of nine other departments and agencies in recommending that the bill be vetoed.

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 purports to entitle property owners to compensation for any agency action that diminishes by one-third the potential value of any affected portion of property -- without regard for the public interests being served by agency actions.

This sweeping requirement could multiply the cost of many vital regulatory actions that protect the public, impairing the ability of government to take needed actions and potentially saddling the taxpayers with enormous new costs. Further, the bill appears to create Federal liability for State and local agency actions.

Although OMB has not completed the complex task of estimating the Government-wide cost of S. 605, we have developed a preliminary estimate for the compensation title of H.R. 9, the companion bill in the House. Our estimate of direct spending for the compensation title of H.R. 9 is \$28 billion through the year 2002. S. 605 would provide compensation for the programs covered in the House-passed takings legislation, as well as most other Federal

programs. We therefore expect the cost of S. 605 to be several times the \$28 billion cost of the House-passed legislation.

These new costs would fall under the PAYGO provisions of the Budget Enforcement Act contributing to a sequester of other mandatory programs. Such a sequester would force automatic reductions in medicare, veterans' readjustment benefits, various programs providing grants to States, child support administration, farmer income and price support payments, agricultural export promotion, student loan assistance, foster care and adoption assistance, and vocational rehabilitation.

Moreover, these estimates of increased direct spending do not include the substantial Federal discretionary costs to administer the compensation claims program authorized by S. 605, or the costs of managing property acquired by the Federal Government under the bill.

I want to emphasize that these are not estimates of Fifth Amendment "takings" due to Federal activities, but instead reflect the costs of implementing a radical, harmful, and expensive compensation scheme that would likely encourage unmerited claims. Under the bill, for example, if a property has increased in value because of a Federal action, a person could still request compensation even if a small part of the property decreased in value due to this action.

Furthermore, property and other terms in the bill are defined so broadly that an enormous array of Federal programs could be covered, including regulations involving bank deposit security, Navy training maneuvers, customs seizures and forfeitures, recalls of adulterated food and drugs, drinking water standards, and many other normal, everyday programs that Congress has previously mandated to protect the U.S. population.

I know you have already heard many of these points, which were detailed in testimony by the Justice Department on April 6, 1995. In addition, the bill's problems have been described in letters from the Departments of Agriculture, Defense, Army/Civil Works, Health and Human Services, the Interior, Justice, Transportation and the Treasury, and the Environmental Protection Agency. These departments and agencies have advised that they would recommend a veto of S. 605, or similar legislation, if presented to the President in its current form.

I would appreciate your consideration of the increased spending estimated to result from this legislation, as well as the Administration's serious concerns about impairing the government's responsibility to protect the public. I would be pleased to discuss this with you further.

Sincerely,

A handwritten signature in cursive script that reads "Alice M. Rivlin".

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

PRIVATE PROPERTY RIGHTS LEGISLATION

**VIEWS OF THE
DEPARTMENT OF JUSTICE**

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

MAY 4, 1995



U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

May 4, 1995

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

Dear Mr. Chairman:

Thank you for the opportunity to appear on behalf of the Administration at the Senate Judiciary Committee's April 6, 1995 hearing on S. 605, the Omnibus Property Rights Act of 1995. I would like to address more fully several issues raised at the hearing that are of critical importance to the Committee's consideration of S. 605. Specifically, this letter addresses: (1) the ways in which the bill would go far beyond the constitutional standard for just compensation; (2) the inadequacy of the narrow nuisance exception to allow for protection of human health, public safety, the environment, and other interests important to the American people; and (3) the broad applicability of S. 605 to all manner of basic protections.

The Administration is committed to protecting property rights. We believe that the Constitution provides the best protection. Where specific statutes are in need of reform, we look forward to working with the Congress to protect the property rights and the quality of life of the American people. As noted in my testimony, however, the Administration cannot support takings legislation that will impair the federal government's ability to carry out essential functions or cost the American taxpayers billions of dollars. The Attorney General would recommend that the President veto S. 605 or similar bills.

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

It was suggested at the hearing that opposition to S. 605 is tantamount to opposition to the Just Compensation Clause of the Fifth Amendment to the Constitution. The compensation standards set forth in S. 605, however, have nothing to do with the Just Compensation Clause.

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, and no court has ever read the Constitution in this way. Yet S. 605 would effectively establish these extreme principles as the law of the land.

The ultimate standards for deciding whether compensation is required under the Constitution are justice and fairness. When an agency action is alleged to have imposed a compensable burden, the Constitution requires consideration of the property interest at issue; the regulation's nature, purpose, and economic impact; the property owner's legitimate expectations; the public interest protected by the government action; and any other relevant factors. The Constitution by no means insulates regulation from triggering the payment of compensation, but neither has it ever afforded an absolute right to maximize profits at the expense of others.

In contrast to the constitutional standards of justice and fairness, S. 605 ignores 200 years of constitutional tradition. It would preclude consideration of the purpose of the agency action, the public interest, the landowner's reasonable expectations, and other important considerations. Thus, it is simply false to state that S. 605 would vindicate constitutional principles, or that opposition to S. 605 constitutes opposition to the Constitution. To the contrary, this effort to supplant our constitutional tradition with extreme statutory compensation requirements reflects an unfortunate distrust of the genius of our Founders and the wisdom of the Constitution.

This fundamental conflict between the bill and the Constitution is perhaps most clearly reflected in section 204(a)(2)(D), which would require compensation whenever agency action reduces the value of the affected portion of property by 33 percent. In Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California (U.S. 1993), every Member of the U.S. Supreme Court joined an opinion stating that loss in value by itself is insufficient to demonstrate a taking, so long as the property retains economically viable use or value. Instead, loss in value must be analyzed together with other relevant factors, such as the owner's reasonable expectations and the nature of the government action at issue. S. 605's inflexible 33 percent compensation trigger disregards this long-established and widely accepted constitutional precept. Moreover, by establishing the affected portion of the property (as opposed to the property as a whole) as the touchstone, the bill again conflicts with Concrete Pipe and other important precedents, such as Penn Central

Transportation Co. v. New York City (U.S. 1978). It also ignores several crucial factors traditionally examined under the Constitution, such as whether the regulation returns an overriding benefit to other portions of the same parcel.

Several other specific provisions of the bill also go beyond constitutional standards for compensation. Although some appear to be loosely based on certain Supreme Court cases interpreting the Just Compensation Clause, the bill distorts these cases by wrenching those standards from their appropriate setting and by disregarding important limitations.

For example, section 204(a)(2)(B) would require compensation where a condition of a permit or other agency action lacks "a rough proportionality between the stated need for the required dedication and the impact of the proposed use of the property." This standard appears to be derived from Dolan v. City of Tigard (U.S. 1994) decided last Term. That case focuses, however, on situations where the government requires a permit applicant to make a dedication of property that eviscerates the applicant's right to exclude others. The Dolan Court expressly distinguished such dedication requirements which involve the loss of fundamental property rights from regulation that merely restricts the ability to use property in a particular way. The bill's revision of the Dolan test would inappropriately extend the "rough proportionality" standard far beyond public dedications of real property and apply it to any type of condition on agency action that might affect any type of property.

Even if a bill were to accurately articulate the holdings of Supreme Court cases under the Just Compensation Clause, any effort to freeze such holdings into law by statute would contravene the critical teaching of constitutional takings jurisprudence: that takings analysis best proceeds on a case-by-case basis through a balancing of all factors relevant to the ultimate constitutional standards of fairness and justice.

II. The Bill's Nuisance Exception is Inadequate to Ensure Sufficient Protection of Human Health, Public Safety, the Environment, and other Vital Protections.

S. 605 does not require compensation where agency action prohibits land use that is already prohibited by state nuisance law. Despite statements to the contrary at the April 6 hearing, it is simply false to suggest that state nuisance law by itself adequately protects human health, public safety, the environment, and other vital protections important to the American people.

It goes without saying that where state law sufficiently addresses an issue, Congress has no reason to address the issue through federal legislation. Congress provides for federal

protection of human health, public safety, the environment, and other important interests only where state law is inadequate to the task. State nuisance law was never intended, and has never served, as complete protection from all human health risks and other threats to our welfare.

The legislative histories of the major environmental statutes demonstrate the inability of state nuisance law to provide adequate protection. For example, the legislative history of the Clean Air Act contains a report by the Secretary of Health, Education and Welfare regarding the problems of air pollution from stationary sources. The report discusses a rendering plant in Bishop, Maryland, and describes how malodor emissions from the plant endangered the health and welfare of the residents of Shelbyville and adjacent areas. Adverse health effects included "nausea, vomiting, lack of appetite; gasping, labored breathing, irritation of nose and throat, aggravation of respiratory ailments; emotional or nervous upsets ranging from anger to mental depression; and headaches, general discomfort, or interference with the ability to work or to enjoy homes and property." Other adverse effects included "discouraged industrial and business development, depressed property values, diminished real estate sales, [and] decreased business volume * * *." The report concluded that state nuisance law was inadequate to address these severe health and welfare dangers:

Bishop Processing Company's dry rendering plant has had problems with malodors since it became operational in 1955. Officials from Delaware and Maryland recommended corrections but all efforts to obtain abatement by local and State officials through public nuisance laws have been fruitless.

S. Doc. No. 63, 91st Cong., 2d Sess. 1679 (1970).

State nuisance law has also proven inadequate to fully protect our nation's lakes and rivers. In 1979, the Senate heard testimony about the pollution of the Warrior River and its tributaries by seventeen industries and the resulting harm visited upon riparian owners:

There was every sort of polluter involved in that case, just about. They continued to pollute. Why? Because we could not find a successful vehicle under the common law, under nuisance law, that would adequately protect these individuals.

Hazardous and Toxic Waste Disposal: Hearings Before the Subcomm. on Resource Protection and Environmental Pollution of the Senate

Comm. on Environment and Public Works, 96th Cong., 1st Sess. 693
(1979).

This legislative history confirms what legal scholars have long known. Commentators have identified several factors that render nuisance law inadequate to control widespread pollution, including the difficulty of proving a causal link between the harm and the unreasonable conduct of the defendant, and the inability to establish a nuisance where serious cumulative harm is caused by pollutants from several sources, none of which by itself would cause significant damage. F. Grad, 1 Treatise on Environmental Law, at p. 1-44 (1994). Moreover, the defendant's conduct often must be substantial and continuing in order to constitute a nuisance, which renders nuisance law ill-equipped to prevent single or intermittent discharges of toxic pollutants. Nor would the bill's nuisance exception cover many protections designed to address long-term health and safety risks. Nuisance law is also inadequate to provide protection to those who might be particularly sensitive to the harmful health effects of pollution, such as children and senior citizens.

Due to the limitations inherent in state nuisance law, property owners and others have failed to obtain relief in nuisance actions for a variety of harms and injuries, including flooding caused by filling of adjacent property,¹ groundwater contamination,² hazardous waste contamination of property,³ asbestos removal,⁴ and contamination of a creek by a leaking landfill.⁵ Although some of these examples might constitute a nuisance in other jurisdictions or in different factual settings, these cases amply demonstrate that state nuisance law does not provide sufficient protection to all Americans from threats to human health, public safety, the environment, our homes, and our property.

The nuisance exception also fails to recognize that there are other important public interests unrelated to health and safety and not addressed by state nuisance law, such as national

¹ Johnson v. Whitten, 384 A.2d 698, 700-701 (Me. 1978).

² Cereghino v. Boeing Co., 826 F. Supp. 1243, 1247 (D. Or. 1993).

³ American Glue and Resin, Inc. v. Air Products & Chemicals, Inc., 835 F. Supp. 36, 48-49 (D. Mass. 1993).

⁴ City of Manchester v. National Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986).

⁵ O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 657-58 (E.D. Penn. 1981).

defense, foreign relations, civil rights protection, worker safety rules, airline safety, food and drug safety, and many other vital protections. By requiring compensation for many protections that Congress has deemed necessary to advance the public interest, except where such protections fall within state nuisance law, S. 605 would undermine Congress's authority to decide what conduct or activity needs to be regulated to protect the public.

III. S. 605 Would Undermine Basic Protections Across the Board.

At the April 6 hearing, there was considerable discussion of the scope and effect of S. 605. You expressed surprise in response to statements that the bill could require compensation for agency actions under the Americans with Disabilities Act, efforts by the Food and Drug Administration (FDA) to keep dangerous drugs off market shelves, and other important government protections.

It is essential for the Committee to comprehend the bill's all-encompassing scope. The definitions of "agency action," "property," "taking," and other key terms in section 203 of the bill are so open-ended that they impose no meaningful limitation on the reach of the bill. For example, "agency action" is not limited to regulations, permit denials, and the like, but seems defined in a circular fashion to include everything an agency does that "takes" property as that term is used in the bill. The term "taking of private property" is similarly defined in a circular fashion to include anything that requires compensation under the bill. These open-ended definitions are combined with the exceedingly broad compensation standards discussed above.

At the hearing, Senator Biden asked several witnesses whether S. 605 would require compensation if the FDA banned the sale of a dangerous drug and thereby reduced the value of the manufacturer's inventory or factory by 33 percent. Certain witnesses suggested that no compensation would be owing because no one has a property right to sell a dangerous drug. This analysis is completely misplaced. Under the bill, the question is not whether the right to sell a dangerous drug is "property," but instead whether the term "property" as defined in the bill would include the inventory and factory. It seems clear that the language of the bill would require the conclusion that it does. Any agency action -- including a ban on the sale of unsafe drugs -- that reduces the value of a portion of property by 33 percent could give rise to a claim for compensation under section 204(a)(2)(D).

You suggested that a court might employ a "rule of reason" in interpreting the bill to avoid harsh results. The Supreme Court has made clear that federal courts must apply the plain

language of a statute to the facts before it. Connecticut National Bank v. Germain (U.S. 1992); Toibb v. Radloff (U.S. 1991); United States v. Ron Pair Enterprises, Inc. (U.S. 1989). In interpreting statutes, courts are not free to substitute their judgment for that of the legislature simply because they might disagree with the policy implications of a particular law. Badaracco v. Commissioner (U.S. 1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."); TVA v. Hill (U.S. 1978) ("Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."). The courts would have little choice but to follow the plain meaning of the bill and find many government actions compensable, regardless whether the result is unjust or unsound public policy.

The range of agency actions that could give rise to compensation requests under S. 605 is breathtaking. As we discussed at the hearing, for example, the bill could require compensation where requirements imposed under the Americans with Disabilities Act reduce the value of any portion of property by 33 percent. It would be impossible to catalogue all other potential applications. A few more are listed below by way of illustration:

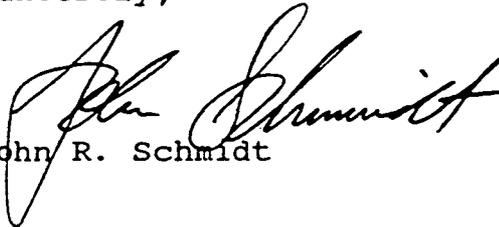
- Prohibitions on the sale of dangerous medical devices.
- Restrictions on the sale of animals and plants necessary to prevent the spread of contagious disease.
- Marketing quotas for crops.
- Restrictions on the sale or production of explosives or dangerous weapons.
- Protections under the National Flood Insurance Program designed to decrease the risk of flooding.
- A phase-out of single hull tankers, a suspension of an unsafe air carrier's operations, or orders directing motor carriers to stop using unsafe vehicles.

If these examples seem far-fetched, it is not because they are outside the scope of S. 605, but because the bill imposes an extremely broad compensation requirement.

As I indicated at the hearing, it is not our desire to distort the language of the bill or to engage in "scare tactics" but rather to make sure the Committee is fully and honestly informed regarding the consequences of the bill, which we believe are potentially very severe from both a functional and a fiscal point of view.

I hope this letter serves to clarify several of the points raised at the April 6 hearing. We remain ready to discuss any of these matters further with you at any time.

Sincerely,



John R. Schmidt

cc: Senator Joseph R. Biden
Ranking Minority Member

PRIVATE PROPERTY RIGHTS LEGISLATION

**VIEWS OF THE
DEPARTMENT OF THE INTERIOR**

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

MAY 3, 1995



THE SECRETARY OF THE INTERIOR
WASHINGTON

MAY 3 1995

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

Dear Mr. Chairman:

I am writing to express the Department of the Interior's strong opposition to S. 605, the "Omnibus Property Rights Act of 1995," which is now under consideration by your Committee.

S. 605 would establish a radical new right to compensation for private property owners whose property value is diminished as a result of Federal regulations and actions. Once we accept the principle that the government must pay private property owners not to do harm to the interests of the society at large, the American taxpayer will be left with two equally unacceptable alternatives: spend huge sums of taxpayers' money to maintain even our current level of protection for public health, safety and the environment, or let this protection decrease significantly and, in some cases, cease to exist.

Moreover, enactment of S. 605 would result in a massive increase in litigation at a time when the Congress has expressed a serious interest in cutting down litigation in this country. It will impose complex and costly bureaucratic procedures on all Federal agencies, and will greatly increase the government's vulnerability to spurious compensation claims with significant budgetary impacts. Finally, enactment of title V of S. 605 would significantly weaken and render more difficult the implementation and enforcement of the Endangered Species Act and section 404 of the Federal Water Pollution Control Act.

In short, the vast majority of property owners in this country would be hurt, not helped, by S. 605. For all these reasons, if S. 605 in its current form or any similar legislation is sent to the President, I will recommend that he disapprove it.

This legislation provides compensation benefits for the owners of private property the value of any portion of which has been reduced by 33% or more as the result of any Federal action or certain state actions carried out pursuant to Federal law. In addition, it would require agencies to assess and in some cases re-promulgate policies and regulations that may give rise to compensation claims. Further, the bill creates a separate compensation system with respect to actions taken pursuant to the

Endangered Species Act or section 404 of the Federal Water Pollution Control Act, and vests new administrative appeal rights and consent to entry rights in private land owners.

S. 605 appears to be a conglomeration of a number of earlier bills introduced with respect to private property "takings." The result of combining these bills has been to create a piece of legislation that, while seriously flawed in its separate titles, is virtually unworkable when those titles are read together.

The Department of Justice has presented testimony to your committee outlining the serious concerns that the Administration has with S. 605. We strongly concur with Justice's views and will not repeat them here. Rather, we would like to take this opportunity to focus on title V.

TITLE V - PRIVATE PROPERTY OWNERS ADMINISTRATIVE BILL OF RIGHTS

Enactment of title V of S. 605 would significantly affect protection for endangered and threatened species and wetlands under the Endangered Species Act (ESA) and section 404 of the Federal Water Pollution Control Act, (the Acts), respectively.

Reverse Preemption and "Least Impact" Test

Section 503 makes the implementation and enforcement of the Acts subject to any applicable law enacted by any one of the 50 states, the approximately 555 federally recognized Indian tribes, and an unknown number of unrecognized tribes. This is in essence "reverse preemption," allowing state and tribal veto of Federal law. This section will allow States and Tribes to hinder or even prohibit implementation and enforcement of the Acts.

Section 503 also requires agency heads to administer and implement the Acts "in a manner that has the least impact on private property owners' constitutional and other legal rights." While it is appropriate that these matters be taken into account, S. 605 would establish it as a new substantive test for implementation of these Acts that would override scientific determinations the agency heads are required to make under them with regard to what is the most effective protection for the species or area involved.

Staying Agency Actions Under the Endangered Species Act and Section 404

Section 508 would allow private property owners to halt implementation of any action under the Acts for the cost of a 32 cents stamp. This de facto veto will invite the filing of thousands of spurious claims, create huge appraisal bills for the American taxpayers, and open the door to massive noncompliance of the Acts. Nowhere in section 508 is the agency head given the

authority to determine whether a claim for compensation is meritorious. Section 508(c) simply states that once a request is made the agency head "shall stay the decision and shall provide the private property owner an offer" Every request for compensation, no matter how frivolous, must be met with an appraisal of the claimant's property and a determination of what effect the agency action had on it. Not only will this process be extremely expensive and administratively burdensome, but it will also be lengthy and will likely result in indefinite stays of many actions taken by agencies under the Acts.

Novel and Broad Theory of Compensation

Section 508 would entitle private property owners that are deprived of 33 percent or more of the fair market value of any affected portion of their property as a consequence of a final qualified agency action (defined as an action taken under the ESA or section 404) to compensation "in accordance with the standards set forth under section 204" of S. 605. However, section 508, in subsections (b) through (g), would appear to set up an entirely separate compensation provision for any private property owner who alleges he has suffered a loss and requests compensation.

Section 508(c) would require an agency head who has received a request for compensation under title V to stay the agency decision that created the grounds for the request and provide the owner with two offers: (1) an offer to buy the affected property at fair market value, assuming no use restrictions under the Acts, and (2) an offer to compensate the owner for the difference between fair market value without the restrictions and fair market value with them. The owner would then choose which offer he prefers and arguably could unilaterally take the agency into binding arbitration if neither offer is acceptable.

Implementation of this section would be enormously expensive. The expense will derive not just from the compensation requirements, but also from the appraisal process and the bureaucracy necessary to process claims and then administer the scattered property that will come into Federal ownership.

Moreover, we note that the definition of "private property or property" in title II (Section 203(5)) differs from the definition of "property" in title V (Section 502(3)). Based on the construction of the bill, claimants alleging diminishment of value because of the ESA or Section 404 could conceivably file under either title. This would create additional confusion and invite litigation because some interests that clearly are not property and would not be eligible for compensation under section 508 would be defined as property and would be compensable under section 203(5).

Access to Private Property

Section 504 states that an agency head may not enter privately owned property to collect information without written consent by the private property owner to the entry and notice to the private property owner of the entry. As drafted, this section would not be limited to information related to implementation of the ESA and section 404, but rather applies to all actions of the agency heads. This would seriously interfere with a number of important enforcement responsibilities of this Department, as well as the other agencies involved. Our responsibilities under CERCLA, the Oil Pollution Act of 1990, and numerous other statutes, often require employees of this Department to enter private lands without written consent of the owner.

We have already recognized that in certain non-law enforcement circumstances where Departmental employees are seeking access to private property to collect biological or other data, it is appropriate to get written consent for that entry. For example, on January 5, 1995, I issued an order requiring employees of the National Biological Service to obtain permission from the land owner, lessee, or other lawful occupant before undertaking any work on private land. This order also prohibits the initiation of any new land surveys on private land without the prior written permission of the land owner.

Administrative Appeal Rights

Section 506 would amend both section 404 of the Federal Water Pollution Control Act and section 11 of the ESA by adding new rights of administrative appeal. Under the ESA, private property owners would have rights to challenge, among other things, critical habitat determinations and jeopardy findings or the reasonable and prudent alternatives resulting from those findings. This could generate administrative appeals by many thousands of owners, as contrasted with an appeal by an individual owner who is denied a permit, and would add significantly to the cost of both of these programs.

MISLEADING FINDINGS

The findings that lead off the title state, in section 501(3), that private property owners have been forced to resort to extensive, lengthy, and expensive litigation to protect themselves. One of the presumed purposes of title V therefore is to minimize litigation. S. 605, however, will not cut down on litigation. For the reasons set forth above, we believe it will in fact spawn a legal tidal wave. In addition, while section 501(7) recognizes the importance of nuisance laws enacted at the state and local level, title V does not exempt from compensation situations similar to those exempted under title II in section 204(d).

Section 501(8) states that traditional pollution control laws are intended to protect the general public's health and physical welfare while current habitat protection programs are intended to protect the welfare of plants and animals. This presents a false dichotomy that overlooks important benefits that the general public realizes from habitat protection. By preserving biological diversity in both plant and animal species, we realize great benefits as a society. We depend on these resources for basics such as food, oxygen, medicines, as well as psychological benefits derived from observing and studying the natural world, and the knowledge we are passing on as much natural diversity as possible to future generations.

Even species that appear to have no value to humans often do. We have learned that blood cells from one species of horseshoe crab can be used to improve testing for bacterial endotoxins. Other species serve as bellwethers of the health of an entire ecosystem of interdependent plant and animal life. The amenities fostered by habitat protection also make communities more desirable places in which to live and work, and thus helps support property values. We fool ourselves if we believe that protection of habitat does not contribute to our general health and welfare.

Unfortunately, this mistaken finding is consistent with the operational section of title V, which would eliminate any incentive for landowners to cooperate with the government to conserve habitat and species that are valuable to the community and the nation.

CONCLUSION

Whether by design or effect, S. 605 would impose such overwhelming and unjustified costs and administrative burdens on this Department that it would cripple our ability to protect our nation's environment, wildlife, and natural heritage.

The Department realizes that concerns have been raised about regulatory actions taken under the ESA and section 404 that can affect homeowners and small property owners, and we are taking steps to address these concerns. For instance, we recently announced a package of reforms to improve implementation of the ESA, including a proposal that would in most cases exempt homeowners and owners of small tracts of land from restrictions designed to protect a threatened species. These are enclosed for your consideration. We also note that the Administration has recently issued a proposed rule for a nationwide general permit for homeowners impacting up to one-half acre of wetlands.

On March 7, I appeared before the Senate Subcommittee on Drinking Water, Fisheries and Wildlife and committed to Senator Chafee, the Chairman of the Environment and Public Works Committee, that I am ready and willing to work with the Committee on the

reauthorization of the Endangered Species Act. I believe that issues related to the purported effects of a specific Act, such as the ESA or section 404, should be addressed directly with respect to that Act and on their own merit, rather than by a sweeping, "one-size fits all" approach which will undermine the rights of property owners, invite legal and bureaucratic tangle, and impose fiscal burdens on taxpayers.

The Office of Management and Budget has advised that from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of Congress.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Bullitt". The signature is written in a cursive, slightly slanted style with a prominent initial "B".

Enclosure

PRIVATE PROPERTY RIGHTS LEGISLATION

VIEWS OF THE DEPARTMENT OF THE ARMY

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

MAY 10, 1995



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108



REPLY TO
ATTENTION OF

10 MAY 1995

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

Dear Mr. Chairman:

The Department of the Army (Army) wishes to comment on S. 605, the "Omnibus Property Rights Act", and on the various similar "compensation" bills now pending before the Senate. The Army strongly opposes S. 605, and similar bills, for the reasons expressed in this letter and its attachment, and the Army would recommend that the President veto S. 605, if enacted in its current form, or similar legislation.

The Army is committed to protecting private property rights and operates its regulatory program accordingly. As the Army Corps of Engineers administers the regulatory program, it makes every effort to minimize the impact of these important regulations on private property owners, while still protecting other property owners and the overall public interest.

Our position is that not only are S. 605 and other proposed compensation bills unwarranted, but that they would also have serious adverse effects on the Army's regulatory and civil works programs and on the general public. While the Army's regulatory program is not perfect, overall the Corps does an effective job of balancing public and private interests. We should focus on addressing the legitimate concerns of property owners -- something the President's wetlands plan does -- and we should not base major legislative decisions on anecdotal information that usually is not supported by the facts.

The Army is committed to making improvements that will keep the regulatory program respectful of private property rights, and make the program more convenient for all landowners and for the regulated public in general. In fact, we are seeing results from our efforts to improve the regulatory process. For example, during the last six months the Corps reduced by 60 per cent the number of permit applications that had been pending for more than two years, down to a total of 62 permit applications. Broad improvements were outlined by the President's August 24, 1993, wetlands plan. Included in the plan are measures such as administrative appeals for permit denials, jurisdictional determinations, and administrative penalties; 90-day deadlines for most permit decisions; additional general permits for private residences and for small landowners; and guidance to encourage expedited, simplified permitting for activities in wetlands with relatively low ecological value. I have enclosed, for your use, recently updated information on the President's wetlands plan.

Bde

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report for the consideration of the Committee.

Sincerely,



John H. Zirschky
Acting Assistant Secretary of the Army
(Civil Works)

Attachment

CF: CRC
OCE (CECC-J) Comeback Copy
OCLL
SACW (FILE, READ, SIGN)
WP6.1a/H\USERS/CASSADY\
S.605/S. Bond\May 10,95

ATTACHMENT

The CWA Section 404 Program Already Protects Private Property Rights

The legally binding regulations that govern the Army's regulatory program clearly establish respect for and protection of private property rights as one of the cardinal principles guiding all regulatory actions and decisions. See 33 C.F.R. § 320.4(g) (stating that "[a]n inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection.") We believe in the basic common law principle that "no one has the right to use his or her property to harm another." As the Army, acting through the Corps of Engineers, administers its regulatory program, we try to reduce the impact of these important regulations on private property owners as much as possible, while still allowing the Army to protect other property owners and the overall public interest.

Every year the Army authorizes approximately 90,000 separate and distinct activities by general permit, usually with little or no delay or expense to the regulated public, but with general permit conditions to minimize adverse effects on neighboring and downstream landowners and on the overall public interest. Even for the larger-scale proposals that must be authorized by individual permits, the Army annually grants approximately 10,000 individual permits, and denies only about 500; the majority of those denials are denials "without prejudice", made necessary by a state's denial of a water quality certification or coastal zone management certification. Thus, in the vast majority of cases, the Corps regulatory program authorizes owners of private property to use their land profitably, subject to reasonable conditions to protect the rights and property values of others, and the overall public interest.

As part of our efforts to reinvent government, the Administration has reformed the Section 404 program to reduce burdens on small landowners and others. Many individuals and small businesses are already allowed to fill portions of certain wetlands without needing to get an individual permit. Three new initiatives announced on March 6, 1995, will give small landowners even greater flexibility.

First, landowners will be allowed to fill in or otherwise affect up to one half acre of wetlands to construct a single-family home and attendant features such as a garage or driveway. The second initiative clarifies the flexibility available in the section 404 program to persons seeking to construct or expand homes, farm buildings, and small business facilities where the impacts are up to two acres. Third, the Administration proposed new guidance that will expedite the process used to approve wetland mitigation banks, which will allow more development projects to go forward more quickly. In addition, the Army Corps of Engineers is reforming its wetland program to make the permit application process less expensive and faster. These changes will substantially reduce or eliminate the burden for small landowners in many cases.

The Army operates its regulatory program in a manner that is highly respectful of the rights of private property owners. In those instances where it may appear that private property rights have not been sufficiently considered, the Army attempts to rectify the situation. Unfortunately, if a

pending "takings/compensation" bill, such as the current version of S. 605, were to become law, the inherent flaws in those bills would significantly disrupt the ability of the Army to implement its regulatory program. Moreover, in our opinion, in a relatively brief period of time the large number of claims that the taking/compensation bills would engender would deplete or eliminate funding for other important Army Civil Works responsibilities, such as food control, navigation, etc.

Enactment of S. 605 Would Create Overwhelming Problems

The problems associated with S. 605 and similar "taking/compensation" bills have been explained in the "Statement of John R. Schmidt, Associate Attorney General, Before the Subcommittee of the Constitution, Committee on the Judiciary, U.S. House of Representatives, Concerning Takings and Related Legislation Presented on February 10, 1995"; by the letter report of the U.S. Department of Justice (DOJ) on Title IX of H.R. 9, dated February 15, 1995, and signed by Assistant Attorney General Sheila F. Anthony; in the "Statement of John R. Schmidt, Associate Attorney General, Before the Committee on the Judiciary, United States Senate, Presented on April 6, 1995"; and in similar statements of the DOJ on this general subject. We support the DOJ position regarding why those "compensation" bills would allow and encourage a vast number of unjustified claims based on the Corps' conditioning of permits, enforcement actions, jurisdictional determinations, and denials of permit applications (both denials without prejudice and denials with prejudice).

It should suffice to state here that the inflexible terms of S. 605 and similar bills are unworkable. They would impose an unmanageable administrative burden and cause the Corps to cease to protect the public interest through the regulatory program (i.e., by ceasing to impose permit conditions, permits denials, enforcement actions, etc.), or, alternatively, to subject the Army Civil Works budget to a growing, practically limitless number of potentially large claims. These could amount to many tens of millions of dollars every year. Further, the inflexible terms of S. 605 and similar bills would result in many or most of those claims being paid from funds appropriated for operation of the Civil Works program.

If S. 605 or any similar bill were to become law, it would invite and encourage a multitude of claimants to file billions of dollars worth of claims against the Army annually, even though the vast majority of those claimants would not have a real economic loss or a reasonable grievance against the Army regulatory program. This is true for several reasons. For example, S. 605 would encourage speculators and their attorneys to purchase wetland and riparian property, and to subdivide larger tracts containing wetlands or riparian land, for the primary purpose of creating claims for the "affected portion" of property under the terms of S. 605. This new "land rush" to acquire and to "segment out" wetland property would quickly inflate the value of wetlands, not because wetlands are suitable for development, but because S. 605 would allow and encourage speculators to use wetland claims to exploit the Federal Treasury.

Similarly, S. 605 would encourage the owners of wetlands or riparian lands to generate bogus or highly speculative permit applications, or to seek unneeded jurisdictional determinations or enforcement actions, in order to create claims under the terms of S. 605. The Army would be forced to pay many (and probably most) of the anticipated myriad of claims, because the unreasonable terms and procedures of S. 605 would require that result. For example, S. 605 would not require claimants

to document actual or clearly predictable losses in order to assert compensable claims, and the claims procedures of S. 605 would virtually ensure a recovery for any wetland property owner who can find a cooperative "qualified appraisal expert" (undefined in S. 605). Thus, S. 605 would force the Army to pay claims that could amount to many millions (or perhaps billions) of dollars yearly to claimants who would deserve nothing under the constitutional standards for "regulatory takings", or in terms of fundamental fairness or common sense. S. 605 invites wholesale exploitation and abuse of the Federal Treasury, would constitute a monumental "giveaway" of scarce public funds, and would cost huge sums merely to administer.

Because the terms of S. 605 would allow so many abuses, if that bill or any similar bill were to become law, it would engender unjustified, but nonetheless huge and virtually unlimited, claims against the Army's Civil Works budget, plus very large administrative costs. The payments required by such laws would drain the Army's regulatory funds, making it impossible to continue protecting public health, safety, environmental values, and the overall public interest, through administration of the Army Corps of Engineers' regulatory program.

Presumably, the first effect of S. 605, by inducing large claims amounting yearly to many tens of millions of dollars, would be that the Army would no longer have sufficient funds to support the Corps regulatory personnel who process and issue the tens of thousands of separate Corps regulatory authorizations that U.S. citizens need every year so they can legally carry on their legitimate activities in or affecting the waters of the United States. Relatively speaking, the annual budget for the Corps regulatory program is not very large (e.g., the regulatory program received a "fenced" appropriation of \$101 million for Fiscal Year 1995), and about 70 per cent of that budget goes to pay the salaries of the Corps regulatory personnel. Because the numerous multi-million dollar claims engendered by S. 605 would soon force the Army to eliminate the Corps regulatory staff for lack of funds to pay them, U.S. citizens would soon have to defer activities subject to regulation indefinitely, or proceed with their projects without the needed permit authorizations, thereby endangering the environment, as well as breaking the law and subjecting themselves to civil and criminal enforcement actions brought by the DOJ and the U.S. Environmental Protection Agency, as well as Clean Water Act citizens lawsuits.

Soon, however, the innumerable large and unjustified claims that S. 605 would engender presumably would exhaust the limited, "fenced" budget of the Corps regulatory program itself, and would begin rapidly to deplete the Army Civil Works appropriations needed for responding to flood control needs, navigation, shore protection, and environmental restoration. This wholesale sacrifice of the public interest cannot possibly be justified by the alleged need to add to the already adequate protection for private property rights now provided by the Fifth Amendment to the Constitution, the Tucker Act, the Federal Courts, and by 42 U.S.C. 4654(c), which provides for payment of attorneys' fees for plaintiffs who prevail in "regulatory takings" cases.

If enacted S. 605 would make it virtually impossible for the Army and the Corps to continue to protect the public interest through the Corps regulatory program, and in fact, to operate that program at all, for the various reasons indicated herein and in the DOJ documents cited above. For example, S. 605 would radically change the established legal standards governing when the denial or conditioning of a Corps permit would require Federal compensation. The end result would be that for the many thousands of times every year when the Corps is required by statute and by legally binding regulations to condition a permit, bring an enforcement action, make a jurisdictional determination, or deny a permit application, thereby restricting the ability of a property owner to fill in or otherwise destroy any area of the waters of the United States, the affected property owner could (and presumably would) demand compensation under the terms of S. 605. Moreover, under the remarkable new rules of law and procedures created by S. 605, a property owner/claimant often would be able to obtain compensation from Army funds, no matter how small the area or interest protected compared to the total area developed, no matter how grievous the harm to public interest caused by the landowner's proposed activity, and whether or not the landowner's proposal or claim was actually supported by reasonable, investment-backed expectations, fundamental fairness, or by common sense.

The Army believes that the unreasonable new substantive rules of law and new procedures imposed by S. 605 and similar bills often would ensure that claimants would recover in full, even though such claimants would have no right to recover anything under the rules of law carefully developed over the years by the U.S. Supreme Court to govern "regulatory taking" cases. This remarkable restructuring of current law would invite speculators to bid up the price of wetland properties, and invite every landowner of aquatic property to submit bogus Section 404 permit applications for infeasible projects, merely to obtain permit conditions or denials, for the purpose of obtaining compensation under the overly-generous terms of S. 605. Since the cumulative compensation awards under S. 605 would soon add up to many millions (eventually billions) of dollars, all of which sums would apparently be paid from the Army's Civil Works appropriations, the Army would soon be effectively unable to process permit applications or to protect the public interest by responding to floods and other disasters, and by carrying on the Army's authorized activities in aid of navigation, flood control, and environmental restoration.

Section 501 -- The findings that underlie the bill are inaccurate and misleading.

Section 501 of S. 605 refers to the protection afforded to property rights under the Fifth Amendment to the Constitution, and states that the 404 program has been implemented "in a manner that deprives property owners of the use and control of their property." These findings might be read to suggest that regulation under the 404 program routinely interferes with constitutionally protected property rights. As to the 404 program, an August, 1993, report of the U.S. General Accounting Office found that of the 13 cases decided by the Claims Court (now the Court of Federal Claims) involving the 404 program as of May 31, 1993, only one resulted in a final judicial determination of a taking that required compensation under the Constitution. (One other case discussed in the Report was settled prior to decision by the court.) It is thus inaccurate to suggest that the section 404 program has significantly impaired constitutionally protected property rights.

Section 501(a)(3) of the bill states that property owners are being forced to resort to

expensive and lengthy litigation to protect their constitutional rights. Yet the President's comprehensive Federal wetlands policy, announced in August of 1993, contains several features designed to reduce the time and expense of challenging wetlands determinations, such as allowing administrative appeals of positive jurisdictional determinations, permit denials, and administrative penalties. The 1993 wetlands policy also includes a proposal to require most permitting decisions to be made within 90 days. Moreover, the relative lack of success of takings challenges to regulatory actions under the 404 program suggests that the length and expense of these cases is attributable, at least in part, to their lack of merit.

Section 501(a)(8) of the bill incorrectly suggests that the 404 program is unrelated to the protection of human health and public safety. In fact, wetlands enhance flood control, protect against coastline and riverbed erosion that might threaten public safety, and filter out pollutants that would otherwise contaminate our Nation's drinking water and waterways.

Section 503 -- The requirements in section 503 would undermine the stated purposes of the bill.

Section 501(b) states that the purpose of the bill is "to provide a consistent Federal policy" for the protection of private property rights and other constitutional rights. Yet section 503 of the bill would undermine such consistency. Section 503(a) states that, 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" This requirement would lead to inconsistent federal policy because the states and tribal governments have different, and perhaps even conflicting, laws relating to property, privacy, and other matters. (Ordinarily, nationwide consistency in Federal legal policy is advanced by Article VI of the Constitution, which provides that the Constitution and Federal laws are the supreme law of the land, notwithstanding any conflicting state law.) Moreover, to the extent that section 503(a) is intended to waive sovereign immunity, we question whether the language employed is sufficient under applicable Supreme Court case law. U.S. Department of Energy v. Ohio, 112 S. Ct. 1627 (1992); United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992).

Section 503(a) requires that the 404 program be administered "in manner that has the least impact on private property owners' constitutional and other legal rights." It is not clear whether this provision is aspirational or enforceable. In addition, the "least impact" standard ignores the fundamental truth that environmental protection necessarily involves a delicate weighing of competing concerns. This standard might be read improperly to elevate a property owner's individual rights over and above the public's legitimate interest in the protection of human health and the environment.

Section 504 and 505 -- The consent-for-entry provisions and the restrictions on use of collected data are unnecessary and would hamstring a wide range of essential enforcement efforts.

Section 504 of the bill would prohibit 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. Section 505 would prohibit the use of data collected on privately owned property to implement or enforce

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 information's accuracy, section 505(2) would require the agency head to specifically determine that the information is accurate before using it to implement or enforce the 404 program.

The Army believes that sections 504 and 505 would be an unnecessary legislative intrusion into legitimate law enforcement and information gathering activities. The Fourth Amendment to the Constitution already protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Section 504 could be construed to render unlawful any non-consensual entry onto private property even if the entry occurred under the authority of a search warrant. As the courts have recognized in interpreting the Fourth Amendment, however, there are many instances in which legitimate law enforcement activity necessitates entry onto private property without the owner's consent, and such entry may be made without violating the owner's constitutional rights. With respect to section 505 of the bill, the Due Process clause of the Fifth Amendment, the Clean Water Act (CWA), the regulations under the CWA and the Administrative Procedure Act, 5, U.S.C. 551 et seq., already afford property owners fully adequate opportunities to challenge agency determinations under the 404 program.

We are unaware of any need to supplement the Fourth and Fifth Amendments to the Constitution with additional legislative protection like those provided in section 504 and 505 of the bill. While aerial photographs or other mechanisms can sometimes provide evidence of violations, entry onto property is often a necessary part of environmental enforcement, and an absolute requirement to obtain consent prior to entry might well bring legitimate law enforcement efforts to a halt. The restrictions on the use of data in section 505 of S. 605 also appear unwarranted.

S. 605 Would Create Huge New Bureaucracies and Countless Lawsuits:

S. 605 would also require the creation of huge and costly bureaucracies to address compensation requests. Title II would greatly expand the grounds for filing judicial claims for compensation where regulation affects private property. Title V would establish an administrative compensation scheme with binding arbitration at the option of the property owner.

Agencies would need to hire more employees to process compensation claims, more lawyers to litigate claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property values, and more arbiters to resolve claims. The sheer volume of entitlement requests under these schemes would be overwhelming. The result would be far more government, not less.

The Takings Impact Analysis Requirement In Title IV Would Create Massive And Costly Bureaucratic Red Tape.

Section 403 (a)(1)(B) of the bill would require all agencies to complete a private property taking impact analysis (TIA) before issuing "any Policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property." The Administration firmly

believes that government officials should evaluate the potential consequences of proposed actions affecting private property, and the Corps currently does that pursuant to Executive Order No. 12630.

Because S. 605 would establish such a broad definition of "taking," however, Title IV would impose an enormous, unnecessary, and untenable paperwork burden on many aspects of Army operations. This inflexible and unnecessary bureaucratic burden would apply to all kinds of government efforts to protect public safety, human health, and other aspects of the public good. The bill would severely undermine these efforts by imposing an incalculable paperwork burden. At a time when the Administration is reinventing government to make it more streamlined and efficient, Title IV would result in "paralysis by analysis" and generate a vast amount of unnecessary red tape.

The specific requirements of section 404 of S. 605 are also disturbing. Among other things, it would require agencies to reduce actions that are compensable under the Act to "the maximum extent possible within existing statutory requirements." By elevating property impact above all other legitimate goals and objectives, section 404 would inevitably lead to less effective implementation of any Federal program that affects property rights.

The bill's enforcement mechanism are unclear, but section 406 of the bill suggests that actions could be filed in Federal courts to enforce the TIA requirement. Opponents of any government action would use legal challenges under the bill to delay or defeat the action by challenging whether an analysis must be done, whether every person with an interest received notice, and whether the analysis is adequate. Such litigation would result in an enormous additional burden on the Federal Courts' already overburdened docket.

The Administrative Appeal Provision

Section 506 and 507 of the bill would require the issuance of rules to establish administrative appeals for various regulatory actions under the 404 program. The Administration has already decided to provide administrative appeals for a number of these actions, including Section 404 jurisdictional determinations, 404 permit denials, and 404 administrative penalties.

We believe, however, that it is ill-advised to require administrative appeals for certain actions specified in the bill. For example, "cease and desist" orders and other compliance orders under the 404 program require a property owner to restore or otherwise alter property. Under current law, an administrative compliance order under the 404 program is not subject to judicial review unless and until the property owner refuses to comply with the order, at which point the Justice Department decides whether to attempt to enforce the order in Federal court. This system often results in prompt compliance and remediation, but allows for judicial review if the owner believes that the order is improper. An administrative appeal, as required by section 506, would create an unneeded and burdensome bureaucratic review that would disrupt this streamlined process, have a chilling effect on prompt compliance, and preclude a quick enforcement response to threats to human health and the environment.

PRIVATE PROPERTY RIGHTS LEGISLATION

**VIEWS OF THE
U.S. ENVIRONMENTAL PROTECTION AGENCY**

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

MAY 4, 1995



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 4 1995

THE ADMINISTRATOR

Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

I am writing to express the Environmental Protection Agency's (EPA) strong opposition to S. 605, the "Omnibus Property Rights Act of 1995." This proposal would seriously jeopardize human health and the environment and would undermine much of our nation's carefully balanced environmental legislation. It would create a huge taxpayer giveaway to polluters and would establish another bureaucracy to process claims. The American people neither can afford nor desire any of these results, and, for these reasons, I will recommend that the President veto S. 605 in its current form, or similar legislation.

Under S. 605, the 33 percent compensation requirement establishes a conflict between new compensation claims and present Congressional mandates. This bill could force crippling federal payments under almost all of EPA's Congressionally-mandated programs that protect public health and the environment. This might include our decisions -- compelled by statute -- to designate air quality regions as not in attainment with fundamental Clean Air Act health-based standards, or to impose even quite minimal pollution controls. Because these actions are Congressional mandates, we do not have the option of simply ceasing to carry them out.

Almost any EPA activity, from new drinking water standards to reforming hazardous waste incinerator regulations, would expose EPA to claims due to diminution of some portion of "property" by 33 percent. Under the Clean Water Act, for example, effluent guidelines, water quality standards provisions and even the National Pollutant Discharge Elimination System program could be said to cause a diminution in property value. The same could be argued regarding hazardous waste management standards, acid rain controls and hazardous air pollutant regulations, or even pesticides regulation. All of these are examples of Agency exposure to suits under this bill, potentially to be paid by taxpayers.



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Most troubling is the bill's ambiguous "supermandate" provision. In a single stroke -- and without careful consideration or debate -- it would rewrite all of the carefully crafted statutes that EPA administers to elevate claimed private property rights concerns over any other values.

This legislation would create extreme statutory remedies that would replace the careful balance created by the Constitution for considering private property rights issues. The bill's overly broad definition of property includes not just land, but any interest in real or private property. The bill would also compensate lost business value, which goes far beyond what the Constitution would require.

Further, S. 605 ignores the expectations that property owners reasonably should have at the time they acquire property, particularly with respect to constraints designed to protect others that are imposed by the existing regulatory framework. It also ignores the fact that harm may be caused to others by the use of property.

By making individual prerogative to unrestricted use of property the supreme goal of federal regulation, S. 605 would create a serious conflict with EPA's environmental protection mission. It would supplant the careful Constitutional balance developed over 200 years of takings jurisprudence and replace it with a compensation scheme that elevates individual property interests -- no matter how speculative or unreasonable -- above community needs and the rights of others. Gone from this balance is any sense of justice or responsibility to local communities. The bill would encourage owners to abuse government permitting processes to apply for lucrative uses they never intend to pursue, solely to establish a claim for benefits, or to parcel their property into pieces more likely to create a takings claim. It creates a multibillion dollar entitlement program for the worst polluters and wealthiest corporations while the public, who these environmental laws were designed to protect, pays the tab.

S. 605 also would undermine our co-operative administration of the pollution control laws with the states. A strong Federal-State partnership, created by Congress, exists as a part of our major environmental statutes. Because EPA could be liable for State-permitting decisions under these laws, we would be required to engage in intrusive oversight of all State decisions.

Similarly, the provisions addressing government entry of private property for information gathering purposes are highly problematic. The ban on entering private property would allow landowners to hide or alter problems that agency personnel would otherwise have a lawful right to investigate. This could have a chilling effect on enforcement actions. The American people do not want their neighbor's homes or property to become hazardous waste dumps, with EPA unable to investigate properly or remedy such problems. Finally, the new provisions empowering the Court

of Federal Claims to invalidate agency actions would confuse our existing statutory judicial review provisions.

This Administration has been committed to reviewing EPA's activities to ensure that they treat property owners in a fair, efficient, and cost effective way. Current administrative efforts underway include implementation of the Administration Wetlands Plan, as well as several new initiatives to further ease any regulatory burden on small landowners, farmers, and small business owners. I would be pleased to work with you on additional constructive efforts to ensure that our Congressionally-mandated activities do not give rise to Fifth Amendment claims for just compensation. I would be pleased also to work with you to identify changes to allow property owners to assert such claims more easily in the rare instances when they do arise.

I strongly oppose S. 605 because it undermines fundamental health and environmental protection critical to the American public, as well as the careful balance developed by the courts over the past 200 years for protecting all who own private property.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's programs.

Sincerely,

A handwritten signature in cursive script, appearing to read "Carol M. Browner".

Carol M. Browner

Enclosures

PRIVATE PROPERTY RIGHTS LEGISLATION

**VIEWS OF THE
DEPARTMENT OF DEFENSE**

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

MAY 10, 1995



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D.C. 20301-1600

10 MAY 1995

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

Dear Mr. Chairman:

The Department of Defense has the following comments and concerns regarding S. 605, the "Omnibus Property Rights Act of 1995." Because this bill may have significant unintended consequences that could detrimentally affect military readiness, the Department strongly opposes passage of the bill and the Secretary will recommend that the President veto S. 605, if enacted in its present form.

A number of agencies have already addressed in considerable detail some of the problems inherent in the bill's exceedingly broad definition of "property" and its creation of statutory causes of action that focus only on the impact of agency actions on the property owner. Consequently, the Department of Defense will restrict its comments to certain ways in which the bill could adversely affect military operations and training.

Airfield Operations

S. 605 is likely to effect a fundamental and highly disruptive change in the law concerning aircraft overflight. In general, existing case law compensates landowners only for regular and frequent overflight by military aircraft at altitudes of 500 feet or less above ground level. Conversely, with one exception (since limited to its peculiar facts), overflight at altitudes greater than 500 feet has been held not to be compensable. Flight patterns at many military airfields (particularly those now surrounded by urbanization) have been specifically designed with the now-well-established 500-foot dividing line in mind to ensure that operations take place only in freely navigable airspace (i.e., higher than 500 feet above ground level) or in strict accordance with existing airspace easements.

Senate 605 threatens to erode or even wholly supplant the relative certainty that derives from this notably functional "bright line" test. By requiring compensation whenever overflight diminishes the fair market value of the affected portion of a parcel of land by 33 percent, irrespective of the altitude of the overflight, S. 605 could open the Department to a plethora of lawsuits where existing flight patterns were developed predicated on the 500-foot above ground level presumption. The product of these lawsuits would likely be the diversion of substantial amounts of money otherwise intended for training and operations; a forced change to existing flight patterns with a possible loss in training verisimilitude; and an extended period of disruptive uncertainty while these lawsuits wind their way through the courts.

Air Installation Compatible Use Zone (AICUZ) Program

The AICUZ Program is a Department planning tool that determines the potential noise and accident effects aircraft operations may have on communities surrounding military airfields, and transmits this information to local planning and zoning commissions for their use. The intent is that local planning authorities will enact ordinances and building codes to discourage incompatible development adjacent to military airfields.

Historically, courts have held that neither the Department's publication of an AICUZ plan (i.e., a Compatible Use District map) nor its participation in the local zoning process constitutes a compensable taking. These cases are predicated on the fact that the AICUZ plan by itself has no legal effect until implemented by the local entity that actually undertakes the zoning, and that in seeking to influence the zoning process the Department is doing nothing more than would be expected of any interested adjoining landowner.

S. 605 could effectively overturn this line of cases and operate to discourage the Department from even undertaking AICUZ planning. Courts may determine in certain cases that the Department's publication of an AICUZ plan alone, even if not ever

adopted by a local zoning authority, could diminish the fair market value of the affected portion of an adjoining parcel by the requisite 33 percent threshold for compensation. Additionally, by requiring payment of just compensation by the federal government whenever a broadly defined "State agency" "carries out or enforces" a Federal regulatory program, the Department could be required to underwrite a portion of the local zoning process whenever some part of the Department's AICUZ plan is adopted. Moreover, landowners who may be reluctant to bring action against their own local zoning authorities can be expected to have no such qualms about suing the United States.

For these reasons, if S. 605 makes the Department vicariously liable for takings claims whenever a local zoning ordinance embraces an AICUZ plan, the Department may be unable or unwilling to provide local authorities with the information they need to make reasonable decisions concerning zoning in the vicinity of military airfields. This, in turn, would deny potential home buyers the information they need to make informed decisions concerning whether they wish to live beneath an accident potential zone or in an unacceptable noise zone.

Naval Operations

Senate 605 could have a potentially significant effect on naval operations. If the Secretary of Transportation cannot disapprove the construction of a bridge or causeway pursuant to Section 401 of the Federal Water Pollution Control Act (FWPCA) or the Secretary of the Army (acting through the Chief of Engineers) cannot disapprove a pier, wharf, or bulkhead that extends beyond the established harbor line pursuant to Section 401 of the FWPCA, without triggering a right to compensation, the Navy's ability to navigate through rivers and harbors will be compromised.

Moreover, S. 605 could adversely affect Naval training. Under current law, the Corps of Engineers may establish danger zones and restricted areas in navigable waters and restrict the access of private vessels while the Navy trains. Under S. 605, it may be necessary for the Corps or the Navy to compensate owners of vessels and waterfront property if an individual

alleges that restricted access or training activities interfere with the individual's business or property. Furthermore, although aircraft bombing areas are necessary to ensure military readiness, S. 605 may curtail practice bombing to avoid unintentional inconvenience to private entrepreneurs.

Base Closure

The Supreme Court's decision in Dillon v. Specter, 114 S. Ct. 1719 (1994), notwithstanding, S. 605 could provide a vehicle for local businesses to challenge the implementation of base closures. Section 205(a) of S. 605 states that a property owner may file a civil action "to challenge the validity of any agency action that adversely affects the owner's interest in private property." Certainly, the identification of a base for possible closure, as well as the closure itself, may at least temporarily cause a 33 percent decrease in the fair market value of property and a similar reduction in business revenues. Given S. 605's unprecedentedly broad definition of "property," this bill could open the floodgates to claims heretofore barred by existing takings jurisprudence and the Administrative Procedure Act.

Note also that a temporary decrease in fair market value, not a realized monetary loss, appears to be sufficient under S. 605 to give a party standing. Consequently, local property owners in base closure communities could seek compensation for "paper" losses even if they do not sell their property and the property recovers its value after redevelopment of the base.

Finally, S. 605 could constrain intensified operations necessitated by base closure. As units are transferred from closing bases to a reduced number of open bases, training on available lands must necessarily increase. The disturbances caused by the aircraft, vehicles, and weapons that are a necessary part of effective training could diminish the fair market value of lands adjacent to the Department's remaining bases, and give rise to takings claims that would not be cognizable under existing takings case law. This, in turn, could force the Department to choose between curtailing training and paying takings claims out of available appropriations; a Hobson's choice with adverse consequences for military readiness in either

case.

Conclusion

The Department of Defense believes that S. 605 will adversely affect national defense imperatives. The Department is concerned that S. 605 will unacceptably compromise military readiness at a time when a significantly reduced fighting force is being asked to do more with less. For this reason, the Department strongly opposes S. 605.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the provision of the above views to the Committee for its consideration.

Sincerely,



Judith A. Miller

cc:

The Honorable Joseph R. Biden, Ranking Minority

PRIVATE PROPERTY RIGHTS LEGISLATION

VIEWS OF THE GENERAL SERVICES ADMINISTRATION

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

JUNE 15, 1995



Administrator
General Services Administration
Washington, DC 20405

June 15, 1995

The Honorable Orrin Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The General Services Administration (GSA) wishes to express its views on S. 605, a bill "To establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment."

GSA supports the protection of the rights of private property owners. S. 605, however, likely will have a significant adverse impact on the public welfare by unnecessarily burdening GSA programs. GSA, therefore, strongly opposes S. 605, and I will recommend to the President that he veto the bill, if enacted in its current form, or as similar legislation.

GSA, as one of the Federal Government's primary landholding agencies, is responsible for the acquisition, use and disposal of Federal real property. These activities typically can include the acquisition of land for, and the construction of, new Federal courthouses, border stations, office buildings, and warehouses. These activities may also include screening excess Federal property for use by other Federal agencies as a Federal prison, or for homeless use under the Stewart B. McKinney Homeless Assistance Act. Each of these activities involves "agency actions" by GSA, which could trigger unforeseen claims for compensation and the concomitant litigation if S. 605 is enacted as currently drafted.

GSA is principally concerned with the effect of Titles II and IV of S. 605. While the exact impact of Title II can not be determined until its provisions are challenged and defined through inevitable legal actions, this title will result in a significant increase in frivolous and unfounded claims against GSA (and other agencies) and an added litigation burden on GSA and the Federal courts system. In addition, this title may increase unnecessarily the cost of acquiring or constructing Federal office buildings,



courthouses, border stations, etc., and will likely delay the acquisition, construction, or disposal of needed Federal facilities.

Presently, when GSA exercises the power of eminent domain to acquire a parcel of land, GSA is required to compensate fairly the owner for the taking and comply with the landowner protection provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. 4651-4652) ("the Relocation Act"). Under S. 605, GSA also might be sued by the surrounding landowners and businesses that believe that the Federal presence would incidentally diminish the value of their property or would limit their properties' future development potential. Also, any surrounding business (whether or not they owned the neighboring real property) could sue GSA for any business losses or lost business opportunities if the parcel of land GSA condemned or purchased could have been otherwise developed.

While GSA recognizes that S. 605 does require that the claimant sustain at least a 33% diminution in the value of the affected portion of the parcel and does provide Federal agencies with certain legal defenses against a claim, the bill places the litigation burden of proof on the Government. Accordingly, if S. 605 is enacted GSA can expect a significant increase in the number of frivolous claims against which it must defend itself in court. This increased burden will adversely impact this agency.

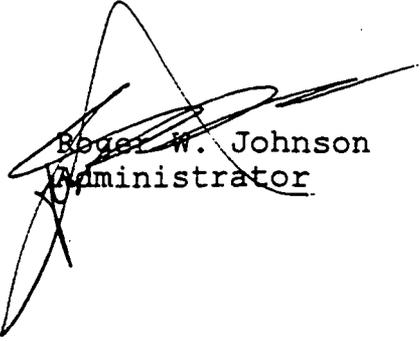
GSA is also concerned that S. 605 may have an unintended negative impact on the Government's legitimate use of its own real property holdings. The Government engages in operations on its own properties which some communities consider to have a negative impact on the real estate market. Examples of actions which have provoked community disagreement can range from the evaluation and nomination of property for historic designation and the designation of property as a wildlife conservation area, to the transfer of Federal property for homeless assistance or a correctional facility. Each of these programs is a legitimate use of Government-owned property, and the Government is actually encouraged to make such use of property under various Federal statutes, including the Federal Property and Administrative Services Act of 1949. To the extent permitted under law, GSA has endeavored to work with impacted communities when making property transfer decisions.



With regard to Title IV of the bill, GSA believes that its wide-ranging provisions will impose an excessive administrative burden on its real property acquisition, management and disposal programs. Presently, before acquiring title to real property and beginning the construction of a Federal building, GSA is required to undertake a host of activities. The activities often include preparing prospectuses for approval by congressional committees, conducting various surveys and appraisals, preparing environmental and community impact statements, and complying with the requirements of the Relocation Act. Although the requirement of S. 605 that agencies complete a private property taking impact analysis before issuing or promulgating any policy, regulation, proposed legislation, or related agency action which will likely result in a taking of private property, does not apply when GSA exercises the power of eminent domain, such an analysis will likely be required for most agency real property activities. GSA believes the takings impact analysis required by S. 605 is an unnecessary administrative burden which is contrary to this agency's efforts to streamline its real property acquisition, management and disposal activities.

The Office of Management and Budget has advised that, from the standpoint of the Administration, there is no objection to the submission of this report to your committee.

Sincerely,


Roger W. Johnson
Administrator



PRIVATE PROPERTY RIGHTS LEGISLATION

VIEWS OF THE

DEPARTMENT OF HEALTH AND HUMAN SERVICES

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

MAY 5, 1995



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAY 5 1995

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

Dear Mr. Chairman:

We take this opportunity to inform you of the views of the Department of Health and Human Services (HHS) on S. 605, the "Omnibus Property Rights Act of 1995".

This Department strongly opposes S. 605, which we fear would seriously erode important health and safety protections now afforded to all under Federal laws. If S. 605 in its current form, or similar legislation, were sent to the President, we would recommend that he veto it.

The bill's ostensible purpose is to protect property owners from unreasonable intrusion upon their rights by the Federal Government. However, the bill's effect could be to hamper severely the Government's ability to restrain illegal and irresponsible uses of property by private individuals that impinge on the rights of other individuals or the community. Among many other harmful effects, S. 605 could seriously compromise the mission of this Department to protect the safety of food, drugs, blood, and health care facilities such as hospitals, dialysis centers, nursing homes, and mammography providers.

We entirely agree that the Government should compensate owners for any takings of private property, as required by the Constitution. But while this basic principle can be stated simply, it is by no means so simple to apply. Important corollaries to the principle have evolved over two centuries of case law interpreting the Just Compensation Clause of the Fifth Amendment. Thus, in determining whether a regulatory action has effected a Fifth Amendment taking and, if so, what compensation is just, the owner's right to make use of his property must be balanced against his responsibilities to the community. A regulatory action such as seizure of goods that violate applicable laws is not a compensable taking. A taking does not occur merely because government action incidentally reduces the value of property or limits its use: the courts have long recognized that government could not function if it were required to compensate for every such impact.

We ought not to set aside any of the elements of the Constitutional interpretation that have developed over two hundred years of careful judicial consideration of the facts of actual cases, let alone to supplant them wholesale as S. 605 would do.

Title II--Compensation

Section 204(a) of S. 605 requires Federal and State agencies to compensate a property owner if as a result of agency action the property is taken for public use and any one of five specified circumstances applies. These include--

"(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..."; and

"(D) such action diminishes the fair market value of the affected portion of the property...by 33 percent or more..."

We are unable to ascertain the full effect of this requirement on HHS programs, in light of numerous ambiguities in the text of the bill, notably in the definitions of key terms or lack thereof. Among matters of concern:

- o The definition of "property" (§203(5)) is extremely broad, encompassing not only land and water rights but also rights under contract and interests defined as property under State law. Its full extent is unclear, particularly given the final catchall category: "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".
- o The definition of "taking" (§203(7)(A)) is essentially circular: it "means any action whereby private property is directly taken as to require compensation under the fifth amendment to the United States Constitution or under this Act".... In short, the term "taking" means "taking", whatever that means. However, the narrow exclusions provided in §203(7)(B), limited to condemnation and criminal forfeiture actions, could be taken to mean that any other regulatory action affecting property value or use (such as action to protect public health or safety), since it is not excluded, is within the definition of "taking".
- o The exclusion from compensation for a "taking" covers only circumstances where the owner's use of the property is a "nuisance" under State law. We would expect this exclusion to have little practical applicability (rarely is any Federal regulatory action needed to restrict a use already prohibited by State nuisance law). But, as with the limited exclusions from the

definition of "taking", here again the omission of an exclusion for health and safety rules can be read to override by implication the Constitutional holdings that many such actions do not effect a taking.

It is our fear that, if the bill were enacted, we would be confronted with legal challenges by entities regulated by HHS advancing arguments such as the following:

- o In cases where enforcement actions (e.g., recalls or seizures of adulterated or misbranded foods, drugs, and devices, or an injunction against a manufacturing or health care facility creating safety hazards) resulted in the loss of 33 percent or more of the value of the property, the manufacturers might seek to recoup all financial losses.
- o Where an injunction or license suspension temporarily shut down a manufacturing plant or health care facility, HHS might be sued for the owner's economic losses during this period.
- o The sponsor of an innovator drug might claim that FDA's approval of a generic competitor was a taking, because it diminished the value of the innovator.
- o If FDA published regulations raising the minimum quality standards for mammography facilities, or if the Health Care Financing Administration (HCFA) raised the standards for participation of nursing homes in Medicare and Medicaid, a facility that could not afford to upgrade to the new minimum standards might argue that the regulations effected a taking. Indeed, given the breadth of the definition of "property" and the requirement to treat as a taking the deprivation of productive use of "property or that part of the property affected by the action", the facility might bring suit solely with respect to the individual pieces of equipment rendered obsolete.

The gist of the problem posed by S. 605 is this: In carrying out its regulatory and enforcement responsibilities under the Federal Food, Drug, and Cosmetic Act (FDC Act), the Mammography Quality Standards Act, and other statutes protecting patient and consumer safety, the Department may determine that products or entities are in violation of the law, and apply sanctions such as seizure or injunction; may determine that products or entities that once complied with law no longer do so, and withdraw approval or licensing; and may establish or raise standards applicable to a product or entity, based on a determination that previous standards (or the lack thereof) did not provide sufficient protection of public health and safety. As a direct result of

these and other acts which FDA, HCFA, and other agencies must perform to carry out their statutory responsibilities (including approval of competing products), individual property owners may incur substantial economic losses.

Actions such as those described above are not takings under established Fifth Amendment law, which correctly recognizes the general good served by health and safety laws. But aggrieved parties might argue that S. 605 substitutes for these time-tested decisional factors, whose purpose is to achieve fairness and justice in takings law by balancing the legitimate rights of individuals with the legitimate rights of the community of which the individual is a part, a statutory cause of action that does no such thing. Such a change would have a devastating impact on the capacity of FDA and other HHS agencies to protect public health and safety.

Title IV--Taking Impact Analysis Requirements

Title IV of S. 605 requires agencies to complete taking impact analyses before issuing any policy, regulation, proposed legislation, or related agency action likely to result in a "taking" as defined in Title II. These analyses might be required for enormous numbers of agency actions, adding to a workload already made impossible by the takings claims (and drain on funds) resulting under title II of the bill.

More importantly, the prohibition in § 404 against promulgating a rule that could require an uncompensated taking as defined by the bill might be read to block important health and safety regulations. For example, any regulation that would result in 33 percent diminution of value of any portion of an affected product or facility arguably could not be promulgated, regardless of the value to the public health. This provision is even more far-reaching than the "supermandate" proposed under S. 343: that provision would bar promulgation of any rule for which the agency could not determine that total benefits to society would outweigh costs, but §404 could be read to bar a rule if any single regulated entity would lose one-third of the value of any portion of its property. Such a provision would eviscerate the public health protections that are the essence of consumer protection laws like the FDC Act.

Because the bill would also require agencies to review and repromulgate all regulations that would result in takings under the bill's revised takings definition, public health protections that have been in place for many years could also be removed. Reducing takings "to the maximum extent possible" within existing statutes (§ 404(b)(1)) could roll back consumer protection to minimum levels because of individual firms' economic arguments.

Page 5 - The Honorable Orrin G. Hatch

That is, the bill's unclear language might be read to compel minimum public health protection and disease prevention under existing statutes when takings, as newly defined, might occur.

Past regulations requiring warning statements on potentially dangerous products (thereby reducing the market value), withdrawing product approvals based on safety concerns, and setting safety standards could all be called into question. For example, if the regulations implementing the Mammography Quality Standards Act set safety requirements that a mammography facility could not meet, the owner could argue that the regulation must fall if any lesser restrictions would be allowable under the statute.

Even calculating the effects of existing regulations on property values would be an extremely burdensome and wasteful task. It is unclear whether the bill would require agencies to try to calculate diminutions in property values at the time the regulation was originally promulgated. If so, gathering the necessary information for the analysis would be extraordinarily difficult, if not impossible, and the results would inevitably be based on incomplete and speculative information.

For all the foregoing reasons, we strongly object to S. 605, which could seriously undermine health and safety protections under Federal law, and we would recommend that the President not approve it.

The Office of Management and Budget has advised that there is no objection to the presentation of this report.

Sincerely,



Secretary

PRIVATE PROPERTY RIGHTS LEGISLATION

**VIEWS OF THE
DEPARTMENT OF THE TREASURY**

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

MAY 8, 1995



GENERAL COUNSEL

DEPARTMENT OF THE TREASURY
WASHINGTON

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

May 8, 1995

Dear Mr. Chairman:

This letter expresses the views of the Department of the Treasury on S. 605, the "Omnibus Property Rights Act." The bill purports "to establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment."

The Department of the Treasury strongly opposes S. 605, and the Secretary of the Treasury will recommend to the President that he veto S. 605, if sent to him in its current form, or similar legislation.

S. 605 would supplant the traditional framework for the consideration and determination of "takings" under the Constitution, which permits flexibility in considering relevant factors for determining just compensation when private property is taken for a public use. The bill mandates compensation to a property owner when government action reduces the value of any portion of the property by 33 percent. The bill is drafted so broadly that compensation would be required in a virtually unlimited number of actions, many of which are not subject to viable takings claims under current law. Moreover, the bill also would place new and onerous procedural requirements on agencies before they may take actions that may affect private property.

Enactment of S. 605 or similar legislation would jeopardize a broad range of Treasury enforcement and regulatory functions, impose significant new administrative burdens and expenses on Treasury offices and bureaus, and generate costly and burdensome relitigation of issues of law currently considered settled.

For example, the definition of "takings" fails to exclude such actions as civil forfeitures, denials of licenses or society payments, detentions of merchandise, court ordered attachments of property, and seizures of property authorized by law to secure the payment of civil penalties. Including such actions within the scope of the bill will severely and adversely affect the principal means by which the United States Customs Service enforces over 400 laws for more than 40 Federal agencies.

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Moreover, where a takings issue had been raised and litigated in connection with particular law enforcement actions, the bill invites the unnecessary and costly relitigation of the same matters.

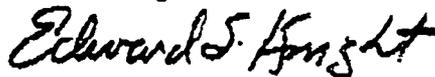
In the financial services sector, S. 605 also could be interpreted to apply to enforcement actions and regulations of the Office the Comptroller of the Currency and the Office of Thrift Supervision. The application of the bill to these actions will severely impede the ability of regulators to protect the safety and soundness of financial institutions and the nation's banking system. For example, S. 605 could encourage protracted litigation by individuals whose personal interests conflict with the broader interests of protecting depositors, shareholders, creditors, and the deposit insurance funds. Delays in action caused by litigation and the time to complete the required takings impact analysis could result in far greater losses to financial institutions and to the deposit insurance funds than otherwise would be the case.

Similarly, the bill arguably could require the bank regulators to compensate owners of banks if additional capital requirements were imposed or certain banking powers were curtailed. If enacted, S. 605 would severely impair the flexibility needed by the bank regulators to ensure the continued safe and sound operation of the banking industry.

The Department also is concerned that the many impediments created by S. 605 to the effective and timely exercise of traditional regulatory powers may threaten the property values of many Americans, particularly the values of homes and other real estate.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely,



Edward S. Knight
General Counsel

PRIVATE PROPERTY RIGHTS LEGISLATION

VIEWS OF THE DEPARTMENT OF AGRICULTURE

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

MAY 4, 1995



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

May 4 1995

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

Dear Mr. Chairman:

This letter presents the Department of Agriculture's views concerning S. 605, the "Omnibus Property Rights Act of 1995".

The Department understands the concerns that have given rise to this legislation and is committed to working with the Department's customers and Congress to reduce the regulatory impact of USDA programs. However, the Department believes that S. 605 would result in a tremendous amount of new litigation, create new bureaucracies, and cost the American taxpayer billions of dollars. Therefore, the Department strongly opposes S. 605 and would recommend that the President veto the bill if enacted in its current form or other similar legislation.

S. 605 is an amalgam of various property rights bills currently pending in the Senate. This bill includes a compensation provision, a section providing for alternative dispute resolution of private property taking disputes, a requirement for private property taking impact analyses and a title termed "Private Property Owners Administrative Bill of Rights".

The Department fully supports private property rights. The Fifth Amendment to the Constitution has served as an effective vehicle for over 200 years in determining the entitlement of property owners to compensation for takings of private property. The interests balanced by the courts in making such determinations include the character and economic impact of the government action and the reasonable expectations of the property owner. The balancing of interests which takes place under the Fifth Amendment provides protection for private property owners as well as protection for the public.

Title II of S. 605 would effectively replace this long-standing body of jurisprudence with a statutory compensation standard that focuses only on the impact of the agency action on the property owner. While not completely clear, the bill could be read as requiring that a property owner receive compensation whenever agency action "...diminishes the fair market value of the affected portion of the property ... by 33 percent or more with respect to the value immediately prior to governmental action". Section 204(a)(2)(D).

Because the legal standards articulated by S. 605 represent a sharp departure from existing takings jurisprudence, it is difficult to precisely predict the magnitude of successful claims which this legislation would create. Therein lies one of the most troubling aspects of this bill. It is sure to give rise to a vast amount of litigation as property owners attempt to make claims under the legislation. Only after this wave of litigation has made its way through the federal court system would we know precisely the magnitude of the fiscal implications of this bill.

A wide variety of USDA programs may be affected by this legislation. For example, we would expect potential claims concerning restrictions imposed by USDA's Animal and Plant Health Inspection Service (APHIS). In order to control and eradicate diseases and plant pests, APHIS at times imposes limitations on the movement of animals or plants and the use of land on which animal or plants are produced. These controls are necessary to prevent the spread of highly contagious diseases and harmful pests which can be devastating to domestic producers of animal and plants.

We would expect the filing of claims for a number of activities authorized by the Forest Service. For example, there are numerous inholdings and mining claims within the National Forest System. The Forest Service grants permission to cross or use National Forest System lands to access these holdings and claims. Also holders of water use rights exercise their water rights on National Forest System lands. Water rights are specifically defined as property under S. 605. In order to protect public resources on these federal lands, the Forest Service sometimes places conditions on the permission for access or land use. While the agency action in these instances involves granting permission to access or use federal lands, if the action has any effect on the value of the property rights held by private property owners, we can expect claims in this area should S. 605 become law.

Another possible area of potential claims could be expected under the traditional farm programs. For example, the Department's Consolidated Farm Services Agency (CFSA) restricts the amount of acreage that specific farmers can plant to tobacco through acreage allotments, and restricts the amount of tobacco that can be marketed by the farmer through marketing quotas under the Agricultural Adjustment Act of 1938. Allotments are considered to be personalty under some state laws, e.g. North Carolina's probate law, and, therefore, would fall within the definition of property under S. 605. Similarly, long-term Conservation Reserve Program contracts entered into with owners and operators of farms by the Commodity Credit Corporation (CCC) also could be subject to the compensation provisions of S. 605 if the Secretary of Agriculture exercises a statutory right to terminate the contracts prior to the contract expiration date.

Under section 15(g) of the Food Stamp Act of 1977 (7 U.S.C. 2024(g)), property, including property defined by S. 605, is subject to civil forfeiture proceedings if "furnished or intended to be furnished by a person in exchange for coupons, authorization cards or access devices..." in violation of law. While criminal forfeiture proceedings are exempted from the definition of "taking" under S. 605, civil forfeiture

proceedings are not. Persons may argue that property forfeited under the authority of section 15 constitutes a taking, for which compensation is due.

With respect to Title II, the bill states that compensation is to be paid by agencies from currently available appropriations that support the activities giving rise to the claim. Therefore, the amount of funds available for the affected programs could be reduced by that amount necessary to pay compensation claims. If insufficient funds are available in the fiscal year of a final compensation award, agencies could be required to pay from appropriations for the next fiscal year or seek additional appropriations. (Section 204(f)). Programs funded as entitlements like the commodity price stabilization programs, would be open-ended sources of funding for compensation claims.

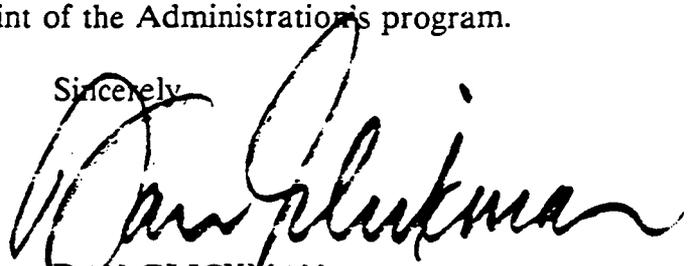
As described above, S. 605 will undoubtedly engender a great deal of litigation. Because the level of valid claims would be almost impossible to predict, budgeting for both the programs and the compensation claims would become extremely difficult. This will make it virtually impossible for both the authorizing and appropriating committees as well as program administrators to budget and plan for program operations.

Title II of S. 605 rearranges Federal court jurisdiction over private property takings disputes. We defer to the Department of Justice for its views on these provisions.

Title IV of S. 605 requires Federal agencies, with certain exceptions, to complete a private property taking impact analysis (TIA) before issuing or promulgating any policy, regulation, proposed legislation or related agency action likely to result in a taking of private property. The definition of a "taking of private property" for Title IV is that contained in section 203 of the bill, so that in order to comply with Title IV, agencies will have to determine first whether agency action "is likely to result in a taking of private property" under Title II. (Section 403(a)(1)(B)). As described above, it would be many years before the legal implications of Title II could be fully known. Yet, agencies, upon enactment of the bill, will be required to prepare TIAs which describe the potential "takings" impact of agency actions. It will be very difficult therefore, for agencies to properly implement Title IV until Title II has been interpreted through judicial review.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Glickman", written over a large, faint circular stamp or watermark.

DAN GLICKMAN

Secretary

PRIVATE PROPERTY RIGHTS LEGISLATION

**VIEWS OF THE
DEPARTMENT OF TRANSPORTATION**

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

MAY 2, 1995



THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

May 2, 1995

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

Dear Mr. Chairman:

This presents the views of the Department of Transportation on S. 605, a bill entitled

"The Omnibus Property Rights Act of 1995."

The Department of Transportation (DOT) fully supports private property rights, and departmental programs already comply with the real property acquisition policies in Title III of the Uniform Relocation Act (42 U.S.C. §§ 4651-4655) which ensure that owners of real property are treated fairly. Furthermore, the Administration is committed to reforming government regulations that impose unreasonable restrictions or unnecessary burdens on the use of private property.

The Department, however, strongly opposes S. 605 because it would force the Federal Government to incur tremendous costs in implementing transportation safety regulations without regard to their benefits, thereby compromising safety protections vital to the American public. Accordingly, I will recommend to the President that he veto S. 605, if it is sent to him in its current form, or similar legislation.

The Fifth Amendment to the Constitution has served as an effective vehicle for over 200 years in determining the entitlement of property owners to compensation for takings of private property. The interests balanced by the courts in making such determinations include the character and economic impact of the government action and the reasonable expectations of the property owner. The balancing of interests which takes place under the Fifth Amendment provides protection for the property owner as well as protection for the public.

S. 605, however, would supplant this long-standing body of jurisprudence and depart significantly from the constitutional standards for defining a "taking." It would require the Federal Government to compensate a private property owner an affected portion of whose property values is diminished as a result of any Federal regulation or other action.

The bill would extend the requirements of compensation for takings of property beyond what the Constitution requires to instances in which the Federal Government, through regulation, diminishes the value of property, including personal property. This raises the possibility of serious consequences for DOT, which regulates the safety of operation of aircraft, automobiles, buses, trains, trucks and vessels, and could jeopardize the safety of the traveling public. For example, the Oil Pollution Act of 1990, administered by the U.S. Coast Guard, established a phase-out schedule for operation of single hull tankers, which could necessitate a payment by the United States under the terms of S. 605, without regard to the benefit of the rule.

This bill could have far-reaching consequences as applied to the Federal Aviation Administration (FAA). Following an accident last year, the FAA issued an airworthiness directive that prohibited operation of ATR-42 and ATR-72 aircraft under certain climatic conditions. To the extent this action temporarily reduced the economic usefulness of the aircraft, an argument could be made that the FAA took private property, within the meaning of this bill, even though it was acting in the interest of the flying public.

The Federal Highway Administration (FHWA) issues out-of-service orders to motor carriers directing them to cease using vehicles or drivers that pose an imminent hazard to safety. In 1993 alone, the FHWA and the states working through the Motor Carrier Safety Assistance Program placed over 500,000 commercial motor vehicles out of service at the roadside due to the hazardous conditions of the vehicles. Rigorous enforcement could be undercut by concerns over the potential "taking" that triggers the compensation provisions of S. 605.

Other DOT agencies have similar responsibilities for ensuring public safety. This bill raises the possibility that the Federal Government would be liable for economic losses experienced by all transporters of passengers and property, including transporters of hazardous materials, who have been directed by the Government to cease operating unsafe equipment to protect public safety. The Research and Special Programs Administration issues facility compliance orders that shut down liquid and gas pipelines until problems have been corrected. Restrictions on transportation of hazardous materials could effectively render worthless materials that cannot be safely transported in commerce.

This bill would invite substantial litigation. Any ambiguity in S. 605, if enacted as drafted, would be resolved in the courts, since this bill breaks new ground. We would expect property owners to test aggressively whether they could be compensated for adverse impacts of a myriad of governmental actions.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to providing these views for the consideration of Congress.

Sincerely,

A handwritten signature in cursive script, appearing to read "Federico Peña".

Federico Peña

PRIVATE PROPERTY RIGHTS LEGISLATION

VIEWS OF THE DEPARTMENT OF VETERANS AFFAIRS

AS WRITTEN TO THE SENATE COMMITTEE ON THE JUDICIARY

MAY 10, 1995



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

MAY 10 1995

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

Dear Mr. Chairman:

I wish to provide the views of the Department of Veterans Affairs (VA) on S. 605, the "Omnibus Property Rights Act of 1995". The bill could have major adverse consequences for VA which require that we strongly oppose it as introduced.

Under section 203 of the legislation, the definition of "private property" or "property" includes "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." Case law already exists establishing that recipients of veterans' benefits possess a constitutionally protected property interest in those benefits. See Walters, et al. v. Nat'l Ass'n of Radiation Survivors, et al., 473 U.S. 305, 320 n. 8 (1985); Nat'l Ass'n of Radiation Survivors v. Derwinski, 994 F.2d 583, 588 n. 7 (9th Cir. 1992). Some courts have further found that applicants for veterans' benefits also have a protected property interest. See, e.g., Nat'l Ass'n of Radiation Survivors, 994 F.2d at 588 n. 7. But see, e.g., Gendron v. Saxbe, 389 F. Supp. 1303, 1306 (C.D. Cal) (three-judge panel) (VA disability-compensation claimant had no protected property interest in unproven claim), aff'd sub nom., Gendron v. Levi, 423 U.S. 802 (1975).

Section 205(a) of the bill would permit a "property owner" to challenge in either the United States District Court or the United States Court of Federal Claims "the validity of any agency action that adversely affects the owner's interest in private property." Millions of

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The Honorable Orrin G. Hatch

veterans, their dependents and survivors have such a property interest in continued receipt of VA disability, training and death benefits from VA, and under this bill it would appear that any departmental action to reduce or terminate ongoing awards (or to offset payments for debt-collection purposes) would permit adversely affected individuals to bring suit in a U.S. District Court or the Court of Federal Claims. Moreover, to the extent all unsuccessful applicants for VA benefits would be found to have such a property interest, the litigative burden on the department would be enormously greater.

Less than 7 years ago, after more than a decade of careful deliberation, Congress enacted the Veterans' Judicial Review Act (VJRA) which established a single Article I court with exclusive jurisdiction to hear appeals from adverse VA benefit determinations. The 7-member U.S. Court of Veterans Appeals (CVA) is authorized to review decisions by VA's administrative appellate board, with review on the record using a de novo review standard on questions of law and a clearly erroneous standard regarding agency factual findings. Appeals may be taken from CVA to the U.S. Court of Appeals for the Federal Circuit and from there to the U.S. Supreme Court.

The VJRA offers disappointed VA claimants meaningful judicial review before a court which specializes in these issues, and whose decisions are themselves reviewable by an Article III court. It is explicit in requiring the exhaustion of administrative remedies, permitting court review only on the record considered by the Department and limiting jurisdiction to a single forum. Were VA (and the Department of Justice) required to defend agency actions throughout the 94 U.S. District Courts and the Federal claims court, under uncertain legal standards, not only would its costs greatly increase but the advantages of uniform interpretation and application of law envisioned under the VJRA (and supported by the major veterans organizations) would be largely lost.

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The Honorable Orrin G. Hatch

Advice has been received from the Office of Management and Budget that there is no objection to the submission of this report on S. 605.

Sincerely yours,

A handwritten signature in cursive script that reads "Jesse Brown". The signature is written in dark ink and is positioned above the printed name.

Jesse Brown

JB/jht

PRIVATE PROPERTY RIGHTS LEGISLATION

STATEMENT OF ALICE M. RIVLIN

DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

EXECUTIVE OFFICE OF THE PRESIDENT

BEFORE THE SENATE ENVIRONMENT & PUBLIC WORKS COMMITTEE

JULY 12, 1995

TESTIMONY OF
ALICE M. RIVLIN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

July 12, 1995

Mr. Chairman, Members of the Committee, thank you for the opportunity to discuss the potential costs of takings legislation.

Congress is considering two major takings compensation bills. H.R. 9 would require payment to landowners for restrictions on real property imposed under the Clean Water Act, Endangered Species Act, and water provisions under the reclamation laws and other public land laws. S. 605 would require payment to owners of real or personal property for reductions in the value of their property caused by virtually any governmental action.

Although OMB has not completed the complex task of estimating the Government-wide cost of S. 605, we have developed a preliminary estimate for the compensation title of H.R. 9 -- the more limited House bill. OMB estimates that H.R. 9 would impose about \$28 billion in new costs over 7 years, making it one of the largest mandatory programs created in recent times. Should S. 605 be enacted with its much broader provisions and scope, it would potentially cost several times the cost of H.R. 9.

To be sure, we believe in property rights and the payment of just compensation. But these bills go far beyond our longstanding constitutional tradition. They go beyond property rights and seek to pay people to obey the law. That is not a proper role for the federal (or state or local) government. We should not pay airlines for the time their planes are grounded to comply with airworthiness directives. We should not pay drug manufacturers when their products are recalled from the market. We should not pay polluters to install emissions controls. However, we can and should make it easier for people to obey the law and have their grievances addressed and answered more quickly. This Administration is working to do just that.

As I wrote in a recent letter to the Senate, if S. 605 were presented to the President in its current form, I would join the heads of nine other departments and agencies in recommending that he veto it.

What is a "Taking?"

Generally speaking, property can be "taken" in two ways. First, the government can physically "invade" property; this type of taking occurs, for example, when the government constructs a highway that runs through a person's land. Second, property can sometimes be "taken" as a result of government regulation that restricts how the property may be used.

This second type of taking -- a regulatory taking -- does not occur simply because government regulation has diminished the value of property; as a unanimous Supreme Court stated two years ago, "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.) Instead, the Supreme Court has applied a case-by-case analysis to determine whether a regulatory taking has occurred. It considers, among other factors, the activity sought to be regulated, the public purpose of the regulation, the reasonable expectations of the property owner, and the remaining economic uses of the property after the government has taken action.

Administration Concerns

We have three generic, interrelated concerns with the compensation bills before Congress:

1. The legislation would create a radical new regime of property entitlements that would encourage claims that have no basis in actual losses to property owners.
2. These claims could prove hugely expensive; in fact, the bills would create one of the most expensive new spending programs in recent history, costing taxpayers tens of billions of dollars.
3. Because these claims could be so expensive, the government no longer will be able to afford to take needed action to protect the public.

In addition, we have many specific concerns with this legislation. Supreme Court decisions have balanced the loss in a parcel against the value of the rest of the parcel. But under these bills, even if most of a property has risen in value due to a Federal action, any small portion that has fallen in value due to this action could be the subject of a compensation claim.

Furthermore, these bills define "property" and other terms so broadly and vaguely, they encourage landowners to "game the

system" -- potentially resulting in an enormous number of claims. Under S. 605, the same piece of property could be the subject of multiple compensation claims under essentially the same law. The bill defines "owner" as a "possessor in property rights at the time the taking occurs, including when [a] the statute, regulation, rule, order, guideline, policy, or action is passed or promulgated; or [b] the permit, license, authorization, or governmental permission is denied or suspended." Thus, several different people could file claims for compensation: person "A", who owns the property when the law is passed, sells to person "B" who is a possessor at the time the rule is promulgated, who sells to person "C" who applies for a permit.

Because the bills do not require property owners who assert claims to document actual or clearly predictable losses, we would anticipate many unsubstantiated claims. S. 605 says compensation shall include both the fair market value of the property and "business losses." Property owners could stake claims for developments that may never occur. For example, not all farmers plan to build shopping centers on their wetlands. Nevertheless, this bill would appear to allow all wetland owners to claim they want to build a shopping center and argue the claim should cover any business losses because they cannot do so.

Cost Estimates

The compensation title of H.R. 9 would create unprecedented, statutory private property rights and entitlements beyond those guaranteed by the Constitution or in current laws. Because the legislation would not require owners to document actual or clearly predictable losses to assert claims, and would allow claims to be filed for alleged impacts on an "affected portion" of a property, taxpayer costs could be enormous.

How did we derive our cost estimates? OMB asked the agencies affected by H.R. 9 to develop estimates of claims exposure -- the funds needed to satisfy all claims likely to be filed under the legislation. To be sure, due to administrative and judicial determinations, actual expenditures would be less than total claims exposure. On the other hand, the OMB estimates understate total taxpayer costs because they do not include agency administrative costs to process the claims; higher agency costs of managing the property that the Federal Government acquires under the mandated purchase program; interest on any successful claims; and costs to the judiciary when litigation was pursued.

We assumed a time lag between passage of the bill and payments, due to the need for agency action to trigger a claim, the agency's ability to process the claim, agency funds available to pay the claim, and the percentage of claims moving to the

courts -- where a less timely resolution is anticipated. We assumed Congress would not appropriate more funds for claim processing in 1996, but would appropriate funds (as an appropriated entitlement) in 1997 and after for payments and claims processing.

We assumed that from fiscal 1997-2002, all claims would start to be processed in the year they are submitted, and no backlogs will develop. We assumed that in 1996, half the claims would be processed, creating a backlog for the rest. Agencies would settle about 5 percent of them in 1997.

Generally, we assumed a 24-month processing time between claim submittal and payment. OMB and the agencies did not assume that more citizens would seek to get benefits by being regulated. Agencies did assume, however, that citizens now being regulated would become more combative, and less inclined to accept permit conditions.

Here are a few examples of the types of costs which would be incurred under both bills:

- Under the Endangered Species Act, claims could be filed when the Interior Department "lists species" and "critical habitat are designated," or when incidental "take permits" are denied or conditioned upon undertaking a habitat conservation plan.
- Under the Wetlands Program, a landowner needs a permit to discharge dredged or fill material into waters of the U.S., including wetlands. Compensation claims could potentially result when conditions are imposed on permits, when permits are denied, from enforcement actions implementing current permits, and from jurisdictional determinations that a particular parcel is a wetland.
- Under the Swampbuster Program, to participate in federal farm programs, farmers must comply with the requirements of Swampbuster, which prevent them from converting wetlands into cropland. The Swampbuster restriction has been part of farm programs since 1985 and comes into play only as a result of the farmer's choice to participate in the federal farm programs. Under these bills, some owners of wetlands that could be converted to farmland will submit claims for the loss of program benefits if they converted their wetlands.
- Under the Reclamation Acts, irrigators and municipal or industrial water users may claim that an Interior Department decision to release large amounts of water for flood control purposes adversely affects the user's ability to farm, supply customers, or meet water quality standards.

While we don't have estimates for S.605, its broad scope would allow claims for a variety of Federal activities, including:

- recalls or seizures of adulterated or misbranded foods or drugs;
- bank regulatory actions, including imposition of capital requirements; and
- issuance of airworthiness directives that prohibit certain aircraft from flight under certain climatic conditions.

PAYGO Implications

These bills have PAYGO implications because they mandate compensation and do not make the Federal obligation-to-pay clearly subject to Congress appropriating the funds in advance for this purpose.

Since the costs would fall under PAYGO provisions of the Budget Enforcement Act, they could prompt a sequester of other mandatory programs, forcing automatic, across-the-board cuts in medicare, veterans' readjustment benefits, various programs that provide grants to States, child support administration, farm income and price supports, agricultural export promotion, student loans, foster care and adoption assistance, and vocational rehabilitation.

A Better Way

Rather than pay people to obey the law, the Administration has sought to improve the government's social contract with its citizens. To that end, we have proposed changes in many Federal programs to make them more flexible, user-friendly, and more sensitive to their impacts on citizens. These include our proposed changes in the Endangered Species Act and the section 404 wetland program.

Joseph Sax, Counselor to the Secretary of Interior and Deputy Assistant Secretary for Policy who testified before you on June 27, detailed the changes that Secretary Babbitt has proposed in implementing the ESA. Let me stress that our intent is to have fewer citizens need to approach the Federal government for ESA permits, and to have more certainty as to what the Federal program entails.

Similarly, we have launched changes to the wetlands program. I understand that the Army Corps of Engineers representative who is here today will discuss some of those changes, and that a more

in-depth hearing is also scheduled for next week.

Conclusion

This legislation would create a massive new Federal spending program which would burden taxpayers, encourage an endless number of unwarranted claims against the Treasury, and seriously impair the ability of Federal agencies to serve and protect the public as Congress intended.

PRIVATE PROPERTY RIGHTS LEGISLATION

STATEMENT OF JOHN R. SCHMIDT

ASSOCIATE ATTORNEY GENERAL

U.S. DEPARTMENT OF JUSTICE

BEFORE THE SENATE ENVIRONMENT & PUBLIC WORKS COMMITTEE

JUNE 27, 1995



Department of Justice

STATEMENT

OF

JOHN R. SCHMIDT

ASSOCIATE ATTORNEY GENERAL

CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

CONCERNING

TAKINGS LEGISLATION

PRESENTED ON

JUNE 27, 1995

I. INTRODUCTION

Mr. Chairman and Members of the Committee: Thank you for the opportunity to provide the Administration's views regarding so-called "takings" bills, particularly those bills that would replace the constitutional standard for compensation with what is, in our view, a radical and dangerous statutory compensation mandate. Although my testimony today will address compensation bills generally, to illustrate specific points I will occasionally refer to two pending compensation bills that have been at the focal point of the debate: (1) the "Private Property Protection Act of 1995," passed by the House of Representatives as H.R. 925, re-passed as part of a comprehensive regulatory reform bill, H.R. 9, and then referred to this Committee for consideration; and (2) S. 605, the "Omnibus Property Rights Act of 1995," which is being considered by the Senate Judiciary Committee.

It is sometimes worthwhile to state the obvious just to ensure that no one is laboring under any misconceptions. This Administration strongly supports the protection of private property rights. The right to own, use, and enjoy private property is at the very core of our nation's constitutional heritage and our continued economic strength. These rights must be protected from interference by both private individuals and governments. That is why the Constitution ensures that if the government takes someone's property, the government will pay "just compensation" for it. That is what the Constitution says. That is what the President demands of his Administration.

To the extent government regulations impose unreasonable restrictions or unnecessary burdens on the use of private property, this Administration is committed to reforming those regulations to make them more fair and flexible. We have already implemented a number of significant regulatory reforms to alleviate burdens on property owners, and we are developing additional ways to improve federal programs to provide greater benefits to the public while reducing regulatory burdens, particularly for small landowners. I will briefly describe some of these reforms later in this testimony. Other Administration witnesses will discuss these reforms in greater detail in subsequent testimony before this Committee.

Mr. Chairman, no one could disagree with the concerns that underlie S. 605, H.R. 925, and other compensation bills. All citizens should be protected from unreasonable regulatory restrictions on their property. But these bills would do little or nothing to protect property owners or to ensure a fairer and more effective regulatory system. Rather, we are convinced that compensation bills are a direct threat to the vast majority of American citizens.

The truth is that these bills are based on a radical premise that has never been a part of our law or tradition: that a private property owner has the absolute right to the greatest possible profit from that property, regardless of the consequences of the proposed use on other individuals or the public generally. As a result, passage of these arbitrary and

radical compensation schemes into law would force all of us to decide between two equally unacceptable alternatives. The first option would be to cut back on the protection of human health, public safety, the environment, civil rights, worker safety, and other values that give us the high quality of life Americans have come to expect. We would be forced to consider this option because the cost of these protections and programs after passage of this radical compensation legislation would be vastly increased. Ironically, if we choose this path, the value of the very property this legislation seeks to protect would erode as vital protections are diminished.

The other option would be to do what these proposals require: pay employers not to discriminate, pay corporations to ensure the safety of their workers, pay manufacturers not to dump their waste into the streams that run through our neighborhoods, pay restaurants and other public facilities to comply with the civil rights laws, and so on. In other words, American citizens would be forced to pay property owners to follow the law. In the process, we would virtually eliminate any hope of ever balancing the budget.

No matter which of these two avenues we pursue, hardworking American taxpayers will be the losers. Either they will no longer be able to enjoy the clean skies, fresh water, and safe workplaces they have come to expect, or they will be forced to watch as their tax dollars are paid out to corporations and other large property owners under programs that mandate compensation.

The Administration will not and cannot support legislation that will hurt homeowners or cost American taxpayers billions of dollars. The Administration, therefore, strongly opposes S. 605, H.R. 925, and similar bills. The Attorney General would strongly recommend that the President veto such legislation.

Although compensation bills vary in their particulars, I would like to make four general points today relevant to all these bills: (1) they are a radical departure from our constitutional traditions; (2) they are budget-busters that would result in untenable costs to American taxpayers; (3) they would create huge new bureaucracies and a litigation explosion; and (4) they would undermine our ability to provide vital protections to the American people.

II. A RADICAL DEPARTURE FROM THE CONSTITUTION

To understand the radical nature of these bills, it is necessary to understand the traditional constitutional protections afforded to property owners throughout our nation's history.

As you know, the Fifth Amendment to the Constitution of the United States provides that "private property [shall not] be taken for public use, without just compensation." That short phrase has provided the compensation standards for takings cases since the founding of our country. Within its contours lies a balance between the authority of the government to act in the

public interest and its obligation to provide compensation when those actions place an unfair burden on an individual's property. Before we consider proposals to alter and expand those standards, it is worth discussing what the Constitution provides and why we believe it has served the American people so well over the last 200 years.

The genius of the Constitution's Just Compensation Clause is its flexibility. In deciding whether a regulation effects a compensable taking, our constitutional traditions require the government, and if necessary the courts, to consider the nature of the property interest at issue; the regulation's economic impact; its nature and purpose, including the public interest protected by the regulation; the property owner's legitimate expectations; and any other relevant factors. The ultimate standards for compensation under the Constitution are fairness and justice. Thus, we have never recognized an absolute property right to maximize profits at the expense of the rights of others. For example, reasonable zoning by local governments has long been accepted as a legitimate means to promote safe and decent communities without requiring the payment of compensation to those whose property values might be adversely affected. Indeed, we recognize that the value of property in the community as a whole is thereby enhanced. On the other hand, when government regulation "goes too far" (in the words of Justice Holmes) and imposes a burden so unfair on an individual property owner that it constitutes a taking, just compensation must be paid.

It goes without saying that the economic impact of a regulation is an important consideration in deciding whether it would be fair and just to compensate a property owner. But in the very case that established the concept of a regulatory taking -- Pennsylvania Coal Co. v. Mahon (1922) -- 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."

Thus, from the earliest days of our Republic, we have recognized that the government has a legitimate, and indeed a critical, role to play in protecting all of us from the improper exploitation of property. In America, we have an opportunity to use our property freely -- within the bounds we set through our communities and elected representatives. We have also recognized that our rights as citizens entail a corresponding responsibility to refrain from exercising those rights in ways that harm others. As noted by Justice Scalia in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992), 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." Much the same could be said of protective measures enacted by the federal government in the legitimate exercise of its constitutional powers.

This constitutional tradition has been carefully developed by the Founders and the courts through hundreds of cases over the course of our nation's history. As I mentioned, its genius is its flexibility, for it allows the courts to address the many different situations in which regulations might affect property. It allows for the fair and just balancing of the property owner's reasonable expectations and property rights with the public benefits of protective laws, including the benefit to the property owner.

The pending compensation bills disregard our constitutional tradition and our civic responsibilities. They replace the constitutional standards of fairness and justice with a rigid, "one-size-fits-all" approach that focuses on the extent to which regulations affect property value, without adequate regard to fairness, to the harm that a proposed land use would cause others, to the landowner's legitimate expectations, or to the public interest. H.R. 925 requires compensation where covered federal action reduces the value of any portion of property by 20 percent. S. 605 uses a 33 percent loss-in-value threshold.

It is important to recognize just how radical these bills are. In 1993, every Member of the U.S. Supreme Court joined an opinion stating that diminution in value by itself is insufficient to demonstrate a taking. See Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 113 S. Ct. 2264, 2291 (1993). They not only acknowledged the correctness of this principle, but

they characterized it as "long established" in the case law. It is a principle developed and accepted by jurists and scholars throughout our nation's history. This constitutional principle does not result from insensitivity to property rights by the Founders or the courts, but instead from a recognition that other factors -- such as the landowner's legitimate expectations, the landowner's benefit from government action, and the effect of the proposed land use on neighboring landowners and the public -- must be considered in deciding whether compensation would be fair and just. Because compensation bills preclude consideration of these factors, their single-factor test would necessarily result in myriad unjustified windfalls at the taxpayers' expense.

The compensation bills are further flawed because the loss-in-value trigger focuses solely on the affected portion of the property. The courts have made clear that under the Constitution, fairness and justice require an examination of the regulation's impact on the parcel as a whole. E.g., Concrete Pipe, 113 S. Ct. at 2290; Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978). By establishing the affected portion of the property as the touchstone, these bills ignore several crucial factors essential to determining the overall fairness of the regulation, such as whether the regulation returns an overriding benefit to other portions of the same parcel.

Further, because these bills focus on the affected portion of the property, they are easy targets for manipulation and

abuse. A landowner could segment the parcel or otherwise manipulate the loss-in-value calculation in a manner that demonstrates a very high (if not total) loss in value in almost every case. Suppose the civil rights laws require a restaurant to make its restrooms accessible to wheelchair users. Under bills like S. 605, the restaurant owner would not need to show the requisite loss in value for the entire restaurant, but only for the affected portion of the restaurant. In other words, the owner could argue that the space needed for this accommodation is no longer available for tables, and that because this small affected portion has been reduced in value, the owner could seek compensation. Proponents of these bills have acknowledged that the "affected portion" provisions would operate in this fashion, conceding, for example, that a restriction applying to only one acre of a 100-acre parcel could be compensable under these bills. See 141 Cong. Rec. H2509, col. 2 (March 2, 1995) (Rep. Canady).

Other provisions in these bills similarly go beyond constitutional standards for compensation. Although some provisions appear to be loosely based on certain Supreme Court cases interpreting the Just Compensation Clause, the bills distort these cases by wrenching those standards from their appropriate setting and by disregarding important limitations.

For example, section 204(a)(2)(B) in S. 605 would require compensation where a condition of a permit or other agency action lacks "a rough proportionality between the stated need for the required dedication and the impact of the proposed use of the

property." This standard appears to be derived from Dolan v. City of Tigard (U.S. 1994) decided last Term. That case focuses, however, on situations where the government requires a permit applicant to make a dedication of property that eviscerates the applicant's right to exclude others. The Dolan Court expressly distinguished such dedication requirements, which involve the loss of fundamental property rights, from regulation that merely restricts the ability to use property in a particular way. The bill's revision of the Dolan test could inappropriately extend the "rough proportionality" standard far beyond public dedications of real property and apply it to any type of condition on agency action that might affect any type of property.

Even if a bill were to articulate accurately the holdings of Supreme Court cases under the Just Compensation Clause, any effort to freeze such holdings into law by statute would contravene the critical teaching of constitutional takings jurisprudence: that takings analysis best proceeds on a case-by-case basis through a balancing of all factors relevant to the ultimate constitutional standards of fairness and justice.

Surprisingly, proponents of pending compensation bills sometimes suggest that opposition to these bills is tantamount to opposition to the Just Compensation Clause of the Constitution. It should be clear by now, however, that these bills have nothing to do with the Just Compensation Clause. The Constitution nowhere provides 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 provide that reasonable efforts to protect the American people from harmful property use constitute a compensable taking.

None of the Founders ever proposed the radical and destructive "loss-in-value" compensation theory embodied in these bills, and no court has ever read the Constitution in this way. Nor has the Executive Branch. Nor have any of the previous 103 Congresses. This concept is simply nowhere to be found in our constitutional or political traditions. Yet the pending compensation bills would establish this extreme principle as the law of the land. It is simply false to state that these bills would vindicate constitutional principles, or that opposition to them constitutes opposition to the Constitution. To the contrary, this effort to supplant our constitutional tradition with extreme statutory compensation requirements reflects an unfortunate distrust of the genius of our Founders and the wisdom of the Constitution.

III. AN UNTENABLE FISCAL IMPACT

Because these bills are so broad and inflexible, and because they often mandate compensation where none is warranted, the potential budgetary impacts are extremely high, and for some bills virtually unlimited. Even if these bills forced a reduction in new regulatory protections, they would still have a

huge fiscal impact by requiring compensation for statutorily compelled regulation and other essential protections.

As you may know, the Office of Management and Budget (OMB) has developed a preliminary estimate of the cost of the compensation title of H.R. 9. OMB estimates that direct spending for the compensation title of H.R. 9 would be \$28 billion through the year 2002. This direct spending estimate does not include the substantial discretionary costs of administering a compensation claims program, or the costs of managing the patchwork quilt of property parcels that the Federal government would be forced to acquire.

The compensation scheme in S. 605 is far broader in scope, and OMB therefore expects the cost of S. 605 to be several times the \$28 billion cost of the House-passed legislation. One proponent of S. 605 testified, with respect to the Americans With Disabilities Act alone, that potential liability would make administration of the Act prohibitively expensive. Because S. 605 goes beyond land-use restrictions and applies to all kinds of agency actions, it is likely to have many unintended consequences and untoward fiscal impacts that we cannot even begin to anticipate.

Some federal bills, such as S. 605, would also require the federal government to pay compensation for many State and local actions even where State and local officials would have the discretion to pursue another course of conduct. Imposing federal liability for actions by State and local officials would remove

the financial incentive to ensure that State and local action minimizes impacts on private property and would thereby further expand potential federal expenditures. To avoid this liability, federal agencies would likely feel compelled to monitor State and local actions under federal programs more closely, or to withdraw delegated authority altogether, clearly a step backward in the effort to devolve more authority to State and local governments.

Although the pending federal bills would not impose a direct compensation requirement on State and local governments themselves, certain cost information is available from State and local governments that is illuminating by way of comparison. RKG Associates recently conducted a case study of State compensation bills in New Hampshire. Using conservative assumptions, the researchers concluded that these bills would impose "unmanageable" costs, costs that for one town would exceed its annual budget. One could reasonably expect this experience to be replicated in affected federal programs if a comparable federal compensation bill were enacted.

Proponents of these bills sometimes argue that these costs are already being absorbed by the individual landowners. However, the potential costs of these bills are so high because the bills would require compensation in many cases where compensation would be unfair, unjust, and economically inefficient -- for example, where the landowner had no reasonable expectation to use the land in the manner proposed, where land-use regulation benefits the property as a whole, or where other

uses would yield a reasonable return on investment without harming neighboring landowners or the public. In short, the bills would result in a tremendous and unwarranted transfer of public wealth to a small number of landowners.

These bills also would exact a tremendous economic toll by preventing the implementation of needed protections. For example, fish and shellfish populations that depend on wetlands support commercial fish harvests worth billions of dollars annually. If these radical compensation schemes render the protection of wetlands prohibitively expensive, the commercial fishing industry would suffer devastating financial losses. Note too that some of these bills might require compensation to the fishery and related economic interests whose profits are reduced by the failure to protect wetland habitats. There is seemingly no end to the chain of compensation claims created by these bills.

Some have suggested that the costs of a compensation bill might be limited by raising the loss-in-value compensation threshold. But because these bills apply the loss-in-value threshold to the affected portion of the property, it is unlikely that a higher threshold would result in a meaningful limitation on the scope and cost of the bills. A landowner could often segment the parcel or otherwise manipulate the loss-in-value calculation in a manner that demonstrates a very high (and thus compensable) loss in value.

Even if a compensation statute applied the loss-in-value threshold to the entire parcel, landowners would still be able to engage in strategic behavior to generate compensation claims, such as selling off unaffected portions to family members in order to demonstrate a high loss in the value of the remaining portion. These are far from hypothetical concerns, given the relative ease with which owners could identify and segregate ownership of those portions of their property subject to important protections. Although a court could consider the fairness of such activity in addressing a claim for compensation under the Constitution, the pending compensation bills might well preclude a court from taking these ploys into account.

Another reason why the costs of these bills would be so high is that they would remove any incentive on the part of developers and other property owners to devise plans that accommodate public values, or to reach a compromise on the appropriate balance between property use and the public good. Rather, these bills would encourage property owners to structure their land use proposals in a way that maximizes compensation under the bills, which would inevitably exacerbate controversies while driving up compensation costs.

Some proponents of these bills argue that the costs will depend on how regulators respond. But let us suppose that every regulator responds by doing everything possible to reduce impact on private property. The compensation costs for carrying out existing statutory mandates and providing needed protections

would still be overwhelming. As we continue to explore ways to balance the federal budget, these bills are heading in exactly the wrong direction.

IV. HUGE NEW BUREAUCRACIES AND COUNTLESS LAWSUITS

Compensation bills would also require the creation of huge and costly bureaucracies to address compensation requests. Some bills would greatly expand the grounds for filing judicial claims for compensation where regulation affects private property. Others would establish extensive administrative compensation schemes with binding arbitration at the option of the property owner. Still others, like S. 605, would do both.

These bills would pose very sophisticated and complex legal questions that would create a business boom for lawyers and appraisers. Agencies would need to hire more employees to process compensation claims, more lawyers to handle claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property value, and more arbiters to resolve claims. The sheer volume of entitlement requests under these schemes would be overwhelming. The result would be far more government, not less.

We would be left with the worst of both worlds: a compensation test that ignores critical factors, but that contains terms and provisions that are vague and ambiguous in the extreme. Far from creating an easily administered "bright-line"

for claimants, these bills would be a "lawyers' full employment act" that would ensure much more litigation, bureaucracy, and controversy.

V. A THREAT TO VITAL PROTECTIONS

Passage of a compensation bill would unquestionably undermine the programs and protections covered by the bill. This legislation thus poses a serious threat to human health, public safety, civil rights, worker safety, the environment, and other protections that allow Americans to enjoy the high standard of living we have come to expect and demand. If a compensation bill were to become law, these vital protections -- which Congress itself has established -- would simply become too costly to pursue. Compensation bills that apply to specific environmental protections for wetlands, endangered species, and the like are in their practical effect a frontal assault on these basic protections. Compensation bills that apply to federal programs across the board are, in our view, an attack on our ability to provide basic protections for the American people.

Although these bills purport to protect property rights, they would undermine the protection of the vast majority of property owners: middle-class American homeowners. For most Americans, property ownership means home ownership. "Property rights" means the peaceful enjoyment of their own backyards, knowing that their land, air, and drinking water are safe and clean. The value of a home depends in large measure on the

health of the surrounding community, which in turn depends directly on laws that protect our land, air, drinking water, and other benefits essential to our quality of life.

In fact, in a survey by a financial magazine, clean water and air ranked second and third in importance out of 43 factors people rely on in choosing a place to live -- ahead of schools, low taxes, and health care. By undercutting environmental and other protections, these automatic compensation bills would threaten this basic right and the desires of middle-class homeowners. In the process, the value of the most important property held by the majority of middle-income Americans -- their homes -- would inevitably erode.

Much of the debate about these issues has been fueled by what appear to be horror stories of good, hardworking Americans finding themselves in some sort of regulatory nightmare where the government is forbidding them from using their property in the way that they want. It is important to look closely at these stories, for they often are not as they first appear. They sometimes contain a kernel of truth, but you should realize that you're not always getting all of the facts.

I am not suggesting that there are no genuine instances of overregulation. We all know of cases of regulatory insensitivity and abuse that are quite simply indefensible. As I will discuss later, this Administration has made strides in protecting middle-class landowners and others from unreasonable and unfair burdens,

and we are committed to continuing the effort to reinvent government until the job is done.

Before I address those efforts, however, I want to draw the attention of the distinguished Members to another set of horror stories: those that may result if these compensation bills become law. I am confident that these are not the consequences any of us want:

- Suppose a coal company in West Virginia removed so much coal from an underground mine that huge cracks opened on the surface of the land, rupturing gas lines, collapsing a stretch of highway, and destroying homes. If the State refused to take action, and the Interior Department required the mining company to reduce the amount of coal it was mining to protect property and public safety, the mining company might well be entitled to compensation for business losses under a compensation bill.
- Suppose flight patterns at a military airfield require flights over urban areas. Existing case law under the Constitution might require compensation for overflights only where there are regular and frequent overflights at altitudes of 500 feet or less above ground level. Flight patterns at many military airfields, especially those near cities, have been designed with the well-established 500-foot standard in mind to ensure that operations occur in freely navigable airspace. Compensation bills would supplant established standards and subject the Defense

Department to compensation claims irrespective of the altitude of the overflight.

- Suppose the federal government restricts the importation of assault rifles. If an import permittee could show that the ban reduced the value of his overseas inventory, he could seek compensation under these bills.
- Suppose a group of landowners challenge the implementation of the National Flood Insurance Program, which includes eligibility criteria that restrict land use to decrease the risk of flooding. The landowners could argue that such restrictions diminish the value of their land and claim compensation.
- Suppose the Army Corps of Engineers denies a developer a fill permit under section 404 of the Clean Water Act because such development by the applicant and other nearby landowners would increase the risk of flooding of neighboring homes. Unless the Corps could bear the difficult burden of showing that the permit denial comes within the nuisance exception or some other exception contemplated by these bills, compensation could be required. On the other hand, if the permit were granted, neighboring landowners might claim compensation by arguing that the increased flood risk devalued their land.
- Suppose the Coast Guard establishes a phase-out schedule of single hull tankers; or suppose the Federal Aviation Administration orders airlines to suspend use of certain

commercial aircraft that raise serious safety concerns; or suppose the Federal Highway Administration issues out-of-service orders to motor carriers directing them to cease using vehicles that pose an imminent hazard to safety.

These bills raise the possibility that the taxpayers would have to compensate affected corporations for lost profits or other economic losses where they have been directed to cease operating unsafe equipment to protect the public.

These are just a few examples of the problems with the "one-size-fits-all" approach of these compensation proposals. It is worth noting that most of these examples reflect actual situations in which property owners challenged government conduct as constituting a compensable taking under the Constitution. In each case, the court, often after noting the public benefit derived from the protection at issue, concluded that there had been no taking of property. If a compensation bill becomes law, a different outcome in those cases may well be the result.

VI. THE INADEQUACY OF THE NUISANCE EXCEPTION AND OTHER EXCEPTIONS TO THE COMPENSATION REQUIREMENT

Both S. 605 and H.R. 925 purport to address health and safety concerns by providing an exception to the compensation requirement where the property use at issue would constitute a nuisance under applicable State law. It is entirely inaccurate to suggest, however, that this exception would allow for adequate

protection of human health, public safety, the environment, and other vital protections important to the American people.

It goes without saying that where State law sufficiently addresses an issue, Congress has no reason to address the issue through federal legislation. Congress generally provides for federal protection of human health, public safety, the environment, and other important interests only where State law is inadequate to the task. State nuisance law was never intended, and has never served, as comprehensive protection from human health risks and other threats to our welfare.

The legislative histories of the major environmental statutes demonstrate the inability of State nuisance law to provide comprehensive protection. For example, the legislative history of the Clean Air Act contains a report by the Secretary of Health, Education and Welfare regarding the problems of air pollution from stationary sources. The report discusses a rendering plant in Bishop, Maryland, and describes how emissions from the plant endangered the health and welfare of the residents of Shelbyville and adjacent areas. Adverse health effects included "nausea, vomiting, lack of appetite; gasping, labored breathing, irritation of nose and throat, aggravation of respiratory ailments; emotional or nervous upsets ranging from anger to mental depression; and headaches, general discomfort, or interference with the ability to work or to enjoy homes and property." Other adverse effects included "discouraged

industrial and business development, depressed property values, diminished real estate sales, [and] decreased business volume * * *." The report concluded that State nuisance law was inadequate to address these severe health and welfare dangers:

Bishop Processing Company's dry rendering plant has had problems with malodors since it became operational in 1955. Officials from Delaware and Maryland recommended corrections but all efforts to obtain abatement by local and State officials through public nuisance laws have been fruitless.

S. Doc. No. 63, 91st Cong., 2d Sess. 1679 (1970).

There are several factors that might, in given circumstances, render nuisance law inadequate to provide comprehensive protection from widespread pollution, including the difficulty of proving a causal link between the harm and the unreasonable conduct of the defendant, and the difficulty in establishing a nuisance where serious cumulative harm is caused by pollutants from several sources, none of which by itself would cause significant damage. Moreover, the landowner's conduct might have to be substantial and continuing in order to come within the nuisance exception, which would render the exception inapplicable to single or intermittent discharges of toxic pollutants. Nor would the bills' nuisance exception cover many protections designed to address long-term health and safety risks.

Due to the limitations inherent in State nuisance law, property owners and others have failed to obtain relief in nuisance actions for a variety of harms and injuries, including

flooding caused by filling of adjacent property, Johnson v. Whitten, 384 A.2d 698, 701-702 (Me. 1978), groundwater contamination, Cereghino v. Boeing Co., 826 F. Supp. 1243, 1247 (D. Or. 1993), hazardous waste contamination of property, American Glue & Resin, Inc. v. Air Products & Chemicals, Inc., 835 F. Supp. 36, 48-49 (D. Mass. 1993), and contamination of a creek by a leaking landfill, O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 657-58 (E.D. Penn. 1981). Although some of these examples might constitute a nuisance in other jurisdictions or in different factual settings, these cases amply demonstrate that State nuisance law does not provide comprehensive protection to all Americans from threats to human health, public safety, the environment, our homes, and our property. A nuisance exception to a debilitating compensation requirement would undermine our commitment to nationwide minimum standards of protection.

The nuisance exception also fails to recognize that there are other important public interests unrelated to health and safety and not addressed by State nuisance law, such as national defense, foreign relations, civil rights protection, worker safety rules, airline safety, food and drug safety, and many other vital protections. By requiring compensation for many protections that Congress has deemed necessary to advance the public interest, except where such protections fall within State nuisance law, many compensation bills would undermine Congress's authority to decide what conduct or activity needs to be regulated to protect the public.

H.R. 925 contains an additional public safety exception to the compensation requirement where agency action has "the primary purpose" of preventing an "identifiable" hazard to public health or safety or damage to "specific property." These provisions are extremely vague. It is not at all clear whether they would allow for adequate protection of the public against cumulative threats or long-term health and safety risks, and they would appear to require the American people to bear the risk of scientific uncertainty. This provision would not only spawn countless lawsuits over the meaning of its amorphous terms, but also preclude basic protections for the American people where an agency is unable to demonstrate that its action falls within the provision's narrow scope. This provision points up the danger of replacing the proven, time-honored constitutional standards for compensation -- which allow for full consideration of all relevant factors on a case-by-case basis -- with an inflexible statutory formula that holds vital protections hostage to an ambiguous and prohibitively expensive compensation requirement.

VII. OTHER CONCERNS

The overall breadth of the compensation bills is staggering. In S. 605, the definitions of "agency action," "property," "taking," and other key terms are so open-ended that they impose no meaningful limitation on the reach of the bill. For example, "agency action" is not limited to regulations, permit denials, and the like, but seems defined in a circular fashion to include

everything an agency does that "takes" property as that term is used in the bill. The term "taking of private property" is similarly defined in a circular fashion to include anything that requires compensation under the bill. These open-ended definitions are combined with the exceedingly broad compensation standards discussed above.

Think of the consequences of these bills for just the federal permit programs. A landowner would be able to claim compensation whenever an application for a federal permit is denied. For example, a landowner could apply for a federal permit to build a waste incinerator. If that permit is denied for whatever reason and the denial decreases the value of the property, the government could be obligated to pay the permit applicant. It is not much of a stretch to conclude that applying for federal permits may become a favored form of low-risk land speculation. The more likely a permit is to be denied, the more attractive it may be under these schemes.

S. 605's confusing terms and conditions make it difficult to predict how the courts would apply it, but we can rest assured that plaintiffs' lawyers will seek the broadest possible application: compensation where military training temporarily disrupts neighboring property owners; compensation for a bank where federal regulators determine that the bank is no longer solvent and appoints a receiver; compensation for corporations based on changes designed to stabilize and protect pension plans; compensation for agricultural interests that must comply with

restrictions which are imposed to control the spread of animal and plant pests and diseases; compensation based on restrictions on the sale of explosives; 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 crops; and so forth.

Although more limited than S. 605, H.R. 925 is also broadly worded and would likely have many unintended consequences. In addition to countless claims arising out of protections for wetlands and endangered species, potential claims will likely result from annual water allocation decisions, water contract renewals, water contract enforcement actions, denial of change-of-use or water transfer requests, and flood control activities. For example, claims could arise where the Forest Service places restrictions on the renewal of special-use authorizations for water diversions to enhance stream inflows to meet the requirements of Forest Plans. Claims might also be asserted based on decisions affecting rights of way and easements across federal land that affect water delivery. The examples are virtually endless.

VIII. OPPOSITION TO COMPENSATION BILLS

It is because of these far-reaching consequences that the Administration is in good company in opposing these bills. The National Conference of State Legislatures, the Western State Land Commissioners Association, and the National League of Cities have

opposed compensation bills of this kind. Religious groups, consumer groups, civil rights groups, labor groups, hunting and fishing organizations, local planning groups, environmental organizations, and others are on record as opposing compensation legislation. More than 30 State Attorneys General have written the Congress to oppose takings legislation that goes beyond what the Constitution requires.

In a referendum vote last November, the citizens of Arizona voted down by a 60 to 40 margin a process-oriented takings bill subject to many of the same criticisms as the compensation bills before the Congress. States are concerned that compensation bills would cost taxpayers dearly and eviscerate local zoning ordinances, and that family neighborhoods would be invaded by pornography shops, smoke-stack industries, feedlots, and other commercial enterprises. The Administration shares these States' concerns that compensation schemes would bust the budget, create unjust windfalls, and curtail vital protections. And, as I noted earlier, certain federal compensation bills would apply directly to various State and local actions.

Moreover, any federal compensation bill would be served up as a model for compensation requirements at other levels of government. Many of the groups that are lobbying for a federal compensation bill are pushing for comparable State and local legislation as well. If enacted at the local level, compensation bills could render local zoning and everyday local land-use planning obsolete. Citizens would lose the ability to control

the growth and development of their neighborhoods and communities.

IX. A BETTER APPROACH TO PROTECTING PROPERTY RIGHTS

The broad-based compensation packages currently pending in Congress are not the answer to the horror stories that I know all of you have heard and may well hear from other panelists today. Rather, we believe the answer lies in crafting specific solutions to specific problems.

As we consider the potential effects of compensation bills, it is important to keep the takings issue in perspective. Certain advocates of compensation bills suggest that the government routinely disregards constitutional protections for private property. This is simply incorrect. To cite but one example, of the 48,000 landowners who applied for a permit under section 404 of the Clean Water Act in 1994, only 358, or 0.7 percent, were denied a permit. Another 50,000 land-use activities are authorized annually through general permits under the 404 program. And we now have only about 40 takings claims involving the 404 permit program.

As part of our efforts to reinvent government, the Administration is continuing to look for ways to reform specific federal programs to reduce burdens on small landowners and others. Other Administration witnesses will describe these reforms more fully, but let me mention just a few.

Under the wetlands protection program, many individuals and small businesses are already allowed to fill portions of certain wetlands without needing to get an individual permit. Three new initiatives will give small landowners even greater flexibility. First, landowners will be allowed to affect up to one half acre of wetlands to construct a single-family home and attendant features such as a garage or driveway. The second initiative clarifies the flexibility available to persons seeking to construct or expand homes, farm buildings, and small business facilities where the impacts are up to two acres. Third, the Administration proposed new guidance that will expedite the process used to approve wetland mitigation banking, which will allow more development projects to go forward more quickly. In addition, the Army Corps of Engineers is reforming its wetlands program to make the permit application process more efficient. These reforms will substantially reduce or eliminate the burden for small landowners in many cases.

At the Interior Department, Secretary Babbitt is pursuing several changes to the endangered species program to benefit landowners. For the first time ever, the Interior Department has proposed significant exemptions for small landowners. Under this new policy, activities that affect five acres or less and activities on land occupied by a single household and being used for residential purposes would be presumed to have only a negligible adverse effect on threatened species. The same would be true for one-time activities that affect five acres or less of

contiguous property if the property was acquired prior to listing. Thus, under most circumstances, these tracts would be exempted from regulation under the Endangered Species Act (ESA) for threatened species. The Interior Department has also announced an increased role for the States in ESA implementation, and new proposals to strengthen the use of sound and objective science. Under a new "No Surprises" policy, property owners who agree to help protect endangered species on their property are assured their obligations will not change even if the needs of the species change over time. The Interior Department's "Safe Harbor" policy also protects landowners from additional ESA land use restrictions where they voluntarily enhance wildlife habitat on their lands. And under a comprehensive plan for the protection of the Northern Spotted Owl, the Fish and Wildlife Service proposed a regulation that would generally exempt landowners in Washington and California owning less than 80 acres of forest land from certain regulations under the ESA designed to protect the Owl.

Proponents of statutory compensation schemes have argued that they are necessary because it is difficult and time-consuming to litigate a constitutional takings claim in federal court. You will hear them say it takes fifteen years and \$500,000 to litigate these claims. On balance, however, the cases they cite to support this assertion generally involve multimillion dollar claims brought by large corporations. Although lengthy litigation is to be avoided where possible,

complex business litigation is often hard fought and protracted.

We are keenly aware of the need to assure that all Americans can seek redress through the courts for meritorious claims. A property owner who successfully litigates a takings claim is currently entitled to recover attorneys fees, litigation costs, and interest from the date of the taking, a powerful aid to vindicating meritorious claims. The Justice Department is committed to working with the courts to devise additional ways to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute resolution techniques where appropriate. Again, we believe that solutions that focus on the specific issues of concern are preferable to rigid, one-size-fits-all compensation schemes.

X. RADICAL CHANGES TO THE COURT OF FEDERAL CLAIMS

Certain takings bills would expand the jurisdiction of the U.S. Court of Federal Claims (CFC) by giving it the authority to invalidate acts of Congress that adversely affect private property rights, and to review agency action even where other statutes confer jurisdiction elsewhere.

We are greatly troubled by these provisions, which discard the important distinctions between the CFC, an Article I court created by statute, and the district courts, Article III courts whose judges are life-tenured. We believe this radical expansion of the CFC's authority raises serious constitutional concerns.

Briefly put, these provisions plainly implicate Article III of the Constitution, which provides that "[t]he judicial Power of

the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." These provisions would grant the CFC the power to invalidate acts of Congress that adversely affect property rights in violation of the Constitution. The CFC would be authorized to strike statutes from the books at the request of private parties, thereby affecting the rights of third parties protected by the statutes but not before the court. We believe that grant of power probably violates Article III.

The expansion of the CFC's injunctive and declaratory powers also raises separation of powers concerns. Under these proposals, the CFC could hear constitutional challenges to any statute or regulation, enacted under any of Congress's powers, involving any department or agency of the federal government, as long as the challenge involves the claim that the government action adversely affects private property. That would give the court government-wide as well as nation-wide jurisdiction over an important class of constitutional cases. By adding to the CFC's existing power to award damages the power to issue injunctions and declaratory relief, the CFC would become indistinguishable from an Article III court in its remedial powers.

We are also opposed to the repeal of 28 U.S.C. §1500, which bars the CFC from hearing any claim as to which the plaintiff already has a claim pending in another court. First, there is no need to repeal that section. Advocates of repeal argue that repeal is necessary because current law forces a property owner

to elect between equitable relief in federal district court and monetary relief in the CFC. That view of the law is, however, outdated and mistaken. Loveladies Harbor v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (the CFC may entertain a claim for monetary relief where the plaintiff has another claim for equitable relief arising out of the same facts pending in federal district court).

Second, the repeal of §1500 would create opportunities for savvy litigators to manipulate the courts in bringing not just takings claims but all claims over which the CFC has jurisdiction. For example, if §1500 were repealed, a plaintiff would be able to begin litigating aspects of a contract claim in district court and subsequently initiate a suit before the Court of Federal Claims in an effort to find the most sympathetic forum and to stretch the Department's litigation resources. While the United States presumably would have the right to transfer the cases and consolidate them in one forum, the United States might not learn until well into the litigation that a complaint filed in the district court involved the same dispute as a complaint filed in the CFC due to the minimal requirements of notice pleading. Our ability to identify related actions would be further limited by the sheer volume of civil litigation involving the United States.

XI. CONCLUSION

The Administration strongly supports private property rights. Compensation bills, however, represent a radical departure from our constitutional traditions and our civic responsibilities. They would impose an enormous fiscal burden on the American taxpayer, generate unjust windfalls for large landowners, create huge and unnecessary bureaucracies and countless lawsuits, and undermine the protection of human health, public safety, the environment, worker safety, civil rights, and other vital interests important to the American people. As a result, they would hurt the overwhelming majority of American property owners, middle-class homeowners, by eroding the value of their homes and land.

The Administration would like to work with the Congress to find ways to further reduce the burden of regulatory programs on American property owners. Compensation bills, however, are a ham-fisted, scattershot approach that would impair our ability to carry out essential functions and would impose a tremendous and unwarranted cost on the pocketbooks of middle-class Americans. Accordingly, the Attorney General would strongly recommend that the President veto compensation legislation.