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Takings (95) [5]

N- PLS. red dot copy to  
Mikva,  
Copy to Beta Nelson

Per our discussion.

Doneful



THE WHITE HOUSE  
WASHINGTON

DATE: 1/9/95

TO: Abner Mikva

FROM: Marvin Krislov  
White House Counsel  
Room 128, OEOB, x7900

FYI

Appropriate Action

Let's Discuss

Per Our Conversation

Per Your Request

Please Return

Other

cc: Beth Nolan

JK 216

93

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*Constitutional Problems*  
*Under Lincoln*

Revised Edition

by <sup>James G. Field</sup> J. G. Randall

*Professor of History Emeritus*  
THE UNIVERSITY OF ILLINOIS

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“dictum” to the contrary) Congress acted in the interest of freedom. Slavery in the District of Columbia was abolished, with compensation to loyal owners, on April 16, 1862; and emancipation in the territories (but without compensation) was provided by act of June 19, of the same year.<sup>47</sup>

## v

Our attention must now turn to that form of emancipation which Lincoln favored in preference to any other because it came nearest to satisfying his sense of what was statesmanlike, equitable, and legally sound. This was gradual emancipation by voluntary action of the States with Federal coöperation and compensation. In recommending, on March 6, 1862,<sup>48</sup> that Congress should pass a resolution pledging financial aid for this purpose, the President pointed out that the matter was one of perfectly free choice with the States; and that his proposition involved “no claim of a right by Federal authority to interfere with slavery within State limits, referring, as it does, the absolute control of the subject . . . to the State and its people.” Lincoln was too good a lawyer to ignore the constitutional limitations as to the power of Congress over slavery in the States, and the legal importance of the vested rights of slave owners which called for compensation. On

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<sup>47</sup>*U. S. Stat. at Large*, XII, 376, 432, 538, 665. In an able analysis of the Dred Scott case, E. S. Corwin has shown that Taney's denial of congressional power to prohibit slavery in the territories was not an “obiter dictum,” but a canvassing afresh of the question of jurisdiction. He points out, however, the irrelevancy of Taney's argument in invoking the doctrine of “vested rights” in the interpretation of the “due process” clause, and thus denouncing the Missouri Compromise as a violation of the Fifth Amendment. (*Am. Hist. Rev.*, XVII, 52-69.)

<sup>48</sup>*Cong. Globe*, 37 Cong., 2 sess., p. 1102.

April 10, 1862, Congress passed the following resolution,<sup>49</sup> in the identical form proposed by the President.

*Be it resolved* . . . That the United States ought to cooperate with any State which may adopt gradual abolishment of slavery, giving to such State pecuniary aid, to be used by such State in its discretion, to compensate for the inconveniences, public and private, produced by such a change of system.

This joint resolution was directed primarily to the border States, but it offered pecuniary assistance to any State that should abolish slavery. An unfavorable reply to the proposal was made by a congressional delegation from the border States,<sup>50</sup> and the scheme was never carried out. It came very near, however, to being put to a practical test in Missouri. Even before that State had passed an emancipation law, both houses of Congress passed bills giving actual financial aid to the State for the purpose of emancipation. The bills disagreed in form, and time was lacking in the short session ending in March, 1863, to perfect and pass the same bill through the two houses; but the affirmative action of both houses on the actual appropriation of money is significant of the serious purpose of Congress to fulfill the Federal side of the proposal.<sup>51</sup>

Five months after the initiation of the scheme for compensated abolition, the executive proclamation of emancipation, which we will consider on a later page,

<sup>49</sup>*Ibid.*, Appendix, p. 420.

<sup>50</sup>*Ann. Cyc.*, 1862, p. 722.

<sup>51</sup>In the House bill Federal bonds to the amount of ten million dollars were provided. The Senate bill provided bonds up to twenty million dollars; but, if emancipation should not be effected before July 4, 1865, the amount to be delivered was to be only ten million. (*Cong. Globe*, Jan. 6, 1863, 37 Cong., 3 sess., p. 209; *Senate Journal*, Feb. 12, 1863, p. 243.)

was issued (September 22, 1862). The proclamation, however, did not apply in the border States, nor universally within the Confederate States; and its issuance by no means indicated an abandonment of the scheme for State abolition with Federal compensation. In the September proclamation the President specifically declared his intention to "recommend the adoption of a practical measure tendering pecuniary aid" to loyal slave States voluntarily adopting immediate or gradual abolishment. The compensation scheme was his idea of the proper method for the permanent eradication of slavery, while the proclamation was a measure of partial application whose legal effect after the war he regarded as doubtful.

As a side light on the President's policy of making compensation to slave owners, it is interesting to study a general order concerning the military use of property and slaves in the Southern States, which he issued on the very day when the Emancipation Proclamation was broached in Cabinet meeting (July 22, 1862). He ordered that property be used where necessary for military purposes, but that "none shall be destroyed in wantonness or malice." He further directed "that . . . commanders employ . . . so many persons of African descent as can be advantageously used for military or naval purposes, giving them reasonable wages for their labor," and ordered "that, as to both property and persons of African descent, accounts shall be kept . . . as a basis upon which compensation can be made in proper cases." This order was written in Lincoln's handwriting and was issued as a general order by the War Department.<sup>52</sup> It is of interest as showing how the President, while occupied with the subject of emancipa-

<sup>52</sup>Stanton Papers, VIII, No. 51769; *O. R.*, Ser. III, Vol. 2, p. 397; Nicolay and Hay, *Works*, VII, 287.

tion by proclamation, was at the same time mindful of the property rights of slave owners.

In his annual message of December 1, 1862, Lincoln presented at some length a detailed project for compensated emancipation which he wished to have adopted as articles amendatory of the Constitution. These proposed amendments provided for the delivery of United States bonds to every State which should abolish slavery before the year 1900. All slaves made free by the chances of war were to be forever free, but loyal owners of such slaves were to be compensated. The President, in this message, argued elaborately and eloquently for the adoption of his scheme.<sup>53</sup>

An examination of this able message reveals much concerning the legal phases of emancipation as viewed by the President. He treated the subject of the liberation of slaves as one still to be decided, showing that he did not regard the Emancipation Proclamation as a settlement or solution of the question in the large sense. State action was still to be relied upon for the legal accomplishment of emancipation; and this was in harmony with the statement which the President is reported to have made in his interview with the border-State delegation on March 10, 1862, "that emancipation was a subject exclusively under the control of the States, and must be adopted or rejected by each for itself; that he did not claim, nor had this Government any right to coerce them for that purpose."<sup>54</sup>

The message shows further that he considered compensation the correct procedure; and believed that such compensation by the Federal Government, the expense of which would be borne by the whole country, was

<sup>53</sup>Nicolay and Hay, *Works*, VIII, 93-131.

<sup>54</sup>McPherson, *Political History of the Rebellion*, 210 *et seq.*

equitable. He would set constitutional discussions at rest by writing his plan of liberation (even to the amount and interest rate of the bonds and the terms of their delivery) into the fundamental law. Yet, though he was proceeding by constitutional amendment, his method was not to emancipate by purely national action; for the matter was still to be left to the States and would apply only in those States which should choose to cooperate. It was to be voluntary emancipation by the States with compensation by the nation. For even so much national action as was involved in "coöperation" with States desiring to give freedom to their slaves, Lincoln favored the adoption of a constitutional amendment, though this financial "coöperation" is the sort of thing that Congress nowadays regards as a part of an ordinary day's work.

We need not, of course, conclude that the President, in his own mind, doubted the constitutionality of the proposal for compensated emancipation; though, as we have seen, he did doubt the constitutional power of Congress to impose liberation upon a State. He said in communicating his original proposal to the border-State delegation that his proposition, since it merely contemplated cooperation with States which should voluntarily act, involved no constitutional difficulty.<sup>55</sup> In his December message he made no reference to any defect in the constitutional power of Congress to act as he proposed. The plain inference is, not that the President considered an amendment necessary to legalize his project; but that he wished the scruples of those who did think so satisfied, and also that he wished so grave and important a matter to be dealt with by a solemn, fundamental, act.

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<sup>55</sup>Nicolay and Hay, *Works*, VII, 125-126.

Since this project for State abolition with Federal aid was never adopted, we need not dwell further upon the many interesting questions which it presented. Perhaps its chief interest is to be found in the light it throws upon Lincoln's lawyerlike caution in dealing with the slavery question as a matter of permanent law.

All these cautious legal considerations in Lincoln's mind and this circumspection in his official acts should not be regarded as dimming his intense conviction as to the moral wrong and shameful social abuse of slavery. To review his works is to find emphatic and numerous expressions of this conviction. Space is lacking for a full showing of these statements, but a few typical ones may be noted here. In 1854: "This declared indifference . . . for the spread of slavery, I cannot but hate. I hate it because of the monstrous injustice of slavery itself. I hate it because it . . . enables the enemies of free institutions . . . to taunt us as hypocrites . . ." In 1855: "I hate to see the poor creatures hunted down and caught . . ." In 1859: "Never forget that we have before us this whole matter of the right or wrong of slavery in this Union . . ." In 1864: "I am naturally antislavery. If slavery is not wrong, nothing is wrong. I cannot remember when I did not so think and feel . . ." <sup>56</sup> These sentiments were among the deep fundamentals of Lincoln's liberal thought.

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<sup>56</sup>For these statements see Nicolay and Hay, *Works*, II, 205, 282; V, 122; X, 65. For a full and useful compilation of Lincoln's many utterances on slavery (with references), see Archer H. Shaw, ed., *Lincoln Encyclopedia*, 298-339.

DRAFT: 2-7-94 10:30 pm

**DRAFT TESTIMONY ON HOUSE PROPERTY RIGHTS BILLS**

Mr. Chairman, and Members of the Subcommittee, I very much appreciate the opportunity to share with you the Administration's views regarding private property rights, and how various bills being considered by the Congress would affect vital protections that benefit every one of us.

The Administration strongly supports private property rights, just as we strongly support the protection of human health, public safety, the environment, civil rights, worker safety, and other protections that give us the high quality of life the American people have come to enjoy. The right to own, use, and enjoy private property is important to our nation's economic strength and our Constitutional heritage. If the government takes someone's property, the government should pay. That's what the Constitution says. That's what the President demands of his government. We are particularly concerned with protecting the property rights and assuring fair treatment of middle-class homeowners, family farmers, and small businesses. As part of our efforts to reinvent government, the Administration is aggressively developing ways to improve federal programs to eliminate adverse effects on small landowners, and we would like to work with the Congress to continue to refine those programs.

Several pending bills relating to property rights, however, would have devastating consequences and would end up hurting most Americans. They threaten to create a budget-busting, bureaucratic maze, and they could deprive people of a government

that protects the public health, safety, civil rights, and the environment. Alternatively, they will force a potentially huge new tax burden on the middle class. These bills -- such as Title IX of H.R. 9, one of the "Contract with America" bills -- would require the government to automatically pay compensation when regulation decreases property value by a specified amount. Some would require the government, and taxpayers, to pay even when only a small portion of the property is affected. They would require compensation without sufficient regard for fairness or the public interest, an outcome that is bad for ordinary Americans. The Administration strongly opposes these compensation bills -- bills that represent a radical departure from 200 years of American experience in protecting property rights under the Constitution.

The Administration is not alone in opposing these bills. The National Conference of State Legislatures, the Western State Land Commissioners Association, and the National League of Cities have also opposed these bills. 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. Over 30 State Attorneys General recently wrote the Congress to oppose takings legislation that goes beyond what the Constitution requires.

As you know, the Fifth Amendment requires the payment of just compensation when the government takes private property. In

deciding whether a regulation is a compensable taking under the Constitution, the courts consider the regulation's economic impact; its nature and purpose, including the public interest protected by the regulation; the landowner's legitimate expectations; and any other relevant factor. The ultimate standards for compensation under the Constitution are fairness and justice.

This Constitutional tradition has been carefully developed by the courts through hundreds of cases over the course of our nation's history. 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 landowner's reasonable expectations and property rights with the public benefits of protective laws, including the benefit to the landowner.

It goes without saying that economic impact is an important consideration in deciding whether fairness and justice require the payment of compensation to a landowner where regulation restricts land use. 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 "Government 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." 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. We have also recognized that our rights as citizens entail a corresponding responsibility to refrain from exercising our rights in ways that harm others. There has never been 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.

The pending compensation bills disregard our civic responsibilities, set aside our Constitutional tradition, and ignore the experience and expertise of our courts. They replace the finely tuned Constitutional standards with a rigid, "one-size-fits-all" approach that focuses on the extent to which regulation affects 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. They ignore the wisdom of Pennsylvania Coal and in fact would eviscerate many vital protections.

By imposing a broad-based compensation requirement based on reductions in property value, without sufficient regard for the public interest, these bills would undermine the protection of human health, public safety, the environment, civil rights, worker safety, and other protections important to the American

5

people. For example, they would codify the unreasonable notion that the American people should compensate polluters not to pollute, and that taxpayers must pay people to refrain from using their property in a way that harms others and violates federal law. Because compensation would generally come from the agency's appropriation, the inevitable result would be less protection -- less protection for human health, for workers, for civil rights, for the property of others, for our environment, for all of us. Or, in the alternative, if we continue to provide needed protections for all Americans, the taxpayer would be forced to find ways to pay the compensation prescribed in the bills -- an unfair result for middle-class landowners.

These bills would also require the creation of huge and costly bureaucracies in every federal regulatory agency to evaluate compensation requests. The sheer volume of entitlement requests would likely be overwhelming. Agencies with little experience in addressing the novel compensation claims under these bills would be called on to resolve countless complicated legal and factual issues under the laws of all fifty states, under thousands of municipal codes, and under the vague and ambiguous provisions of these bills.

The fear of bankrupting State and local governments has led several State legislatures to decline to adopt similar compensation schemes. Just a few months ago, the citizens of Arizona voted down by a 60 to 40 margin a process-oriented takings bill that had been subject to many of the same criticisms

6

as the compensation bills. States are concerned that compensation bills would 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 and curtail vital protections. Indeed, some of the federal compensation bills would subject various State and local actions to the compensation requirement, raising significant implications for State-federal working relationships. Just as we are working to ease unfunded mandates to the States, these measures could dramatically increase them.

Certain bills provide exceptions to the compensation requirement where the land use at issue violates State and local law, or where it poses a serious and imminent threat. But these narrow exceptions would not adequately safeguard human health, public safety, or other vital protections that benefit every American citizen. The discharge of pollution into our Nation's air, land, and waterways, for instance, often poses long-term health risks that would not be covered by the exceptions. Pesticide use, wetlands destruction, discharges of toxic pollutants to air and water, mining, or other land use by an individual property owner might not constitute a nuisance or imminent threat by itself, but could cause serious harm over time, especially in conjunction with similar use by nearby landowners. The exceptions would not apply to certain critical

public-safety issues that are governed exclusively by federal law, such as nuclear power plant regulation. As a result, public safety in these matters would be held hostage to the government's ability to pay potentially huge compensation claims. Nor do the exceptions address uniquely federal concerns, such as national defense and foreign relations. For instance, had compensation legislation been in effect during the Iranian hostage crises, federal seizure or freezing of Iranian assets could have given rise to numerous statutory compensation claims.

The State-law exception ignores the critical role that federal legislation plays in protecting the public interest. Pollution and other adverse effects of improper land use do not respect political boundaries. By discarding the advantages of uniform, national standards for federal programs, these bills would leave us with a patchwork quilt of confusing and inadequate regulation. It is difficult to overestimate the confusion and uncertainty that would ensue. The exceptions also fail to recognize that there are many important public interests such as civil rights that are not related to health and safety and not fully addressed by State law.

For example, suppose a property owner proposes to build a hazardous waste incinerator. If EPA denies the required federal permit due to long-term health risks to nearby residents, the property owner might be entitled to seek compensation under these bills, even if there are safe uses of the property that would provide the owner with a reasonable return on investment.

This is a hypothetical case that could easily come true under the legislative proposals. In the following examples, a courts found that no "taking" of private property had occurred under the Fifth Amendment. The results in these cases could very well be different if pending takings legislation is enacted:

- In Statesboro, Georgia, a local land developer violated Federal wetlands protection regulations and built two houses in a cypress swamp (after warnings from the government). Not only did the homes eventually flood, but because the natural drainage of the swamp was altered, houses nearby were also flooded and damaged. Responding to outraged neighbors, the Federal government required the developer to mitigate the damage (1992).
  
- The M & J Coal Company of 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. When officials from the Office of Surface Mining in the Department of the Interior required M & J Coal to reduce the amount of coal it was mining to protect property and public safety, the company sued under the Fifth Amendment. The court rejected M & J Coal's claim that, despite the company's 34.5 percent annual profits, mining regulations had "taken" its property (1994).

- A restaurant franchisee challenged the Americans with Disabilities Act provisions governing access for disabled individuals in public accommodations as a "taking". The court rejected the argument that the franchisee's property was taken because he would have to spend money to make the restrooms accessible to individuals in wheelchairs (1993).

If enacted at the State level, compensation bills would have equally devastating consequences. To cite but a few examples from the case law:

- A tavern owner in Arkansas claimed that sobriety roadblocks and stationary patrols conducted by state troopers nearby on highway constituted a "taking" of his property. The tavern owner argued that the troopers' actions deprived him of "significant revenues" and that patrons should be able to drink on his premises without having to worry about being stopped by the police at a safety check. The court disagreed (1992).
- A chemical company unsuccessfully claimed that a county's denial of a permit to operate a hazardous waste facility was a "taking". The company argued that due to extensive contamination in the area, developing a toxic waste dump was the only economically beneficial use of the property (1994).

10

- An outdoor advertising company challenged as a "taking" a city ordinance that limited the number of billboards in order to preserve the character of the city. The court rejected the company's claim (1992).
- A landfill operator claimed that a county ordinance prohibiting the construction of additional landfills due to health and safety concerns had deprived it of its "right" to establish a garbage dump and hence constituted a "taking". The court rejected its argument (1992).

Enacting the proposed compensation legislation would turn these "good for the property rights of the community" stories into "horror stories." And these are only a few of the many examples that could be given. Although we could argue under certain bills that compensation would not be required in some of these cases, we can be sure that landowners and their attorneys would argue vigorously that they are entitled to payment. In short, compensation bills would force us to choose between protecting our homes and families and bankrupting the federal Treasury.

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,

11

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 recent 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, compensation bills would threaten this basic right and the desires of middle-class homeowners.

These bills also threaten civil rights protection, worker safety rules, and other protections that might be viewed as a limitation on land use. In the 1960s, segregationists argued that our landmark civil rights laws unreasonably restricted their property use, and that they should be compensated under the Constitution simply because they were required to integrate. The Supreme Court rejected this argument, finding the Constitution flexible enough to allow us to protect basic human dignity, even if that protection restricts land use to some extent. A much different result could occur with respect to new civil rights protections if rigid compensation legislation were to replace the flexible Constitutional standards.

Because these bills are so broad and inflexible, the potential budgetary impacts are almost unlimited. Even if new protections were scaled back, these bills could still have a

12

staggering fiscal impact by requiring compensation for statutorily compelled regulation and other essential government action. The payments would go to those who would like to use their property in a way that would be contrary to federal law, typically large corporations and wealthy landowners who have the economic power to harm others if left unregulated. These bills would also generate a flood of requests for federal action by property owners who have no intention of development, but rather seek to elicit an unjustified windfall for speculative future uses through a compensable permit denial or permit condition. Where regulation affects only a small portion of an owner's parcel, the owner could segment the property to trigger the compensation requirement with respect to the affected portion. These bills might be construed to require compensation even where the landowner knew about the regulation when purchasing the property, and even where the landowner's purchase price was reduced due to the restriction on land use. And corporations could keep coming back for more compensation by applying for new permits under different programs. If the restriction is subsequently lifted, the landowner would have no obligation to repay. By requiring unfair compensation payments to large corporations and other wealthy landowners, these bills would create an entitlement scheme at the expense of ordinary, middle-class taxpayers.

These bills also pose hidden dangers. Blanket compensation bills are so crude and broad-based that they are likely to have

13

dangerous, unintended consequences by undermining our laws in ways we cannot now anticipate. We should craft specific solutions to specific problems. For example, as part of our efforts to reinvent government, the Administration has refined specific federal programs to reduce burdens on small landowners and others. The Army Corps of Engineers is refining its wetlands program to make the permit application process cheaper and faster. It is setting deadlines for permit decisions, and not requiring detailed evaluations of small projects that have minor impacts. This will substantially reduce or eliminate the burden for small landowners in many cases. At the Interior Department, Secretary Babbitt has already implemented several changes to the endangered species program to benefit landowners. 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. Recently, the Fish and Wildlife Service proposed a regulation that would exempt individuals owning less than 80 acres from regulation under the Endangered Species Act associated with the Northern Spotted owl.

In short, we must protect property rights, but we must not undermine the protection of human health, public safety, the environment, civil rights, the property rights of others, and other vital protections that benefit every American. Compensation bills are a blunderbuss approach that would provide

14

unjust windfalls to wealthy corporations at a tremendous cost to the health, safety, and pocketbooks of middle-class Americans.

In addition, the Administration is working to eliminate inadvertent or unreasonable impairments of property rights caused by federal regulation, even if a restriction does not rise to the level of a compensable taking under the Constitution. We believe regulators should carefully consider the potential impact of proposed rules on private property. In contrast to the approach of the compensation bills, which do not provide tools to prevent burdens on property, we are reinventing government by developing specific ways to prevent federal programs from resulting in unreasonable burdens. The Administration is also taking action to make sure that federal programs are not duplicating State, tribal, and local programs, and transferring authority to those governments that are closer to the people.

We are especially concerned with the fair treatment of middle-class homeowners, small businesses, and family farmers. We are currently developing measures to provide relief by taking action to reform programs to make them more fair and flexible. For example, we are looking at methods in the wetlands and endangered species programs that will essentially eliminate the regulatory burdens on small landowners and provide easier access to the courts for those who believe that the government has taken their property. We would like to work with the Congress in our efforts to refine specific federal programs to provide such relief.

15

Proponents of statutory compensation schemes have argued that these are necessary because it is difficult and time-consuming to litigate a Constitutional takings claim in federal court. We note that a property owner who successfully litigates a takings claim is already 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 has also been active in working with the courts on approaches to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute resolution techniques. In keeping with this spirit, we would like to work with the Congress to improve access to our courts by small landowners. Again, we believe that solutions that focus on the specific issues of concern are preferable to a rigid, one-size-fits-all compensation scheme.

The Administration supports and values private property rights of all landowners as provided for in the Constitution. We must find ways, however, to ensure that property rights are protected in a manner that does not threaten the protection of human health, public safety, the environment, civil rights, worker safety, and the property rights of others, or create more red tape, more litigation, and a heavier tax burden on the middle class. In this regard, we do not support the compensation requirements proposed in the pending Contract Bill or in other pending takings legislation.

TALKING POINTS FOR ABNER MIKVA

RE: TAKINGS

1. Republican contract legislation provides compensation for any agency action reducing property value by ten per cent or more. Under the bill, if a property owner submits a demand, the agency must stay its action, offer compensation and submit to binding arbitration if the owner rejects the offer.

2. This standard would radically change takings law and is a budget buster--both in terms of the compensation and bureaucracy.

3. We agree that administrative reforms, such as streamlining the permitting process and creating "one stop shopping," would be consistent with Administration reforms.

4. However, we are concerned that negotiating even for a milder bill would undermine environmental, health and safety regs. Over 30 state Attorneys General recently opposed takings legislation beyond Constitutional requirements.

5. The working group memo to the VP identified three options:

#1) President to oppose the Republican bill and call the takings issue a core issue;

#2) Use Cabinet officials to deliver opposition to Republican bill and reserve President until last moment;

#3) Engage Hill in dialogue about moderate bill.

THE WHITE HOUSE  
WASHINGTON

December 21, 1994

MEMORANDUM FOR THE VICE PRESIDENT

CC: THE CHIEF OF STAFF

THROUGH: CAROL RASCO  
KATIE MCGINTY

FROM: Paul Weinstein (DPC) Michael Davis (OEP)  
Tracey Thornton (Leg) Peter Yu (NEC)  
Sally Katzen (OMB) Marvin Krislov (Counsel)

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SUBJECT: Takings Strategy

Prior to the midterm election, the working group on takings was grappling with the issue of whether the Administration should compromise on takings amendments to secure passage of the President's environmental agenda. The election has radically changed this situation. Takings, which is addressed in the House Republican "Contract", is likely to be a centerpiece issue in the next Congress. It should be noted that "takings" means different things to different people. "Takings" in the constitutional sense means any government "taking" of private property that invokes the Just Compensation clause and requires that the government compensate the property owner. The courts have historically determined the point at which this occurs. However, many proponents of "takings" or "private property" legislation attempt to provide for compensation well beyond that required by the Constitution or to impose onerous administrative requirements on regulatory agencies unrelated to constitutional requirements. The Republican "Contract", and most other legislation proposed (by both Republicans and conservative Democrats) in the past, falls into both categories.

*The purpose of this memorandum is to outline options for responding to efforts to pass takings legislation. Option 1 recommends the President draw the line early against accepting legislative changes to takings. Option 2 differs mainly from Option 1 in that it proposes utilizing the Cabinet (in testimony, etc.) to deliver a strong message and hold the President's involvement (and veto threat) until the most strategic time. Option 3 is a quiet engagement approach that places a greater emphasis on engaging the Hill in crafting legislation and a communications strategy for developing a non-big government approach to protecting the legitimate rights of landowners from unreasonable takings while ensuring the ability of the Federal government to*

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*effectively protect the health and safety of our citizens and our natural environment. Option 3 does not assume the President can sustain a veto on takings legislation agreed to by Senate and House moderates.*

### **Political Landscape**

The takings issue presents a potentially difficult dilemma between sound policy and the potential reaction of the public to our position. Unlike unfunded mandates or risk legislation, aggressive takings legislation would do more than simply change the techniques used for funding and managing federal regulation; it would also alter almost 200 of years constitutional law. Tampering with constitutional requirements without a principled reason is hardly the type of legacy this Administration wishes to leave. On the other hand, the private property rights movement is strong and growing, and opposition to takings legislation without, at a minimum, changing the debate so that people see the legislation for what it really is, could cast the Administration as being unsympathetic to property rights. Providing an alternative means of addressing legitimate concerns of property owners would allow us to diminish this concern to some extent.

It is important to recognize that opposition to property rights legislation proposed is broad-based -- reaching well beyond the environmental community. Civil rights, religious, health care, consumer, labor, planning, sportsmen, and other groups are clearly on record opposing such legislation. Over 30 state Attorneys General recently wrote the Congress opposing takings legislation that goes beyond what the Constitution requires. The National Conference of State Legislatures have strongly opposed such legislation as well. It is not clear that these groups would oppose legislation to address the legitimate claims of property owners, but they clearly oppose measures as broad and intrusive as those discussed below.

### **Background**

The Fifth Amendment of the U.S. Constitution states that "private property" shall not "be taken for public use without just compensation." In other words, if the government needs your land to build a public road or a hospital, the government must pay compensation. Whether a regulation results in a "taking" generally depends on a number of fact specific considerations, including the relative intrusiveness of the regulation, its economic effect on the property owner, and the owner's particular circumstances and investment-backed expectations. For any case where the landowner feels aggrieved, the Tucker Act and the U.S. Constitution guarantee such landowner the right to bring suit in the Federal Courts to seek compensation.

Those opposed to governmental, and particularly environmental, regulation have seized on and exploited the public's concern over protection of private property in an effort to thwart legitimate governmental action to protect the public interest. These efforts typically, and sometimes successfully, portray necessary regulation and protection of private property as mutually exclusive, which of course they are not. These "property rights" interests have grown into a powerful force composed of many organizations and backed by conservative think tanks.

The private property rights or takings debate has been brought to light in the past few years primarily in the context of the Clean Water Act Section 404 "wetlands" program and the Endangered Species Act (ESA). Many feel that these programs impose substantial and unnecessary burdens on landowners. It is important to remember that this Administration has developed a solid roadmap (not yet completely implemented) for improving the wetlands program and is currently in the process of developing a package of administrative reforms for the ESA.

The private property rights movement has been active legislatively at both the state and federal levels. Bills to advance the "private property" cause have been introduced in the majority of state legislatures, although so far they have been enacted in only a few states. In the Congress, many and varied bills have been introduced in both Houses. In general, the bills attempt to thwart environmental, health and safety regulation by at least raising the specter of requiring compensation as a result of virtually all governmental regulation, thereby making such regulation economically infeasible.

Major federal legislative efforts in the 103rd Congress include:

- Senator Dole/Heflin's legislation (S. 2006) to require complex takings analyses before a wide range of governmental action can take place. A version of this bill, improved by changes made by Senator Bumpers but retaining a problematic judicial review provision, was adopted as an amendment to the Safe Drinking Water Act in the Senate. The Dole legislation is cumbersome, but it is better than the "Contract" bill because it does not address the compensation issue.
- Representative Tauzin's proposal to provide compensation for any governmental action that diminishes the value of any piece or portion of property by more than 50%.

#### **Republican "Contract"**

The House Republican "Contract" bill is more extreme than any prior legislative proposals. The "Contract" would provide that property owners are entitled

to compensation for agency actions that reduce the value of property. This title would:

- Entitle property owners to compensation "for any reduction in the value of property owned by the property owner" that results from "a limitation on an otherwise lawful use of the property imposed by final agency action" and that "is measurable and not negligible." Reductions in the value of ten percent or more are deemed not negligible. The entitlement extends by express definition to "any interest in land" and "any proprietary water right."
- Require that if a property owner unilaterally demands compensation for a particular agency action, the agency must stay its action and make an offer to compensate the property owner for the diminution in the value of the property.
- Provide that if the property owner rejects the offer, the property owner may submit the matter for arbitration before a private arbitrator, whose decision is binding on both the agency and the property owner.

The budgetary impacts of this bill are considerable. Significant costs will be incurred not only from the costs of compensation, which might range into the tens of billions of dollars, but also from the costs of appraising, disputing, and arbitrating these issues whenever a demand for compensation is made. In addition, legislation will create a need for a new bureaucracy to respond to the flood of requests for permits and other regulatory rulings. Finally, there are constitutional questions as to whether Congress can remit the adjudication of statutory or constitutional rights to a private person.

### **Strategy for the Next Congress**

The working group looked at a range of options aimed at resolving the takings issue. It is the opinion of all the members of the group that takings legislation has the greatest potential to damage the Administration's ability to protect public health, safety, and the natural environment. We have narrowed the list of options down to three. All three options agree with respect to the desired substantive outcome. All offices agreed that the President should be prepared to veto any legislation that requires compensation to property owners beyond that required by the Just Compensation Clause of the Constitution, and that less extreme legislation consistent with the attached principles should be acceptable to the Administration.

In addition, all offices strongly endorse developing a coordinated communications strategy designed to change the debate on takings, and believe that such a strategy is key to holding off extreme takings legislation. Using the model

that defeated the Arizona takings proposition in November, we would work to develop a coalition of sportsmen, religious groups, mayors and governors, environmentalists, and public health advocates who are opposed to changing the takings law for different reasons. Attached (attachment 2) is a draft strategy developed by OEP which they plan to discuss with interest groups subject to your approval.

The difference between the options lies essentially in the degree to which the Administration, and particularly the President, become engaged in the debate on this issue. Option 1, proposes that the President identify this issue as a "core" issue, and be actively engaged in the debate including an early and public veto threat. Option 2 is essentially the same as Option 1 except that it recommends that the cabinet secretaries lead the attack against the "Contract" takings legislation and delay the threat of a Presidential veto until the appropriate time. Option 3 proposes that the Administration work quietly with its friends on the Hill to craft an acceptable legislative alternative to the "Contract", but that the Administration not publicly engage on the issue.

#### **Option 1: Draw The Line**

Several members of the working group believe that of all the "trinity" regulatory issues, changes to the takings law is one legacy this President does not want. They support a riskier, but perhaps bolder, strategy. Proponents of this option propose the President identify the takings issue as a "core issue" and pro-actively exploit the radical nature of the Contract bill. In particular, they proposes that the President

- State that he supports sound unfunded mandates, risk, and cost-benefit legislation, but believes that the takings bill is unwise as a matter of governance and unsound as a matter of law;
- Adopt a public position against the Contract bill and emphasize that the bill represents:
  - an unjustified corruption of two centuries of constitutional jurisprudence; and
  - an extreme measure designed to end government as we know it--writing the final chapter of the Reagan-Stockman dismantling of government; and
- Proceed administratively (aggressively), including either modifying or augmenting the Reagan Executive Order so that it appears stronger.

- Threaten to veto any takings bill, such as the one included in the "Contract", that fundamentally changes the takings jurisprudence so carefully developed by the Founders and the Supreme Court.

### Analysis

As the Republican Contract makes clear, the regulatory issues may be defining issues for the Administration and the next election. Accordingly, we face a critical strategic choice: does the President pursue compromise and damage control, or does he stake out an aggressive position. Both approaches have familiar weaknesses: a compromise strategy may engender criticism that "no one knows what the President stands for" and afford the President no credit from either side. An aggressive position could force a politically difficult veto (and possible override) if the legislation is not substantively changed and the debate is not recast according to the communications strategy.

### **Option 2: Modified Draw The Line**

Proponents of this approach believe that it is vital for the Administration to engage fully in the debate over takings legislation -- including the President at the appropriate time. In this regard, some of the group believe that Option 1 should be modified as noted below:

- We must first agree on a set of principles (Attachment 1) which clearly outline the Administration's position. The principles should be clear to all on where we draw the line -- the President should veto any legislation that provides compensation beyond the levels required under the current law and the Constitution.
- In early to mid-January, the Cabinet Secretaries and Assistant Secretaries should mount an aggressive campaign against the "Contract" takings proposal. Using the principles noted above, we should tell the public how bad the bill is -- more red tape, more litigation, reduced protection of public health and safety and the environment, and it is a budget buster. In addition, we should publicize the Administration's initiative to provide regulatory relief to the small landowner. For example, we can package a fairly impressive list of reforms for the wetlands and endangered species programs. Further, we could advocate legislative reforms to the judicial takings process that would reduce the expense and delay experienced by small landowners.
- At the appropriate time the President and the Vice President should speak unequivocally about the issues raised in the "Contract" on takings. The President should make clear his commitment to the protection of property rights while saying

the "Contract" bill simply goes to far and will be bad for the middle and working class Americans. The timing of the President's involvement should be discussed further. The major point here is that unlike Option 1, we do not believe the President should come out immediately with a veto message on takings nor issue an Executive Order. Rather we should use our Cabinet (in testimony, etc.) to deliver a strong message and hold the President's involvement until the most strategic time.

As previously discussed in this memorandum, proponents of this approach believe that a well coordinated communications strategy designed to change the debate on takings is vital. Substantial support should be generated to support the Administration's position on takings.

### Analysis

Same advantages as Option 1 but with the additional one of providing some flexibility on the Presidential veto threat. This approach requires the White House to effectively coordinate a successful communications strategy. Outside interest groups are already gearing up to respond to Republicans and others on takings legislation.

### **Option 3: Quiet Engagement**

#### Statement Of Principles

Using last year's unfunded mandates strategy as a model, the working group has developed a statement of principles that could guide the Administration's position in relation to compromise legislation (Attachment 1). The principles set forth the Administration's strong and unwavering commitment to protecting private property rights and our recognition that landowners (emphasis on small property owners) must often follow time consuming and expensive procedures when challenging a government decision on a Federal permit or making a claim of a constitutional taking of their property. The principles also propose some general administrative and legislative changes to address any property owners' legitimate concerns with the process. Under this option, these principles will not be made for public consumption but are instead designed to help guide the Administration in its negotiations with the Hill and to provide guidelines for the agencies. Selected sections of the principles may be shared with advocacy groups with whom we will be working to develop a communications strategy.

Advocates of this strategy believe that the key to moderating takings legislation coming out of the Congress lies in a behind the scenes dialogue with key moderates in the Senate, which is traditionally more bipartisan than the House and

where the filibuster provides the minority leadership with some additional leverage. We have already had some preliminary discussions with the staff of Senators Bumpers and Baucus. They indicated a desire to work with us quietly on developing a reasonable alternative bill to the "Contract" put forth in the House. Senator Bumpers worked with Majority Leader Dole on legislation last year which we may very well have to accept in some form. It is the strong recommendation of the working group that the President should veto any legislation that provides compensation beyond the levels permissible under current law (Bumpers' and Baucus' staff concur.)

Over the next two weeks Bumpers' staff will be conferring with the staff of the new Senate Majority Leader to see if they can come to some general agreement. Senator Baucus will do the same with Senator Chafee. Since Senator Heflin, who cosponsored the Dole bill last year, is the ranking minority on the Judiciary Committee Subcommittee to which takings legislation will be referred and is up for reelection in 1996, we will confer with his staff shortly. We have also had preliminary discussions with Senators Daschle and Glenn's staff. Daschle's staff favors the attempt at compromise approach and plans to talk to Baucus and Bumpers. Glenn's staff reluctantly concede probable defeat and plan to talk to Kennedy and Moynihan's staffs. We plan to meet with Bumper's and Baucus' staff in approximately a week and provide them with our principles pending your approval.

This group also recommends reconvening the working group of Democratic Senators that was put together last year by White House Legislative Affairs. This group includes the staff of Senators Biden, Bumpers, Baucus, Breaux, Nunn, Johnston, Conrad, Daschle, Glenn, and Hollings.

If Bumpers' is unable to reach a compromise with Dole, we will need to assess our strength to sustain a veto in the Senate and work with the Democratic leadership to develop some amendments that may siphon off a few Republicans while holding the Democrats.

The key difference between this approach and Options 1 and 2 is that we believe a veto message by the President or a cabinet-led attack against the takings language in the "Contract" could be counterproductive.

#### Analysis

While there are advocates within the Administration on both sides of the debate on unfunded mandates and risk/cost-benefit analysis, we could find no one within the EOP or agencies who support changing takings law -- except for some administrative improvement to help small property owners get expedited

consideration. In addition, compromise legislation, which will be difficult to agree on, may feed the criticism that "no one knows what the President stands for." On the other hand, many believe that the takings/private property debate resonates much more strongly with the American people than either unfunded mandates or risk, and therefore, we should not put the President in the position of having to oppose takings legislation.

### **Recommendation**

The working group on takings could not reach a consensus position.

### **Decision**

Option 1

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Option 2

Option 3

Discuss Further

## Attachment 1

**PROPERTY RIGHTS STATEMENT OF PRINCIPLES**

The Clinton Administration has been, and continues to be, a champion of the rights of the Nation's landowners. The President firmly believes that private ownership and use of property is a cornerstone of this country's heritage and tradition -- as well as our economic strength.

The President and his Administration are committed to ensuring that Federal programs do not impose unwarranted burdens on landowners. In this regard, the Administration will redouble its efforts to take administrative action to make regulatory programs more fair, flexible, and efficient. Further, the Administration will work with the Congress on legislation that addresses legitimate concerns without sacrificing effective protection of human health, public safety, and the environment.

At the same time, the President is concerned that "property rights" legislative proposals currently being considered inappropriately inhibit the ability of Federal, State, and local governments to effectively protect the health and safety of our citizens and our natural environment; and result in more bureaucracy, more red tape, and increased taxes -- an inequitable result for middle and lower-income families and individuals. Further, such proposals create what is essentially a "bad neighbor" policy -- where neighbors will have to fight it out among themselves to protect their property.

The following principles will serve as a guide for the Administration in its discussions with Congress, interest groups, and the public. These principles cover a range of specificity from general Administration positions to specific programmatic reforms for wetlands and endangered species programs.

### **Private Property Rights Principles**

- 1) **The Clinton Administration firmly believes that private ownership and use of property is a cornerstone of this country's constitutional heritage and historical tradition, as well as its economic strength.**
- 2) **The Fifth Amendment to the Constitution provides that private property shall not be taken for public use without just compensation.**
- 3) **The Clinton Administration recognizes fully its obligation to ensure that the requirements of the Just Compensation Clause of the Constitution are fulfilled at all times by making it clear that all executive branch agencies have a fundamental responsibility to protect property rights and to ensure that landowners are free from unwarranted burdens on private property. Agencies will continue to assess the impacts of their activities on private property.**
- 4) **The Clinton Administration recognizes that many government actions affect private property in some way -- often the value of the property will be enhanced and sometimes the value of property will be diminished.**
- 5) **The Clinton Administration recognizes the importance of Federal, State, and local government programs that protect the Nation's health, safety, and environment. In most cases these programs are working in harmony with landowners and many of the negative perceptions concerning property rights are not consistent with the facts. For example, approximately 95 percent of all Federal wetland permits are issued.**
- 6) **The Clinton Administration recognizes that landowners must often follow time consuming and expensive procedures when challenging a government decision on a Federal permit or making a claim of a constitutional taking of their property. Accordingly, the Administration will respond through administrative action where possible and work with the legislative and judicial branches to streamline regulatory and compensation procedures for**

**landowners. Such action will include, but will not necessarily<sup>1</sup> be limited to the following:**

- *Establishment of a small landowner assistance office to provide information to property owners on regulatory procedures and requirements and on the procedures for filing a claim for compensation for an alleged taking. The office will review complaints and advocate to the relevant agency or department in favor of those which they believe have merit;*
- *Streamline procedures for landowner compensation where the government and the landowner are in agreement that a Federal action has resulted in a regulatory taking;*
- *Establishment of an administrative appeals process for landowners who are denied permits under the wetlands rules. This streamlined process will allow landowners to challenge permit decisions without the expense and time required if they go to court -- currently a landowner's only recourse;*
- *Establishment of an administrative appeals process for landowners that disagree with wetlands jurisdiction decisions. This will provide significant relief for landowners who under the current system can challenge a jurisdictional determination only after applying for a permit and going to court;*
- *To increase predictability and reduce delays, establish deadlines for making permit decisions;*
- *Simplify the permit application process by creating across agencies one application for small property owners and a one-step process for applying;*
- *Base Endangered Species Act (ESA) decisions on sound science by requiring formal, independent scientific peer review of all proposals to list species and all draft plans to recover species;*
- *Give people quicker ESA answers and greater certainty by: speeding up the permitting process for low impact activities, making compliance*

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<sup>1</sup> Many other wetlands and Endangered Species Act reforms may be possible and are currently under consideration.

*inexpensive and quick for small-scale activities; identifying at the outset activities on private lands that are compatible with the ESA, so as not to tie up land use and development unnecessarily; providing certainty to landowners who participate in conservation planning, and protecting them against later demands for additional mitigation and payments;*

- *Treat private landowners more fairly by: facilitating economic use of private land by acquiring additional habitat to be protected, from the military when bases are closed, by enrolling existing federal lands in habitat reserves, by arranging for purchases of RTC lands, etc.; creating presumptions in favor of economic use of land by private owners whose activities create only negligible impacts on ESA listed species; creating presumptions in favor of economic use of land by individual homeowners, and small tract, low impact activities;*
  - *Providing incentives to landowners who voluntarily agree to enhance habitat on their lands by insulating them from restrictions if they later need to bring their land back to its previous condition.*
  - *Setting priorities in the listing of species to ensure that public and private resources are used as efficiently and effectively as possible.*
- 7) **The Clinton Administration will work with the Congress to ensure that individual property rights are protected and that the legitimate interests of the public are not diminished. In this regard, the Clinton Administration will support property rights legislation that is consistent with the above principles.**
- 8) **The Clinton Administration will not support legislative proposals that establish unnecessary requirements for compensation that go beyond what is required by the Constitution or inhibit the ability of Federal, state, and local governments to protect the health and safety of our citizens. Current legislative proposals, including the Contract with America legislation, could adversely affect:**
- *ZONING LAWS, including those that prevent the establishment of an adult bookstore next to the neighborhood school or church;*

- *WORKER HEALTH AND SAFETY LAWS, including those that require employers to protect employees from safety and health hazards in the workplace, as well as child labor laws;*
  - *ENVIRONMENTAL LAWS, including those that prevent landowners from storing barrels of toxic waste near a neighborhood or by a school.*
  - *CIVIL RIGHTS LAWS, including those meant to halt unfair housing practices or job discrimination;*
- 9) **The Clinton Administration will not support legislation that establishes arbitrary thresholds for compensation beyond which is required by the Constitution. Further, such an approach:**
- 
- *creates a bad neighbor policy and unnecessary layers of wasteful bureaucracy, more red tape and more litigation. It would be unjust to compensate landowners who cause pollution and/or devalue their neighbors property.*
  - *is a needless budget buster -- paying polluters and potentially costing taxpayers billions;*
  - *raises significant constitutional concerns.*

**Attachment 2****COMMUNICATIONS STRATEGY****Define the Debate**

The primary goal is to ensure that the Republican Contract's takings clause does not slip through under the radar screen. Environmental agencies and NGO's are currently doing research to help with this. Most energies will focus on clearly defining 10-30 specific examples that show how bad this clause is (creating "poster children" that can compete with the poster children the Wise Use movement has created).

One such example: It will be impossible to enforce SMCRA, meaning rivers will again run orange in Appalachia and the health of children (not to mention the property values of their parents) will be in decline.

Another example: FERC will have difficulty moving in any direction on licensing power lines. If they refuse to grant a license, the power generator will file a claim. And if they do grant a license, those homeowners whose property abuts the transmission line corridor will file claims of their own.

Once this research is further along, the community will start a series of events that show the impact of these examples. The events will be visual and will involve real folks. If the stories are compelling enough -- and they will be -- they will take on lives of their own.

**Outreach to Other Constituencies**

The environmental community and agencies believe it's best to have a spokesperson other than an environmentalist leading this effort. This strategy was used in defeating Arizona's takings legislation by 60 percent. The debate is more likely to be won if people realize this is a raid on the Treasury and an attack on the public's health and safety. The environmental NGO's have begun to meet with other constituencies -- for example, they recently met with AFL-CIO officials.

This process needs to take place inside the Administration as well. The Departments of Labor and Justice and the Office of Management and Budget, for example, may have the best examples of the horrible impact the takings clause would have. Each department needs to be doing the same kind of research that the environmental agencies have undertaken.

**Mobilize the Grass Roots**

A fairly significant effort is underway by the environmental community to build alliances with more local groups. These would include neighborhood associations, local planning organization, etc. There is some possibility that money might be raised for a separate media and organizing campaign -- targeted specifically at the takings issue.

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# Council on Environmental Quality

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P. 02

Testimony  
July 3, 1995  
10:00 a.m., Room 303 Utah State Capitol  
Richard G. Wilkins  
Professor of Law  
J. Reuben Clark Law School  
Brigham Young University  
July 3, 1995

I am pleased to have the opportunity to testify in support of Senate Bill No. 605. The Bill addresses - and provides redress for - one of the most troubled areas of the Supreme Court's Takings Clause jurisprudence: that is, when does government regulation go "too far"? The bill also addresses - and alleviates - an unfortunate jurisdictional tangle that has developed between United States District Courts and the Court of Claims. For both of these reasons, I hope that the Bill will be passed and signed into law.

#### I. WHEN DOES GOVERNMENT REGULATION GO "TOO FAR"?

The need to provide effective statutory protection for regulatory abuse of private property rights is plain. Although the Supreme Court has attempted to enunciate and apply workable limits on governmental power under the Fifth Amendment's Taking Clause, that effort has proven exceptionally difficult. The difficulty, moreover, has stemmed - not from the Court's inability to discern governing principles - but from its inability to pragmatically apply those principles to discrete cases. Section 204 (a) (2) (D) of Senate Bill 605 effectively addresses this remedial "gap".

Section 204 of Senate Bill 605, in large measure, restates current constitutional doctrine. Subsection (a) (1), for example, restates the rule in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Subsection a(2) (A), (B), (C) and (E) set out the tests enunciated by the Supreme Court in its recent decision in Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), and Nollan v. California Coastal Commission, 483 U.S. 825 (1987). These provisions, therefore, are rather unremarkable (unless, of course, one disagrees with the decisions just noted). The provision that I find most noteworthy in Senate Bill No. 605 is Subsection a(2) (D) of Section 204 which, as I understand it, puts remedial teeth into a constitutional principle that harks back to Justice Holmes 1922 opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 412 (1922). That principle is this: while government has the power to regulate despite incidental impacts on property value, government regulation may not go "too far" without violating the Takings Clause. The Supreme Court has been remarkably unsuccessful in effectuating this principle.

A hypothetical illustration highlights both the tensions inherent in Justice Holme's dictum and the difficulties that have

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plagued the Supreme Court's efforts to enforce it. Suppose that a developer purchases a piece of property near an urban area that, for many years, has been zoned for high-density commercial development. The property, put to its highest and best commercial use, has a value in excess of \$10 million. However once development begins, the property is determined to be the habitat for an endangered - and federally protected - animal species. As a result, property that once was worth \$10 million comes to have little (or no) commercial value.

Some version of this hypothetical scenario is played out again and again in modern society. On the one hand is the property owner who legitimately believed that it had the right to develop and use a classic property interest in a profitable manner. On the other hand is the legitimate need of the public to preserve important public interests. How are these conflicting interests to be mediated?

The governing constitutional doctrine is relatively clear: government, in the course of furthering even such important goals such as protecting endangered species, may not go "too far". Or, as the Supreme Court somewhat more cogently explained in 1960, government may not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). The result dictated by either of these formulations, however, is hardly self-evident. Granted that the government may not go "too far" in intruding upon the right of a property owner in the course of furthering even important governmental interest, what distinguishes the far from the near? Granted that government may not force some property owners to bear a disproportionate burden of the cost of protecting endangered species, when is that line crossed?

Supreme Court cases addressing the issue give little concrete guidance. Indeed, the Court has managed to protect property owners in only two rather discrete categories of cases. First, when government regulation constitutes an actual, physical intrusion upon property, the property owner must be compensated, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Second, if government action deprives a property owner of all economic value, compensation is required. Senate Bill No. 605 preserves (and effectuates) these jurisprudential rules. Section 204(a)(1); (a)(2)(C). Between these relatively clear lines, however, lies a vast area of uncertainty. It is in this area that Senate Bill 605 provides welcome clarity.

The Supreme Court has been unable to identify precisely when government action goes "too far". (In fact, one could even argue that the Court has been unable to apply its relatively "clear"

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P. 04

physical invasion and total loss of value rules.) One, perhaps, should not be too critical of the Court's vacillations in this area. The problem has many facets-including such determinations as how to define "property" in the first place (Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470 (1987)) and how to balance the relative interests of individual property owners and the public (Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)). Senate Bill 605 obviates these difficulties by providing a clear remedial rule: government goes "too far" when it "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 the governmental action." Section 204 (a) (2) (D).

The legislation, in sum, finally puts teeth into Justice Holme's 1922 dictum.

Senate Bill No. 605's bright-line approach to resolving when government action goes "too far" has much to commend it. It is straightforward and understandable. Several of the Supreme Court's discussions of when government goes "too far" have become bogged down in essentially philosophical debates regarding the meaning and nature of property. Is property a "bundle of rights"? If so, what is the most important "stick" in that bundle-the right to exclude others? Or is the most important stick, perhaps, the right to develop property rights to their full economic potential? Divisions between the Justices on such issues, as evidenced by the various opinions in Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470 (1987), give legal theoreticians and philosophers grist for learned discourse, but provide little practical help for either property owners or government regulators. This philosophical debate regarding the nature and protection of property rights, moreover, shows little sign of being resolved by

The clarity of the "physical invasion" and "deprivation of all value" lines is often more apparent than real. For example, determining when a "physical" invasion has occurred has proven difficult. In the development hypothetical noted above, for example, the property owner may plausibly claim that-in the course of protecting the endangered animal-the government has imposed an easement limiting development on the affected property. If so, has there been a physical invasion requiring compensation? The property owner, furthermore, may well argue that, because regulation has effectively destroyed the commercial value of the property, it has lost "all economic value." If so, the government will predictably reply that the owner has not lost "all value": after all, the property owner may still visit the affected property for family picnics and other outings. (See, e.g., the dissents filed in Lucas, 112 S. Ct. 2886 (1992)). The Court has hardly been consistent in addressing (and resolving) such arguments. Compare Lucas with Andrus v. Allard, 444 U.S. 51 (1979).

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the Supreme Court. The legislation, therefore, settles an important remedial issue by declaring that property rights are essentially economic rights.<sup>1</sup>

The line drawn by Senate Bill 605 not only resolves the philosophical debate just noted, it effectuates a rough (and I believe) fair balance between public need and individual right. Any government regulation, of course, will have an impact upon property values somewhere. Justice Holmes recognized that fact in Mahon when he noted that "government hardly could go on" if it had to compensate owners for every adverse effect of regulatory actions upon property rights, 260 U.S. at 413. But the Court has been unable to provide any coherent stopping point for the pragmatic need noted by Justice Holmes. Indeed, the Court's cases could be read to support the proposition that government regulation never goes "too far" unless it effectively deprives a property owner of all economic use or value of its property. Lucas, 112 S. Ct. 2886 (1992). Senate Bill 605, in effect, decrees that government regulation may deprive a property owner of as much as 33% of the value of its property, but - beyond that point - the exaction is a cost that should be "borne by the public as a whole." Armstrong, 364 U.S. at 49.

There will be academicians and theorists, of course, who will be dismayed by the rather straightforward, pragmatic lines drawn by this legislation. Some may protest that linking property rights with "fair market value" ignores other important values that inhere in the "bundle of rights" known as property. Others will argue that prohibiting government from taking more than 33% of the market value of identified property improperly and arbitrarily ties the hands of government. I have no doubt that cogent arguments can (and probably will be) made along both of those lines.

Such arguments, however, do not give me significant pause. If the Supreme Court were to adopt the pragmatic lines drawn by this legislation, the arguments that property involves more than mere economic value and that government regulatory authority should not be limited to an arbitrary percentage of that economic value would have real weight. But Senate Bill No. 605 does not establish a constitutional limit to the definitions of property, nor does it set a constitutional barrier to the exercise of government power. If experience demonstrates that either the purely economic definition of property or the 33% limitation on cost-free government action is unwise, the legislative power is sufficient to protect the public interest.

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<sup>1</sup> Compare Andrus v. Allard, 444 U.S. 51 (1979) (Court concludes that federal regulation which effectively destroyed all economic value of certain Indian objects did not constitute a taking because, even though objects had no commercial value, the owner retained the right to possess them).

In the meantime, this legislation provides a clear - and needed - remedial rule in an area where Supreme Court adjudication has been unsatisfactory. The legislation pours workable content into the constitutional edict that government not go "too far" in interfering with property rights.

II. WHICH COURT HAS JURISDICTION UNDER THE TAKINGS CLAUSE?

In addition to resolving the remedial problem just noted, Senate Bill 605 also eliminates a troublesome jurisdiction tangle that has developed between United States District Courts and the Court of Claims.

At the present time, a litigant who seeks to enjoin government regulatory action in Federal District Court on the ground that it violates the Takings Clause will likely be met with the argument that, since the Takings Clause does not prohibit government action but only requires just compensation, the District Court lacks jurisdiction because the proper forum is the Court of Claims. Litigants who are prescient enough to proceed directly to the Court of Claims, however, will be met with the government argument that a damages claim is premature because injunctive relief (not available in the Court of Claims) was not sought in Federal District Court. Current law, in short, permits the government to argue the jurisdiction equivalent of "heads I win, tails you lose."

Section 205 of Senate Bill 605 resolves this problem by providing that both the Federal District Courts and the Court of Claims shall have concurrent jurisdiction over monetary claims brought under the legislation, and by providing both courts with injunctive power to invalidate government action which violates the legislation.

This provision is helpful and most needed. As I have noted above, some may argue that the substantive lines drawn by Section 204 of the legislation are unwise. Similar arguments, however, can hardly be made about Section 205. Whatever one's views regarding the proper definition of property rights, or the extent to which the government should be permitted to adversely impact property rights without paying compensation, it is simply not appropriate to permit the government to whipsaw litigants by claiming - wherever the suit is filed - that it was filed in the wrong court.

## The Takings Clause: A Modern Plot for an Old Constitutional Tale

Richard G. Wilkins\*

### I. Introduction

This is the story of the continuing tribulations of that little clause tucked at the end of the fifth amendment to the United States Constitution which provides, in a rather straightforward manner, that "private property" shall not be "taken for public use, without just compensation."<sup>1</sup> Consistent construction of these few words holds extreme importance for both property owners and government regulators. But, notwithstanding its seeming linguistic simplicity, the takings clause has engendered Supreme Court precedent as convoluted as the plot of a pulp novel. Over sixty-five years ago, Justice Holmes declared that the clause requires compensation if the government encroaches "too far" upon property rights.<sup>2</sup> Unfortunately, however, there has been little agreement regarding when that point is reached.<sup>3</sup> And, although the Court recently emphasized the theoretical importance of the clause when it concluded that all "takings" — even temporary ones — require compensation,<sup>4</sup> the most important element of the constitutional story line remains obscure: the Court has candidly recognized its inability to deduce "objective rules" that will clearly indicate when government action "becomes a taking."<sup>5</sup> As a result, hardly any one, whether property owner or government regulator, can be certain that this tale will have a happy ending.<sup>6</sup>

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1 U.S. CONST. amend. V.

2 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-16 (1922) (land use regulations constitute a taking if they go "too far;" the State of Pennsylvania had taken a mining company's property by legislating that certain coal must be left in place to prevent surface subsidence).

3 *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1242-46 (1987) (Court concludes that, on balance, a statute virtually identical to the one at issue in *Pennsylvania Coal* now passes constitutional muster; Pennsylvania's requirement that certain coal be left in the ground to prevent subsidence does not constitute a taking because the regulation does not make over-all operation of the coal mines unprofitable and the state has a substantial interest in preventing surface damage).

4 *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2389 (1987).

5 *Id.* at 2399 n.17 (Stevens, J., dissenting) (citing *Hodel v. Irving*, 107 S. Ct. 2076 (1987); *Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 183-84 (1978)).

6 *Cf. First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. at 2393-400 (Stevens, J., dissenting) (arguing that the majority should not have reached the issue whether a "temporary taking" required compensation because, on the facts presented, it was a legal certainty that the lower courts on remand would find that the regulatory action did not amount to a taking).

The dismal state of the takings clause has been frequently noted. Many distinguished writers have commented on the Court's crazy-quilt takings jurisprudence. *See, e.g., C. HART, LAND USE PLANNING* (3d ed. 1977); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*,

The conundrum created by current takings clause jurisprudence can be understood by considering the plight of two hypothetical landowners, each owning property affected by government action. The first is a typical homeowner, who has been informed the city will condemn a portion of her backyard vegetable garden to build a highway. The second is a developer who, after publicizing her plans to build a twenty-five-story office tower within the scope of long-standing zoning regulations, learns that a group of nearby residents opposed to the development has persuaded the city commissioners to enact a "mountain view" ordinance. The ordinance, enacted after the residents unsuccessfully attempted to block the office tower by changing the applicable zoning regulations, diminishes the value of the second owner's property by at least sixty-five percent because it prohibits any construction over forty feet in height in order to protect the residents' view of distant mountains.

Both property owners have at least a rudimentary understanding that, while the city may put their property to "public use," the city's ability to "take" the property hinges upon the payment of "just compensation."<sup>7</sup> The property owners, to be sure, may not frame the taking issue in constitutional terms, but the basic operative provisions of the fifth amendment's takings clause are understood: "If the city wants to benefit my neighbors by putting my vegetable garden or my developable air space to a public use, it must pay for that privilege."

But, despite the obvious common sense similarities between the property owners' plights,<sup>8</sup> under current Supreme Court precedent a disparate outcome for each case is virtually guaranteed. The homeowner will be awarded enough money to keep her in tomatoes for years.<sup>9</sup> The other landowner — who by any realistic measure suffered a substantial injury when she lost the right to build her office tower — will be dismissed without a dime.<sup>10</sup> Instead of cash, she will receive the admonition that "[l]egislation designed to promote the general welfare commonly burdens some more than others,"<sup>11</sup> perhaps bolstered with a backhanded compliment for preserving a scenic view that will make a long-lasting contribution to the public weal.<sup>12</sup>

1962 S. Ct. Rev. 63; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Rose, *Mahon Reconstructed: Why the Takings Clause is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984). For an historical overview of the takings clause see Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694 (1985).

7 U.S. CONST. amend. V.

8 In both cases, government has taken an easement to permit access — in the first case physical, in the second case visual — across real property.

9 Cf. *Loretto v. Teleprompter Manhattan CATV Corp.*, 438 U.S. 419, 435-40 (1982) (statute requiring landlord to permit physical installation of cable television wires on her apartment building constitutes a taking requiring payment of just compensation).

10 Cf. *Landmark Land Co. v. City of Denver*, 728 P.2d 1281 (Colo. 1986), *appeal dismissed sub nom.*, *Harsh Inv. Corp. v. City of Denver*, 107 S. Ct. 3222 (1987) (involving challenge to Denver "mountain view" ordinance which placed 42-foot height limitation on property previously zoned for the construction of high-rise office towers; the evidence showed that the property owner suffered a 65% diminution in the value of the commercially zoned property).

11 *Penn Central Transp. v. City of New York*, 438 U.S. 104, 133 (1978).

12 Cf. *id.* at 132 (turning aside a challenge to the New York landmark preservation law, at least in part because the statute "preserve[s] structures of historic or aesthetic interest").

Vol. 64  
1989

The contrasting results of the two cases just examined, though hardly satisfying, are virtually mandated by the Supreme Court's recent attempts to delineate the functional boundaries of the takings clause. The Court has identified pragmatic factors to govern the application of the clause, including the nature or character of the government action involved, the economic impact on the property owner, and the extent to which the government action interferes with distinct investment-backed expectations.<sup>13</sup> But, like old dogs, these criteria have lain toothless by the wayside, nary able to take a healthy nip at the heels of the government regulators. Indeed, while repeatedly invoking its multiple-factor test, the Court has found a taking only in cases involving either physical dispossession<sup>14</sup> or, less frequently, total destruction of some right closely related to physical dominion over property.<sup>15</sup> Such cases, however, "are relatively rare."<sup>16</sup> Accordingly, the vast majority of governmental actions adversely affecting the interests of property owners escape with little or no constitutional scrutiny.

This Article suggests that the Court's lax construction of the takings clause demands correction. To further that end, the Article critiques the takings clause analysis presently used by the Court. That analysis has generally proceeded on two levels, with the Court (1) inquiring whether government regulation exceeds "police power" limitations, and then (2) examining whether the regulation, even if a legitimate exercise of police power, nevertheless constitutes a taking. Each level of the analysis, along with suggestions for improvement, will be examined in turn.

The first section of the Article scrutinizes the "police power" test applied to takings clause cases. Under the police power analysis, the Court inquires whether government regulation bears a substantial relationship to a legitimate state interest.<sup>17</sup> Although this inquiry traditionally has not operated as a significant limitation on the regulation of property rights,<sup>18</sup> the Court has rather abruptly suggested that the analysis has real bite.<sup>19</sup> The wisdom of testing legislative or administrative action against a rigorous "means/ends" standard, however, is questionable. Such an approach proved unmanageable and unwise in the heyday of "substantive due process," and there is little reason to think the meth-

<sup>13</sup> *Id.* at 124.

<sup>14</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Cf. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2393-400 (1987) (Stevens, J., dissenting) (the majority should not have reached the taking issue because, on the facts presented, it was a legal certainty that the regulatory action did not amount to a taking); *Hughes*, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 *RUTGERS L. REV.* 243 (1982).

<sup>15</sup> Government regulation cannot destroy a "fundamental attribute of ownership." *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980). For examples of such "attributes," see *Hodel v. Irving*, 107 S. Ct. 2076, 2083 (1987) (right to "pass on property" to "one's heirs" or "to one's family"); *Kaiser Aetna v. United States*, 444 U.S. at 179-80 (right to exclude).

<sup>16</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. at 2393.

<sup>17</sup> *Agins v. City of Tiburon*, 447 U.S. at 260-62; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. at 127.

<sup>18</sup> E.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-90 (1926).

<sup>19</sup> *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3147 (1987).

odology will prove more workable — or justifiable — in the context of the takings clause.

If the police power hurdle is cleared, government action must be scrutinized to determine whether it constitutes a "taking." Beginning with *Pennsylvania Coal Co. v. Mahon*,<sup>20</sup> the Court recognized that government regulation, even though it does not result in physical dispossession of the property owner, can nevertheless constitute a taking if it goes "too far."<sup>21</sup> The second section of this Article explores the current status of this inquiry.

In the sixty-six years since the *Pennsylvania Coal* test was first announced, government regulation has become one of the nation's true growth industries. The Court, accordingly, has attempted to isolate specific criteria to aid in delineating the "far" from the "near." These criteria, however, have never been rigorously applied. As a consequence, and despite the counter-intuitive nature of the results, vegetable garden owners are given cold hard cash for lost zucchini while investors are given the boot for millions of dollars in development rights that are lost when the city condemns a scenic easement over their property.<sup>22</sup>

This condition should not continue.<sup>23</sup> The third section of the Article suggests a relatively modest solution: the Court should demonstrate that its takings clause analysis is more than high-toned rhetoric. Fifth amendment doctrine, I believe, does not need wholesale revamping — it needs a vitamin pill. The Constitution provides just compensation for all takings, even temporary ones.<sup>24</sup> And, determining which governmental actions constitute "takings" is not so difficult a task that the Court should relegate the takings clause to the status of a constitutional myth. Indeed, the Court has already identified factors that, if consistently and carefully applied, furnish a workable contemporary plot for the clause. The Court, however, simply has not demanded adherence to its own story line. The time has come for the Court to brush off its traditional takings analysis and demonstrate that it means what it says.

## II. The Police Power Limit: Do the Means Relate To The Ends?

As Justice Brennan has recently noted, there can be little "dispute that the police power of the States encompasses the authority to impose conditions" on the ownership and use of property.<sup>25</sup> Whether such conditions exceed the legitimate scope of the police power has been tested

<sup>20</sup> 260 U.S. 393 (1922).

<sup>21</sup> *Id.* at 415.

<sup>22</sup> *Landmark Land Co. v. City of Denver*, 728 P.2d 1281 (Colo. 1986), *appeal dismissed sub nom. Harsh Inv. Corp. v. City of Denver*, 107 S. Ct. 3222 (1987).

<sup>23</sup> See Epstein, *The Public Purpose Limitation On The Power Of Eminent Domain: A Constitutional Liberty Under Attack*, 4 PAGE L. REV. 231, 264 (1984) (urging judges deciding takings cases to "be more careful to protect the individual from excessive governmental schemes"); cf. Oakes, "Property Rights" In *Constitutional Analysis Today*, 56 WASH. L. REV. 583, 625-26 (1981) (predicting a "new era" in the judicial protection of property rights and noting that "the takings clause has suddenly come to the fore") (footnote omitted).

<sup>24</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2388 (1987).

<sup>25</sup> *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3151 (1987) (Brennan, J., dissenting).

for expecting that she could exploit that interest. The government, after all, had indicated that the proposed use of the property was permissible because the contemplated development was in accord with existing zoning regulations. This fact should be given at least as much weight as the government "acquiescence" noted in *Kaiser Aetna*.<sup>292</sup> The developer's reliance upon the zoning regulations, moreover, was not unreasonable. Indeed, the citizens who opposed the developer were unsuccessful in changing the zoning regulations to block the proposed construction. Thus, this is not a case where a property owner was "gambling" that a regulatory scheme would be altered in her favor<sup>293</sup> or where she should have recognized that the government, "upon focusing on the issue," would refuse to recognize her interests.<sup>294</sup> On the contrary, the surrounding facts demonstrate that the developer made an investment "in contemplation of a purpose or use based upon a reasonable expectation."<sup>295</sup> The mountain view ordinance infringed that reasonable investment-backed expectation.

### Conclusion

The takings clause has not had a happy history. The Court's construction of the clause has been tortuous, inconsistent and "essentially ad hoc."<sup>296</sup> Complaining property owners with closely analogous interests have obtained exceedingly different results, as demonstrated by the disparate treatment that would almost certainly be accorded the hypothetical homeowner and developer. The homeowner's invocation of the takings clause would quite predictably result in a monetary award. By contrast, the developer who lost sixty-five percent of her commercial property value would receive nothing. For her, the compensation promised by the fifth amendment is a fairy tale; a chimera floating on the constitutional horizon that is, somehow, always barely beyond grasp.

The Supreme Court is undoubtedly aware of the unsatisfactory results dictated by its takings clause jurisprudence. Indeed, the Court has recently tried to buttress its analysis by closely scrutinizing the rationality of regulations which adversely affect property interests.<sup>297</sup> The Court, however, should be wary before subjecting all regulations affecting the use or enjoyment of property to strict "means/ends" scrutiny. In most other areas of the law, absent substantive constitutional infirmity, government regulation is tested against a standard of bare rationality. There is little reason to suppose that property regulations should be accorded different treatment. If, as is undoubtedly the case, takings clause values deserve more rigorous protection than is secured by existing precedent,

<sup>292</sup> *Kaiser Aetna*, 444 U.S. at 179.

<sup>293</sup> *Cf. Habersham at Northridge v. Fulton County*, 632 F. Supp. 815, 823 (N.D. Ga. 1985) *aff'd*, 791 F.2d 170 (11th Cir. 1986) (developer purchases property hoping that it will be rezoned to permit highly profitable construction).

<sup>294</sup> *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1008 (1984).

<sup>295</sup> *Kinzli v. City of Santa Cruz*, 620 F. Supp. 609, 619 (N.D. Cal. 1985), *rev'd and vacated as not ripe*, 818 F.2d 1449, 1453-54, *opinion amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988).

<sup>296</sup> *Kaiser Aetna*, 444 U.S. at 175.

<sup>297</sup> *Nollan v. California Coastal Comm'n.*, 107 S. Ct. 3141, 3150 (1987).

the Court should provide that protection by shoring up the substantive requirements of the clause itself.

Delineating the precise requirements of the takings clause has proven to be a daunting task. The Court, in fact, has despaired of its ability to distill "objective rules" to govern the area.<sup>298</sup> Nevertheless, the Court has derived a three-factor test, first announced in *Penn Central*, to aid the fifth amendment analysis. But, while repeatedly invoking the character of the government action, economic diminution, and interference with investment-backed expectations, the Court has failed to give these factors precise content or substantive bite. For example, in analyzing the character of government action, the Court has focused almost exclusively upon physical dispossession. Then, in considering economic diminution and interference with investment-backed expectations, it has approved any outcome short of complete confiscation. As a result, only those government actions which physically dispossess the property owner or totally destroy the value of her holdings have resulted in an award of compensation. I believe this result is improper and have suggested a recasting of the *Penn Central* factors which gives government considerably less latitude.

The central inquiry under the first *Penn Central* factor — the character of the government action — should be whether the government action imposes burdens that are appropriately carried by the community as a whole rather than individual property owners. This requires an analysis of why the government is acting, and how the action affects the individual property owners. The Court's traditional approach, which focuses upon the presence or absence of physical intrusion, does not adequately answer these questions. The Court's inquiry here should instead hinge upon whether the government action furthers an important police power objective and whether the action results in an average reciprocity of advantage between the affected property owner and the public. If the government action serves a truly compelling public need,<sup>299</sup> or unquestionably secures an average reciprocity of advantage,<sup>300</sup> this prong of the analysis may be determinative of the takings issue. In most cases, however, further inquiry into the *Penn Central* factors will be required.

The Court's analysis of economic diminution, the second *Penn Central* factor, has been decidedly permissive. Almost any economic impact short of complete confiscation passes scrutiny. The takings clause, however, protects against more than absolute appropriation. Therefore, the focus of the economic diminution inquiry should not be whether the property owner has lost her entire "bundle" or suffered a total loss of value. Rather, the Court should inquire whether the property owner has been deprived of a valuable, identifiable property interest. Loss of a single "strand" is a real injury that raises constitutional concern.

298 *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2399 n.17 (1987) (Stevens, J., dissenting).

299 *Mugler v. Kansas*, 123 U.S. 623 (1887).

300 *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

An analysis of investment-backed expectations is necessary to determine whether particular economic injuries should result in an award of compensation. If particular government actions do not interfere with the legitimate expectations of the property owner, no monetary award is due. The takings clause, after all, only requires "just" compensation. The Court has given little guidance here. Indeed, the Court's explorations of this factor have rarely focused on the actual expectations of affected property owners, and dictum in *Penn Central* itself seemingly rejects explicit consideration of such evidence. The classic decision in *Pennsylvania Coal Co. v. Mahon*,<sup>301</sup> however, turned upon the Court's analysis of the property owner's actual expectation. And, as evidenced by its own decision in *Kaiser Aetna v. United States*,<sup>302</sup> the Court has not completely abandoned that original understanding.

The preceding analysis provides protection to the hypothetical real estate developer as well as the homeowner. The mountain view ordinance, while a legitimate exercise of the police power, does not serve a compelling public need or secure anything even closely approximating an average reciprocity of advantage between the developer and the public. Because the character of the government action does not, by itself, sustain the imposition upon the property owner, a careful inquiry into whether the developer has sustained a substantial economic loss is required. The result of the inquiry is apparent: the developer has been forced to cede a scenic easement having definite and ascertainable value to the public. Even though she has not lost everything, she has lost a significant "strand" from her "bundle" of rights. That loss, moreover, is compensable because enactment of the mountain view ordinance deprived the developer of a distinct investment-backed expectation: her otherwise well-founded right to construct a multi-story office tower.

The analysis outlined above infuses the *Penn Central* analysis with significant new vigor. Under my approach, both the vegetable gardener and the commercial developer can legitimately lay claim to the protection of the takings clause. This is justifiable, I believe, because both property owners have been deprived of closely analogous property rights. They deserve analogous treatment. My approach, of course, fetters somewhat the ability of government to accomplish, without cost, all public objectives that it might deem desirable. That fact does not give me significant pause; that is, after all, the primary mission of the takings clause. That mission, moreover, is not well served by a shifting or weak-kneed constitutional analysis. The Court's elaboration of the takings clause has been too long without a consistent, workable plot. The *Penn Central* factors, if carefully and thoughtfully applied, can provide that missing element. Property owners invoking the takings clause deserve a happy ending.

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May 18, 1995

**MEMORANDUM TO TAKINGS GROUP**

FROM: Tom Jensen

RE: Agency Takings Letters.

Enclosed are the collected letters from the various agencies regarding S. 605. If you have any questions or comments please call my assistant Michael Mielke at: 395-7414.



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

May 14 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.

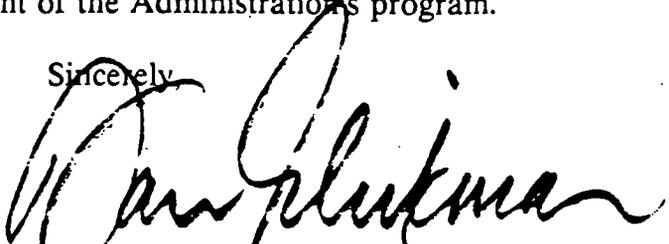
As described above, S. 605 will undoubtedly engender a great deal of litigation. Because the level of valid claims would be almost impossible to predict, budgeting for both the programs and the compensation claims would become extremely difficult. This will make it virtually impossible for both the authorizing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



DAN GLICKMAN  
Secretary



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.

*Ble*

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  
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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.

## The Clinton Wetlands Plan

Wetlands protection -- especially the Federal regulatory program under Section 404 of the Clean Water Act -- has been controversial over the past few years. Much continues to be said about Federal regulation of wetlands, but what is really happening?

Shortly after coming into office, the Clinton Administration convened an interagency working group to address legitimate concerns with Federal wetland policy.

After hearing from States, developers, farmers, environmental interests, members of Congress, and scientists, the working group developed a comprehensive, 40-point plan to enhance wetland protection while making wetland regulations more fair, flexible, and effective. This plan was issued on August 24, 1993.

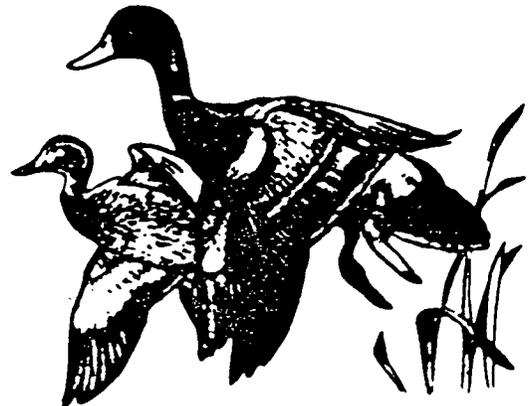
The Clinton Administration's Plan emphasizes improving Federal wetlands policy by:

- streamlining wetlands permitting programs;
- increasing cooperation with private landowners to protect and restore wetlands;
- basing wetland protection on good science and sound judgment; and
- increasing participation by States, Tribes, local governments, and the public in wetlands protection.

- protection of private property from flooding;
- shoreline erosion control;
- water quality improvements;
- habitat for fish and wildlife;
- natural products for human use; and
- opportunities for recreation, education, and research.

Over 90% of the commercial catch of fish and shellfish in the Southeastern United States depend on coastal wetlands systems, according to scientists.

Waterfowl hunters spend over \$600 million annually in pursuit of wetlands-dependent birds.



## Accomplishments

The Clinton Administration has already taken a number of actions to implement the Wetlands Plan, including:

- clarified, through regulation, that prior converted croplands are *not* wetlands under both the Swampbuster and Clean Water Act programs;
- issued policies that have increased flexibility in wetland permitting and reduced burdens on permit applicants;
- given USDA the responsibility for identifying all wetlands on agricultural lands for *both* the Swampbuster and Clean Water Act programs;
- made it easier for permit applicants to use mitigation "banks;"
- allowed for greater flexibility in permitting requirements in Alaska, due to the unique circumstances in that State;
- authorized New Jersey to operate its own wetlands program, in place of the Clean Water Act Section 404 program;
- requested increased funding for the Wetlands Reserve Program, to assist farmers who want to restore wetlands; and
- increased funding to States, Tribes, and local governments for wetlands programs.



## Next Steps

These efforts are only the first steps that the Clinton Administration is taking to reduce the burden of Federal wetlands regulations, to minimize Federal overlap, and to encourage greater participation by State, Tribal and local governments in protecting wetlands. Activities currently under development include:

- developing an administrative process to minimize the regulatory burden on small landowners and farmers for small projects on their land;
- establishing clear and firm deadlines for Corps of Engineers permit decisions;
- allowing administrative appeals of permit denials and wetland jurisdictional determinations as an alternative to expensive and time-consuming litigation;
- establishing a wetland delineator certification program to increase the government's reliance on wetlands delineations performed by private experts, providing greater certainty and flexibility to applicants;
- improving wetlands assessment techniques to allow for better consideration of wetlands functions in permit decisions;
- clarifying exemptions of man-made wetlands from jurisdiction;
- developing guidance that will facilitate the use of programmatic general permits -- giving State and local governments more flexibility in wetlands protection and reducing unnecessary duplication; and
- expanding the Wetlands Reserve Program into all 50 States and allowing more types of land into the program.

...the Clinton Administration is acting to ensure that the Federal government implements its regulatory programs in a manner that is efficient, responsive, and fair to everyone, including America's small landowners. This commitment is especially important for wetlands programs -- it is imperative that we meet our Nation's wetlands protection objectives without imposing unnecessary burdens on individuals who own property that happens to include wetlands.

What can small landowners expect in 1995? The most significant actions will be the development of a process to ease the regulatory burden on small landowners and farmers by expanding availability of general permits, and two new Section 404 initiatives aimed at streamlining the wetlands regulatory program. The first action will allow small landowners and farmers to build homes, expand their businesses or

It is estimated that another 50,000 activities are covered each year by general permits that do not require the public to notify the Corps at all.

## What About Help For Small Landowners?

The Clinton Administration is acting to ensure that the Federal government implements its regulatory programs in a manner that is efficient, responsive, and fair to everyone, including America's small landowners. This commitment is especially important for wetlands programs -- it is imperative that we meet our Nation's wetlands protection objectives without imposing unnecessary burdens on individuals who own property that happens to include wetlands.

What can small landowners expect in 1995? The most significant actions will be the development of a process to ease the regulatory burden on small landowners and farmers by expanding availability of general permits, and two new Section 404 initiatives aimed at streamlining the wetlands regulatory program. The first action will allow small landowners and farmers to build homes, expand their businesses or



- individuals are now allowed to fill a small amount of certain wetlands without the need for an individual permit
- permit decisions will generally be required within 90 days from the issuance of a permit application's public notice
- administrative appeals will be available for permit denials and wetland jurisdictional determinations

farms, or engage in other small projects on their land without being subject to the current regulatory process. The new initiatives will establish clear regulatory deadlines for Section 404 permit decisions, as well as a simple administrative appeals process for the Section 404 permit program. In addition, a streamlined USDA appeals process will increase predictability and efficiency for farmers by expanding decision-making at the State and local levels.

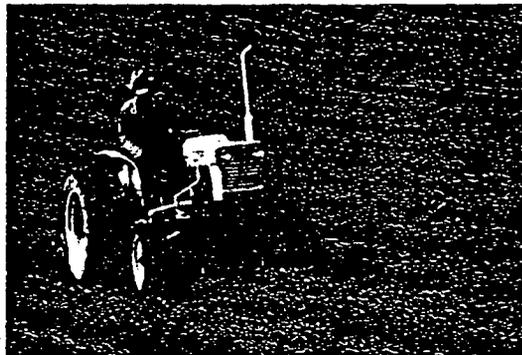
## Not All Wetlands Are the Same

### Will The "Definition" Of Wetlands Be Revised?

The Administration is currently funding a National Academy of Sciences study of wetlands identification techniques that is expected to be completed in the Spring of 1995. While the Academy continues to examine the question of how best to delineate wetlands, the Corps, EPA, USDA, and Fish and Wildlife Service have each adopted the Corps' 1987 Wetlands Delineation Manual. The agencies' use of the 1987 Manual has resulted in far fewer disagreements over wetlands identification. Once the Academy's recommendations are made public, the Administration will decide what, if any, changes to the 1987 Manual are necessary. Any proposed changes will be field tested and circulated for public review and comment before they are made final and adopted for use by the agencies.

While landowners should look forward to these new streamlining actions discussed above, landowners have also benefitted from guidance issued in August 1993 concerning projects with minor impacts. This guidance emphasized that small projects with minor impacts do *not* need the same detailed permit review as large, more complex proposals. Recognizing that not all wetlands have the same value, the guidance ensures that the regulatory program reflects this variation among wetlands. For example, proposals for activities in wetlands which are degraded and perform limited functions, or are small in size (e.g., less than one acre), or activities that cause only temporary impacts, will not require a detailed analysis of project alternatives.

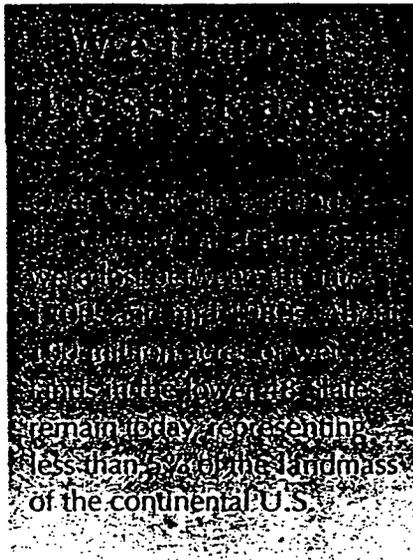
Landowners can also take advantage of numerous general permits that have already been issued, either on a nationwide or regional basis, and authorize activities with minor impacts. General permits do not require that a landowner complete a permit application, and most do not require any prior notification to the Corps. If the landowner follows the terms and conditions of the general permit, the activity is automatically authorized. There are currently thirty-nine nationwide general permits, and several hundred regional general permits. These permits authorize a wide-range of activities, including maintenance of structures, road crossings, and fills in headwater areas and isolated waters.



### How Has The Administration Addressed Farmers' Concerns?

The Clinton Administration recognizes the valuable contribution of agricultural producers to the Nation's economy and, more generally, to the American way of life. The Administration also appreciates the challenges faced by farmers as they

# The Clinton Administration Wetlands Plan: An Update



try to comply with wetlands protection programs, as well as other environmental laws. As a result, the Administration is committed to ensuring that Federal wetlands programs do not place unnecessary restrictions or burdens on farmers.

Perhaps the most important information for farmers regarding the Clean Water Act Section 404 regulatory program is that most routine, ongoing farming activities do *not* require permits, as Section 404(f) of the Clean Water Act exempts most farming practices currently in use.

Moreover, the Clinton Administration issued a final regulation in August 1993 which assures American farmers that an estimated 53 million acres of prior converted cropland will not be subject to permit requirements. Prior converted croplands -- croplands which were converted from wetlands prior to passage of the Food Security Act (December, 1985) -- are not subject to either the Clean Water Act or the Food Security Act.

For those farmers with wetlands on their property, the Administration has simplified wetlands regulations. Farmers can now rely on a single wetlands determination by USDA for *both* the Swampbuster program and the Clean Water Act Section 404 regulatory program.

## Can These Changes Be Made Within The Existing Statutory Framework?

The Clinton Administration has made significant progress in implementing this comprehensive package of wetland policy reforms. Implementation of the Administration's Wetlands Plan will protect our valuable resources, while allowing for economic growth and treating landowners and developers fairly.

While the Plan includes a limited number of legislative recommendations, most actions can be undertaken within the current legislative framework.

The Administration looks forward to continuing to work with Congress and the American public to improve the Nation's wetland policy.



US Army Corps  
of Engineers  
Office of the Chief  
of Engineers

# NEWS Release

Release No.	Contact:
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## Three Initiatives To Aid Wetlands Permitting Announced

Washington, D.C., March 6, 1995—Today, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and the U.S. Department of Agriculture Natural Resources Conservation Service announced three initiatives designed to reduce the regulatory burdens on property owners seeking wetlands permits.

"These initiatives are part of a comprehensive 40-point wetlands reform plan announced by the Administration in August of 1993," said Dr. John Zirschky, Acting Assistant Secretary of the Army for Civil Works. "These activities, along with other parts of the President's Wetlands Plan, strive to make wetlands programs more fair, flexible, and effective."

A new nationwide general permit will authorize activities in wetlands related to the construction or expansion of a home. This permit would allow, for example, a couple to build a home on non-tidal wetlands property without applying for an individual Clean Water Act permit. Specifically, the proposed nationwide permit would allow landowners to affect up to one half acre of wetlands to construct a single-family home and attendant features such as a garage and driveway. The Army Corps of Engineers will formally propose the nationwide permit in the Federal Register within the next two weeks. The public will have an opportunity to comment on the proposal before the permit becomes final.

Second, the Environmental Protection Agency and the Corps are clarifying the regulatory flexibility available to individuals seeking to construct or expand homes or farm buildings, and small business facilities where the impacts are up to two acres and are not covered otherwise by the new nationwide permit. For example, landowners proposing to expand a small business would not be asked to look at off-site options or alternatives.

Also today, the Corps, EPA, and the Natural Resources Conservation Service, along with the Departments of Interior and Commerce, announced that they have proposed, for public comment, guidance on the establishment and use of wetland mitigation banks. The guidance will expedite the process used to approve the establishment and use of such banks -- providing landowners greater flexibility in meeting mitigation requirements. Mitigation banking means the restoration, creation, enhancement, and in some cases the preservation of wetlands expressly for the purpose of compensating for future wetlands losses. The proposed guidance, which will be published in the *Federal Register* this week, will be out for public comment for 45 days.

--more--

"With the implementation of the initiatives announced today and the other parts of the President's Wetland Plan, we are reforming programs but not rolling back the protection of our Nation's valuable wetland resources," said Robert Perciasepe, Assistant Administrator for Water, Environmental Protection Agency.

**###**

**Note to Editors:** On Monday from 10:00 a.m. to 2:00 p.m. three people who have been involved in the development and implementation of these initiatives will be available to discuss these three initiatives as well as implementation of the President's 1993 Wetlands Plan.

**For the U. S. Army Corps of Engineers call:** George Halford in the Public Affairs Office at 202-272-0011. He will coordinate an interview with Mr. Michael Davis the chief of the Corps Regulatory Program.

**For the Environmental Protection Agency call:**

**Ms. Robin Woods  
EPA Press Office  
Environmental Protection Agency  
(202) 260-4377**

**For the Natural Resources Conservation Service call:**

**Mr. Warren M. Lee  
National Wetland Team Leader  
U.S. Department of Agriculture  
Natural Resources Conservation Service  
(202) 720-3534**



## 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 Dalton 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



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.



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



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.

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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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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.

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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, reading "Carol M. Browner". The signature is written in black ink and is positioned below the word "Sincerely,".

Carol M. Browner

Enclosures



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,

A handwritten signature in cursive script, appearing to read "Donna E. Shalala".

Secretary



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

Revised 5/1/95

## MEMO ON THE NUISANCE EXCEPTIONS IN H.R. 925 AND S. 605

### Introduction

Both the House-passed and Senate "takings" bills (H.R. 925, S. 605) use a nuisance exception to limit the compensation obligation they establish for government actions that diminish property values. The two bills differ in their specific language. H.R. 925 says "[i]f a use is a nuisance as defined by the law of a State...no compensation shall be made." (sec. 4). S. 605 provides "[n]o compensation shall be required...if the owner's use...is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated." (sec. 204(d)(1)).

These are among the most important provisions of the bills, for they define the universe of compensable regulation. Those whose "use is a nuisance" will not be compensated, no matter how extensive the economic burden regulation imposes. Since "nuisance" is a familiar legal term of art, it may seem that a nuisance test would provide a clear test for compensation, and would definitively identify those owners whose activities are undeserving of compensation.

Unfortunately, that is not the case. The main reason is that nuisance law is full of restrictive technical requirements, with the result that much harmful conduct that is the subject of modern regulation is not legally a nuisance. In practice, few owners are likely to be denied compensation under these bills, however harmful and unjustified their conduct. A number of illustrative examples are noted below to show the difficulty of proving a use to be a nuisance.

The bills also present a variety of other interpretive difficulties that make them anything but "bright line" guides to compensability. For example, is the nuisance exception meant to require a showing that the activity in question meets the technical standards of state nuisance law (as assumed in the preceding paragraph), or is it enough simply to show that the activity is 'nuisance-like'? If the former, as noted, the exception is very narrow. If the latter, it is very vague and uncertain.

There are other interpretive problems. For example, is it enough that the conduct would be a nuisance in some circumstances,

though not in the particular circumstances of the case presented (see "Hazardous Waste in California", p.4)? Is it enough that the conduct had been (or might have been) a nuisance previously, but state nuisance law is deemed preempted by the existence of federal regulation (see p. 5)? These are only a few of numerous unanswered questions that assure plentiful dispute, confusion, and litigation over the nuisance exception should either H.R. 925 or S. 605 be enacted.

It should also be noted at the outset that while the drafters of the bills have appropriated some language from Supreme Court opinions, they have distinctly not adopted the Court's constitutional standard for determining when compensation is due. The Supreme Court has never said that compensation must be paid for value-diminishing regulation unless the conduct in question is a state-law nuisance. For example, the nuisance-oriented standard of the *Lucas* case--language from which is picked up in S. 605--was only applied by the Supreme Court to the extreme and rare case where regulation deprives an owner of all economically beneficial use of land. The Senate bill would apply the *Lucas* language to a far more expansive range of regulation than the Supreme Court has done.

Indeed, the Court has not applied a formal nuisance standard at all to most regulation. In its 1987 decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,<sup>2</sup> the Court said that in determining whether compensation must be paid for a regulation it is not necessary to "weigh with nicety the question whether the [regulated uses] constitute a nuisance according to the common law."<sup>3</sup> Compensation is not required so long as "the State merely restrains uses of property that are tantamount to public nuisances...."<sup>4</sup> Over the years, the Court has found the following uses, none of them nuisances at common law, all to be "tantamount to public nuisances" and thus amenable to regulation without compensation: a brewery, legal when built, that was made less valuable by the enactment of a liquor prohibition law; cedar trees that were spreading a disease to nearby apple orchards; and land slated for commercial development that was zoned for less profitable development than the unrestrained market would have allowed.

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<sup>1</sup> 112 S.Ct. 2886 (1992).

<sup>2</sup> 107 S.Ct. 1232 (1987).

<sup>3</sup> p. 1244.

<sup>4</sup> p. 1245 (emphasis added).

## What is Nuisance?

The essence of private nuisance is an interference by use on one property with the use and enjoyment of the land of another. The injury is not to the property owner, but to rights that attend property ownership--rights to the unimpaired condition of the property as well as reasonable comfort and convenience in its occupation. Paradoxically, nuisance is both extremely open-ended and uncertain in the scope of its coverage, and at the same time is encumbered with rigid technical rules that sharply limit its application. Dean Prosser in his treatise says "there is perhaps no more impenetrable jungle in the entire law than ...nuisance."<sup>5</sup> While almost anything could be a nuisance, a great many of the most serious modern harms have not been susceptible of redress under the doctrine because of its technical limits, its requirements of proof, and the remedies it offers. The various technical requirements are set out below.

### The Technical Limits of Nuisance Law

The following are illustrative--but by no means exhaustive--examples of harmful conduct that are the subjects of federal regulation, but are not considered nuisances under the law of one or more states. In each case, since the use does not constitute a state law nuisance, the federal regulation would likely give rise to a claim for compensation under the bills now before Congress.

Wetland Filling in Maine: Plaintiff and defendant were abutting landowners in Winter Harbor, Maine. Water drained across plaintiff's land and onto the defendant's land, though there were no serious problems of water accumulation on defendant's land. Before the advent of the 404 program, defendant filled a part of his land, constructing a barrier that impeded the natural flow of drainage from the plaintiff's land onto his land. As a result, water backed up onto plaintiff's land, flooding plaintiff's basement at times of heavy rain. Plaintiff sued, claiming a nuisance. The Maine Supreme Court said there was no nuisance. If you obstruct the flow of water (as defendant did), rather than collecting and discharging it (as in a ditch), it is not a nuisance, though your neighbor is equally harmed either way.<sup>6</sup>

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<sup>5</sup> W. Page Keeton et al., Prosser and Keeton on the Law of Torts, sec. 86, at 616 (5th ed. 1984).

<sup>6</sup> Johnson v. Whitten, 384 A.2d 698 (Me. 1978). See generally, Martin J. McMahon, Jr., Liability for Diversion of Surface Waters by Raising Surface Level of Ground, 88 A.L.R. 891, 897-98.

Land Subsidence from Mining in West Virginia: Coal mining caused subsidence which ruptured gas, power, and water lines, and opened cracks in the earth that were safety hazards. Previous owners of surface lands had sold to coal companies their property right against subsidence years earlier. Because nuisance is a property owner's legal claim, and the surface owners no longer had a property interest to assert, there was no nuisance. Moreover, there was apparently no violation of state regulatory law. But there was a hazard to public health and safety, which was finally cured by a cessation order issued by the Federal Office of Surface Mining under federal law.<sup>7</sup>

Groundwater Contamination in Oregon: In the 1960's and 1970's an industry disposed of industrial solvents (TCE and TCA) which migrated onto, and contaminated, the farmer plaintiff's groundwater. The contamination was not discovered until 1986. The farmer sued in nuisance, but was thrown out of court because an Oregon statute does not allow nuisance suits to be brought more than 10 years after the event claimed to be a nuisance. The defendant was, however, subjected to remediation under an order issued by the Federal EPA.<sup>8</sup>

Hazardous Waste in California: A former owner had left hazardous substances on the property and the current owner sought to recover from it the cost of cleanup by claiming a nuisance. But the court held that an act committed on your own property isn't a nuisance. A nuisance is an act committed on one property that interferes with the use of another property. The former owner was subjected to regulation under both CERCLA and RCRA.<sup>9</sup>

A similar case arose in Massachusetts when a landowner tried to recover in nuisance from a company that had spilled chemicals on its property in the course of deliveries. The suit was dismissed because nuisance only deals with interference by a use one owner makes of his property with the use and enjoyment of the property of another.<sup>10</sup>

Asbestos Removal in Rhode Island: A City sued asbestos manufacturers in nuisance for the cost of having to remove

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<sup>7</sup> M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995).

<sup>8</sup> Cereghino v. Boeing Co., 826 F. Supp. 1243 (D. Ore. 1993).

<sup>9</sup> In re Cottonwood Canyon Land Co., 146 B.R. 992, 36 ERC 1304, 23 Bankr.Ct.D. 1010 (U.S. Bankruptcy Court, D. Colo. 1992).

<sup>10</sup> American Glue & Resin, Inc. v. Air Products & Chemicals, Inc., 835 F. Supp. 36 (D. Mass. 1993).

asbestos from schools and other public buildings. The suit was dismissed because under the law of nuisance a defendant must be in control over the instrumentality that constitutes the nuisance, and here the manufacturer, having already sold the asbestos, no longer had control over it.<sup>11</sup>

#### Preemption of Nuisance by Federal Regulatory Law

Sometimes conduct that would have been a nuisance is no longer a nuisance because courts hold that the very existence of a regulatory regime has, and was intended to, displace common law remedies like nuisance. This situation could result in a most ironic outcome under the bills now before Congress where non-compensability under the regulatory regime may depend on the existence of a common law nuisance.

Radio Signals in Michigan: Residents of Oak Park, Michigan sued in nuisance, complaining that the defendant radio station's signals were interfering with operation of their home electronic equipment. Their case was dismissed on the ground that the Federal Communications Act preempted state nuisance law in the area of radio frequency interference.<sup>12</sup> The residents were able to get the FCC to intervene, and it ordered the station to take costly measures to eliminate the problem. Had S. 605 been law, the FCC action could have been compensable because the nuisance exception might not have been available.

Airport Noise in Chicago: Landowners near airports can't bring nuisance actions concerning the number of flights per hour, aircraft technology, or takeoff angle of planes because such subjects are the exclusive province of the FAA.<sup>13</sup>

#### Preemption and Interstate Nuisance

Interstate pollution is peculiarly a subject for federal law. Bills like S. 605 seem not to take account of this matter. For example, interstate water pollution was traditionally governed by a federal common law of nuisance. The Supreme Court has now held

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<sup>11</sup> City of Manchester v. National Gypsum Company, 637 F.Supp. 646 (D. R.I. 1986).

<sup>12</sup> Broyde v. Gotham Tower, Inc., 13 F.3d 994, 997-98 (6th Cir. 1994), cert. denied 114 S.Ct. 2137 (1994).

<sup>13</sup> Bieneman v. City of Chicago, 864 F.2d 463, 473 (7th Cir., 1988), cert. denied 109 S.Ct. 2099, 2100 (1989).

that the Clean Water Act preempted the federal common law of nuisance.<sup>14</sup>

While state nuisance law still exists, the Supreme Court has ruled that only the law of the state that is the source of the pollution is applicable.<sup>15</sup> This ruling potentially presents a quite troublesome situation. For example, under the Clean Water Act, the EPA can (and perhaps must) refuse to issue a discharge permit if the discharge would violate a downstream state's water quality standards.<sup>16</sup> Under section 204(d)(1) of S. 605, however, compensation may be required for such a refusal unless the discharge constitutes a nuisance in the state "in which the property is situated" (the source state). In such circumstances, the discharger seeking a permit is unlikely to be violating its own (source) state's law. S. 605 could thus interfere with the administration of interstate pollution law under the Clean Water Act.

#### Problems of Proof in Nuisance Law

It is often said that modern regulatory statutes have been enacted precisely because nuisance law is not well-suited to meet the increasingly complex problems of modern life, with sophisticated synthetic chemical products, and the complex risks they may create.<sup>17</sup> Nuisance does not deal effectively with risk of future harm, and especially cumulative and long term harm. Nowhere is the limit of nuisance clearer than in the standard of proof of harm required in nuisance law, as compared to standards of proof deemed appropriate for regulatory regimes, as illustrated by the following case:

Leaking Landfill in Pennsylvania: A landfill discharged hundreds of thousands of gallons of foul-smelling leachate every year. Neighbors brought a nuisance action claiming contamination of a nearby creek and of drinking water. The State Department of Environmental Resources issued an order directing correction of the discharging activity, but the court found insufficient

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<sup>14</sup> Illinois v. Milwaukee, 101 S.Ct. 1784 (1981).

<sup>15</sup> International Paper Co. v. Ouellette, 107 S.Ct. 805, 809, 812 (1987).

<sup>16</sup> Arkansas v. Oklahoma, 112 S.Ct. 1046, 1056 (1992).

<sup>17</sup> See, e.g., Humbach, Evolving Thresholds of Nuisance and the Takings Clause, 18 Colum. J. Envtl. L. 1, 7 n. 34 (1993); Rabin, Environmental Liability and the Tort System, 24 Hous. L. Rev. 27, 28 (1987); Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189, 1282-83 (1986).

evidence of harm under the standards of common law nuisance to support a nuisance suit, and made the following observation:

Plaintiff's failure to make out the nuisance claims is no indication of the potential hazards posed by the landfill. Witnesses expert in water and solid waste management and toxicology noted the risks posed by leachate containing known and suspected carcinogens.... In short, the harm caused by the landfill's discharges, toxic and otherwise, is not proved and not known. These failures of proof are fatal to the common law negligence and nuisance allegations of the present complaint.<sup>18</sup>

While a court can enjoin a prospective nuisance, it can only do so upon finding it "highly probable" that the activity will lead to substantial injury.<sup>19</sup> This stringent standard for issuing an injunction makes nuisance law especially unhelpful in dealing with modern toxic and environmental risks. For one, the analysis it dictates requires courts to engage in the sort of risk assessment that is more appropriate to legislatures. Legislatures not only have the technical and scientific expertise readily at hand to enable them to consider such problems, but they are also called upon to make value judgments about what risks to human life and health society is willing to accept. Furthermore, if a decision is going to be made that the public has to bear the risks of a certain pollution-generating activity, it is more appropriate for legislatures than courts to assign such risk. Also, some regulation sets tolerable risk levels through "technology forcing standards" that require industry to develop technologies that will minimize or eliminate risks altogether. While courts may be theoretically capable of bringing about such desirable technological innovation in their adjudication of nuisance actions by, for example, issuing an increasingly stringent pollution abatement schedule, they lack the technical expertise needed to construct and supervise such regulatory regimes effectively.<sup>20</sup> For all these reasons,

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<sup>18</sup> O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 658 (E.D. Pa. 1981).

<sup>19</sup> William L. Prosser, Handbook of the Law of Torts, sec. 90, at 603 (4th ed. 1971).

<sup>20</sup> Courts themselves have not hesitated to point out the limitations of nuisance in addressing modern environmental harms and have expressed diffidence about their own capacity to protect the public from such harms through the adjudication of nuisance actions. See, e.g., Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 871 (N.Y. Ct. App. 1970); O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 658 n. 40 (E.D. Pa. 1981); Adkins v. Thomas

judicially fashioned nuisance law has not developed sufficiently to cover many of the problems addressed by modern regulatory programs.

This limitation of nuisance is magnified when it comes to cumulative and long term impacts. In the typical nuisance case, a court will only have one defendant before it; namely, the party alleged to be creating a nuisance by the use of its property. In this traditional two-party context, the problem of cumulative impacts cannot be adequately addressed. All of the above problems of proof are, understandably, even more difficult in cases of long-term harm, where the ill effects of toxics and pollution may not appear for many years.

### Nuisance and the Background Principles of Nuisance

So far this memo has assumed that the nuisance exception in the bills before Congress would require a showing that a regulated activity meets all the technical standards of nuisance in order for the exception to be triggered. That seems to be the standard of H.R. 925; it is less certain as to S. 605 which refers to the background principles of nuisance and property law. It is possible that the bills (and particularly S. 605) intend to impose a less technically rigorous standard, and that it would be enough to show 'nuisance-like' conduct to avoid the compensation requirement.<sup>21</sup> If so, a problem of a quite different sort is presented. The issue would no longer be whether conduct meets the many technical requirements of nuisance, but rather the vague and open-ended question: What is the scope of the phrase "a nuisance as commonly understood and defined by background principles of nuisance and property law?"

Should this be the question presented by the bill, all hope of a bright-line, simple, and straightforward compensation law will quickly evaporate. It would be hard to imagine a standard more prone to produce extensive litigation and uncertainty, precisely the goal the proponents of the bills say they want to avoid.

Perhaps the best way to illustrate what is likely to be in store is by looking back to the Supreme Court's decision in the 1987 case, *Keystone Bituminous Coal Association v. DeBenedictis*.<sup>22</sup>

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Solvent Co., 487 N.W.2d 715, 717 (Mich. 1992).

<sup>21</sup> However, section 501(6) speaks about compliance "with current nuisance laws," which seems more directed to technical nuisance.

<sup>22</sup> 107 S.Ct. 1232 (1987).

The case involved a state law regulating coal mining in order to prevent surface subsidence. The Justices divided 5-4. In effect the question before them was whether the state was engaged in abating activity "akin to a public nuisance."<sup>23</sup> Justice Stevens and four of his colleagues found that Pennsylvania was merely restraining "uses of property that are tantamount to public nuisances"<sup>24</sup> and that it is not necessary to "weigh with nicety the question whether [the activity] constitute[s] a nuisance according to common law."<sup>25</sup> Chief Justice Rehnquist and three of his colleagues insisted, on the contrary, that "[t]his statute is not the type of regulation that our precedents have held to be within the 'nuisance exception' to takings analysis."<sup>26</sup>

If the Justices of the United States Supreme Court have to struggle so much to determine where to draw the line over the nuisance principle, one can only imagine what the claims process would look like under an enacted S. 605.

#### Public and Private Nuisance

Public and private nuisance are two quite different legal wrongs. Neither H.R. 925 nor S. 605 distinguishes between them, and presumably the use of the term nuisance in both bills is meant to embrace both public and private nuisance. While most of the discussion above is directed to private nuisance, the same basic point applies to both public and private nuisance. That is, both have certain technical requirements that have to be met, or a nuisance claim will be dismissed by a court.

Public nuisance interferes with the exercise of public rights (rather than private property rights). Widely disseminated water and air pollution can be public nuisances, and classic public nuisances are keeping a house of prostitution, storing explosives in the midst of a city, making loud and disturbing noises, and blocking public thoroughfares.

This distinction means that pollution making water unusable for many downstream landowners in the use of their land is not a public nuisance because it only interferes with private rights. But pollution that interferes with the public right to fish in a river, or the public right of navigation, is a public nuisance. Thus, many harms--even widespread ones--are not public nuisances

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<sup>23</sup> p. 1243.

<sup>24</sup> p. 1245.

<sup>25</sup> p. 1244.

<sup>26</sup> p. 1256.

because they don't interfere with rights one has as a member of the general public. There has, however, been a resurgent and sometimes successful modern application of public nuisance actions by state prosecutors, especially in hazardous waste cases.<sup>27</sup>

#### Federal Law Encroachment on State Jurisdiction

While nothing in either H.R. 925 or S. 605 directly preempts state authority to define state nuisance law, one potentially undesirable consequence of the bills, if enacted, would be to engage federal agencies and courts in an ongoing process of defining the boundaries and rationale of nuisance law in all 50 states. It seems inevitable that this process will bring a significant federal influence to bear on the interpretation and content of an area of state law that has always been the special domain of the states. The federal influence could be especially strong in influencing nuisance law, where state-law development has not been extensive in recent years, having been largely displaced by extensive regulatory statutes.

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<sup>27</sup> Sevinsky, Public Nuisance: A Common Law Remedy Among the States, 5 Natural Resources and Environment 29 (1990).



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.

Enclosure



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,<sup>1</sup> groundwater contamination,<sup>2</sup> hazardous waste contamination of property,<sup>3</sup> asbestos removal,<sup>4</sup> and contamination of a creek by a leaking landfill.<sup>5</sup> 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

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

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

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

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

<sup>5</sup> 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:

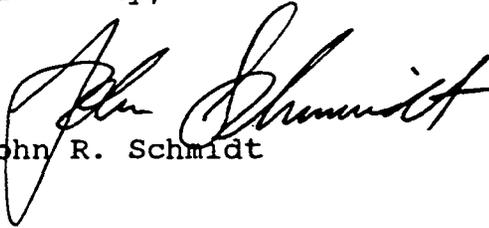
- Prohibitions on the sale of dangerous medical devices.
- Restrictions on the sale of animals and plants necessary to prevent the spread of contagious disease.
- Marketing quotas for crops.
- Restrictions on the sale or production of explosives or dangerous weapons.
- Protections under the National 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



# Department of Justice

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STATEMENT

OF

JOHN R. SCHMIDT

ASSOCIATE ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

THE OMNIBUS PROPERTY RIGHTS ACT OF 1995

PRESENTED ON

APRIL 6, 1995

## I. INTRODUCTION

Mr. Chairman, and Members of the Committee: Thank you for the opportunity to provide the Administration's views regarding S. 605, the "Omnibus Property Rights Act of 1995," and similar bills that seek to expand the traditional concept of "takings."

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 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 government.

To the extent government regulation imposes 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 describe some of these reforms in greater detail later in this testimony.

Mr. Chairman, no one could disagree with the concerns that underlie S. 605. All citizens should be protected from unreasonable regulatory restrictions on their property. But S. 605, and H.R. 925 passed by the House of Representatives, will do little or nothing to protect property owners or to ensure a fairer and more effective regulatory system. Rather, we are convinced that these proposals to require compensation in contexts very different from the balance struck under the Constitution itself are a direct threat to the vast majority of American citizens.

The truth is that this bill and similar proposals 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 radically new compensation schemes into law will 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. The cost of these protections and programs after passage of the proposed compensation legislation would be vastly increased. Ironically, if we chose 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 their property and our neighborhoods, pay restaurants and other public facilities to comply with the civil rights laws. That is, each American would be forced to pay property owners to follow the law. In the process, we would end 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 as 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 and similar bills. The Attorney General would recommend that the President veto S. 605 or similar legislation.

II. THE COMPENSATION SCHEMES IN TITLES II AND V WOULD HARM THE OVERWHELMING MAJORITY OF PROPERTY OWNERS, COST AMERICAN TAXPAYERS BILLIONS OF DOLLARS, CREATE HUGE NEW BUREAUCRACIES AND A LITIGATION EXPLOSION, AND UNDERMINE VITAL PROTECTIONS

A. The Fifth Amendment to the U.S. Constitution

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 is a compensable taking, the Constitution requires 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 property or other 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, compensation must be paid.

This constitutional tradition has been carefully developed by 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.

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." 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 we consider our constitutional tradition and the potential effects of S. 605, it is important to keep the takings issue in perspective. Certain advocates of compensation bills suggest that the government routinely disregards its constitutional obligation to pay just compensation when it takes private property. This is simply incorrect. The Justice Department's regulatory takings docket is actually relatively small. 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 30 takings claims involving the 404 permit program. These figures result from our commitment to ensuring that government programs are implemented in a way that respects property rights.

B. The Compensation Schemes in S. 605

A Radical Departure from Constitutional Tradition: The compensation schemes in S. 605 disregard our civic responsibilities and our constitutional tradition. 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 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. They ignore the wisdom of the Supreme Court, and they would wipe out many vital protections and generate unjust windfalls.

S. 605 would require the federal government to pay a property owner when federal agency action reduces the value of the affected portion of the property by 33 percent or more. The compensation requirement also applies to a wide range of state and local actions under federally funded, delegated, or required programs. The single exception to the compensation requirement is in the relatively rare instance in which the agency action does nothing more than restrict property use that is already prohibited by applicable state nuisance law.

It is important to recognize just how radical S. 605 and similar bills are. In 1993, every Member of the U.S. Supreme Court -- including all eight Justices appointed by Republican Presidents -- 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, 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 S. 605 precludes consideration of these factors, its single-factor test would necessarily result in myriad unjustified windfalls at the taxpayers' expense.

The compensation standard in S. 605 is also flawed because the loss-in-value trigger focuses solely on the affected portion of the property. The courts have made clear that 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. New York City, 438 U.S. 104, 130-31 (1978). By establishing the affected portion of the property as the touchstone, the bill ignores 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. Moreover, under S. 605 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. For example, if a developer is allowed to develop 99 acres of a 100 acre parcel, but required to leave one acre undeveloped to protect a bald eagle's nest, the developer could seek compensation for that restriction on a single acre. Or suppose the civil rights laws require a restaurant to make its restrooms accessible to wheelchair users. Under S. 605, the

restaurant owner would not need to show a 33 percent loss in value of the entire restaurant, but only of the affected portion of the restaurant. In other words, it 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, automatic compensation is required under the bill.

Sections 204(a)(2)(A) through (C) would freeze into law several additional compensation standards that appear to be loosely based on various Supreme Court cases. In our view, these standards in the bill reflect unjustifiably broad readings of the applicable case law.

The overall breadth of the bill's compensation requirement is staggering. It includes extremely broad definitions of "property," "just compensation," "agency action," and other key terms, some of which conflict with their accepted meaning as used in the Constitution. It applies without regard to the nature of the activity the agency seeks to prohibit. In many cases, large corporations would be free to use their property in whatever manner they desire, however reckless, without regard to the impact their activities have on their neighbors and the community at large.

Think of the consequences of this requirement 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.

Because S. 605 goes beyond mere land-use restrictions and applies to all manner of agency actions, it is likely to have many unintended consequences that we cannot even begin to anticipate. The bill's various and 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 for businesses that must comply with access requirements under the Americans with Disabilities Act; compensation for a bank where federal regulators determine that the bank is no longer solvent and appoints a receiver; compensation for corporations across the country where the Congress adjusts federal legislation designed to stabilize and protect pension plans; compensation for virtually any federal action that might affect the complex water rights controversies in the West; compensation for agricultural interests that must comply with changing phytosanitary restrictions; compensation where food safety rules or product labeling requirements diminish the value of factories producing unsafe products; and so forth. The examples are virtually endless.

A Threat to Property Rights: 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 recent 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.

An Untenable Fiscal Impact: Because these bills are so broad and inflexible, and because they mandate compensation where none is warranted, the potential budgetary impacts are almost unlimited. Even if new regulatory protections were scaled back, these bills would still have a huge fiscal impact by requiring compensation for statutorily compelled regulation and other essential government action. The Administration agrees with the

assessment made earlier this year by Senator Richard L. Russman, a Republican State Senator from New Hampshire, who testified before the House Judiciary Subcommittee on the Constitution on behalf of the National Conference of State Legislatures. He stated:

As a fiscal conservative and believer in limited government, compensation-type "takings" bills represent expensive "budget-busters." Their purpose is to give taxpayer subsidies to those who have to comply with requirements designed to protect all property values, and the health and safety of average Americans.

Because the compensation scheme in S. 605 is so broad in scope, it is extremely difficult to provide even a rough estimate of its overall potential fiscal impact. I am told that one proponent of these bills testified, with respect to the Americans with Disabilities Act alone, that potential liability would make administration of the Act prohibitively expensive. A 1992 study by the Congressional Budget Office estimated that application of one takings proposal to just "high value" wetlands -- a proposal that also would have radically revised existing compensation obligations -- would cost taxpayers \$10-15 billion. S. 605 would, of course, apply to far more programs and agency actions than just these two examples. Because S. 605 goes beyond mere 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.

Proponents of these bills sometimes argue that these costs are already being absorbed by the individual landowners.

However, the potential costs of the bill are so high not because landowners are unreasonably shouldering these costs now, but because the bill would require compensation in many cases where compensation would be unfair and unjust -- for example, where the landowner had no reasonable expectation to use the land in the manner proposed, or where other uses would yield a reasonable return on investment without harming neighboring landowners or the public.

S. 605 also requires 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 under the bill.

In addition to the compensation costs, S. 605 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 compensation schemes render the protection of wetlands prohibitively expensive, the commercial fishing industry would suffer devastating financial losses. Ironically, this bill might require the federal government to compensate the fishery and related economic interests whose profits are reduced by the government's failure to protect

wetland habitats. There is seemingly no end to the chain of compensation claims created by the bill.

At the end of the day, no one can really say how much S. 605 would cost American taxpayers, except to say that those costs would be in the billions of dollars. The answer given by some proponents of these bills is that the costs will depend on how regulators respond. But 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. I urge every fiscally responsible Member of this Committee to insist on a realistic cost analysis of this bill before the Committee votes on its merits.

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 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.

A Threat to Vital Protections: As I mentioned earlier, the passage of any of these compensation bills would pose 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 S. 605 were to become law, these vital protections -- which Congress itself has established -- would simply become too costly to pursue.

S. 605 evidently attempts to address this concern in a small way by providing an exception to the compensation requirement in Title II where the property use at issue would constitute a nuisance under applicable state law.

This narrow nuisance-law exception would not adequately allow for effective protection of human health, public safety, and other vital interests that benefit every American citizen. For example, the nuisance exception would not cover many protections designed to address long-term health and safety risks. The discharge of pollution into our Nation's air, land, and waterways often poses long-term health risks that would not be covered by the exception. Nor does the nuisance exception address cumulative threats. Very often, the action of a single person by itself does not significantly harm the neighborhood, but if several people take similar actions, the combined effect can devastate a community. Pesticide use, wetlands destruction,

discharges of toxic pollutants to air and water, improper mining, or other property use by an individual property owner might not constitute a nuisance by itself. However, in conjunction with similar use by other property owners, they can seriously affect the health or safety of a neighborhood or an entire region. In some states, special interest groups have lobbied state legislatures for exceptions to the nuisance laws that allow huge commercial enterprises to operate noxious facilities in family-farm communities and residential neighborhoods.

Furthermore, there are certain critical public-safety issues that are governed exclusively by federal law, such as nuclear power plant regulation. As a result, public safety in these matters could be held hostage to the government's ability to pay huge compensation claims. Nor does the nuisance exception address uniquely federal concerns, such as national defense and foreign relations. Had S. 605 been in effect during the Iranian hostage crisis, federal seizure or freezing of Iranian assets could have resulted in numerous statutory compensation claims.

The nuisance exception also fails to recognize that there are many important public interests that are not related to health and safety and not addressed by state nuisance law. As I have already discussed, these bills threaten civil rights protection, worker safety rules, and many other vital protections.

"Horror Stories": 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 great strides in reducing unreasonable and unfair burdens on middle-class landowners, 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 this bill.

- Suppose a restaurant franchisee challenges the Americans with Disabilities Act provisions governing access for disabled individuals in public accommodations. If the franchisee could show that the requirements of the ADA somehow reduced his profits (perhaps by requiring a ramp that reduces the number of tables allowed in the restaurant) and thus diminished the value of the affected property, he could be entitled to compensation.
- 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 the bill.
- Suppose a group of landowners challenge the federal government's implementation of the National Flood Insurance Program, which imposes certain land use restrictions designed to decrease the risk of flooding. They could argue that such restrictions diminish the value of their land and obtain 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 development would constitute a nuisance under applicable state law, compensation could be required.

- 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 or drivers that pose an imminent hazard to safety. The bill raises the possibility that the taxpayers would have to compensate affected corporations for economic losses where they have been directed by the government to cease operating unsafe equipment to protect the public.

These are just a few examples of the problems the "one-size-fits-all" approach of these compensation proposals raises. It is worth noting that most of these examples reflect actual situations in which property owners challenged government conduct as constituting "takings" entitling them to compensation. In each case, the court, often after noting the public benefit derived from the government action, concluded that there had been no taking of property. If S. 605 becomes law, a different outcome in those cases may well be the result. Other examples of potentially compensable agencies actions under the bill can be found in an article published earlier this week in a national newspaper, which reported that a Nevada rancher is claiming that

the government has "taken" his property by failing to prevent wildlife from drinking water and eating grass on public lands where the rancher has a grazing permit, and that California agribusiness operations who receive water from a federal irrigation project are hoping that bills like S. 605 will allow them to obtain compensation for reductions in federal water subsidies.

Opposition to Compensation Bills: It is because of these far-reaching and ill-conceived 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 recently wrote the Congress to oppose takings legislation that goes beyond what the Constitution requires. On the other hand, the corporate trade associations and many other organizations that support compensation bills like S. 605 do not purport to represent the interests of most Americans.

Activity in the States is particularly instructive. More than 34 state legislatures have considered and declined to adopt takings bills. The New Hampshire and Arkansas legislatures rejected takings bills in the last few weeks. Just a few months

ago, 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. Indeed, some of the federal compensation bills, including S. 605, would subject various State and local actions to the compensation requirement, raising significant implications for state-federal working relationships.

Conclusion: The Administration supports and values the private property rights of all property owners as provided for in the Constitution. We must find ways, however, to ensure that individual property rights are protected in a manner that does not threaten the property rights of others, does not create more red tape, more litigation, a heavier tax burden on most Americans, and does not undercut the protection of human health, public safety, the environment, civil rights, worker safety, and other values important to the American people. S. 605 and other automatic compensation bills fail in each of these respects. As a result, the Attorney General would recommend to the President that he veto any such proposal that reaches his desk.

### III. 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. If federal programs are treating some individuals unfairly, we should fix those programs.

As part of our efforts to reinvent government, the Administration has reformed specific federal programs 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 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 cheaper and faster. These reforms will substantially

reduce or eliminate the burden for small landowners in many cases.

At the Interior Department, Secretary Babbitt has already implemented 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. Thus, under most circumstances, these tracts would be exempted from regulation under the Endangered Species Act 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. 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 associated with the Northern Spotted 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. We note that a property owner who successfully litigates a takings claim is already 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 also committed to working with the courts on approaches to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute resolution techniques. Again, we believe that solutions that focus on the specific issues of concern are preferable to a rigid, one-size-fits-all compensation scheme.

IV. THE PROVISIONS GRANTING THE COURT OF FEDERAL CLAIMS  
EQUITABLE POWERS AND REPEALING 28 U.S.C. 1500 ARE  
UNNECESSARY AND UNWISE.

We are greatly troubled by the provisions in S. 605 that essentially discard the important distinctions between the Court of Federal Claims, an Article I court created by statute, and the district courts, Article III courts whose judges are life-tenured. For example, section 205 of the proposal would expand the jurisdiction of the Court of Federal Claims by giving it the authority to invalidate acts of Congress that adversely affect private property rights, the authority to decide all claims against the United States for monetary relief including those concerning the proper interpretation of statutes and regulations that are currently determined by district courts, the authority to grant injunctive and declaratory relief when appropriate in any case within its jurisdiction, and the authority to consider

related claims brought under the Federal Torts Claims Act (FTCA). At the same time, the proposal would expand the jurisdiction of the district courts by giving those courts concurrent jurisdiction with the Court of Federal Claims over claims for monetary relief under the legislation. The proposal makes clear that "the plaintiff shall have the election of the court in which to file a claim for relief."

We should always be careful when we manipulate the jurisdiction of our courts, particularly when the jurisdiction of statutory courts such as the Court of Federal Claims are enhanced to the detriment of Article III courts. It is difficult to predict what the many consequences of such actions will be. However, we do know that these changes will give an Article I court the power for the first time to invalidate the actions of Congress. The power of invalidation is so great and raises such fundamental questions about the structure of the federal government that it has been traditionally reserved for Article III courts.

We also know that these changes would significantly blur the distinctions between the Court of Federal Claims and the district courts and, as a result, ignore the historical purpose and functions of the Court of Federal Claims. That Court was established by Congress pursuant to Article I of the Constitution to eliminate the need for Congress itself to consider private bills for monetary relief. Its function has been to provide a centralized forum -- with expertise in specialized issues arising

under federal law -- to grant adequate relief at law for certain types of claims against the United States. As a result, the Court of Federal Claims has the authority to grant injunctive and declaratory relief in only very narrow circumstances. The proposed expansion of that Court's powers to grant such relief and to consider questions of state law pursuant to ancillary FTCA claims would fundamentally change the nature of that Court and its relationship to the district courts.

We are also opposed to the repeal of 28 U.S.C. §1500, which bars the Court of Federal Claims 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. According to the bill, repeal is necessary as current law "forces a property owner to elect between equitable relief in the district court and monetary relief (the value of the property taken) in the United States Court of Federal Claims." That is no longer the law. Loveladies Harbor v. United States, 27 F.3d 1545 (Fed. Cir. 1994). 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 Court of Federal Claims 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 government's litigation resources. While the government presumably would have the right

to transfer the cases and consolidate them in one forum, the government 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 Court of Federal Claims due to the minimal requirements of notice pleading. The government's ability to identify related actions would be further limited by the sheer volume of civil litigation involving the United States.

V. THE TAKING IMPACT ANALYSIS REQUIREMENT IN TITLE IV WOULD CREATE MASSIVE AND COSTLY BUREAUCRATIC RED TAPE AT THE EXPENSE OF IMPORTANT PROTECTIONS.

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 on private property. Indeed, we consulted with the Senate last year on a similar requirement during its work on the Safe Drinking Water Act, and we hope to continue to work with Members who are interested in this issue.

Because S. 605 establishes such a broad definition of "taking," however, Title IV would impose an enormous, unnecessary, and untenable paperwork burden on many aspects of government 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 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 protections that affect property rights.

The bill's enforcement mechanisms 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 courts' already overburdened docket.

## VI. CONCLUSION

The Administration strongly supports private property rights. S. 605, however, represents a radical departure from our

constitutional traditions and our civic responsibilities. It 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, it 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. S. 605, however, is a ham-fisted, scattershot approach that would impair the government's ability to carry out essential functions and would impose a tremendous cost on the pocketbooks of middle-class Americans. Accordingly, the Attorney General will recommend a veto if S. 605 or any similar automatic compensation scheme or compensation entitlement program were to pass.



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



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.

-2-

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.

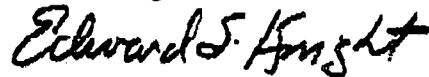
In the financial services sector, S. 605 also could be interpreted to apply to enforcement actions and regulations of the Office the Comptroller of the Currency and the Office of Thrift Supervision. The application of the bill to these actions will severely impede the ability of regulators to protect 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



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 black ink and is positioned above the printed name.

Jesse Brown

JB/jht

U.S. DEPARTMENT OF JUSTICE  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  
POLICY, LEGISLATION AND SPECIAL LITIGATION SECTION  
WASHINGTON, D.C. 20530

FAX NUMBER 202/514-4231

CONFIRMATION NUMBER 202/514-1442

DATE: 2-28-95<sup>5</sup>

FROM: Tim Dowling

PHONE NUMBER: 514-4642

NUMBER OF PAGES TO BE TRANSMITTED (including cover): 18

TO:

	FAX	PHONE
Tom Jensen	395-3744	
Eric Olsen	720-5437	720-3808
Marvin Krislov	456-1647	

MESSAGE:

Markup of draft bill attached.

Sent last night to Sax, Cohen, Wood, Van Ness, Dennis, Guzy

"Tier I" procedures for non-taking adverse effects on property are set forth in 5(b)(1).

"Tier II" procedures for takings claims are in 5((c) & (d)).

For clarity, these provisions now speak in terms of "takings claims" rather than "regulatory effects." If we keep this phraseology for Tier II, I propose deleting the definition of "regulatory effect."

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2  
3 104th CONGRESS  
4  
5 1st Session  
6  
7 S. XX

8  
9 TITLE\*

10  
11 Rule\*

12  
13 IN THE SENATE OF THE UNITED STATES

14  
15 DATE\*

16  
17 SPONSOR\* Mr. Bumpers

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22  
23 XXXXXXXXX)\* introduced the following bill;  
24 which was read twice and referred to the  
25 Committee on

26  
27 )L)

28  
29 Rule\*

30  
31 A BILL

32  
33 TITLE\*To ensure that Federal agencies take  
34 into account and are accountable for the  
35 effect of their actions on the property rights  
36 and values of affected citizens and their  
37 communities, and for other purposes.

38  
39 Be it enacted by the Senate and House of  
40 Representa\_tives of the United States of  
41 America in Congress assembled,

42  
43 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

44  
45 (a) Short Title. This Act may be cited as  
46 the "Private Property, Homeowner, and  
47 Community Protection Act of 1995".

48  
49 (b) Table of Contents. The table of contents  
50 of this Act is as follows:

51  
52 Sec. 1. Short title; table of contents.

53  
54 Sec. 2. Findings.

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Sec. 3. Purposes.

Sec. 4. Definitions.

Sec. 5. Agency procedure.

Sec. 6. Small private property owner assistance programs.

Sec. 7. Written permission for entry.

Sec. 8. Emergency exceptions.

Sec. 9. Modifications to the Clean Water Act.

Sec. 10. Modifications to the Endangered Species Act.

Sec. 11. Judicial review.

SEC. 2. FINDINGS.

Congress finds that\_

(1) the protection of private property from unreasonable governmental interference is a foundation of American freedom enshrined in the Bill of Rights within the fifth amendment to the United States Constitution;

(2) the ability to put private property to economically viable use is fundamental to the personal prosperity of individual Americans as well as to the economic vitality of communities and our Nation as a whole;

(3) the application of Federal laws (including regulations) and policies can affect, directly or indirectly, the use and enjoyment of real property, and the effects may serve to reduce or enhance the value of such property;

(4) Federal laws (including regulations)

1 and policies can protect private property from  
2 adverse effects resulting from unwise use of  
3 the private property of others, thereby aiding  
4 individuals and the community as a whole in  
5 the advancement of economic stability, public  
6 health, safety, and the general welfare;  
7

8 (5) the Supreme Court has interpreted the  
9 fifth amendment to recognize that necessary  
10 and appropriate governmental action may so  
11 severely restrict an individual's use of  
12 private property while benefiting the public  
13 that in fairness and justice, the burden  
14 should be borne by the public as a whole,  
15 rather than solely by the individual affected;  
16

17 (6) the Supreme Court has recognized that  
18 the determination of when the public, rather  
19 than the individual, must bear the burden in  
20 the form of providing a property owner with  
21 just compensation is one made on a case by  
22 case basis;  
23

24 (7) active and properly informed  
25 participation by citizens in the governmental  
26 process helps balance the rights of  
27 individuals, communities, corporations, and  
28 other entities to use property in accordance  
29 with the rights of other property owners and  
30 the general public;  
31

32 (8) clarification is necessary desirable

33 (A) to help ensure that Federal agencies\_

34 (i) respect the private property rights of  
35 citizens;  
36

37 (ii) include as an integral part of their  
38 decisionmaking process a consideration of the  
39 effect of agency action on privately-owned  
40 property; and  
41

42 (iii) communicate with and consider the  
43 views of property owners and other members of  
44  
45

1 the community; and

2  
3 (B) to ensure that legitimate claims for  
4 just compensation are brought, adjudicated,  
5 and resolved as expeditiously as possible;

6  
7 (9) ~~owners of~~ small property owners often  
8 may lack the financial resources to fully and  
9 adequately pursue through judicial process  
10 claims relating to Federal regulatory effect  
11 on their property; and

12  
13 ~~(10) Executive Order No. 12360 has not~~  
14 ~~fully provided small property owners with~~  
15 ~~adequate guidance or assistance in working~~  
16 ~~with Federal agencies on issues involving land~~  
17 ~~use and planning in cases in which small~~  
18 ~~property owners feel adversely effected by the~~  
19 ~~agency action.~~

20  
21 SEC. 3. PURPOSES.

22  
23 The purposes of this Act are to

24  
25 (1) establish new procedures to ensure that  
26 Federal agencies consider the effect of their  
27 actions on private real property as those  
28 actions relate to ~~owners of~~ small property  
29 owners;

30  
31 (2) ensure that Federal agencies assist  
32 ~~owners of~~ small property owners to comply  
33 efficiently and fully with Federal laws by  
34 providing timely explanations of requirements  
35 and assistance;

36  
37 (3) assist ~~owners of~~ small property owners  
38 in receiving prompt responses to their  
39 requests for consideration of the effect of  
40 agency actions on private property;

41  
42 (4) enhance the opportunities of citizens  
43 to participate in the process of government  
44 and to achieve greater equity in Federal  
45 environmental and land use decisions affecting

1 the rights of owners of small property owners  
2 and the effect of those decisions on their  
3 communities;

4  
5 (5) reduce the cost to owners of small  
6 property owners of pursuing claims that agency  
7 action has resulted in a taking of their  
8 property; and  
9

10 (6) protect against unexpected Federal  
11 financial liability that could result from  
12 court determinations that agency actions  
13 require the payment of just compensation when  
14 such liability could have been otherwise  
15 avoided while accomplishing full compliance  
16 with the law.

17  
18 SEC. 4. DEFINITIONS.

19  
20 In this Act:

21  
22 (1) Agency. The term "agency" means an  
23 agency (as defined in section 551 of title 5,  
24 United States Code).

25  
26 (2) Agency action. The term "agency  
27 action" means an agency action (as defined in  
28 section 551 of title 5, United States Code).  
29 ~~proposed action, or a determination not to act~~  
30 ~~or proposed determination not to act, with~~  
31 ~~respect to a project, activity, or program~~  
32 ~~funded in whole or in part under the direct or~~  
33 ~~indirect jurisdiction of an agency, including~~  
34 ~~a project, activity, or program that~~

35  
36 ~~(A) is carried out by or on behalf of the~~  
37 ~~agency;~~

38  
39 ~~(B) is carried out with Federal financial~~  
40 ~~assistance;~~

41  
42 ~~(C) requires a Federal permit, license, or~~  
43 ~~approval; or~~

44  
45 ~~(D) is subject to State or local regulation~~

1 ~~administered pursuant to a delegation of~~  
2 ~~authority by or approval of a Federal agency.~~  
3

4 (3) Community organization. The term  
5 "community organization" means an entity  
6 described in section 501(c) (3) or (4) of the  
7 Internal Revenue Code of 1986 that is exempt  
8 from taxation under section 501(a) of the  
9 Internal Revenue Code of 1986, the charitable  
10 purpose of which includes\_  
11

12 (A) the protection of health, safety,  
13 quality of land, or natural or cultural  
14 resources;

15 (B) advancement of the goals of  
16 environmental justice,  
17

18 that demonstrates an active and federally  
19 recognized participation in a case or  
20 controversy involving property, ~~the division~~  
21 ~~of the unit of local government responsible~~  
22 ~~for land use and resource planning, and the~~  
23 ~~applicable soil and water conservation~~  
24 ~~district.~~  
25

26 (4) Indirect regulatory effect. The term  
27 "indirect regulatory effect" means the  
28 regulatory effect of agency action on property  
29 other than property that is the immediate  
30 subject of an agency action.  
31

32 (5) ~~Affected Party~~ Person. The term  
33 ~~"affected party"~~ "person" means an  
34 individual, corporation, or community  
35 organization, ~~or unit of State or local~~  
36 ~~government~~ that claims to suffer an indirect  
37 regulatory effect on ~~private property rights~~  
38 as the result of an agency action.  
39

40 (6) Property. The term "property" means  
41 privately-owned real property.  
42

43 (6) Property owner. The term "property  
44 owner" means the holder of an ownership or  
45

7

1 leasehold interest in a ~~small~~ property that  
2 may be subjected to a regulatory effect or  
3 indirect regulatory effect as the result of an  
4 agency action.  
5

6 ~~(8) Regulatory effect. The term~~  
7 ~~''regulatory effect'' means a substantial~~  
8 ~~reduction or increase in the economic value of~~  
9 ~~a property or interest in property [Does~~  
10 ~~''interest in property'' include anything~~  
11 ~~other than an ownership interest or leasehold~~  
12 ~~interest? We should probably delete ''interest~~  
13 ~~in property.''] or any substantial curtailment~~  
14 ~~or expansion of any particular use to which a~~  
15 ~~property has been made that is, or can~~  
16 ~~reasonably be projected to be, the direct or~~  
17 ~~indirect result of an agency action.~~  
18

19 (8) Small property. The term ''small  
20 property'' means a property that\_  
21

22 (A) is a qualified residence, as determined  
23 under section 163(h)(5)(A)(i)(II) of the  
24 Internal Revenue Code of 1986;  
25

26 (B) is connected with a farming, ranching,  
27 aquaculture, or nonindustrial forestry  
28 operation with respect to which payments are  
29 limited under section 1001 of the Food  
30 Security Act of 1985 (7 U.S.C. 1308); and  
31

32 (C) is connected with the operation of a  
33 small-business concern (as determined under  
34 section 3 of the Small Business Act (15 U.S.C.  
35 632)).  
36

37 (9) Taking. The term ''taking'' means  
38 Federal an agency action ~~affecting~~ with  
39 ~~respect to a property for interest in~~  
40 ~~property? probably not.] to the extent that~~  
41 compensation is required by the Constitution.  
42

SEC. 5. AGENCY PROCEDURE.

1  
2  
3 (a) Establishment of Procedure. Each agency  
4 identified by the Attorney General under  
5 subsection (h)(1) shall establish a procedure,  
6 consistent with its statutory authorities, for  
7 the consideration of the regulatory adverse  
8 effects of the agency's actions on property  
9 rights of property owners that is consistent  
10 with the requirements of this section and the  
11 guidelines established by the Attorney General  
12 under subsection (h)(2).  
13

14 (b) Requirements. A procedure under  
15 subsection (a) shall at a minimum provide for  
16

17 (1) consideration by the agency of any  
18 adverse effects of agency actions on small  
19 property, regardless of whether such adverse  
20 effects would constitute a taking, including:  
21

22 (a) an identification of the statutory  
23 authorities administered by the agency  
24 that may adversely affect the ability of  
25 owners of small property to utilize their  
26 property;  
27

28 (b) an assessment of such authorities,  
29 and the specific rules, processes and  
30 mechanisms by which they are  
31 administered, to assess any adverse  
32 impacts on small property, with specific  
33 reference to economic consequences; and  
34

35 (c) consideration of potential  
36 improvements, including but not limited  
37 to regulatory changes and legislative  
38 proposals, that would reduce adverse  
39 impacts on small property.  
40

41 (2) consideration by the agency, on the  
42 request of an affected property owner, of the  
43 regulatory effect that an agency action would  
44 have on the property of a property owner, a  
45 claim that an agency action would constitute a

1 ~~taking~~ including expedited agency  
2 consideration of regulatory effects ~~such~~  
3 ~~claims~~ under subsection (c);

4  
5 (2) the conduct of adjudications under  
6 subsection (d);

7  
8 (3) resolution of any findings that an  
9 agency action has resulted or will result in a  
10 taking of property; and

11  
12 (4) training of agency personnel to better  
13 consider the effect of agency actions on  
14 property rights and community relations.

15  
16 (c) Expedited Agency Consideration of  
17 Regulatory Effects ~~Takings Claims~~.

18  
19 (1) In general. When an agency identified by  
20 the Attorney General under subsection (h)(1)  
21 receives a request from a property owner, ~~or~~  
22 ~~other person indirectly affected,~~ to consider  
23 ~~the effect of a agency action on the property~~  
24 ~~owner's use and value of property, whether an~~  
25 ~~agency action would constitute a taking,~~ the  
26 agency shall

27  
28 (A) consider the request, including, as the  
29 agency deems appropriate, the consideration  
30 of

31  
32 (i) information supplied by the property  
33 owner;

34  
35 (ii) information provided by other affected  
36 persons, including State and local  
37 governments; and

38  
39 (iii) information developed by the agency in  
40 the course of proposing the agency action or  
41 investigating the request;

42  
43 (B) ~~take into account the effect of the~~  
44 ~~agency action to the extent consistent with~~  
45 ~~the purposes and requirements of the law under~~

1 ~~the authority of which the agency action is~~  
 2 ~~taken and make available to the property~~  
 3 ~~owner, on request, a detailed analysis of that~~  
 4 ~~effect its determination, in writing,~~  
 5 ~~including any analysis of the effect of the~~  
 6 ~~agency action on the owner's property;~~

7  
 8 (C) ~~if the property owner so requests or if~~  
 9 ~~the agency considers it necessary for the~~  
 10 ~~development of facts sufficient in order to~~  
 11 ~~reach an appropriate determination, conduct an~~  
 12 ~~adjudication under subsection (d); and~~

13  
 14 (D) if the matter is referred for  
 15 adjudication, take prompt action in response  
 16 to the findings made in the adjudication.  
 17

18 (2) Expedition. An agency shall ensure that  
 19 its procedure provides for the most  
 20 expeditious completion under this subsection  
 21 and adjudication and response to adjudication  
 22 under subsection (d) as the nature and  
 23 complexity of the agency action in question  
 24 will allow.  
 25

26 (3) Effect on Agency Action. Consideration  
 27 of a taking claim under this section shall not  
 28 stay or otherwise delay the effect of the  
 29 agency action that gives rise to the taking  
 30 claim.  
 31

32 (d) Adjudication.  
 33

34 (1) Hearing. When a claim is referred under  
 35 subsection (c)(3), the agency shall consider  
 36 the claim on the record following an  
 37 opportunity for hearing under section 554 of  
 38 title 5, United States Code.  
 39

40 (2) Basis of decision. The decision of a  
 41 claim referred under subsection (c)(3) shall  
 42 ~~be based on a consideration of make findings~~  
 43 ~~of fact and conclusions of law regarding:~~  
 44

45 (A) the authority under which the agency

1 action is taken;

2  
3 (B) whether the agency action ~~is or would~~  
4 ~~likely amounts~~ to a taking of property;

5  
6 (C) whether modifications ~~are available~~  
7 ~~pursuant to subsection 3(A)~~ could be made to  
8 ~~reduce any adverse effect on the use,~~  
9 ~~enjoyment, or value of the property;~~ and

10  
11 (D) if a taking is ~~likely to be found,~~ the  
12 amount of payment ~~that would be necessary to~~  
13 ~~make~~ ~~provide~~ just compensation.

14  
15 (3) Agency Response to Adjudicatory  
16 Findings. If it is determined in an  
17 adjudication ~~that~~ an agency action constitutes  
18 a taking, ~~or that there are sufficiently~~  
19 ~~persuasive reasons why the agency action might~~  
20 ~~be held to constitute a taking as to justify~~  
21 ~~taking 1 of the following actions,~~ the agency,  
22 in consultation with the Attorney General,  
23 ~~shall~~ ~~is authorized to~~ take ~~± one~~ or more of  
24 the following actions:

25  
26 (A) Reverse or modify the agency action so  
27 as to avoid or reduce the effect of the agency  
28 action on the property owner, if and to the  
29 extent to which a reversal or modification  
30 would be consistent with and permit the full  
31 enforcement of, ~~the overall purposes of the~~  
32 ~~law under which the agency action is taken.~~

33  
34 (B) Prepare and serve on the property owner  
35 a ~~detailed~~ statement stating reasons why the  
36 agency does not concur with the  
37 determination.

38  
39 (C) ~~On the request of the property owner,~~  
40 ~~and to the extent statutory authorization~~  
41 ~~exists and to the extent that funds are~~  
42 ~~available in advance through an appropriation,~~  
43 ~~pay just compensation for the taking through~~  
44 ~~appropriate procedures, including, file a~~  
45 ~~declaration under the first section of the Act~~

1 of February 26, 1931 (40 U.S.C. 258a), to  
 2 condemn a property interest taken for public  
 3 use, limited to the interests in property  
 4 determined to be taken pursuant to this  
 5 subsection (d), and this Act shall constitute  
 6 authority for the taking for the purposes of  
 7 the second sentence of the first undesignated  
 8 paragraph of that section, or

9  
 10 (D) Notify the property owner of remedies  
 11 available under the fifth amendment to the  
 12 United States Constitution.

13  
 14 (e) Alternative Dispute Resolution.

15  
 16 (1) Determination of no taking. If the  
 17 agency, in consultation with the Attorney  
 18 General, determines that an agency action does  
 19 not constitute a taking, the agency shall  
 20 promptly notify the property owner of the  
 21 decision.

22  
 23 (2) Consent to alternative dispute  
 24 resolution. If a property owner brings a claim  
 25 seeking compensation in the Court of Federal  
 26 Claims, on the request of the property owner,  
 27 the agency and the Attorney General shall  
 28 consent to submit the claim to the any process  
 29 of alternative dispute resolution which has  
 30 been approved by the Attorney General in a  
 31 form consistent with the practices of the  
 32 court.

33  
 34 ~~(f) Qualification To Invoke Proceedings~~  
 35 ~~Under This Section. A property owner shall be~~  
 36 ~~entitled to invoke proceedings under this~~  
 37 ~~section to enforce or protect a use or~~  
 38 ~~enjoyment or the value of the property only if~~  
 39 ~~the property owner (or, in the case of a~~  
 40 ~~property that the property owner acquired by~~  
 41 ~~inheritance, a person from whom the~~  
 42 ~~inheritance was received) had the use,~~  
 43 ~~enjoyment, or value of the property prior to~~  
 44 ~~the date on which~~  
 45

1 ~~(1) in the case of an agency action that is~~  
 2 ~~explicitly required by a state, regulation, or~~  
 3 ~~court decision, the date of enactment or~~  
 4 ~~issuance of the statute, regulation, or court~~  
 5 ~~decision; or~~

6  
 7 ~~(2) in the case of an agency action that is~~  
 8 ~~committed to determination by the agency, the~~  
 9 ~~date on which the agency action is published~~  
 10 ~~or interested parties are otherwise given~~  
 11 ~~notice as required by law.~~

12  
 13 (g) Time For Filing Requests. \_

14  
 15 (1) Request for consideration. \_A property  
 16 owner shall submit to the agency a request for  
 17 expedited agency consideration of regulatory  
 18 effects a takings claim under subsection (c)  
 19 not later than 30 days the date on which the  
 20 agency action is published or interested  
 21 parties are otherwise given notice as required  
 22 by law.

23  
 24 (2) Request for consent to alternative  
 25 dispute resolution. \_A property owner shall  
 26 submit to the agency a request for consent to  
 27 alternative dispute resolution under  
 28 subsection (e) (2) not later than 30 days after  
 29 the agency notifies the property owner of its  
 30 determination that an agency action does not  
 31 constitute a taking.

32  
 33 (h) Responsibilities of the Attorney  
 34 General. \_The Attorney General shall \_

35  
 36 (1) not later than 60 days after the date of  
 37 enactment of this Act, publish a list of  
 38 agencies that must establish a procedure under  
 39 subsection (a), which list shall include, at a  
 40 minimum, all agencies the actions of which  
 41 have a significant possibility of affecting  
 42 the value, use, or enjoyment of property;

43  
 44 (2) not later than 90 days after the date of  
 45 enactment of this Act, publish guidelines for

1 each Federal agency identified under paragraph  
2 (1) to ensure that, to the maximum extent  
3 practicable, each agency's procedure is  
4 uniform and sufficient to achieve the  
5 objectives of this Act; and  
6

7 (3) not later than 180 days after the date  
8 of enactment of this Act, review and approve  
9 the procedure established by each agency  
10 designed to comply with the requirements of  
11 subsection (a) and paragraph (2).  
12

13 SEC. 6. SMALL PRIVATE PROPERTY OWNER  
14 ASSISTANCE PROGRAMS.  
15

16 (a) Establishment.  
17

18 (1) In general. The Attorney General shall  
19 designate at least 3 of the agencies  
20 identified under section 5(h)(1) to establish  
21 pilot property owner assistance programs.  
22

23 (2) Basis for designation. In designating  
24 such agencies, the Attorney General shall  
25 choose agencies the programs of which have the  
26 potential to affect a broad range of property  
27 owners on a regular basis.  
28

29 (b) Functions. The programs established  
30 under this section shall include the following  
31 functions:  
32

33 (1) Identification of solutions to potential  
34 conflicts with property owners and application  
35 of all available expedited procedures and  
36 incentives to achieve those solutions.  
37

38 (2) Service as a focal point for questions,  
39 requests, complaints, and suggestions from  
40 property owners concerning the policies and  
41 activities of the agency that affect property.  
42

43 (3) Provision of advice to property owners  
44 on how to comply with applicable requirements  
45 of Federal law as efficiently and

1 expeditiously as possible.

2  
3 (4) Provision of information to property  
4 owners on the availability of procedures under  
5 section 5, including procedures of the Court  
6 of Federal Claims and the alternative dispute  
7 resolution process.

8  
9 (5) Coordination among designated agencies  
10 to ensure consistent responses and  
11 communications relating to the private  
12 property owner assistance programs.

13  
14 (6) Annual reporting to the head of the  
15 agency of information and comments  
16 communicated by property owners that will  
17 better fulfill the mission of the agency while  
18 reducing potential conflicts relating to  
19 regulatory effects on property.

20  
21 (7) Annual reporting by the head of the  
22 agency to the appropriate committees of  
23 Congress describing the information and  
24 comments received under paragraph (6),  
25 including recommendations that Congress might  
26 consider to reduce or eliminate overly  
27 burdensome regulations on property owners.

28  
29 (c) Prohibition of Advocacy. Agency  
30 personnel involved in a private property owner  
31 assistance program under this section shall  
32 not serve as advocates or legal counsel for  
33 property owners seeking to invoke proceedings  
34 under this Act.

35  
36 (d) Authorization of Appropriations. There  
37 is authorized to be appropriated to carry out  
38 this section \$1,500,000 for each of fiscal  
39 years 1996, 1997, 1998, 1999, 2000, and 2001.

40  
41 SEC. 7. WRITTEN PERMISSION FOR ENTRY.

42  
43 (a) Compliance With Law. An employee or  
44 agent of an agency acting within the scope of  
45 the employee or agent's employment or

1 authority shall fully comply with\_  
2

3 (1) State and tribal trespass law when  
4 entering a small property; and  
5

6 (2) other applicable law relating to  
7 privacy.  
8

9 (b) Requirements. An employee or agent of  
10 any Federal agency shall not enter a property  
11 unless\_  
12

13 (1) the employee or agent has provided to  
14 the holder of an ownership or leasehold  
15 interest in the property, or the interest  
16 holder's authorized representative, a written  
17 statement generally describing the reason for  
18 entry; and  
19

20 (2) the interest holder or authorized  
21 representative has given written permission  
22 for the entry.  
23

24 (c) Exceptions. ~~Subsection (b) This section~~  
25 shall not apply in a case of entry for the  
26 purpose of\_  
27

28 (1) obtaining consent necessary to comply  
29 with subsection (b);  
30

31 (2) conducting an investigation under  
32 Federal law;  
33

34 (3) enforcing Federal law; or  
35

36 (4) responding to an emergency.  
37

38 SEC. 8. EMERGENCY EXCEPTIONS.  
39

40 This Act does not apply in a case in which  
41 an agency determines that agency action is  
42 necessary to\_  
43

44 (1) safeguard life or property;  
45

(2) respond to a state of disaster; or

(3) respond to a threat to national security.

SEC. 9. MODIFICATIONS TO THE CLEAN WATER ACT.

TO BE SUPPLIED.]

SEC. 10. MODIFICATIONS TO THE ENDANGERED SPECIES ACT.

TO BE SUPPLIED.]

SEC. 11. JUDICIAL PROCEEDINGS.

(a) Rule of Construction. Nothing in this Act shall be construed to impair any right of judicial review derived from other statutory authority or the Constitution.

(b) Scope of Review. Judicial review of implementation of this Act shall be limited to a question relating to the establishment ~~existence~~ of procedures under to section 5 and to any Federal question that may arise out of section 9 or 10.

(c) Admission Into Evidence. Any information obtained in proceedings under section 5 (c), (d)(3), or (e) shall not be subsequently entered into evidence in any judicial proceeding without the consent of the agency and of the property owner to whom the evidence relates, unless the information would have been obtainable through judicial discovery procedure if those proceedings had not occurred. [NOTE: This subsection should be expanded to deal with the question what weight, if any, the court should give to factual findings were made and what deference to legal conclusions were reached in the proceedings, particularly in light of the usual rule that would apply to a section 554 adjudication.]

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DISCUSSION DRAFT 4/20/95

S.L.C.

128  
DEOB

104TH CONGRESS  
1ST SESSION

**S.** \_\_\_\_\_

---

IN THE SENATE OF THE UNITED STATES

Mr. BUMPERS introduced the following bill; which was read twice and referred to the Committee on \_\_\_\_\_

---

**A BILL**

To ensure that Federal agencies take into account and are accountable for the effect of their actions on the property rights and values of affected citizens and their communities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the  
5 “Private Property, Homeowner, and Community Protec-  
6 tion Act of 1995”.

7 (b) **TABLE OF CONTENTS.**—The table of contents of  
8 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings.

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DISCUSSION DRAFT 4/20/85

S.L.C.

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Sec. 3. Purposes.  
Sec. 4. Definitions.  
Sec. 5. Agency procedure.  
Sec. 6. Small private property owner assistance programs.  
Sec. 7. Written permission for entry.  
Sec. 8. Emergency exceptions.  
Sec. 9. Modifications to the Clean Water Act.  
Sec. 10. Modifications to the Endangered Species Act.  
Sec. 11. Judicial review.

1 **SEC. 2. FINDINGS.**

2 Congress finds that—

3 (1) the protection of private property from un-  
4 reasonable governmental interference is a foundation  
5 of American freedom enshrined in the Bill of Rights  
6 within the fifth amendment to the United States  
7 Constitution;

8 (2) the ability to put private property to eco-  
9 nomically viable use is fundamental to the personal  
10 prosperity of individual Americans as well as to the  
11 economic vitality of communities and our Nation as  
12 a whole;

13 (3) the application of Federal laws (including  
14 regulations) and policies can affect, directly or indi-  
15 rectly, the use and enjoyment of real property, and  
16 the effects may serve to reduce or enhance the value  
17 of such property;

18 (4) Federal laws (including regulations) and  
19 policies can protect private property from adverse ef-  
20 fects resulting from unwise use of the private prop-  
21 erty of others, thereby aiding individuals and the

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DISCUSSION DRAFT 4/20/95

S.L.C.

3

1 community as a whole in the advancement of eco-  
2 nomic stability, public health, safety, and the general  
3 welfare;

4 (5) the Supreme Court has interpreted the fifth  
5 amendment to recognize that necessary and appro-  
6 priate governmental action may so severely restrict  
7 an individual's use of private property while benefit-  
8 ing the public that in fairness and justice, the bur-  
9 den should be borne by the public as a whole, rather  
10 than solely by the individual affected;

11 (6) the Supreme Court has recognized that the  
12 determination of when the public, rather than the in-  
13 dividual, must bear the burden in the form of pro-  
14 viding a property owner with just compensation is  
15 one made on a case by case basis;

16 (7) active and properly informed participation  
17 by citizens in the governmental process helps balance  
18 the rights of individuals, communities, corporations,  
19 and other entities to use property in accordance with  
20 the rights of other property owners and the general  
21 public;

22 (8) clarification is necessary—

23 (A) to ensure that Federal agencies—

24 (i) respect the private property rights  
25 of citizens;

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## DISCUSSION DRAFT 4/20/85

S.L.C.

## 4

1 (ii) include as an integral part of their  
2 decisionmaking process a consideration of  
3 the effect of agency action on privately-  
4 owned property; and

5 (iii) communicate with and consider  
6 the views of property owners and other  
7 members of the community; and

8 (B) to ensure that legitimate claims for  
9 just compensation are brought, adjudicated,  
10 and resolved as expeditiously as possible;

11 (9) small property owners often lack the finan-  
12 cial resources to fully and adequately pursue  
13 through judicial process claims relating to Federal  
14 regulatory effect on their property; and

15 (10) Executive Order No. 12360 has not fully  
16 provided small property owners with adequate guid-  
17 ance or assistance in working with Federal agencies  
18 on issues involving land use and planning in cases  
19 in which small property owners feel adversely ef-  
20 fected by the agency action.

21 **SEC. 8. PURPOSES.**

22 The purposes of this Act are to--

23 (1) establish new procedures to ensure that  
24 Federal agencies consider the effect of their actions

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DISCUSSION DRAFT 4/20/85

S.L.C.

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1 on private real property as those actions relate to  
2 small property owners;

3 (2) ensure that Federal agencies assist small  
4 property owners to comply efficiently and fully with  
5 Federal laws by providing timely explanations of re-  
6 quirements and assistance;

7 (3) assist small property owners in receiving  
8 prompt responses to their requests for consideration  
9 of the effect of agency actions on private property;

10 (4) enhance the opportunities of citizens to par-  
11 ticipate in the process of government and to achieve  
12 greater equity in Federal environmental and land  
13 use decisions affecting the rights of small property  
14 owners and the effect of those decisions on their  
15 communities;

16 (5) reduce the cost to small property owners of  
17 pursuing claims that agency action has resulted in  
18 a taking of their property; and

19 (6) protect against unexpected Federal financial  
20 liability that could result from court determinations  
21 that agency actions require the payment of just com-  
22 pensation when such liability could have been other-  
23 wise avoided while accomplishing full compliance  
24 with the law.

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DISCUSSION DRAFT 4/20/85

S.L.C.

6

1 **SEC. 4. DEFINITIONS.**

2 In this Act:

3 (1) **AGENCY.**—The term “agency” means an  
4 agency (as defined in section 551 of title 5, United  
5 States Code).6 (2) **AGENCY ACTION.**—The term “agency ac-  
7 tion” means an action proposed action, or a deter-  
8 mination not to act or proposed determination not to  
9 act, with respect to a project, activity, or program  
10 funded in whole or in part under the direct or indi-  
11 rect jurisdiction of an agency, including a project,  
12 activity, or program that—13 (A) is carried out by or on behalf of the  
14 agency;15 (B) is carried out with Federal financial  
16 assistance;17 (C) requires a Federal permit, license, or  
18 approval; or19 (D) is subject to State or local regulation  
20 administered pursuant to a delegation of au-  
21 thority by or approval of a Federal agency.22 (3) **COMMUNITY ORGANIZATION.**—The term  
23 “community organization” means an entity de-  
24 scribed in section 501(e) (3) or (4) of the Internal  
25 Revenue Code of 1986 that is exempt from taxation

O:\TRU\TRU95.356

## DISCUSSION DRAFT 4/20/85

S.L.C.

7

1 under section 501(a) of the Internal Revenue Code  
2 of 1986, the charitable purpose of which includes—

3 (A) the protection of health, safety, quality  
4 of land, or natural or cultural resources;

5 (B) advancement of the goals of environ-  
6 mental justice,

7 that demonstrates an active and federally recognized  
8 participation in a case or controversy involving prop-  
9 erty, the division of the unit of local government re-  
10 sponsible for land use and resource planning, and  
11 the applicable soil and water conservation district.

12 (4) INDIRECT REGULATORY EFFECT.—The  
13 term "indirect regulatory effect" means the regu-  
14 latory effect of agency action on property other than  
15 property that is the immediate subject of an agency  
16 action.

17 (5) PERSON.—The term "person" means an in-  
18 dividual, corporation, community organization, or  
19 unit of State or local government that claims to suf-  
20 fer an indirect regulatory effect on private property  
21 rights as the result of an agency action.

22 (6) PROPERTY.—The term "property" means  
23 privately-owned real property.

24 (6) PROPERTY OWNER.—The term "property  
25 owner" means the holder of an **ownership or**

O:\TRU\TRU95.356

DISCUSSION DRAFT 4/20/85

S.L.C.

8

1       **leasehold** interest in a small property that may be  
2       subjected to a regulatory effect or indirect regu-  
3       latory effect as the result of an agency action.

4           (8) REGULATORY EFFECT.—The term “regu-  
5       latory effect” means a substantial reduction or in-  
6       crease in the economic value of a property or inter-  
7       est in property [**Does “interest in property”**  
8       **include anything other than an owner-**  
9       **ship interest or leasehold interest? We**  
10       **should probably delete “interest in prop-**  
11       **erty.”]** or any substantial curtailment or expansion  
12       of any particular use to which a property has been  
13       made that is, or can reasonably be projected to be,  
14       the direct or indirect result of an agency action.

15           (8) SMALL PROPERTY.—The term “small prop-  
16       erty” means a property that—

17           (A) is a qualified residence, as determined  
18       under section 168(h)(5)(A)(i)(II) of the Inter-  
19       nal Revenue Code of 1986;

20           (B) is connected with a farming, ranching,  
21       aquaculture, or nonindustrial forestry operation  
22       with respect to which payments are limited  
23       under section 1001 of the Food Security Act of  
24       1985 (7 U.S.C. 1308); and

O:\TRU\TRU95.356

DISCUSSION DRAFT 4/20/85

S.L.C.

9

1 (C) is connected with the operation of a  
2 small-business concern (as determined under  
3 section 3 of the Small Business Act (15 U.S.C.  
4 632)).

5 (9) TAKING.—The term “taking” means Fed-  
6 eral an agency action with respect to a property [or  
7 **interest in property? probably not.**] to the  
8 extent that compensation is required by the Con-  
9 stitution.

10 **SEC. 5. AGENCY PROCEDURE.**

11 (a) ESTABLISHMENT OF PROCEDURE.—Each agency  
12 identified by the Attorney General under subsection (h)(1)  
13 shall establish a procedure for the consideration of the reg-  
14 ulatory effect of the agency's action on property rights of  
15 property owners that is consistent with the requirements  
16 of this section and the guidelines established by the Attor-  
17 ney General under subsection (h)(2).

18 (b) REQUIREMENTS.—A procedure under subsection  
19 (a) shall at a minimum provide for—

20 (1) consideration by the agency, on the request  
21 of a property owner, of the regulatory effect that an  
22 agency action would have on the property of a prop-  
23 erty owner, including expedited agency consideration  
24 of regulatory effects under subsection (c);

O:\TRU\TRU95.856

DISCUSSION DRAFT 4/20/95

S.L.C.

1 (2) the conduct of adjudications under sub-  
2 section (d);

3 (3) resolution of any findings that an agency  
4 action has resulted or will result in a taking of prop-  
5 erty; and

6 (4) training of agency personnel to better con-  
7 sider the effect of agency actions on property rights  
8 and community relations.

9 (c) EXPEDITED AGENCY CONSIDERATION OF REGU-  
10 LATORY EFFECTS.—

11 (1) IN GENERAL.—When an agency identified  
12 by the Attorney General under subsection (h)(1) re-  
13 ceives a request from a property owner, or other per-  
14 son indirectly affected, to consider the effect of a  
15 agency action on the property owner's use and value  
16 of property, the agency shall—

17 (A) consider the request, including, as the  
18 agency deems appropriate, the consideration  
19 of—

20 (i) information supplied by the prop-  
21 erty owner;

22 (ii) information provided by other af-  
23 fected persons, including State and local  
24 governments; and

O:\TRU\TRU95.356

DISCUSSION DRAFT 4/20/85

S.L.C.

11

1 (iii) information developed by the  
2 agency in the course of proposing the  
3 agency action or investigating the request;

4 (B) take into account the effect of the  
5 agency action to the extent consistent with the  
6 purposes and requirements of the law under the  
7 authority of which the agency action is taken  
8 and make available to the property owner, on  
9 request, a detailed analysis of that effect;

10 (C) if the property owner so requests or if  
11 the agency considers it necessary for the devel-  
12 opment of facts sufficient to reach an appro-  
13 priate determination, conduct an adjudication  
14 under subsection (d); and

15 (D) if the matter is referred for adjudica-  
16 tion, take prompt action in response to the find-  
17 ings made in the adjudication.

18 (2) EXPEDITION.—An agency shall ensure that  
19 its procedure provides for the most expeditious com-  
20 pletion under this subsection and adjudication and  
21 response to adjudication under subsection (d) as the  
22 nature and complexity of the agency action in ques-  
23 tion will allow.

24 (d) ADJUDICATION.—

O:\TRU\TRU95.956

## DISCUSSION DRAFT 4/20/95

S.L.C.

## 12

1 (1) HEARING.—When a claim is referred under  
2 subsection (c)(3), the agency shall consider the claim  
3 on the record following an opportunity for hearing  
4 under section 554 of title 5, United States Code.

5 (2) BASIS OF DECISION.—The decision of a  
6 claim referred under subsection (c)(3) shall be based  
7 on a consideration of—

8 (A) the authority under which the agency  
9 action is taken;

10 (B) whether the agency action is or would  
11 likely amount to a taking of property;

12 (C) whether modifications could be made  
13 to reduce any adverse effect on the use, enjoy-  
14 ment, or value of the property; and

15 (D) if a taking is likely to be found, the  
16 amount of payment that would be necessary to  
17 make just compensation.

18 (3) AGENCY RESPONSE TO ADJUDICATORY  
19 FINDINGS.—If it is determined in an adjudication  
20 an agency action constitutes a taking, or that there  
21 are sufficiently persuasive reasons why the agency  
22 action might be held to constitute a taking as to jus-  
23 tify taking 1 of the following actions, the agency, in  
24 consultation with the Attorney General, shall take 1  
25 or more of the following actions:

O:\TRU\TRU95.358

DISCUSSION DRAFT 4/20/85

S.L.C.

13

1 (A) Reverse or modify the agency action so  
2 as to avoid or reduce the effect of the agency  
3 action on the property owner, if and to the ex-  
4 tent to which a reversal or modification would  
5 be consistent with and permit the full enforce-  
6 ment of, the overall purposes of the law under  
7 which the agency action is taken.

8 (B) Prepare and serve on the property  
9 owner a detailed statement stating reasons why  
10 the agency does not concur with the determina-  
11 tion.

12 (C) On the request of the property owner,  
13 and to the extent that funds are available, file  
14 a declaration under the first section of the Act  
15 of February 26, 1931 (40 U.S.C. 258a), to con-  
16 demn a property interest taken for public use,  
17 limited to the interests in property determined  
18 to be taken pursuant to subsection (d), and this  
19 Act shall constitute authority for the taking for  
20 the purposes of the second sentence of the first  
21 undesignated paragraph of that section.

22 (e) ALTERNATIVE DISPUTE RESOLUTION.—

23 (1) DETERMINATION OF NO TAKING.—If the  
24 agency, in consultation with the Attorney General,  
25 determines that an agency action does not constitute

O:\TRU\TRU95.956

DISCUSSION DRAFT 4/20/85

S.L.O.

14

1 a taking, the agency shall promptly notify the prop-  
2 erty owner of the decision.

3 (2) CONSENT TO ALTERNATIVE DISPUTE RESO-  
4 LUTION.—If a property owner brings a claim seeking  
5 compensation in the Court of Federal Claims, on the  
6 request of the property owner, the agency and the  
7 Attorney General shall consent to submit the claim  
8 to the process of alternative dispute resolution in a  
9 form consistent with the practices of the court.

10 (f) QUALIFICATION TO INVOKE PROCEEDINGS  
11 UNDER THIS SECTION.—A property owner shall be entitle  
12 to invoke proceedings under this section to enforce or pro-  
13 tect a use or enjoyment or the value of the property only  
14 if the property owner (or, in the case of a property that  
15 the property owner acquired by inheritance, a person from  
16 whom the inheritance was received) had the use, enjoy-  
17 ment, or value of the property prior to the date on which—

18 (1) in the case of an agency action that is ex-  
19 plicitly required by a state, regulation, or court deci-  
20 sion, the date of enactment or issuance of the stat-  
21 ute, regulation, or court decision; or

22 (2) in the case of an agency action that is com-  
23 mitted to determination by the agency, the date on  
24 which the agency action is published or interested  
25 parties are otherwise given notice as required by law.

O:\TRU\TRU95.356

DISCUSSION DRAFT 4/20/95

S.L.C.

## 15

1 (g) TIME FOR FILING REQUESTS.—

2 (1) REQUEST FOR CONSIDERATION.—A prop-  
3 erty owner shall submit to the agency a request for  
4 expedited agency consideration of regulatory effects  
5 under subsection (c) not later than 30 days the date  
6 on which the agency action is published or interested  
7 parties are otherwise given notice as required by law.

8 (2) REQUEST FOR CONSENT TO ALTERNATIVE  
9 DISPUTE RESOLUTION.—A property owner shall sub-  
10 mit to the agency a request for consent to alter-  
11 native dispute resolution under subsection (e)(2) not  
12 later than 30 days after the agency notifies the  
13 property owner of its determination that an agency  
14 action does not constitute a taking.

15 (h) RESPONSIBILITIES OF THE ATTORNEY GEN-  
16 ERAL.—The Attorney General shall—

17 (1) not later than 60 days after the date of en-  
18 actment of this Act, publish a list of agencies that  
19 must establish a procedure under subsection (a),  
20 which list shall include, at a minimum, all agencies  
21 the actions of which have a significant possibility of  
22 affecting the value, use, or enjoyment of property;

23 (2) not later than 90 days after the date of en-  
24 actment of this Act, publish guidelines for each Fed-  
25 eral agency identified under paragraph (1) to ensure

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DISCUSSION DRAFT 4/20/95

S.L.C.

## 16

1 that, to the maximum extent practicable, each agen-  
2 cy's procedure is uniform and sufficient to achieve  
3 the objectives of this Act; and

4 (3) not later than 180 days after the date of  
5 enactment of this Act, review and approve the proce-  
6 dure established by each agency designed to comply  
7 with the requirements of subsection (a) and para-  
8 graph (2).

9 **SEC. 6. SMALL PRIVATE PROPERTY OWNER ASSISTANCE**  
10 **PROGRAMS.**

11 (a) **ESTABLISHMENT.—**

12 (1) **IN GENERAL.—**The Attorney General shall  
13 designate at least 3 of the agencies identified under  
14 section 5(h)(1) to establish pilot property owner as-  
15 sistance programs.

16 (2) **BASIS FOR DESIGNATION.—**In designating  
17 such agencies, the Attorney General shall choose  
18 agencies the programs of which have the potential to  
19 affect a broad range of property owners on a regular  
20 basis.

21 (b) **FUNCTIONS.—**The programs established under  
22 this section shall include the following functions:

23 (1) Identification of solutions to potential con-  
24 flicts with property owners and application of all

O:\TRU\TRU95.356

## DISCUSSION DRAFT 4/20/85

S.L.C.

17

1 available expedited procedures and incentives to  
2 achieve those solutions.

3 (2) Service as a focal point for questions, re-  
4 quests, complaints, and suggestions from property  
5 owners concerning the policies and activities of the  
6 agency that affect property.

7 (3) Provision of advice to property owners on  
8 how to comply with applicable requirements of Fed-  
9 eral law as efficiently and expeditiously as possible.

10 (4) Provision of information to property owners  
11 on the availability of procedures under section 5, in-  
12 cluding procedures of the Court of Federal Claims  
13 and the alternative dispute resolution process.

14 (5) Coordination among designated agencies to  
15 ensure consistent responses and communications re-  
16 lating to the private property owner assistance pro-  
17 grams.

18 (6) Annual reporting to the head of the agency  
19 of information and comments communicated by  
20 property owners that will better fulfill the mission of  
21 the agency while reducing potential conflicts relating  
22 to regulatory effects on property.

23 (7) Annual reporting by the head of the agency  
24 to the appropriate committees of Congress describ-  
25 ing the information and comments received under

O:\TRU\TRU95.356

DISCUSSION DRAFT 4/20/95

S.L.C.

18

1 paragraph (6), including recommendations that Con-  
2 gress might consider to reduce or eliminate overly  
3 burdensome regulations on property owners.

4 (c) PROHIBITION OF ADVOCACY.—Agency personnel  
5 involved in a private property owner assistance program  
6 under this section shall not serve as advocates or legal  
7 counsel for property owners seeking to invoke proceedings  
8 under this Act.

9 (d) AUTHORIZATION OF APPROPRIATIONS.—There is  
10 authorized to be appropriated to carry out this section  
11 \$1,500,000 for each of fiscal years 1996, 1997, 1998,  
12 1999, 2000, and 2001.

13 **SEC. 7. WRITTEN PERMISSION FOR ENTRY.**

14 (a) COMPLIANCE WITH LAW.—An employee or agent  
15 of an agency acting within the scope of the employee or  
16 agent's employment or authority shall fully comply with—

17 (1) State and tribal trespass law when entering  
18 a small property; and

19 (2) other applicable law relating to privacy.

20 (b) REQUIREMENTS.—An employee or agent of any  
21 Federal agency shall not enter a property unless—

22 (1) the employee or agent has provided to the  
23 holder of an ownership or leasehold interest in the  
24 property, or the interest holder's authorized rep-

O:\TRU\TRU95.356

DISCUSSION DRAFT 4/20/85

S.L.C.

1       representative a written statement generally describing  
2       the reason for entry; and

3               (2) the interest holder or authorized representa-  
4       tive has given written permission for the entry.

5       (c) EXCEPTIONS.—Subsection (b) shall not apply in  
6 a case of entry for the purpose of—

7               (1) obtaining consent necessary to comply with  
8       subsection (b);

9               (2) conducting an investigation under Federal  
10       law;

11               (3) enforcing Federal law; or

12               (4) responding to an emergency.

13 **SEC. 8. EMERGENCY EXCEPTIONS.**

14       This Act does not apply in a case in which an agency  
15 determines that agency action is necessary to—

16               (1) safeguard life or property;

17               (2) respond to a state of disaster; or

18               (3) respond to a threat to national security.

19 **SEC. 9. MODIFICATIONS TO THE CLEAN WATER ACT.**

20       **[TO BE SUPPLIED.]**

21 **SEC. 10. MODIFICATIONS TO THE ENDANGERED SPECIES**  
22       **ACT.**

23       **[TO BE SUPPLIED.]**

O:\TRU\TRU95.356

DISCUSSION DRAFT 4/20/85

S.L.C.

20

1 **SEC. 11. JUDICIAL PROCEEDINGS.**

2 (a) **RULE OF CONSTRUCTION.**—Nothing in this Act  
3 shall be construed to impair any right of judicial review  
4 derived from other statutory authority or the Constitution.

5 (b) **SCOPE OF REVIEW.**—Judicial review of imple-  
6 mentation of this Act shall be limited to a question relat-  
7 ing to the establishment of procedures under to section  
8 5 and to any Federal question that may arise out of sec-  
9 tion 9 or 10.

10 (c) **ADMISSION INTO EVIDENCE.**—Any information  
11 obtained in proceedings under section 5 (c), (d)(3), or (e)  
12 shall not be subsequently entered into evidence in any ju-  
13 dicial proceeding without the consent of the agency and  
14 of the property owner to whom the evidence relates, unless  
15 the information would have been obtainable through judi-  
16 cial discovery procedure if those proceedings had not oc-  
17 curred. **[NOTE: This subsection should be ex-**  
18 **panded to deal with the question what**  
19 **weight, if any, the court should give to factual**  
20 **findings were made and what deference to**  
21 **legal conclusions were reached in the pro-**  
22 **ceedings, particularly in light of the usual**  
23 **rule that would apply to a section 554 adju-**  
24 **dicator.]**

F41

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, D.C. 20503-0001

LRM NO: 978  
FILE NO: 456

**URGENT**

4/7/95

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 6

TO: Legislative Liaison Officer - See Distribution below:  
FROM: Ron PETERSON (for) *Ron Peterson*  
Assistant Director for Legislative Reference  
OMB CONTACT: Mike GOAD 395-7301  
Legislative Assistant's line (for simple responses): 395-8194

SUBJECT: **\*\*REVISED\*\*** AGRICULTURE Proposed Report RE: S805. Omnibus Property Rights Act

**DEADLINE: 11:00 A.M., Monday, April 10, 1995**

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

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

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

**DISTRIBUTION LIST:**

**AGENCIES:**

- 328-Environmental Protection Agency - Chris Hoff - (202) 260-5414
- 329-INTERIOR - Jane Lyder - (202) 208-6706
- 217-JUSTICE - Kent Markus - (202) 514-2141

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- C. Dennis
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- L. Muniz
- R. Cogswell
- B. Damus
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**RESPONSE TO  
LEGISLATIVE REFERRAL MEMORANDUM**

**LRM NO: 978  
FILE NO: 456**

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter.

Please include the LRM number shown above, and the subject shown below.

**TO: Mike GOAD 395-7301  
Office of Management and Budget  
Fax Number: 395-5891  
Branch-Wide Line (to reach legislative assistant): 395-6194**

**FROM:** \_\_\_\_\_ (Date)  
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\_\_\_\_\_  
\_\_\_\_\_ (Name)  
\_\_\_\_\_ (Agency)  
\_\_\_\_\_ (Telephone)

**SUBJECT: \*\*REVISED\*\* AGRICULTURE Proposed Report RE: S605, Omnibus Property Rights Act**

The following is the response of our agency to your request for views on the above-captioned subject:

- \_\_\_\_\_ Concur
- \_\_\_\_\_ No Objection
- \_\_\_\_\_ No Comment
- \_\_\_\_\_ See proposed edits on pages \_\_\_\_\_
- \_\_\_\_\_ Other: \_\_\_\_\_
- \_\_\_\_\_ FAX RETURN of \_\_\_\_\_ pages, attached to this response sheet



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

Honorable Joseph R. Biden  
Ranking Democrat  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senator Biden:

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 the enactment of S. 605 as currently drafted.

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 change this long-standing body of jurisprudence by focusing 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 can be read as 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 likely 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 will 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

Honorable Joseph R. Biden

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"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 may make it difficult 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 may be many years before the legal implications of Title II are 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.

Further, because the TIA is required by section 403(c) to be made available to the public, an agency's otherwise privileged communications regarding the agency's potential exposure to claims arising under the Fifth Amendment or this legislation will be available for potential claimants to use against the government in arbitration or litigation. This public disclosure assuredly will hamper the full internal analysis and disclosure that Title IV intends to precede agency action.

Honorable Joseph R. Biden

4

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,

DAN GLICKMAN  
Secretary