NLWJC- Kagan

Counsel - Box 014 - Folder 002

Takings (95) [7]

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

April 17, 1995

MEMORANDUM FOR TAKINGS TEAM DISTRIBUTION LIST

FROM TOM JENSEN, ASSOCIATE DIRECTOR FOR NATURAL RESOURCES TJ

SUBJECT MEETING NOTICE

I have arranged a meeting with Galen Fountain, Senator Bumpers' aide, at 3:00 p.m. tomorrow (Tuesday). The meeting will be held in room 123 of the Hart Senate Office Building. Please let me know if you will attend.

Galen and I have also agreed to set aside Wednesday afternoon at 3:00 for a follow-up meeting, if needed.

LEGISLATIVE REFERRAL MEMORANDUM
Distribution List

LRM NO: 987

FILE NO: 456

AGENCIES:
264-Advisory Council on Historic Preservation - Dr. Robert D. Bush - (202) 606-8503
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EOP:
C. Dennis
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B. Anderson
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T. Hustead
A. Rhinesmith
B. White
B. Clendenin
K. Schwartz
D. Haun
F. Reeder
M. Krislov
J. Hill

RESPONSE TO
LEGISLATIVE REFERRAL MEMORANDUM

LRM NO: 987
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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: 395-5691
Branch-Wide Line (to reach legislative assistant): 395-6194

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

SUBJECT: TRANSPORTATION 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

U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

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

Dear Mr. Chairman:

This responds to your request for the Department of Transportation's (DOT) views on S. 605, a bill entitled the

"The Omnibus Property Rights Act of 1995."

This bill would require the Federal government to compensate a private property owner whose property value is diminished by at least 33 percent as a result of Federal regulations or other actions. "Property" is defined to mean "all property protected under the Fifth Amendment to the Constitution of the United States, any applicable Federal or State law, or this Act . . . ." A "taking" covered by this bill appears to include takings by "regulation."

The bill appears to extend the requirements of compensation for takings of property under the Constitution to instances in which the Federal government, through regulation, significantly diminishes the value of property, including personal property. This raises the possibility of serious consequences for the Department of Transportation, which regulates the safety of operation of aircraft, automobiles, buses, trains, trucks and vessels, and could jeopardize the safety of the travelling 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 if these vessels lose 33 percent of their value, 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 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 agencies of the Department of Transportation 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.

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 ensures that owners of real property are treated fairly. This Administration supports protection of property rights, and is committed to reforming government regulations that impose unreasonable restrictions or unnecessary burdens on the use of private property. The Department of Transportation, however, opposes this bill 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.

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,

Stephen H. Kaplan

URGENT

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001
4/10/95
LEGISLATIVE REFERRAL MEMORANDUM

LRM NO: 987
FILE NO: 456
Total Page(s): 5

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): 395-6194

SUBJECT: TRANSPORTATION Proposed Report RE: S605, Omnibus Property Rights Act

DEADLINE: 4:30 P.M., Tuesday, April 11,1995

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.

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THE WHITE HOUSE

Office of the Press Secretary
(Dallas, Texas)

For Immediate Release April 7, 1995

REMARKS BY THE PRESIDENT
TO THE AMERICAN SOCIETY OF NEWSPAPER EDITORS

Loews Anatole Hotel
Dallas, Texas

11:55 A.M. EDT

THE PRESIDENT: Thank you very much. Fishbait Fog. (Laughter.) It's got kind of a nice ring, doesn't it? (Laughter.) I knew he was born in New Orleans before he ever said it. I love to listen to people from New Orleans talk.

I thank you for that kind introduction. Your convention program chair, Bob Hayman (phonetic), and your incoming president, Bill Ketler, ladies and gentlemen, I'm very glad to be here.

I thought that in addition to me you were going to hear from three people who had run, are running, and were about to run for President. But only Bill Weld showed up. I hope he stays in the about to run. He and Steve Barrel* are very impressive men, and I'm glad that they came here and gave the Republican point of view.

It's a privilege to be here. I'd like to begin by saying that I am very proud, and I know you are, for the work that the Interamerican Press Association has done in its Declaration of Chapultepec. I know that you and the Newspaper Association of America have worked tirelessly for press freedoms all throughout the Americas. And just before I came out here I was proud to sign a Charter of Endorsement for the Declaration of Chapultepec. And I thank you for giving me that opportunity and what you have done to advance the cause of a free press. (Applause.)

I was talking to a friend of mine the other day who

said, well, in the '94 election we discovered the limits of liberalism, and now we're about to discover the limits of conservatism. And it put me in mind of a story I once heard about the -- and, actually, I thought about it because I met Mr. Favre -- about the late Huey Long, who, when he was governor and he was preaching his share the wealth plan was out in the country one day at a little country crossroads. And he had all the people gathered up. And he was going on about how the people were being plundered by the organized wealthy interests in Louisiana.

And he saw a guy out in the crowd that he knew and he said, "Brother Jones, if you had three cadillacs, wouldn't you give up one of them so we could gather up the kids and take them to school during the week and take them to church on the weekend?" He said, "Sure, I would." He said, "And if you had $3 million, wouldn't you give up just a million of it so we could put a roof over everybody 's head and make sure everybody had food to eat?" He said, "Well, of course, I would." He said, "And if you had three hogs --" He said, "Wait a minute, Governor, I've got three hogs." (Laughter and applause.)

Anyway, that's the limits of liberalism. Now we're about to discover the limits of conservatism. (Laughter.)

MORE

Ladies and gentlemen, we are at an historic moment in our country's history -- on the verge of a new century, living in a very different kind of economy with a bewildering way of challenges and opportunities. In 1992 and in 1994, the voters spoke out and demanded bold changes in the way we govern and the policies we pursue. They know better than anyone else that they are living in a time with new challenges that demand new answers.

In the last two years, my administration has begun to meet those challenges. I ran for President because I felt we were being victimized by 12 years of gridlock in which the deficit had gone up, the wealthiest Americans had done quite well, the middle class had stagnated and the poor were in trouble; in which the American Dream was really at risk because half of the American people were working for the same or lower wages that they had made 15 years earlier.

I had a clear mission. I wanted to grow the middle class, shrink the underclass and speed up the opportunities for entrepreneurs. I wanted to promote the mainstream values of responsibility and work, family and community. I wanted to reform the government so that we could enhance opportunity, shrink bureaucracy, increase our security and, most important of all, empower people through education to make the most of their own lives.

In the first two years we've made good progress. The economy is up and the deficit is down. We've expanded educational opportunities from Head Start through more college loans that are more affordable. The American people are marching toward more security because there are no Russian missiles pointed at the children of our country for the first time since the dawn of the nuclear age, because we passed a serious crime bill that will lower the crime rate in many of our communities throughout the country, and because we've begun to address some of the problems of family security with the Family and Medical Leave Act. And certainly, we have done a lot to shrink and reform the government's bureaucracy.

But it is not enough. Too many Americans don't yet feel any of those benefits. Too many Americans don't yet feel any of those benefits, too many still feel uncertain about their own future, and too many people are overwhelmingly concerned about the social and the underlying moral problems of our society. And so in 1994, they voted to give the Republicans a chance to run the Congress.

In the last 100 days, the House of Representatives has passed a series of bold initiatives. We will soon begin the second 100 days of this Congress. In the first 100 days, the mission of the House Republicans was to suggest ways in which we

MORE

should change our government and our society. In the second 100 days, and beyond, our mission together must be to decide which of these House proposals should be adopted, which should be modified and which should be stopped.

In the first 100 days, it fell to the House of Representatives to propose. In the next 100 days and beyond, the President has to lead the quiet, reasoned forces of both parties in both Houses to sift through the rhetoric and decide what is really best for America. In making these decisions, it is absolutely vital that we keep alive the spirit and the momentum of change. But the momentum must not carry us so far that we betray our legacy of compassion, decency and common sense.

We have entered a new era. For years, out here in the country, the old political categories have basically been defunct and a new political discussion has been begging to be born. It must be now so in Washington, as well. The old labels of liberal and conservative, spender and cutter, even Democrat and Republican, are not what matter most anymore. What matters most is finding practical, pragmatic solutions based on what we

know works in our lives and our shared experiences so that we can go forward together as a nation. Ideological purity is for partisan extremists. Practical solution, based on real experience, hard evidence and common sense -- that's what this country needs.

We've been saddled too long for a political debate -- with a political debate that doesn't tell us what we ought to do, just who we out to blame. And we have got to stop pointing fingers at each other so that we can join hands.

You know, our country has often moved forward spurred on by purists, reformists, populist agendas which articulated grievances and proposed radical departures. But if you think about our most successful periods of reform, these initiatives have been shaped by presidents who incorporated what was good, smoothed out what was rough, and discarded what would hurt. That was the role of Theodore Roosevelt and Woodrow Wilson in the aftermath of the populist era. That was the role of Franklin Roosevelt in the aftermath of the La Follette progressive movement. And that is my job in the next 100 days and for all the days I serve as President.

We stand at a crossroads. In one direction lies confrontation and gridlock; in the other lies achievement and progress. I was not elected President to pile up a stack of vetoes. I was elected President to change the direction of America. That's what I have spent the last two years doing and that's what I want to spend the next 100 days and beyond doing. Whether we can do that depends upon what all of us in Washington do from here on out.

So I appeal today to Republicans and to Democrats alike to get together, to keep the momentum for change going, not to allow the energy and longing for change now to be dissipated amid a partisan clutter of accusations. After all, we share much common ground.

For example, in 1992, I was elected to end welfare as we know it. That was part of my New Covenant of opportunity and responsibility. In 1994, the Republicans made the same demand with their Contract. In the last two years, I have already given 25 states, one-half of the country, the opportunity to do just that on their own. And I introduced the most sweeping welfare reform the country had ever seen. I want to work with the Congress to get real welfare reform.

In 1992, I was elected to slash the deficit. That also was part of my New Covenant. In 1994, the Republican Contract called for a continuing deficit reduction and movement toward a balanced budget. Well, I cut the deficit by $600

MORE

billion, cut 300 programs; I proposed to consolidate or eliminate 400 more. I want to cut the deficit. Except for the interest run up between 1981 and 1992, our budget would be in balance today. My administration is the only one in 30 years to run an operating surplus. I will work with the Republicans to reduce the deficit.

In 1992, I was elected to shrink the size of the federal government which I have done. That, too, was a part of my New Covenant. In 1994, the Republican Contract said we should shrink the government. I have already cut 100,000 bureaucratic positions and we are on the way under budgets already passed to reducing the government by 270,000, to its smallest size since President Kennedy occupied this office. I want to work with Congress to reduce the size of government.

We both want tax cuts, less intrusive government regulations, the line-item veto, the toughest possible fight against crime. These were a part of the New Covenant and a part of the Republican Contract. In two years, we have made real progress on all these fronts, but we can, and we should do more.

MORE

We are near many breakthroughs. The real issue is whether we will have the wisdom and the courage to see our common ground and walk on it. To do that, we must abandon extreme positions and work together. This is no time for ideological extremism. Good-faith compromising, negotiating our differences, actually listening to one another for a change -- these are the currency of a healthy democracy.

In that spirit, I come here today to outline where I stand on the remaining items in the Republican Contract and the unfinished business of my New Covenant.

Let's begin with taxes. In 1993, I made a down payment on the middle-class tax cut I advocated when I ran for President. We cut taxes for 15 million working families. What that means on average is that this year a family of four with an income of $25,000 or less will have about $1,000 in lower tax bills. We did this to ensure that nobody who works full-time and has children should live in poverty. If you want to reform the welfare system, you must reward work and parenting.

So I want a tax cut to expand, to include more members of the middle class. Why? Because half the American people are working for the same or lower incomes they were making 15 years ago. And we've had a recovery that's produced 6.3 million new jobs, the lowest combined rates of unemployment and inflation in 25 years, and we need to spread the benefits of the recovery.

But this $200-billion tax cut, which is really more than three times that if you look at it over a 10 year period, is a fantasy. It's too much. It's not going to happen. We can't afford it. A realistic cut would be somewhere around a third of that. That's something we can afford. In the world we're living in up there, if we go beyond that, what you're going to see is no success at deficit reduction, or horrible injustice to the most vulnerable people in our country. So we can't pass that. Let's get over it and talk about what we can pass and work on doing it. Let's target a tax cut to the right people and for the right purpose.

We have to choose: Do you want a tax cut for the wealthy or for the middle class? The Republican plan gives have of the benefits to the 10 percent of our people who are best off, and most importantly, to the 10 percent of our people who have done very, very well in the last 15 years. Twenty percent of the benefits go to the top one percent of our people. They have done very well in the new global economy. The middle class has suffered the stagnant incomes. Let's direct the tax benefits to those people.

MORE

But we also have to choose what kind of tax break. Shall we just put money in people's pockets? Or shouldn't we do something that will strengthen families and increase the whole wealth and success of the United States over the long run? Let's help our people get the education and job training they need.

The technology revolution, the global economy --these are dividing opportunity at home and abroad. The middle class is splitting apart. And the fault line is education. Those who have it do well; those who don't are in trouble. So let's use the tax cut as I propose in the Middle Class Bill of Rights as sort of a scholarship given by America to people for their cost of education after high school. And let's provide for an IRA that people can withdraw from tax free to meet the exigencies that their families face -- college education, health care costs, first-time home, care of an elderly parent. These things will strengthen our country and we can afford it.

Let's take welfare reform. As I said, both of us, both the Republican Contract and my New Covenant, have focused

heavily on welfare reform. What do we agree on? That there ought to be a limit to welfare; that there ought to be flexibility for the states; that we ought to have the toughest possible child support enforcement; and that people have to take more responsibility for their own lives and for the children they bring into this world.

But the current House bill focuses primarily on cutting costs. It's weak on work and tough on kids. It punishes young people for past mistakes. We must require them, instead, to look to the future, and in the future, to be responsible parents, to be responsible workers, to be responsible students, and then give them the opportunity to do that.

The House bill also punishes young children for the sins of their parents. I think that's wrong. Rich or poor, black, white or brown, in or out of wedlock, a baby is a baby; a child is a child. It's part of our future, and we have an obligation to those children not to punish them for something over which they had absolutely no control. (Applause.)

Now, that's where I disagree. But look what we agree on. We are near historic change. We can do this. We can make a difference. We can break the culture of welfare, and we can do something good for our country to support the values we all believe in. And we can give these children a better future. But to do it, we're going to have to talk through our differences and get beyond the rhetoric to how these real lives work, and not stand on the sidelines posturing for political gain.

Let's take cutting the deficit. The balanced budget amendment is dead. But now we have to get specific; how are we going to cut the deficit and move this budget toward balance? If we can focus on cuts, not making partisan points, that's the first step. There are cuts I can't live with. There are cuts the Republicans can't live with. Let's avoid them and make cuts we can all live with.

We shouldn't cut help for our children. That builds our future. We shouldn't cut their education, their immunization, their school lunches, the infant formulas or the nutrition programs. There's no need to cut them. So far, based on the action they've taken, the Republicans want the poor in this country to bear the burden of two-thirds of their proposed cuts and only get five percent of the benefit of the tax cuts. It is not right. It is wrong. But that doesn't mean we don't have to cut the budget and reduce the deficit.

The rescission package that passed the Senate last night gives us a model about how we should proceed. The House passed a rescission package with completely unacceptable cuts in

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education, child nutrition, environment, housing and national service. The Senate Republicans, to their credit, restored several of these cuts. I insisted on restoring even more and replacing them with better cuts. And almost every one of the Democrats in the Senate agreed.

So, yesterday, over the course of the debate, they worked that out. Those cuts were restored as well. There will still be a $16 billion reduction in the deficit this year. The bill passed 99-0 in the Senate, and I will sign the Senate bill if the House and the Senate will send it to me. That's how we should be doing the business of America.

Let's talk about the line-item veto. As I said before, that was in the Republican Contract, and I campaigned for President on it in 1992. I appeal to Congress to pass it in its strongest form. I appeal to members of my own party who have reservations about it to support it as well. The line-item veto has passed both the Senate and the House.

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If you look at how it passed the Senate, that's an example of how we can make this system work. I strongly supported it. I campaigned to Democratic senators and asked them to support it. They worked out their differences, and it passed overwhelmingly in the Senate.

The President and the Congress both need the power to cut spending. If you doubt it -- if you doubt it -- look at the bill that Congress recently passed to restore to 3.2 million self-employed Americans -- farmers, small businesspeople, professionals and all their family members -- the 25 percent deduction for the cost of their health insurance.

That was a part of my health care plan. I desperately want to do that. We ought to do more. They ought to be treated just like corporations. It is imperative to sign it. But hidden in that bill was a special tax break for people who did not need it. If I had the Senate version of the line-item veto, I could sign the bill and help the people who are entitled to it, and veto the special break. This is the kind of thing that's been hidden in bills of Congress forever. We can now do something about it, and we ought to do it.

Political reform -- something that was also in the Republican Contract: Two of the 10 items in the Republican Contract have actually become law. And two, term limits and the balanced budget amendment, have been defeated. Of the two that have become law, they were both about political reform and they were also both part of my 1992 commitments to the American people. One applies to Congress the laws they impose on the private sector. The other limits the ability of Congress to impose unfunded mandates on state and local government. I was proud to sign them both. They will advance the cause of responsible government in this country.

But political reform means more. It must include, I believe, both lobbying reform and campaign finance reform. If you doubt how much we need lobby reform just go back and refer to the story that was rightly printed just a few days ago about how, in this session of Congress, you have lobbyists actually sitting at the table with congressmen, writing bills for them and then explaining to them what the bills mean. It seems to me that since these bills help the people the lobbyists represent, but drastically restrict the ability of the government to act in the areas of the environment, in protecting our people, we need some significant reform in our lobbying laws. So I don't think we should stop there.

Regulatory reform -- another big item in the Republican Contract: There are lots of horror stories. Every one of you probably knows a story that shows where a bureaucrat

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overreached, or there were too many regulations, or there was too little common sense. I am committed to changing the culture of regulation that has dominated our country for a long time. I have gone around espousing to everybody that they ought to read Mr. Howard's book, The Death of Common Sense.

But for two years, we have been working through the Reinventing Government Initiative that the Vice President has headed to change the culture of regulation. We deregulated banking. We deregulated intrastate trucking. We have reformed the procedures of the SBA. We scrapped the 10,000-page federal personnel manual. We have dramatically changed the way the General Services Administration operates in ways that have saved hundreds of millions of dollars for the taxpayers and put more competition into the process, thanks to the BSA Director, Roger Johnson, who happens to be here with me today. We are working on these things to move forward.

But we must do more. And yet, surely, the answer is not to stop the government from regulating what it needs to regulate. If the Republicans send me a bill that would let

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unsafe planes fly or contaminated meat be sold, or contaminated water continue to find itself into city water systems, I will veto it. I will veto it. But if Congress will just sit down with me and work out a reasonable solution for more flexible regulatory reform, we can create an historic achievement.

I agree that Congress has a role to play. I agree that Congress sometimes hears things about the way regulations work that people in the Executive Branch don't. Congresswoman Johnson and Congressman Bryant and Congressman Geren flew down here with me today -- they're out there all the time talking to their members. They may hear things we don't. That's why I approve of the Senate's 45-day override legislation. But I will veto any bill that lets a bunch of lawyers tie up regulation for years. We've got too much of that as it is.

So I say, flexibility, yes; reform, yes; but paralysis and straightjacketing, no.

Let's talk about legal reform. Are there too many lawsuits? Of course, there are. Do jury awards once in a while get out of hand? Yes, they do. Does this affect the insurance system in the country? It has an impact on it. But at a time when we're giving more and more responsibility to the states in which one of the signal ideas of the Republican Contract that I largely agree with is that the state and local governments should have more responsibility, do we really want to take the entire civil justice system away from the states for the first time in 200 years? I don't think so.

Let me give you a couple of examples. Should we put justice out of the reach of ordinary people with a "loser pay" rule? No. Think about it this way -- "loser pays" will keep ordinary citizens from exercising their rights in court just as a poll tax used to keep ordinary people of color and poverty from exercising their right to vote. I will veto any bill with a "loser pay" requirement such as that that was in the House bill. I don't think it's right.

Punitive damages -- they could stand some reform, but not artificial ceilings. Punitive damages are designed to deter bad future conduct. Now, if you have a national ceiling of $250,000 think what that means -- $250,000 may be too burdensome for a small businessperson who loses a lawsuit. You don't want to put them out of business unless they're malicious. But does anybody seriously believe that $250,000 will have any kind of significant deterrent impact on a giant multinational corporation? So let's negotiate realistic reforms that improve the system, but don't wreck it.

Crime: Crime was a big part of the New Covenant, a

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big part of why I ran for President. The personal security of the American people should be our first concern. And we delivered. After six years we broke gridlock and I signed a crime bill that was endorsed by all the major law enforcement organizations in the country, the cities, the counties, the prosecutors, the attorneys general -- everybody. And it had bipartisan support, too, until we got close to the last election -- Republicans and Democrats cosponsoring all major provisions.

What was in the crime bill? It had more punishment, three strikes and you're out, expansion of capital punishment. It had more police -- 100,000 police on our street. And I might say that over half of the communities in this country have already received grants under the police program just since last October. We're ahead of schedule and under budget. There are already about 17,000 police officers authorized and funded to be hired.

It had more prisons -- something the Republicans very much wanted -- as long as the states agreed to change their sentencing procedures. And it had more prevention programs --

something the police demanded. The police said, you cannot police and punish and imprison your way out of the crime crisis. You have got to give these children in our country something to say yes to. You've got to give them a reason to stay off drugs, a reason to stay in school, a reason to believe they can have a future. So it had all those things.

Now, if the Republicans wish to continue to try to repeal the commitment to 100,000 police, or to repeal the assault weapons ban, they have a perfect right to do it. But if they send me those provisions I will veto them. On the other hand, while the rest of their crime bill needs some work, and I disagree with some provisions of it, it has some good points. If we can build on the '94 crime bill instead of tear it down, we can continue our efforts to make the American people more secure. So let's do that. Let's pass a crime bill we can be proud of, that builds the country up and makes our citizens safer.

The environmental protection area: A big part of my New Covenant was protecting our environment and promoting our natural resources. It's something we can all give to our children whether we die rich or poor. And it is our obligation to our future economic health, because no nation over the long run succeeds economically unless you preserve your environment.

I just got back from Haiti, and I can tell you one of the biggest obstacles to the survival of democracy in that country is they have ripped all the trees off every hill in the country, and we need to plant tens of millions of trees. We could put half the young people in the country to work for a year just trying to undo the environmental devastation. And unless we do it, they're not going to be able to regain their economic footing.

I cannot and I will not compromise any clean water, any clean air, any protection against toxic waste. The environment cannot protect itself. And if it requires a presidential veto to protect it, then that's what I'll provide.

I will also veto the House-passed requirement that government pay property owners billions of dollars every time we act to defend our national heritage of seashores or wetlands or open spaces. If that law were on the books in every state in the country today, then local governments would completely have to give up zoning or be bankrupt every time they try to change a zoning law. That is why every time it's been on the ballot in a state -- and it's been on the ballot 20 times, including in conservative, Republican states -- it has been defeated. The people of Arizona voted against it by a 20-point margin last November.

MORE

Well, the people do not have to vote -- do not have a vote on this issue in Congress. But I do, and I'll use it. This is not a good law.

Peacekeeping: Decades from now when we have our next Republican president -- (laughter) -- he or she will be very grateful that I refused to approve the so-called peacekeeping legislation passed by the House. The United Nations and the world community did not struggle through 45 years of stagnation because of Soviet vetoes to have to deal with a new stagnation because of an American congressional veto.

The United Nations is 50 years old this year. But it's only four or five years old as a real force for international stability and security as it was imagined by Woodrow Wilson and Franklin Roosevelt and Dwight Eisenhower and Arthur Vandenberg, responsible Republicans and Democrats. So let us learn from the United Nations' mistakes in Somalia, and the United Nations' successes in Haiti and throughout the world, about how we can best keep the peace in partnership with our neighbors throughout the world.

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In Haiti there were almost 30 countries in there with us and the multinational force, and under the U.N. mission there now, well over 30 countries -- people who came from a long way away because they know the world must work together to promote humanity and peace and democracy and decency. Let us not walk away from the United Nations and isolate America from the world.

There's some other things I want to talk about. Those are the items in the Republican Contract, many of which were also in my New Covenant and where I stand on them. But I want to talk about some other items as well -- the unfinished business of the agenda that I ran for President on.

I was elected to fix a broken government, to relight the dormant fires of the economy, to make sure that working families reap the just reward of their effort and are able to pass their children the same dream they had, and to end the sort of "something for nothing" mentality that had crept into our country by restoring the values of responsibility and work and family and community.

The Republican Contract, even where I agree with it, does not deal with much of what is really at the heart of America's challenges today -- opportunity and security for working Americans. So let me talk about these issues.

Health care: In the State of the Union I said I had learned that I bit off more than I could chew last year and we have to reform health care a step at a time. But I haven't forgotten the need to reform health care. Everybody knows we still have problems. It costs too much; there are a lot of people who have inadequate coverage; there are a lot of people who have no coverage at all; and there are millions of Americans who could lose their coverage at any time.

So I call on Republicans to join me in taking this one step at a time, beginning with things the majority of them have long endorsed: First, making benefits portable so you don't lose your health care when you change jobs. Second, requiring coverage for families with a preexisting condition so the whole family doesn't lose health care just because there's been one sick child.

I saw a couple from Delaware on the street in Washington a couple of months ago when I was taking my jog -- the best-looking family you ever saw. The young man and woman looked to be in their late '30s; they had five children. Their fourth child had a birth defect and he was a small businessman -- none

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of them had any health insurance. That's an intolerable situation in this country, and we shouldn't put up with it.

The third thing we ought to do is to establish voluntary pools, such as those established in Florida and many other states, which allow small businesses and self-employed people to buy health care on the same terms as those of us who work for government or big corporations can buy it, to put some competitive power behind their need.

The fourth thing we should do is to expand home care for the elderly, so that families who are struggling to keep their elderly parents and grandparents at home in a more independent living setting have some alternative before putting them into a nursing home when it will almost certainly cost the government much, much more money.

And, finally, we ought to do our best in the way of coverage to help families keep their coverage when they're unemployed for an extended period of time. And we should do all this within the context of a determination to hold down the costs

The only thing we can do is to make sure that for a whole lifetime people will always be able to get the skills they need, beginning at the earliest possible time with good education. That means that as we cut the deficit and cut the budget, we must not cut education. We shouldn't cut Head Start. We shouldn't cut aid to public schools to meet national standards of excellence. We shouldn't cut apprenticeships to help young people who don't go on to college get good training so they can get a job with a growing income, not a shrinking income.

We sure shouldn't cut and make more expensive the college loan program when we need more people going to college, and the cost of going is higher than ever before. And we should not cut our national service program, AmeriCorps, which lets people earn college money through community service. Cutting education in the face of global economic competition, as I have said repeatedly, would be just like cutting the defense budget at the height of the Cold War. It undermines our security as a people, and we shouldn't do it.

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I advocated in the Middle Class Bill of Rights a deduction for the cost of all education after high school; the ability to withdraw tax-free from an IRA to pay for the cost of education after high school; and a G.I. Bill for America's workers that would collapse literally dozens of these federal programs that are here, there and yonder in job training into one block grant, and not give it to the states, give it to the people. Let Americans who are unemployed or grossly unemployed have a voucher for cash money which they can use at any education or training facility of their choice as long as it's decent and meets good standards -- so that we can have a continuous, seamless web of lifetime of education and training opportunities for the people of the United States.

Well, there it is. That's what I'm for and what I'm against. I do not want a pile of vetoes. I want a pile of bills that will move this country into the future. I don't want to see a big fight between the Republicans and the Democrats. I want us to surprise everybody in America by rolling up our sleeves and joining hands and working together. I believe this is a time of such profound change that we need a dynamic center that is not in the middle of what is left and right, but is way beyond it. That's what I want, and that's what I'm working for.

If you want to know how I'm going to make other decisions -- if I left one out -- I would refer you to what I said in my address to the nation on December 15th. My test is: Does an idea expand middle-class incomes and opportunities? Does it promote values like family, work, responsibility, and community? Does it strengthen the hand of America's working families in a global economy. If it does, I'll be for it, no matter who proposes it. And if it doesn't, I will oppose it.

The future I want for America is like the one I imagined I had when I was the age of these children that are here in this audience. We can give this to our children. In fact, we can give a bigger future to our children. I am absolutely convinced that if we are tough enough and wise enough and unpolitical enough to put the interests of ordinary Americans first, and to really focus on the future, that our best days are before us, better than we can even imagine. But it all depends on what we do at this crossroads. Let's get busy.

Thank you very much. (Applause.)

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Q Mr. President, you talk about a civilized conversation in this country leading towards a new common ground. How would you challenge American newspapers to forward that conversation, doing things that we aren't doing now?

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THE PRESIDENT: Well, I don't know what each of you are doing or not doing now. But I will give you some examples. I'll give you three examples. I think you should try to replicate in your communities the kind of conversation that Newsweek reprinted based on questions they asked Speaker Gingrich and me about what the role of government is and what it should be. I don't think that we -- I think both of us are a little bit frustrated about it, because we didn't know -- we just answered questions, and then they had to turn it into an article, but it was the beginning of an interesting conversation about what the role of government ought to be.

The second thing I would advise is to take each one of these issues -- I saw in the, I think it was in the Dallas Morning News, one of the papers today, I saw that I read had a portrait of a family on welfare. Take each of these big issues and try to figure out how to go from rhetoric to reality so that people can understand what all these labels mean. Because if all you hear about these debates is what sort of pierces through in 10 or 15 seconds on the evening news, chances are your opinion

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will be more dominated by the rhetoric. And if it happens to comport with the facts, that's fine; but if it doesn't, that's not so good. Newspapers can do that. Newspapers can analyze in depth real, hard evidence on various problems.

And the third thing I think maybe you ought to consider doing is sponsoring conversations within your community of people of different political and racial and other stripes --just people who are different. Because we are running the risk -- interestingly enough, we have more information than ever before, but the way we get it may divide us from one another instead of unite us.

And I think it might be really interesting if all the newspapers in the country sponsored community discussions. I don't mean bring people like me or people who want to be president, or even maybe people from Congress in from outside, but I mean the people in your local community who would represent different political points of view and live in different neighborhoods and are from different racial backgrounds and have an agenda of common topics that are being discussed all around the country -- and let people listen to each other and talk to each other.

My experience has always been that the differences among us, except on a few issues, are not nearly as profound as we think they are. And then report that to your readers. Because we have to establish some sense of common ground. If all of our public discourse is about segmenting the electorate and then trying to make sure that by election day you've got the biggest segment, and there's never an opportunity to redefine where we are in common, that may work okay in a stable time because the polices are more or less set, the direction is more or less set; nobody's going to veer too much one way or the other anyway. But in a time of real profound change where the information revolution has made all of us actors, it is important that we try to establish more common ground. So those would be my three suggestions.

Q Mr. President, we're coming upon the ceremonies to commemorate the 50th anniversary of V-J Day. And someone suggested that it's time to try to heal the wounds of that war, and that the United States should take the first step by apologizing for dropping a bomb on Hiroshima and Nagasaki. Should we apologize, and did President Harry Truman make the right decision in dropping the bomb?

THE PRESIDENT: No. And based on the facts he had before him, yes. (Applause.)

Q Mr. President, last week you went to Haiti

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where the military operation of our troops and other nations really helped restore order and to stop the refugees from coming to our state and to our country. Several miles away, there are several thousand Cubans trying to flee that oppressive regime who are now being detained indefinitely in Guantanamo. What's the way out for our policy and for those Cubans?

THE PRESIDENT: First, we are doing our best to deal with the situation at Guantanamo, which is a very difficult one, for reasons because of where you're from you understand as well as I do. We have moved quickly, or as quickly as we could to review the cases of the children and the elderly people who are there, and we have moved quite a lot of people into the United States. We are now having detailed discussions about what we should do about the remainder of the people who are there at Guantanamo. Meanwhile, we've done what we could to make their conditions as livable, as bearable as possible.

As to our policy, even though I recognize most countries disagree with it, I think being firm has been the proper policy. And I do not believe we should change it except

within the confines of the Cuba Democracy Act. I would remind everyone here who's interested in this that the Cuba Democracy Act, while it stiffened sanctions against Cuba, also for the first time explicitly laid out in legislative language the conditions under which the United States might change various actions toward Cuba in return for actions by the Cubans.

Let me give you just one example. We have established, for the first time, direct phone service into Cuba. And the lines are quite jammed, as I understand it. It's cut the cost of calling home and calling relatives for Cuban Americans. And it's enabled the Cuban government to earn some money, because in all direct telephone conversations internationally, countries -- at least, many countries, put a fee on such conversations. We did that because we thought it was the appropriate thing to do given the state of our relations and because of some things that had changed. Cuba is now establishing a more genuine farmers market that shows some movement in that area.

But the Cuban Democracy Act gives us a framework for future movement, and I -- and also a firmness in our policy. And I think we should stay with both, both the firmness and the framework of the Act.

Q We have heard from several people here that there ought to be a multiracial box on the U.S. Census forms so that people with parents of two races wouldn't have to deny one of them. What do you think should happen here?

THE PRESIDENT: I wouldn't be opposed to that. That's the first time I ever heard it, but it makes sense. It's interesting that you raised that because of a related debate that's going on in Washington today, which is whether we should pass a federal law which makes it clear that we should not discriminate against parents of one race in their attempts to adopt a child of another race. And I personally strongly support that position. And we've been trying to work through it to make -- I thought we had adopted that position last year at the end of the year. We did in large measure. We're talking about whether we need any other legal changes to achieve that.

But I -- we are clearly going to have more and more multiracial, multiethnic children and families in this country. You're the first person who ever asked me that question. But I think it ought to be done. I can't see any reason not to do it.

Q One of the issues we've been examining at this convention, Mr. President, is the new Information Age and our own role in it. And one of the issues that's likely to come up in the next 100 days to which you referred is a broad reform of telecommunications policy. Do you think that a pragmatic,

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practical compromise solution in this area, which affects how people get their dial tones and what is on that dial tone, is likely to come out of these discussions?

THE PRESIDENT: I do. I think it is likely. Let me say that I very much wanted to pass a telecommunications act in the last session of Congress. And we came within a hair's breath of being able to do it. Some rather -- to me any way -- rather minor problems hung it up in the Senate. And, as you know, it's not difficult to hang a bill up in the Senate. And so it got hung. If we can pass the right kind of telecommunications act it can be good for American consumers and it can pump billions of more dollars into this economy and create a very large number of jobs.

It's interesting that you would ask me this. The Vice President and I had lunch yesterday -- our weekly lunch --and we talked about this for quite some time. My concern about the bill in its present form in the Senate is that I believe, as written, it would lead to a rather rapid increase and a rather substantial increase in both telephone and cable rates in ways

that I do not believe are necessary to get the benefits that the telecommunications bill seeks to achieve. So I would like to see some provisions in there which deal with that.

I can also tell you that the antitrust division of the Justice Department has some fairly serious reservations about how far it goes. Now, I have, in several areas, been willing to see, because of the globalization of the economy, some modifications in our antitrust laws. But I'm concerned -- and I think they're warranted. But I think that this may go too far. But the most important concern I have is, are we going to have a very large and unnecessary increase in cable and phone rates immediately if the bill, as passed, is adopted? That is my major concern. But I think we can get one and we certainly need to get one.

Q Mr. President, yesterday on the front page of The New York Times was this headline: "Hillary Clinton, a Traditional First Lady Now." Could you tell us, was there a point where you sat down with the First Lady to discuss her role for the remainder of your term -- (laughter) --

THE PRESIDENT: No.

Q -- and if so, what was the content of that discussion and what prompted it? (Laughter.)

THE PRESIDENT: (Laughter.) I was trying to think of something really funny to say, but it would be a polite way of saying I don't discuss my private conversations with my wife. (Laughter.)

Actually, while I was very pleased with the First Lady's trip and with the way my wife and daughter were treated and what they learned, and very, very pleased with the coverage, I don't really agree with that. I mean, I think that I very much wanted her to go to India, to Pakistan, to Bangladesh, Nepal, to Sri Lanka because that part of the world is a very important part of the world to us. And for various reasons, we have not been as closely involved, even with the democracies there, as we might have been, largely as a legacy of the Cold War.

But one of the biggest obstacles to the modernization of those countries and to the vitality and preservation of democracy are the challenges faced by women and children there. I did not consider the trip either too traditional or unimportant. I thought what they were doing --what Hillary was doing -- was profoundly important. And after getting a blow-by-blow description of the trip for a good long while yesterday from both my wife and daughter, I still feel that way.

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So I -- when my wife was an unconventional First Lady of Arkansas, and working full-time, and as she told that lady in the Bangladesh village, making more money than her husband -- (laughter) -- still her first concern was always for the welfare of mothers, children and families. She founded an organization called the Advocates for Families and Children in our state. She was on the board of the Children's Hospital. We built an intensive care nursery there -- the first time the state had ever been involved. This is a 25-year concern of hers, and I wouldn't over-read the significance of it.

I also wouldn't underestimate the significance of having a First Lady who can galvanize a global discussion about the role of women and young girls in our planet and for our future. (Applause.)

Q You alluded to our being in the Information Age. Many of us in this room are investigating and developing ways of disseminating information electronically. There are thousands outside this room who are doing the same. What role, if any, does the federal government have in censoring or regulating that information and news?

THE PRESIDENT: Let me begin by saying I support what you're doing and I've tried to bring the White House up to date electronically. You know, we have a pretty sophisticated e-mail operation. And now you can take a tour of the White House and all the federal agencies on the Internet and find out more than you ever wanted to know. So we're trying to be there for you in virtual reality land.

I guess you're asking me about the bill that Senator Exon introduced on trying to regulate obscenity through the e-mail system, or through the electronic superhighway. To be perfectly honest with you, I have not read the bill. I am not familiar with its contents, and I don't know what I think. I do believe -- about this specific bill. (Laughter.) I'll tell you what I think about the issue.

I believe that insofar as that governments have the legal right to regulate obscenity that has not been classified as speech under the First Amendment, and insofar as the American public widely supports, for example, limiting access of children to pornographic magazines, I think it is folly to think that we should sit idly by when a child who is a computer whiz may be exposed to things on that computer, which in some ways are more powerful, more raw and more inappropriate than those things from which we protect them when they walk in a 7-Eleven.

So as a matter of principle, I am not opposed to it. I just can't comment on the details of the bill, because I do not know enough about it. And I do not believe in any way, shape or form that we should be able to do on e-mail, or through the electronic superhighway, in terms of government regulation of speech, anything beyond what we could elsewhere. I think the First Amendment has to be uniform in its application.

So I'm not calling for a dilution of the First Amendment. But if you just imagine, those of us who have children and who think about this, you just think about what's the difference in going in the 7-Eleven and hooking up to the computer. I think that we have to find some resolution of this. And within the Supreme Court's standards, which are very strict, I am not -- am philosophically opposed to some action.

Thank you very much. (Applause.)

END12:55 P.M. CDT

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SENATE LISTING

Update: 3/31/95

Member	Room	Phone	Fax	Legislative Contact	Constituent Contact	Grants Contact	Unfunded Mandates/ Takings Contact
Abraham, Spencer (R-MI)	SD-245	224-4822	224-8834	Lee Otis	Lee Otis	Lee Otis	Ray Kethledge
Akaka, Daniel (D-HI)	SH-720	224-6361	224-2126	Nanci Langley	Nanci Langley	Nanci Langley	Esther Kiaaina
Ashcroft, John (R-MO)	SR-170	224-6154	228-5126	Don Trigg (Only	LA Right Now)		
Baucus, Max (D-MT)	SR-511	224-2651	224-1974	Curt Rich	Various people	Tim Warner	Curt Rich
Bennett, Robert (R-UT)	SD-241	224-5444	224-6717	Shaun Parkin	Shaun Parkin	Shaun Parkin	Shaun Parkin
Biden, Joseph (D-DE)	SR-221	224-5042	224-0139	Karen Robb	Patrick Montgomery	Keith Pearce	Michelle DeGuerin
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

4/7/95

LEGISLATIVE REFERRAL MEMORANDUM

LRM NO: 974

FILE NO: 456

Total Page(s): 8

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): 395-6194

SUBJECT: HEALTH AND HUMAN SERVICES Proposed Report RE: S605, Omnibus Property Rights Act

DEADLINE: 4:30 P.M., Friday, April 07,1995

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.

LEGISLATIVE REFERRAL MEMORANDUM
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LRM NO: 974

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RESPONSE TO
LEGISLATIVE REFERRAL MEMORANDUM

LRM NO: 974
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: 395-5691
Branch-Wide Line (to reach legislative assistant): 395-6194

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

SUBJECT: HEALTH AND HUMAN SERVICES 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

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".

In short, the Department strongly opposes S. 605, which we fear would seriously erode important health and safety protections now afforded to all under Federal laws. 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 severely hamper the Government's ability to restrain illegal and irresponsible uses of property by private individuals which 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 unconstitutional takings of private property. 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 limited 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 lightly 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 replace them wholesale as S. 605 would seem to 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 <u>and</u> 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:

- 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".

- 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".

- 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 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 principle that such actions do not effect a taking.

It may be that the sponsors of S. 605 did not intend some or even all of the dramatic changes in takings law that could be read into these and other troubling provisions. (For example, we find it inconceivable that the sponsors intended to require the Food and Drug Administration (FDA) to compensate regulated entities for losses resulting from seizures of adulterated food or contaminated blood.) But regardless of what may have been intended, it is our fear that if the bill were enacted as currently drafted, we would be confronted with legal challenges by entities regulated by HHS advancing arguments such as the following:

- 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% or more of the value of the property, the manufacturers might seek to recoup all financial losses.

- 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.

- 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.

- If FDA published regulations raising the minimum quality standards for mammography facilities, 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 <u>or that part</u> 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 Fifth Amendment law, which recognizes the general good served by health and safety laws. But aggrieved parties might argue that S. 605 eliminates time-tested decisional factors whose purpose is to achieve fairness and justice in takings law by balancing the rights of individuals with the rights of the community of which the individual is a part. 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. If the problems with title II identified above were resolved, this requirement would be inapplicable to HHS (with possible exceptions in rare cases). On the other hand, if the ambiguities remain, 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 appropriated 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% diminution of value of any 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 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.

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.

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

Sincerely,

Secretary

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001
4/7/95

LRM NO: 974
FILE NO: 456

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 8

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): 395-6194

SUBJECT: HEALTH AND HUMAN SERVICES Proposed Report RE: S605, Omnibus Property Rights Act

DEADLINE: 4:30 P.M., Friday, April 07,1995

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.

LEGISLATIVE REFERRAL MEMORANDUM
Distribution List

LRM NO: 974

FILE NO: 456

AGENCIES:
264-Advisory Council on Historic Preservation - Dr. Robert D. Bush - (202) 606-8503
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RESPONSE TO
LEGISLATIVE REFERRAL MEMORANDUM

LRM NO: 974
FILE NO: 456

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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: 395-5691
Branch-Wide Line (to reach legislative assistant): 395-6194

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

SUBJECT: HEALTH AND HUMAN SERVICES 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

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".

In short, the Department strongly opposes S. 605, which we fear would seriously erode important health and safety protections now afforded to all under Federal laws. 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 severely hamper the Government's ability to restrain illegal and irresponsible uses of property by private individuals which 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 unconstitutional takings of private property. 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 limited 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 lightly 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 replace them wholesale as S. 605 would seem to 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 <u>and</u> 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:

- 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".

- 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".

- 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 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 principle that such actions do not effect a taking.

It may be that the sponsors of S. 605 did not intend some or even all of the dramatic changes in takings law that could be read into these and other troubling provisions. (For example, we find it inconceivable that the sponsors intended to require the Food and Drug Administration (FDA) to compensate regulated entities for losses resulting from seizures of adulterated food or contaminated blood.) But regardless of what may have been intended, it is our fear that if the bill were enacted as currently drafted, we would be confronted with legal challenges by entities regulated by HHS advancing arguments such as the following:

- 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% or more of the value of the property, the manufacturers might seek to recoup all financial losses.

- 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.

- 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.

- If FDA published regulations raising the minimum quality standards for mammography facilities, 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 <u>or that part</u> 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 Fifth Amendment law, which recognizes the general good served by health and safety laws. But aggrieved parties might argue that S. 605 eliminates time-tested decisional factors whose purpose is to achieve fairness and justice in takings law by balancing the rights of individuals with the rights of the community of which the individual is a part. 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. If the problems with title II identified above were resolved, this requirement would be inapplicable to HHS (with possible exceptions in rare cases). On the other hand, if the ambiguities remain, 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 appropriated 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% diminution of value of any 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 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.

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.

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

Sincerely,

Secretary

mK

See Attached

KK

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001
3/31/95
LEGISLATIVE REFERRAL MEMORANDUM

LRM NO: 885
FILE NO: 456
Total Page(s): 3

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): 395-6194

SUBJECT: INTERAGENCY MEETING RE: S605, Omnibus Property Rights Act

DEADLINE: 5:00 P.M., Monday, April 03,1995

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: This Legislative Referral Memorandum requests your agency's participation in several ongoing tasks or activities related to the Administration review of S. 605, the "Omnibus Property Rights Act of 1995." Each action is discussed below.

1. COMMENTS ON S. 605. On March 29th this office requested your initial analysis of S. 605 by 5:00 PM, today, 3/31/95--your prompt response is appreciated (See LRM No. 851).

K - Pls. get copy of this bill asap. MM

2. INTERAGENCY MEETING. Representatives from your agency are invited to attend an interagency meeting on S.605 (the text of the bill may be found in the March 23rd Congressional Record, Pages S4498-4502). The purpose of the meeting is to discuss the mechanics of claims exposure scoring for S. 605 and issues related to the interpretation of the bill. We therefore ask that an attorney and the individual responsible for your claims exposure estimate of the bill's impact on your agency's programs attend.

THE MEETING WILL BE HELD ON TUESDAY, APRIL 4, 1995, from 2:30-4:00 PM in the Truman Room of the White House Conference Center at 726 Jackson Place, NW. Due to the size of the room, we ask that you limit your party to three individuals--PLEASE FAX THE NAMES OF YOUR AGENCY'S ATTENDEES TO THIS OFFICE NO LATER THAN 5:00 PM, MONDAY, APRIL 3rd.

3. ANALYTICAL CRITERIA FOR CLAIMS EXPOSURE ESTIMATES OF S. 605. Your analysis of S. 605 should include specific estimates for claims exposure for each affected agency program, and total agency estimates for the administrative costs and FTEs associated with this legislation. Your analysis should be mindful of the bill's very broad scope. Please include the assumptions that are the basis for your analysis. (This claims exposure analysis should build on your initial analysis referred to above in No. 1. Your agency claims exposure analysis will be used by OMB to produce deficit estimates for S. 605. If you have specific questions regarding the analysis effort, you should raise them in the interagency meeting noted above in No. 2, or call Carol Dennis on (202) 395-4822.)

4. AGENCY REPORTS ON S. 605. Each agency addressee of this LRM is requested to prepare a report to Chairman Hatch of the Senate Judiciary Committee which sets forth the impact of S. 605 on your agency's programs. (We do not anticipate that these reports will include claims exposure data.) PLEASE PROVIDE THESE REPORTS TO THIS OFFICE NO LATER THAN 10:00 AM, WEDNESDAY, APRIL 5TH.

LEGISLATIVE REFERRAL MEMORANDUM
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RESPONSE TO
LEGISLATIVE REFERRAL MEMORANDUM

LRM NO: 885
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Office of Management and Budget
Fax Number: 395-5691
Branch-Wide Line (to reach legislative assistant): 395-6194

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

SUBJECT: INTERAGENCY MEETING 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

ideas together in one comprehensive package. Senator HATCH should be particularly commended for his leadership of the working group that consisted of Senators SHELBY, NICKLES, HEFLIN, CRAIG, GRAMM, LOTT, THOMAS, BROWN, KYL, and ABRAHAM.

Mr. President, the Omnibus Property Rights Act of 1995 would accomplish four major objectives:

First, it would require the Federal Government to compensate property owners if Government action reduces the value of property by one-third;

Second, it would provide for alternative dispute resolution procedures and clarify court jurisdiction for takings claims;

Third, it would require Federal agencies responsible for Endangered Species Act and section 404 of the Clean Water Act to provide for administrative procedures to address t kings claims; and

Fourth, it would require agencies to perform a takings impact analysis of regulations, and ensure that agencies select the regulatory alternative that minimizes the taking of private property

Mr. President, these are sweeping reforms. But it is important to point out that our reforms do more than provide that just compensation is paid in proper circumstances. The real test is to minimize the number of takings that occur in the first instance. We need to ensure that when we pursue otherwise laudable goals, that we do so in ways that allow the Government to take private property only as a last resort, and when it is necessary to do so, to insist that just compensation is paid to the property owner. The Omnibus Property Rights Act of 1995 accomplishes these goals, and I intend to bring this bill to the floor as soon as possible. I urge my colleagues to support this much-needed legislation.

Mr. President, I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 605

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Omnibus Property Rights Act of 1995"

TITLE I—FINDINGS AND PURPOSES

SEC. 101. FINDINGS.

The Congress finds that—

(1) the private ownership of property is essential to a free society and is an integral part of the American tradition of liberty and limited government;

(2) the framers of the United States Constitution, in order to protect private property and liberty, devised a framework of Government designed to diffuse power and limit Government;

(3) to further ensure the protection of private property, the fifth amendment to the United States Constitution was ratified to prevent the taking of private property by the Federal Government, except for public use and with just compensation;

(4) the purpose of the takings clause of the fifth amendment of the United States Constitution, as the Supreme Court stated in Armstrong v. United States, 364 U.S. 40, 49 (1960), is "to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole";

(5) the Federal Government has singled out property holders to shoulder the cost that should be borne by the public, in violation of the just compensation requirement of the takings clause of the fifth amendment of the United States Constitution;

(6) there is a need both to restrain the Federal Government in its overzealous regulation of the private sector and to protect private property, which is a fundamental right of the American people; and

(7) the incremental, fact-specific approach that courts now are required to employ in the absence of adequate statutory language to vindicate property rights under the fifth amendment of the United States Constitution has been ineffective and costly and there is a need for Congress to clarify the law and provide an effective remedy.

SEC. 102. PURPOSE.

The purpose of this Act is to encourage, support, and promote the private ownership of property by ensuring the constitutional and legal protection of private property by the United States Government by—

(1) the establishment of a new Federal judicial claim in which to vindicate and protect property rights;

(2) the simplification and clarification of court jurisdiction over property right claims;

(3) the establishment of an administrative procedure that requires the Federal Government to assess the impact of government action on holders of private property;

(4) the minimization, to the greatest extent possible, of the taking of private property by the Federal Government and to ensure that just compensation is paid by the Government for any taking; and

(5) the establishment of administrative compensation procedures involving the enforcement of the Endangered Species Act of 1973 and section 404 of the Federal Water Pollution Control Act.

TITLE II—PROPERTY RIGHTS LITIGATION RELIEF

SEC. 201. FINDINGS.

The Congress finds that—

(1) property rights have been abrogated by the application of laws, regulations, and other actions by the Federal Government that adversely affect the value of private property;

(2) certain provisions of sections 1346 and 1402 and chapter 91 of title 28, United States Code (commonly known as the Tucker Act), that delineate the jurisdiction of courts hearing property rights claims, complicates the ability of a property owner to vindicate a property owner's right to just compensation for a governmental action, that has caused a physical or regulatory taking;

(3) current law—

(A) 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;

(B) is used to urge dismissal in the district court on the ground that the plaintiff should seek just compensation in the Court of Federal Claims; and

(C) is used to urge dismissal in the Court of Federal Claims on the ground that plaintiff should seek equitable relief in district court;

(4) property owners cannot fully vindicate property rights in one court;

(5) property owners should be able to fully recover for a taking of their private property in one court;

(6) certain provisions of section 1346 and 1402 and chapter 91 of title 28, United States Code (commonly known as the Tucker Act) should be amended, giving both the district courts of the United States and the Court of Federal Claims jurisdiction to hear all claims relating to property rights; and

(7) section 1500 of title 28, United States Code, which denies the Court of Federal Claims jurisdiction to entertain a suit which is pending in another court and made by the same plaintiff, should be repealed.

SEC. 202. PURPOSES.

The purposes of this title are to—

(1) establish a clear, uniform, and efficient judicial process whereby aggrieved property owners can obtain vindication of property rights guaranteed by the fifth amendment to the United States Constitution and this Act;

(2) amend the Tucker Act, including the repeal of section 1500 of title 28, United States Code;

(3) rectify the constitutional imbalance between the Federal Government and the States; and

(4) require the Federal Government to compensate property owners for the deprivation of property rights that result from State agencies' enforcement of federally mandated programs.

SEC. 203. DEFINITIONS.

For purposes of this title the term—

(1) "agency" means a department, agency, independent agency, or instrumentality of the United States, including any military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the United States Government;

(2) "agency action" means any action or decision taken by an agency that—

(A) takes a property right; or

(B) unreasonably impedes the use of property or the exercise of property interests;

(3) "just compensation"—

(A) means compensation equal to the full extent of a property owner's loss, including the fair market value of the private property taken and business losses arising from a taking, whether the taking is by physical occupation or through regulation, exaction, or other means; and

(B) shall include compounded interest calculated from the date of the taking until the date the United States tenders payment;

(4) "owner" means the owner or possessor of property or rights in property at the time the taking occurs, including when—

(A) the statute, regulation, rule, order, guideline, policy, or action is passed or promulgated; or

(B) the permit, license, authorization, or governmental permission is denied or suspended;

(5) "private property" or "property" means all property protected under the fifth amendment to the Constitution of the United States, any applicable Federal or State law, or this Act, and includes—

(A) real property, whether vested or unvested, including—

(i) estates in fee, life estates, estates for years, or otherwise;

(ii) inchoate interests in real property such as remainders and future interests;

(iii) personalty that is affixed to or appurtenant to real property;

(iv) easements;

(v) leaseholds;

(vi) recorded liens; and

(vii) contracts or other security interests in, or related to, real property;

(B) the right to use water or the right to receive water, including any recorded lines on such water right;

(C) rents, issues, and profits of land, including minerals, timber, fodder, crops, oil and gas, coal, or geothermal energy;

(D) property rights provided by, or memorialized in, a contract, except that such rights shall not be construed under this title to prevent the United States from prohibiting the formation of contracts deemed to harm the public welfare or to prevent the execution of contracts for—

(i) national security reasons; or

(ii) exigencies that present immediate or reasonably foreseeable threats or injuries to life or property;

(E) any interest defined as property under State law; or

(F) 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;

(6) "State agency" means any State department, agency, political subdivision, or instrumentality that—

(A) carries out or enforces a regulatory program required under Federal law;

(B) is delegated administrative or substantive responsibility under a Federal regulatory program; or

(C) receives Federal funds in connection with a regulatory program established by a State,

if the State enforcement of the regulatory program, or the receipt of Federal funds in connection with a regulatory program established by a State, is directly related to the taking of private property seeking to be vindicated under this Act; and

(7) "taking of private property" "taking" or "take"—

(A) 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, including by physical invasion, regulation, exaction, condition, or other means; and

(B) shall not include—

(i) a condemnation action filed by the United States in an applicable court; or

(ii) an action filed by the United States relating to criminal forfeiture.

SEC. 204. COMPENSATION FOR TAKEN PROPERTY.

(a) IN GENERAL.—No agency or State agency, shall take private property except for public use and with just compensation to the property owner. A property owner shall receive just compensation if—

(1) as a consequence of an action of any agency, or State agency, private property (whether all or in part) has been physically invaded or taken for public use without the consent of the owner; and

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

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

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

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

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

(b) NO CLAIM AGAINST STATE OR STATE INSTRUMENTALITY.—No action may be filed under this section against a State agency for carrying out the functions described under section 203(6).

(c) BURDEN OF PROOF.—(1) The Government shall bear the burden of proof in any action described under—

(A) subsection (a)(2)(A), with regard to showing the nexus between the stated governmental purpose of the governmental interest and the impact on the proposed use of private property;

(B) subsection (a)(2)(B), with regard to showing the proportionality between the exaction and the impact of the proposed use of the property; and

(C) subsection (a)(2)(C), with regard to showing that such deprivation of value inheres in the title to the property.

(2) The property owner shall have the burden of proof in any action described under subsection (a)(2)(D), with regard to establishing the diminution of value of property.

(d) COMPENSATION AND NUISANCE EXCEPTION TO PAYMENT OF JUST COMPENSATION.—(1) No compensation shall be required by this Act if the owner's use or proposed use of the property is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated, and to bar an award of damages under this Act, the United States shall have the burden of proof to establish that the use or proposed use of the property is a nuisance.

(2) Subject to paragraph (1), if an agency action directly takes property or a portion of property under subsection (a), compensation to the owner of the property that is affected by the action shall be either the greater of an amount equal to—

(A) the difference between—

(i) the fair market value of the property or portion of the property affected by agency action before such property became the subject of the specific government regulation; and

(ii) the fair market value of the property or portion of the property when such property becomes subject to the agency action; or

(B) business losses.

(e) TRANSFER OF PROPERTY INTEREST.—The United States shall take title to the property interest for which the United States pays a claim under this Act.

(f) SOURCE OF COMPENSATION.—Awards of compensation referred to in this section, whether by judgment, settlement, or administrative action, shall be promptly paid by the agency out of currently available appropriations supporting the activities giving rise to the claims for compensation. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

SEC. 205. JURISDICTION AND JUDICIAL REVIEW.

(a) IN GENERAL.—A property owner may file a civil action under this Act to challenge the validity of any agency action that adversely affects the owner's interest in private property in either the United States District Court or the United States Court of Federal Claims. This section constitutes express waiver of the sovereign immunity of the United States. Notwithstanding any other provision of law and notwithstanding the issues involved, the relief sought, or the amount in controversy, each court shall have concurrent jurisdiction over both claims for monetary relief and claims seeking invalidation of any Act of Congress or any regulation of an agency as defined under this Act affecting private property rights. The plaintiff shall have the election of the court in which to file a claim for relief.

(b) STANDING.—Persons adversely affected by an agency action taken under this Act shall have standing to challenge and seek judicial review of that action.

(c) AMENDMENTS TO TITLE 28, UNITED STATES CODE.—(1) Section 1491(a) of title 28, United States Code, is amended—

(A) in paragraph (1) by amending the first sentence to read as follows: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States for monetary relief founded either upon the Constitution or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, in cases not sounding in tort, or for invalidation of any Act of Congress or any regulation of an executive department that adversely affects private property rights in violation of the fifth amendment of the United States Constitution";

(B) in paragraph (2) by inserting before the first sentence the following: "In any case within its jurisdiction, the Court of Federal Claims shall have the power to grant injunctive and declaratory relief when appropriate."; and

(C) by adding at the end thereof the following new paragraphs:

"(4) In cases otherwise within its jurisdiction, the Court of Federal Claims shall also have ancillary jurisdiction, concurrent with the courts designated in section 1346(b) of this title, to render judgment upon any related tort claim authorized under section 2674 of this title.

"(5) In proceedings within the jurisdiction of the Court of Federal Claims which constitute judicial review of agency action (rather than de novo proceedings), the provisions of section 706 of title 5 shall apply."

(2)(A) Section 1500 of title 28, United States Code, is repealed.

(B) The table of sections for chapter 91 of title 28, United States Code, is amended by striking out the item relating to section 1500.

SEC. 206. STATUTE OF LIMITATIONS.

The statute of limitations for actions brought under this title shall be 6 years from the date of the taking of private property

SEC. 207. ATTORNEYS' FEES AND COSTS.

The court, in issuing any final order in any action brought under this title, shall award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing plaintiff.

SEC. 208. RULES OF CONSTRUCTION.

Nothing in this title shall be construed to interfere with the authority of any State to create additional property rights.

SEC. 209. EFFECTIVE DATE.

The provisions of this title and amendments made by this title shall take effect on the date of the enactment of this Act and shall apply to any agency action that occurs after such date.

TITLE III—ALTERNATIVE DISPUTE RESOLUTION

SEC. 301. ALTERNATIVE DISPUTE RESOLUTION.

(a) IN GENERAL.—Either party to a dispute over a taking of private property as defined under this Act or litigation commenced under title II of this Act may elect to resolve the dispute through settlement or arbitration. In the administration of this section—

(1) such alternative dispute resolution may only be effectuated by the consent of all parties;

(2) arbitration procedures shall be in accordance with the alternative dispute resolution procedures established by the American Arbitration Association; and

(3) in no event shall arbitration be a condition precedent or an administrative procedure to be exhausted before the filing of a civil action under this Act.

(b) COMPENSATION AS A RESULT OF ARBITRATION.—The amount of arbitration awards shall be paid from the responsible agency's currently available appropriations supporting the agency's activities giving rise to the claim for compensation. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

(c) REVIEW OF ARBITRATION.—Appeal from arbitration decisions shall be to the United States District Court or the United States Court of Federal Claims in the manner prescribed by law for the claim under this Act.

(d) PAYMENT OF CERTAIN COMPENSATION.—In any appeal under subsection (c), the amount of the award of compensation shall be promptly paid by the agency from appropriations supporting the activities giving rise to the claim for compensation currently available at the time of final action on the appeal. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

TITLE IV—PRIVATE PROPERTY TAKING IMPACT ANALYSIS

SEC. 401. FINDINGS AND PURPOSE.

The Congress finds that—

(1) the Federal Government should protect the health, safety, welfare, and rights of the public; and

(2) to the extent practicable, avoid takings of private property by assessing the effect of government action on private property rights.

SEC. 402. DEFINITIONS.

For purposes of this title the term—

(1) "agency" means an agency as defined under section 203 of this Act, but shall not include the General Accounting Office;

(2) "rule" has the same meaning as such term is defined under section 551(4) of title 5, United States Code; and

(3) "taking of private property" has the same meaning as such term is defined under section 203 of this Act.

SEC. 403. PRIVATE PROPERTY TAKING IMPACT ANALYSIS.

(a) IN GENERAL.—(1) The Congress authorizes and directs that, to the fullest extent possible—

(A) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies under this title; and

(B) subject to paragraph (2), all agencies of the Federal Government shall complete a private property taking impact analysis before issuing or promulgating any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property.

(2) The provisions of paragraph (1)(B) shall not apply to—

(A) an action in which the power of eminent domain is formally exercised;

(B) an action taken—

(i) with respect to property held in trust by the United States; or

(ii) in preparation for, or in connection with, treaty negotiations with foreign nations;

(C) a law enforcement action, including seizure, for a violation of law, of property for forfeiture or as evidence in a criminal proceeding;

(D) a study or similar effort or planning activity;

(E) a communication between an agency and a State or local land-use planning agency concerning a planned or proposed State or local activity that regulates private property, regardless of whether the communication is initiated by an agency or is undertaken in response to an invitation by the State or local authority;

(F) the placement of a military facility or a military activity involving the use of solely Federal property;

(G) any military or foreign affairs function (including a procurement function under a military or foreign affairs function), but not including the civil works program of the Army Corps of Engineers; and

(H) any case in which there is an immediate threat to health or safety that constitutes an emergency requiring immediate response or the issuance of a regulation under section 553(b)(B) of title 5, United States Code, if the taking impact analysis is completed after the emergency action is carried out or the regulation is published.

(3) A private property taking impact analysis shall be a written statement that includes—

(A) the specific purpose of the policy, regulation, proposal, recommendation, or related agency action;

(B) an assessment of the likelihood that a taking of private property will occur under such policy, regulation, proposal, recommendation, or related agency action;

(C) an evaluation of whether such policy, regulation, proposal, recommendation, or related agency action is likely to require compensation to private property owners;

(D) alternatives to the policy, regulation, proposal, recommendation, or related agency action that would achieve the intended purposes of the agency action and lessen the likelihood that a taking of private property will occur; and

(E) an estimate of the potential liability of the Federal Government if the Government is required to compensate a private property owner.

(4) Each agency shall provide an analysis required under this section as part of any submission otherwise required to be made to the Office of Management and Budget in conjunction with a proposed regulation.

(b) GUIDANCE AND REPORTING REQUIREMENTS.—

(1) The Attorney General of the United States shall provide legal guidance in a timely manner, in response to a request by an agency, to assist the agency in complying with this section.

(2) No later than 1 year after the date of enactment of this Act and at the end of each 1-year period thereafter, each agency shall submit a report to the Director of the Office of Management and Budget and the Attorney General of the United States identifying each agency action that has resulted in the preparation of a taking impact analysis, the filing of a taking claim, or an award of compensation under the just compensation clause of the fifth amendment of the United States Constitution. The Director of the Office of Management and Budget and the Attorney General of the United States shall publish in the Federal Register, on an annual basis, a compilation of the reports of all agencies submitted under this paragraph.

(c) PUBLIC AVAILABILITY OF ANALYSIS.—An agency shall—

(1) make each private property taking impact analysis available to the public; and

(2) to the greatest extent practicable, transmit a copy of such analysis to the owner or any other person with a property right or interest in the affected property.

(d) PRESUMPTIONS IN PROCEEDINGS.—For the purpose of any agency action or administrative or judicial proceeding, there shall be a rebuttable presumption that the costs, values, and estimates in any private property takings impact analysis shall be outdated and inaccurate, if—

(1) such analysis was completed 5 years or more before the date of such action or proceeding; and

(2) such costs, values, or estimates have not been modified within the 5-year period preceding the date of such action or proceeding.

SEC. 404. DECISIONAL CRITERIA AND AGENCY COMPLIANCE.

(a) IN GENERAL.—No final rule shall be promulgated if enforcement of the rule could reasonably be construed to require an uncompensated taking of private property as defined by this Act.

(b) COMPLIANCE.—In order to meet the purposes of this Act as expressed in section 401 of this title, all agencies shall—

(1) review, and where appropriate, re-promulgate all regulations that result in takings of private property under this Act, and reduce such takings of private property to the maximum extent possible within existing statutory requirements;

(2) prepare and submit their budget requests consistent with the purposes of this Act as expressed in section 401 of this title for fiscal year 1997 and all fiscal years thereafter; and

(3) within 120 days of the effective date of this section, submit to the appropriate authorizing and appropriating committees of the Congress a detailed list of statutory changes that are necessary to meet fully the purposes of section 401 of this title, along with a statement prioritizing such amendments and an explanation of the agency's reasons for such prioritization.

SEC. 405. RULES OF CONSTRUCTION.

Nothing in this title shall be construed to—

(1) limit any right or remedy, constitute a condition precedent or a requirement to exhaust administrative remedies, or bar any claim of any person relating to such person's property under any other law, including claims made under this Act, section 1346 or 1402 of title 28, United States Code, or chapter 91 of title 28, United States Code; or

(2) constitute a conclusive determination of—

(A) the value of any property for purposes of an appraisal for the acquisition of property, or for the determination of damages; or

(B) any other material issue.

SEC. 406. STATUTE OF LIMITATIONS.

No action may be filed in a court of the United States to enforce the provisions of this title on or after the date occurring 6 years after the date of the submission of the applicable private property taking impact analysis to the Office of Management and Budget.

TITLE V—PRIVATE PROPERTY OWNERS ADMINISTRATIVE BILL OF RIGHTS

SEC. 501. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) a number of Federal environmental programs, specifically programs administered under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), have been implemented by employees, agents, and representatives of the

Federal Government in a manner that deprives private property owners of the use and control of property,

(2) as Federal programs are proposed that would limit and restrict the use of private property to provide habitat for plant and animal species, the rights of private property owners must be recognized and respected,

(3) private property owners are being forced by Federal policy to resort to extensive, lengthy, and expensive litigation to protect certain basic civil rights guaranteed by the United States Constitution;

(4) many private property owners do not have the financial resources or the extensive commitment of time to proceed in litigation against the Federal Government;

(5) a clear Federal policy is needed to guide and direct Federal agencies with respect to the implementation of environmental laws that directly impact private property;

(6) all private property owners should and are required to comply with current nuisance laws and should not use property in a manner that harms their neighbors;

(7) nuisance laws have traditionally been enacted, implemented, and enforced at the State and local level where such laws are best able to protect the rights of all private property owners and local citizens; and

(8) traditional pollution control laws are intended to protect the general public's health and physical welfare, and current habitat protection programs are intended to protect the welfare of plant and animal species.

(b) PURPOSES.—The purposes of this title are to—

(1) provide a consistent Federal policy to encourage, support, and promote the private ownership of property; and

(2) to establish an administrative process and remedy to ensure that the constitutional and legal rights of private property owners are protected by the Federal Government and Federal employees, agents, and representatives.

SEC. 502. DEFINITIONS.

For purposes of this title the term—

(1) "the Acts" means the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);

(2) "agency head" means the Secretary or Administrator with jurisdiction or authority to take a final agency action under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);

(3) "non-Federal person" means a person other than an officer, employee, agent, department, or instrumentality of—

(A) the Federal Government; or

(B) a foreign government;

(4) "private property owner" means a non-Federal person (other than an officer, employee, agent, department, or instrumentality of a State, municipality, or political subdivision of a State, acting in an official capacity or a State, municipality, or subdivision of a State) that—

(A) owns property referred to under paragraph (5) (A) or (B); or

(B) holds property referred to under paragraph (5)(C);

(5) "property" means—

(A) land;

(B) any interest in land; and

(C) the right to use or the right to receive water; and

(6) "qualified agency action" means an agency action (as that term is defined in section 551(13) of title 5, United States Code) that is taken—

(A) under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344); or

(B) under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

SEC. 503. PROTECTION OF PRIVATE PROPERTY RIGHTS.

(a) IN GENERAL.—In implementing and enforcing the Acts, each agency head shall—

(1) comply with applicable State and tribal government laws, including laws relating to private property rights and privacy, and

(2) administer and implement the Acts in a manner that has the least impact on private property owners' constitutional and other legal rights.

(b) FINAL DECISIONS.—Each agency head shall develop and implement rules and regulations for ensuring that the constitutional and other legal rights of private property owners are protected when the agency head makes, or participates with other agencies in the making of, any final decision that restricts the use of private property in administering and implementing this Act.

SEC. 504. PROPERTY OWNER CONSENT FOR ENTRY.

(a) IN GENERAL.—An agency head may not enter privately owned property to collect information regarding the property, unless the private property owner has—

(1) consented in writing to that entry;

(2) after providing that consent, been provided notice of that entry; and

(3) been notified that any raw data collected from the property shall be made available at no cost, if requested by the private property owner

(b) NONAPPLICATION.—Subsection (a) does not prohibit entry onto property for the purpose of obtaining consent or providing notice required under subsection (a).

SEC. 505. RIGHT TO REVIEW AND DISPUTE DATA COLLECTED FROM PRIVATE PROPERTY.

An agency head may not use data that is collected on privately owned property to implement or enforce the Acts, unless—

(1) the agency head has provided to the private property owner—

(A) access to the information;

(B) a detailed description of the manner in which the information was collected; and

(C) an opportunity to dispute the accuracy of the information; and

(2) the agency head has determined that the information is accurate, if the private property owner disputes the accuracy of the information under paragraph (1)(C).

SEC. 506. RIGHT TO AN ADMINISTRATIVE APPEAL OF WETLANDS DECISIONS.

Section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) is amended by adding at the end the following new subsection:

"(u) ADMINISTRATIVE APPEALS.—

"(1) The Secretary or Administrator shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an administrative appeal of the following actions under this section:

"(A) A determination of regulatory jurisdiction over a particular parcel of property.

"(B) The denial of a permit.

"(C) The terms and conditions of a permit.

"(D) The imposition of an administrative penalty.

"(E) The imposition of an order requiring the private property owner to restore or otherwise alter the property.

"(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the property involved in the action.

"(3) An owner of private property may receive compensation, if appropriate, subject to the provisions of section 508 of the Emergency Property Owners Relief Act of 1995."

SEC. 507. RIGHT TO ADMINISTRATIVE APPEAL UNDER THE ENDANGERED SPECIES ACT OF 1973.

Section 11 of the Endangered Species Act of 1973(16 U.S.C. 1540) is amended by adding at the end the following new subsection:

"(l) ADMINISTRATIVE APPEALS.—

"(1) The Secretary shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an administrative appeal of the following actions:

"(A) A determination that a particular parcel of property is critical habitat of a listed species.

"(B) The denial of a permit for an incidental take.

"(C) The terms and conditions of an incidental take permit.

"(D) The finding of jeopardy in any consultation on an agency action affecting a particular parcel of property under section 7(a)(2) or any reasonable and prudent alternative resulting from such finding.

"(E) Any incidental 'take' statement, and any reasonable and prudent measures included therein, issued in any consultation affecting a particular parcel of property under section 7(a)(2).

"(F) The imposition of an administrative penalty.

"(G) The imposition of an order prohibiting or substantially limiting the use of the property.

"(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the parcel of property involved in the action.

"(3) An owner of private property may receive compensation, if appropriate, subject to the provisions of section 508 of the Emergency Property Owners Relief Act of 1995."

SEC. 508. COMPENSATION FOR TAKING OF PRIVATE PROPERTY.

(a) ELIGIBILITY.—A private property owner that, as a consequence of a final qualified agency action of an agency head, is deprived of 33 percent or more of the fair market value, or the economically viable use, of the affected portion of the property as determined by a qualified appraisal expert, is entitled to receive compensation in accordance with the standards set forth in section 204 of this Act.

(b) TIME LIMITATION FOR COMPENSATION REQUEST.—No later than 90 days after receipt of a final decision of an agency head that deprives a private property owner of fair market value or viable use of property for which compensation is required under subsection (a), the private property owner may submit in writing a request to the agency head for compensation in accordance with subsection (c).

(c) OFFER OF AGENCY HEAD.—No later than 180 days after the receipt of a request for compensation, the agency head shall stay the decision and shall provide to the private property owner—

(1) an offer to purchase the affected property of the private property owner at a fair market value assuming no use restrictions under the Acts; and

(2) an offer to compensate the private property owner for the difference between the fair market value of the property without those restrictions and the fair market value of the property with those restrictions.

(d) PRIVATE PROPERTY OWNER'S RESPONSE.—(1) No later than 60 days after the date of receipt of the agency head's offers under subsection (c) (1) and (2) the private

property owner shall accept one of the offers or reject both offers.

(2) If the private property owner rejects both offers, the private property owner may submit the matter for arbitration to an arbitrator appointed by the agency head from a list of arbitrators submitted to the agency head by the American Arbitration Association. The arbitration shall be conducted in accordance with the real estate valuation arbitration rules of that association. For purposes of this section, an arbitration is binding on—

(A) the agency head and a private property owner as to the amount, if any, of compensation owed to the private property owner; and

(B) whether the private property owner has been deprived of fair market value or viable use of property for which compensation is required under subsection (a).

(e) JUDGMENT.—A qualified agency action of an agency head that deprives a private property owner of property as described under subsection (a), is deemed, at the option of the private property owner, to be a taking under the United States Constitution and a judgment against the United States if the private property owner—

(1) accepts the agency head's offer under subsection (c); or

(2) submits to arbitration under subsection (d).

(f) PAYMENT.—An agency head shall pay a private property owner any compensation required under the terms of an offer of the agency head that is accepted by the private property owner in accordance with subsection (d), or under a decision of an arbitrator under that subsection, out of currently available appropriations supporting the activities giving rise to the claim for compensation. The agency head shall pay to the extent of available funds any compensation under this section not later than 60 days after the date of the acceptance or the date of the issuance of the decision, respectively. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

(g) FORM OF PAYMENT.—Payment under this section, as that form is agreed to by the agency head and the private property owner, may be in the form of—

(1) payment of an amount equal to the fair market value of the property on the day before the date of the final qualified agency action with respect to which the property or interest is acquired; or

(2) a payment of an amount equal to the reduction in value.

SEC. 509. PRIVATE PROPERTY OWNER PARTICIPATION IN COOPERATIVE AGREEMENTS.

Section 6 of the Endangered Species Act of 1973 (16 U.S.C. 1535) is amended by adding at the end the following new subsection:

"(j) Notwithstanding any other provision of this section, when the Secretary enters into a management agreement under subsection (b) with any non-Federal person that establishes restrictions on the use of property, the Secretary shall notify all private property owners or lessees of the property that is subject to the management agreement and shall provide an opportunity for each private property owner or lessee to participate in the management agreement."

SEC. 510. ELECTION OF REMEDIES.

Nothing in this title shall be construed to—

(1) deny any person the right, as a condition precedent or as a requirement to exhaust administrative remedies, to proceed under title II or III of this Act;

(2) bar any claim of any person relating to such person's property under any other law, including claims made under section 1346 or 1402 of title 28, United States Code, or chapter 91 of title 28, United States Code; or

(3) constitute a conclusive determination of—

(A) the value of property for purposes of an appraisal for the acquisition of property, or for the determination of damages; or

(B) any other material issue.

TITLE VI—MISCELLANEOUS

SEC. 601. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

SEC. 602. EFFECTIVE DATE.

Except as otherwise provided in this Act, the provisions of this Act shall take effect on the date of enactment and shall apply to any agency action of the United States Government after such date.

Mr. HATCH. Mr. President, I am pleased today to support the introduction of the Omnibus Property Rights Act of 1995. This bill is an *omnibus* property rights measure that combines four different approaches, contained in separate titles in the act, designed to protect private property from Federal Government intrusion. The citizens of Utah understand that the right to own property is a precious fundamental right, one which is vulnerable to an overbearing Federal Government.

At my urging, four different approaches contained in various bills, bills designed to protect private property from Federal Government intrusion and introduced by several Senators, were merged in a single bill. I believed that the combination of these approaches would be far more efficacious in protecting private property than in just relying on a single strategy. This omnibus bill is the product of almost a year of work and countless drafts and represents the most sophisticated legislative mechanism to foster and protect the private ownership of property. I want to commend Senators DOLE, GRAMM of Texas, SHELBY, NICKLES, BROWN, CRAIG, LOTT, HEFLIN, KYL, ABRAHAM, and THOMAS, and their staffs, for participating in this project. I intend to hold formal hearings on this bill in the very near future.

The first approach under the bill encompasses property rights litigation reform. This approach, advocated by myself and in part by Senator GRAMM of Texas, establishes a distinct Federal fifth amendment takings claim against Federal agencies by aggrieved property owners, thus clarifying the sometimes incoherent and contradictory constitutional property rights case law. It also resolves the jurisdictional dispute between the Federal district courts and the Court of Federal Claims over fifth amendment takings cases. It is a refinement of a proposal I placed in the CONGRESSIONAL RECORD on October 7, 1994.

The second approach, promoted by Senator DOLE, in essence codifies President Reagan's Executive Order 12630. Under this approach, a Federal agency must conduct a private property taking impact analysis before issuing or promulgating any policy, regulation, or related agency action which is likely to result in a taking of private property. Significantly, we have added to this section a reg. reform provision that prohibits any rule from becoming final if the rule could reasonably be construed when enforced to result in an uncompensated taking of private property.

The third approach, initiated by Senators SHELBY and NICKLES, establishes an agency administrative appellate and compensation procedure for takings of real property during enforcement and administration of both the Endangered Species Act and the Wetlands Preservation Program under section 404 of the Clean Water Act.

These acts present special enforcement problems and an agency appellate and compensation procedure allows the agency and the aggrieved party the option to avoid litigation. The fourth approach provides for alternative dispute resolution in arbitration proceedings. I must add that the bill provides for a complete election of remedies. If a decision of an agency appeal is unreasonably delayed, an aggrieved party may drop the appeal and litigate according to the terms of the act. These four approaches, established by the Omnibus Property Rights Act, together function to empower the property owner with mechanisms to vindicate the fundamental constitutional right of private ownership of property, while instituting powerful incentives for Federal agencies both to protect private property and include such protection in agency planning and regulating.

IMPORTANCE OF PRIVATE PROPERTY

The private ownership of property is essential to a free society and is an integral part of our Judeo-Christian culture and the Western tradition of liberty and limited government. Private ownership of property and the sanctity of property rights reflects the distinction in our culture between a preexisting civil society and the state that is consequently established to promote order. Private property creates the social and economic organizations that counterbalance the power of the state by providing an alternative source of power and prestige to the state itself. It is therefore a necessary condition of liberty and prosperity.

While government is properly understood to be instituted to protect liberty within an orderly society and such liberty is commonly understood to include the right of free speech, assembly, religious exercise, and other rights such as those enumerated in the Bill of Rights, it is all too often forgotten that the right of private ownership of property is also a critical component of liberty. To the 17th-century English political philosopher, John Locke, who

greatly influenced the Founders of our Republic, the very role of government is to protect property. "The great and chief end therefore, on Men uniting into Commonwealths, and putting themselves under Government, is the preservation of their property." [J. Locke, Second Treatise ch. 9, §124, in J. Locke, "Two Treatises of Government" (1698)]. The Framers of our Constitution likewise viewed the function of government as one of fostering individual liberties through the protection of property interests. James Madison, termed the "Father of the Constitution," unhesitantly endorsed this Lockean viewpoint when he wrote in the Federalist No. 54 that "[government] is instituted no less for the protection of property, than of the persons of individuals." Indeed, to Madison, the private possession of property was viewed as a natural and individual right both to be protected against government encroachment and to be protected by government against others.

To be sure, the private ownership of property was not considered absolute. Property owners could not exercise their rights as a nuisance that harmed their neighbors, and Government could use, what was termed in the 18th century, its despotic power of eminent domain to seize property for public use. Justice, it became to be believed, required compensation for the property taken by Government. The earliest example of a compensation requirement is found in chapter 28 of the Magna Carta of 1215, which reads:

> No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

But the record of English and colonial compensation for taken property was spotty at best, although it has been argued by some historians and legal scholars that compensation for takings of property became recognized as customary practice during the American colonial period. [See W. Stoebuck, "A General Theory of Eminent Domain," 47 Wash. L. Rev. 53 (1972)].

Nevertheless, by American independence the compensation requirement was considered a necessary restraint on arbitrary governmental seizures of property. The Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the Northwest Ordinance of 1787, recognized that compensation must be paid whenever property was taken for general public use or for public exigencies. And although accounts of the 1791 congressional debate over the Bill of Rights provide no evidence of why a public use and just compensation requirement for takings of private property was eventually included in the fifth amendment, James Madison, the author of the fifth amendment, reflected the views of other supporters of the new Constitution who feared the example to the new Congress of uncompensated seizures of property for building of roads and forgiveness of debts by radical State legislatures. Consequently, the phrase "[n]or shall private property be taken for public use, without just compensation" was included within the fifth amendment to the Constitution.

THE MODERN THREAT TO PROPERTY RIGHTS

Despite this historical pedigree and the constitutional requirement for the protection of property rights, the America of the mid- and late-20th century has witnessed an explosion of Federal regulation of society that has jeopardized the private ownership of property with the consequent loss of individual liberty. Indeed, the most recent estimate of the direct—that is, not counting indirect costs such as higher consumer prices—cost of Federal regulation was $857 billion for 1992. Today, the cost to the society probably is approaching $1 trillion. According to economist Paul Craig Roberts, the number of laws Americans are forced to endure has risen a staggering 3,000 percent since the turn of the century. Every day the Federal Register grows by an incredible 200 pages, containing new rules and obligations imposed on the American people by supposedly their Government.

Furthermore, even the very concept of private property is under attack. Indeed, certain environmental activists have termed private property an "outmoded concept" which presents an impediment to the Federal Government's resolution of society's problems. It is this type of thinking that has led regulators, in the rush of governmental social engineering, to ignore individual rights. Here are just a few of the hundreds—if not thousands—of examples that occur nationwide:

Mrs. Nellie Edwards was the owner of 36 acres of prime land that was seized by the city of Provo, UT, last year for an airport expansion project. Mrs. Edwards received only $21,500 for her land, which was well below the expected market value of the land because, unbeknownst to her, the Army Corps of Engineers had arbitrarily classified part of her land as a wetland. Mrs. Edwards, in essence, was victimized by the low-land value attached to wetlands. But the infuriating part of this sad story is that an investigator examined her land and saw absolutely no water or wildlife present on the land.

Ocie Mills, a Florida builder, and his son were sent to prison for 2 years for violating the Clean Water Act for placing sand on a quarter-acre lot he owned;

Under this same act, a small Oregon school district faced a Federal lawsuit for dumping clean fill to build a baseball-soccer field for its students and had to spend thousands of dollars to remove the fill;

Ronald Angelocci was jailed for violating the Clean Water Act for dumping several truckloads of dirt in the backyard of his Michigan home to help a family member who had acute asthma and allergies aggravated by plants in the backyard, and

A retired couple in the Poconos, after obtaining the necessary permits to build their home, was informed by the Army Corps of Engineers—4 years later—that they built their home on wetlands and faced penalties of $50,000 a day if they did not restore most of the land to its natural state.

See B. Bovard, "Lost Rights," 35 (1944); N. Marzulla, "The Government's War on Property Rights," Defenders of Property Rights (1994).

CURRENT PROTECTION OF PROPERTY RIGHTS FALL SHORT

Judicial protection of property rights against the regulatory state has been both inconsistent and ineffective. Physical invasions and Government seizures of property have been fairly easy for courts to analyze as a species of eminent domain, not so the effect of regulations which either diminish the value of the property or appropriate a property interest. This key problem to the regulatory takings dilemma was recognized by Justice Oliver Wendell Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). Just how do courts determine when regulation amounts to a taking? Holmes' answer, "if regulation goes too far it will be recognized as a taking," 260 U.S. at 415, is nothing more than an ipse dixit. In the 73 years since Mahon, the Court has eschewed any set formula for determining how far is too far, preferring to engage in ad hoc factual inquiries, such as the three-part test made famous by *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), which balances the economic impact of the regulation on property and the character of the regulation against specific restrictions on investment-backed expectations of the property owner.

Despite the valiant attempt by the Rehnquist Court to clarify regulatory takings analysis in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), *Lucas* v. *South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), and in its recent decision of *Dolan* v. *City of Tigard*, No. 93-518 (June 24, 1994), takings analysis is basically incoherent and confusing and applied by lower courts haphazardly. The incremental, fact-specific approach that courts now must employ in the absence of adequate statutory language to vindicate property rights under the fifth amendment thus has been ineffective and costly. There is, accordingly, a need for Congress to clarify the law by providing bright line standards and an effective remedy. As Chief Judge Loren A. Smith of the Court of Federal Claims, the court responsible for administering takings claims against the United States, opined in *Bowles* v. *United States*, 31 Fed. Cl. 37 (1994):

> [j]udicial decisions are far less sensitive to societal problems than the law and policy made by the political branches of our great constitutional system. At best courts sketch the outlines of individual rights, they cannot

hope to fill in the portrait of wise and just social and economic policy.

This incoherence and confusion over the substance of takings claims is matched by the muddle over jurisdiction of property rights claims. The Tucker Act, which waives the sovereign immunity of the United States by granting the Court of Federal Claims jurisdiction to entertain monetary claims against the United States, actually complicates the ability of a property owner to vindicate the right to just compensation for a Government action that has caused a taking. The law currently forces a property owner to elect between equitable relief in the Federal district court and monetary relief in the Court of Federal Claims. Further difficulty arises when the law is used by the Government to urge dismissal in the district court on the ground that the plaintiff should seek just compensation in the Court of Federal Claims, and is used to urge dismissal in the Court of Federal Claims on the ground that plaintiff should first seek equitable relief in the district court. This Tucker Act shuffle is aggravated by section 1500 of the Tucker Act, which denies the Court of Federal Claims jurisdiction to entertain a suit which is pending in another court and brought by the same plaintiff. Section 1500 is so poorly drafted and has brought so many hardships, that Justice Stevens, in *Keene Corporation* v. *United States*, 113 S.Ct. 2035, 2048 (1933), has called for its repeal or amendment.

Title II of the Omnibus Property Rights Act, which I introduced as S. 135 in January, addresses these problems. In terms of clarifying the substance of takings claims, it first clearly defines property interests that are subject to the act's takings analysis. In this way a floor definition of property is established by which the Federal Government may not eviscerate. This title also establishes the elements of a takings claim by codifying and clarifying the holdings of the Nollan, Lucas, and Dolan cases. For instance, Dolan's rough proportionality test is interpreted to apply to all exaction situations whereby an owner's otherwise lawful right to use property is exacted as a condition for granting a Federal permit. And a distinction is drawn between a noncompensable mere diminution of value of property as a result of Federal regulation and a compensable partial taking, which is defined as any agency action that diminishes the fair market value of the affected property by 33 percent or more. The result of drawing these bright lines will not end fact-specific litigation, which is endemic to all law suits, but it will ameliorate the ever-increasing ad hoc and arbitrary nature of takings claims.

This title also resolves the jurisdictional confusion over takings claims. Because property owners should be able fully to recover for a taking in one court, the Tucker Act is amended giving both the district courts and the Court of Federal Claims concurrent jurisdiction to hear all claims relating to property rights. Furthermore, to resolve any further jurisdictional ambiguity, section 1500 of the Tucker Act is repealed.

Finally, I want to respond to any suggestion that may arise that this act will impede Government's ability to protect the environment or promote health and safety through regulation. This legislation does not emasculate the Government's ability to prevent individuals or businesses from polluting. It is well established that the Constitution only protects a right to reasonable use of property. All property owners are subject to prior restraints on the use of their property, such as nuisance laws which prevents owners from using their property in a manner that interferes with others. The Government has always been able to prevent harmful or noxious uses of property without being obligated to compensate the property owner, as long as the limitations on the use of property "inhere in the title itself." In other words, the restrictions must be based on "background principles of State property and nuisance law" already extant. The Omnibus Property Rights Act codifies this principle in a nuisance exception to the requirement of the Government to pay compensation.

Nor does the Omnibus Property Rights Act hinder the Government's ability to protect public health and safety. The act simply does not obstruct the Government from acting to prevent imminent harm to the public safety or health or diminish what would be considered a public nuisance. Again, this is made clear in the provision of the act that exempts nuisance from compensation. What the act does is force the Federal Government to pay compensation to those who are singled out to pay for regulation that benefits the entire public. In other words, it does not prevent regulation, but fulfills the promise of the fifth amendment, which the Supreme Court in *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960), opined is:

> to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole.

Mr. BURNS. Mr. President, I rise today as an original cosponsor to the Omnibus Private Property Act. Since the beginning of this Congress, many bills to protect private property rights have been introduced. This bill encompasses those bills in a comprehensive proposal.

For too long, Washington has disregarded the fifth amendment to our Constitution. Laws, regulations, and other actions have allowed the rights of private property owners to be abused. Now we have the opportunity to provide a consistent Federal policy to encourage, support, and promote the private ownership of property and to ensure the constitutional and legal rights of private property owners.

The legislation we are introducing reaffirms our private property rights. It requires compensation for a loss of property value when the Federal Government takes certain actions. The bill also allows for taking disputes to be resolved through settlement or arbitration as an alternative to litigation. In addition, the Omnibus Private Property Rights Act requires that the Federal agencies responsible for enforcing the Endangered Species Act and the Clean Water Act establish procedures so private property owners may appeal actions and seek compensation.

Another important aspect of the bill deals with regulations. This bill requires that taking impact analysis be conducted prior to promulgating regulations. If these actions result in a loss of 33 percent of value of the property, compensation is required.

Montanans believe that protecting private property is of utmost importance. And Congress should pass the Omnibus Property Rights Act which reinforces the Government's responsibility to protect property rights and will help get the Federal Government off the backs of Montana's working men and women.

Mr. MACK. Mr. President, I am proud to be an original cosponsor of the Omnibus Property Rights Act of 1995. I thank Senator HATCH and my other colleagues who drafted this bill which seeks to stop Government from infringing upon its citizens' private property rights.

Private property rights are fundamental to a free and fair society. Last June, Chief Justice Rehnquist wrote on behalf of the majority, "We see no reason why the takings clause of the fifth amendment, as much a part of the Bill of Rights as the first amendment or fourth amendment, should be relegated to the status of a poor relation."

Over the past several years, we have seen Federal bureaucrats trample our fifth amendment right that private property shall not, "* * * be taken for public use without just compensation." There are countless examples of people forced to spend their time and money fighting their own Government for the simple right to use their land. Unfortunately, there are even more citizens who never make it to court because they cannot afford lawyers to help them fight for their rights. In these cases, Government has robbed its citizens of the use of their property, without even compensating them. It makes you wonder if the American people still control their Government or if our U.S. Government now controls us.

The Omnibus Property Rights Act will restore the basic rights accorded to private property owners by our Founding Fathers in the Bill of Rights. It will slash through the bureaucracy that has rendered those rights meaningless, and it will preserve for future generations the essential freedoms and rights upon which America was founded.

By Mr. BRADLEY (for himself and Mr. LAUTENBERG):

S. 606. A bill to make improvements in pipeline safety, and for other purposes; to the Committee on Commerce, Science, and Transportation.

THE PIPELINE SAFETY ENHANCEMENT ACT OF 1995

• Mr. BRADLEY. Mr. President, I introduce legislation that will save lives and property: the Pipeline Safety Enhancement Act. I am very pleased to announce that my colleague, Senator LAUTENBERG, is joining we as a cosponsor of this bill.

Exactly 1 year ago today, at 11:55 p.m., a fireball lit up the sky in Edison, NJ. This eery light was visible for miles around. At ground zero, a plume of fire and smoke rose hundreds of feet in the air. Within minutes, nearby apartment buildings caught fire. Within hours, these buildings were utterly gone. Hundreds of people were rendered homeless, their possessions completely destroyed.

The physical casualties were miraculously low. Yet, damage was done. The nightmares persist. The memory and the fear remain.

The community is rebuilding. The victims are healing and moving on. But, issues raised by the blast remain unresolved.

Edison spurred a national debate on how we manage pipeline safety. My comprehensive one-call legislation—introduced in the House by Congressman PALLONE—came within a hairsbreadth of becoming law last Congress. The signals are positive for this year: it's a truly bipartisan issue—Senators SPECTER and LOTT have joined Senators LAUTENBERG and EXON and myself as cosponsors—pushed by a powerful private sector coalition.

Since the Edison accident and the introduction of legislation, the value of these one-call notification programs have been recognized by the State of New Jersey, which now has a first-class program, the National Transportation Safety Board and the U.S. Department of Transportation. In fact, the need for a better program is a central feature of the pipeline safety reauthorization bill being proposed by the Secretary of Transportation and the Administration.

There's more to the story, however. On February 7, 1995, the NTSB issued safety recommendations stemming from the Edison disaster. These recommendations should be taken very seriously. Edison was a wake-up call, where only by a miracle literally hundreds of people escaped serious injury. They certainly weren't saved by our public policies.

My legislation will codify the NTSB recommendations into law. My bill will call for stronger materials in our pipelines, better pipeline identification procedures, improved leak detection, more effective safety inspection requirements and new analysis of siting risks. Every one of these is included specifically in the NTSB report.

Mr. President, this is needed. This is also the least we can do. I urge my colleagues to consider this legislation carefully and pass it without delay.

Mr. President, I ask unanimous consent to have a brief description of the bill and the bill text be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 606

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Pipeline Safety Enhancement Act of 1995".

SEC. 2. IMPROVEMENTS IN PIPELINE SAFETY.

(a) TOUGHNESS STANDARDS.—Section 60102 of title 49, United States Code, is amended by adding at the end the following new subsections:

"(l) TOUGHNESS STANDARDS.—

"(1) IN GENERAL.—Not later than 180 days after the date of enactment of the Pipeline Safety Enhancement Act of 1995, The Secretary of Transportation, in consultation with appropriate officials of the Research and Special Programs Administration of the Department of Transportation (referred to in this section as the 'Research and Special Programs Administration'), shall prescribe minimum standards for toughness (as defined and determined by the Secretary of Transportation, in consultation with the appropriate officials of the Research and Special Programs Administration) for new pipes installed in gas pipeline facilities and hazardous liquid pipeline facilities.

"(2) HIGH-DENSITY POPULATION AREAS.—In establishing the minimum standards for toughness under paragraph (1), the Secretary of Transportation shall give particular attention to the installation of new pipes in high-density population areas (as such term is used in section 60109).

"(3) PIPE DEFINED.—For purposes of this subsection, the term 'pipe' means any pipe or tubing used in the transportation of gas, including pipe-type holders.

"(m) MARKINGS.—

"(1) IN GENERAL.—Not later 180 days after the date of enactment of the Pipeline Safety Enhancement Act of 1995, the Secretary of Transportation, in consultation with appropriate officials of the Research and Special Programs Administration, shall prescribe minimum standards that require for the marking of pipelines in class 3 and class 4 locations (as such terms are used in subpart L of part 192 of title 49, Code of Federal Regulations, as in effect on the day before the date of enactment of the Pipeline Safety Enhancement Act of 1995) to identify hazardous liquid pipeline facilities and high-pressure pipelines.

"(2) HIGH-PRESSURE PIPELINE DEFINED.—For purposes of this subsection, the term 'high-pressure pipeline' means any gas pipeline in which the gas pressure is higher than that provided to the customer.

"(n) TESTING.—

"(1) IN GENERAL.—Not later than one year after the date of enactment of the Pipeline Safety Enhancement Act of 1995, the Secretary of Transportation, in consultation with appropriate officials of the Research and Special Programs Administration, shall include in the minimum safety standards prescribed under subsection (a) a requirement that each operator of a gas pipeline facility or hazardous liquid pipeline facilities conduct, on a periodic basis, inspections or tests capable of identifying damage caused by corrosion and other time-dependent damage that may be detrimental to the continued safe operation of the pipeline and that may necessitate remedial action, in order to determine the adequacy of the pipeline facility to operate at established maximum allowable operating pressure.

"(2) MAXIMUM ALLOWABLE OPERATING PRESSURE DEFINED.—For purposes of this subsection, the term 'maximum allowable operating pressure' means the maximum pressure at which a pipeline or a segment of a pipeline may be operated under regulations issued under this chapter."

(b) ASSESSMENT OF PUBLIC EDUCATION PROGRAM CONCERNING LEAK DETECTION.—Section 60116 of title 49, United States Code, is amended—

(1) by inserting "(a) IN GENERAL.—" before "Under regulations"; and

(2) by adding at the end the following new subsection:

"(b) ASSESSMENT.—

"(1) IN GENERAL.—Not later than 180 days after the date of enactment the Pipeline Safety Enhancement Act of 1995, and every two years thereafter, the Secretary of Transportation, in consultation with appropriate officials of the Research and Special Programs Administration of the Department of Transportation, shall conduct an assessment of the programs conducted under this section to determine—

"(A) with respect to the programs conducted under this section—

"(i) the appropriateness of the information provided; and

"(ii) the effectiveness of the educational techniques used; and

"(B) in comparison to other similar educational programs, the relative effectiveness of educational techniques used in the programs conducted under this section.

"(2) REGULATIONS.—Upon completion of an assessment conducted under paragraph (1), the Secretary, in consultation with the appropriate officials of the Research and Special Programs Administration, shall promulgate such regulations as the Secretary determines to be appropriate to improve the programs conducted under this section."

(c) STUDY.—The Secretary of Transportation shall take such action as may be necessary to expedite the completion of the study conducted by the Research and Special Programs Administration of the Department of Transportation relating to methods to reduce public safety risks in the siting pipeline facilities. In addition, the scope of the study referred to in the previous sentence shall be modified to include the consideration of building standards. The Secretary of Transportation shall ensure that the results of the study are widely available to the governments of States and political subdivisions thereof.

PIPELINE SAFETY ENHANCEMENT ACT

This legislation would codify recommendations made by the National Transportation Safety Board. This independent safety board made specific safety recommendations to the federal government on February 7, 1995. At that time, the NTSB released a report on the natural gas pipeline disaster that occurred at Edison, NJ, on March 23, 1994.

The Pipeline Safety Enhancement Act will include the following five requirements which are identified specifically in the Edison safety report:

(1) that the Secretary of Transportation develop minimum standards for the strength of new pipe installed for natural gas and hazardous liquid pipelines; the Secretary is to give special consideration to the use of pipe in high-density population areas (such as Edison, NJ);

LEGISLATIVE REFERRAL MEMORANDUM
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LRM NO: 1133

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RESPONSE TO
LEGISLATIVE REFERRAL MEMORANDUM

LRM NO: 1133
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.

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Office of Management and Budget
Fax Number: 395-5691
Branch-Wide Line (to reach legislative assistant): 395-6194

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

SUBJECT: JUSTICE 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

DRAFT: 4-28-95

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 adequate protection of human health, public safety, the environment, and other protections important to the American people; and (3) the broad applicability of S. 605 to all manner of basic protections.

I. <u>S. 605 is a Radical Departure from the Constitution.</u>

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 constitutes 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 a consideration of the nature 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 constitutional considerations. Thus, it is simply false to state that S. 605 would vindicate important constitution principles, or that opposition to S. 605 constitutes opposition to the Constitution. To the contrary, this effort to supplant our constitutional tradition with extreme 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 the 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. Rather, the economic effects 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 the touchstone, the bill again conflicts with Concrete Pipe and other important precedents. 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 fundamentally distorts these cases by wrenching those standards from their appropriate setting and by disregarding important limitations.

For example, Section 204(a)(2)(A) would require compensation where agency action "does not substantially advance the stated governmental interest to be achieved by the legislation or regulation on which the action is based." This standard appears to allude to the "nexus" requirement for land-use restrictions articulated in Nollan v. California Coastal Commission (U.S. 1987). S. 605 would improperly apply this standard beyond the fact-specific context of land-use regulation, the context in which it originated and is properly applied. Moreover, in Dolan v. City of Tigard (U.S. 1994) decided last Term, the Court characterized Nollan as requiring an "essential nexus" or logical relatedness between the agency action at issue and a legitimate government interest. By freezing into law a previously used formulation of the nexus requirement, S. 605 separates the standard from its constitutional moorings and risks compelling an inappropriately heightened level of scrutiny.

Another provision, 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. 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 from regulation that merely restricts the ability to use property. The bill's revision of the Dolan test would 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.

A third compensation standard, set forth in section 204(a)(2)(C), would require compensation where agency action "results in the property owner being deprived, either temporarily or permanently, of all or substantially all economically beneficial or productive use of the property or that part of the property affected by the action without a showing that such deprivation inheres in the title itself." This test appears to be derived from Lucas v. South Carolina Coastal Council (U.S. 1992). Lucas, however, held that diminution in value might constitute a per se taking only where "regulation denies all economically beneficial or productive use of land," a situation the Lucas court described as "relatively rare." In Concrete Pipe, the Supreme Court subsequently reaffirmed that the Lucas standard applies to real property. Concrete Pipe also makes clear that the test should be applied to the parcel as a whole, not just to the affected portion of the property as provided for in the bill. Moreover, the bill's compensation requirement for temporary deprivations contravenes the established constitutional principle that normal government delay does not give rise to a

taking of private property under the fifth amendment. Tabb Lakes v. United States (Fed. Cir. 1994).

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 Important to the American People.

S. 605 does not require compensation where agency action prohibits land use that is already prohibited by state nuisance law.[1] Despite statements to the contrary at the 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 threats to human health 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 1970 report submitted to the Senate Committee on Public Works 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,

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[1] A private nuisance is an unreasonable interference with the use and enjoyment of the plaintiff's land. Public nuisances include violations of laws that specify various conditions as nuisances, and may include other unreasonable interferences with a general right of the public. Restatement (Second) of Torts, §821.

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." 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.

Secretary of Health, Education, and Welfare, National Emissions Standards Study, 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 similar 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 in 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 wetlands,[2] groundwater contamination,[3] hazardous waste contamination of property,[4] asbestos removal,[5] airport noise,[6] and contamination of drinking water from a leaking landfill.[7] 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 that are not related to health and safety and not addressed by state nuisance law, such as national defense, foreign relations, civil rights protection, worker safety rules, airline safety, food and drug safety, and many other vital protections. By requiring compensation for many protections that Congress has deemed necessary to advance the public interest, except where such protections fall within state nuisance law, S. 605 would undermine Congress's authority to decide what conduct or activity needs to be regulated to protect the public interest.

Although the purported purpose of the bill is to provide easily administered "bright lines" for compensation, the nuisance

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[2] Johnson v. Whitten, 384 A.2d 698 (Me. 1978).

[3] Cereghino v. Boeing Co., 826 F. Supp. 1234 (D. Ore. 1993).

[4] American Glue and Resin, Inc. v. Air Products & Chemicals, Inc., 835 F. Supp. 36 (D. Mass. 1993); In re Cottonwood Canyon Land Co., 146 B.R. 992, 36 ERC 1304 (U.S. Bankruptcy Court, D. Colo. 1992).

[5] City of Manchester v. National Gypsum Co., 637 F. Supp. 646 (D. Rhode Island) 1986).

[6] Broyde v. Gotham Tower, Inc., 13 F.2d 994 (6th Cir.), cert. denied, 114 S. Ct. 2137 (1994).

[7] O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642 (1981).

exception in S. 605 would generate considerable confusion, inconsistency, and opportunities for litigation. One leading authority has described nuisance law by stating that "there is perhaps no more impenetrable jungle in the entire law than * * * nuisance."[8] This impenetrable body of law would generate far more litigation over countless agency actions than existing standards under the Just Compensation Clause. In the end, the bill would substitute the judicial process and the vagaries of state nuisance law for Congress's authority to establish necessary protections for the American people. Where such protections do not fall within the scope of a state's nuisance law, S. 605 would impose a incapacitating compensation requirement that would nullify Congress's decision to establish the protections.

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 could be easily read as imposing 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,"

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[8] W. Page Keeton et al., Prosser and Keeton on the Law of Torts, at 616 (1984).

but instead whether the term "property" as defined in the bill would include the inventory and factory. It seems clear that the bill would be so construed. Any agency action -- including a ban on the sale of unsafe drugs -- that reduces the value of a portion of property by 33 percent would give rise to a claim for compensation under section 204(a)(2)(D).

You asked whether a court would 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. Bararacco 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 would require compensation where requirements imposed under the American with Disabilities Act reduce the value of any portion of property by 33 percent. It would be impossible to catalogue all other possible applications. A few 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 assault rifles or other weapons.
- Protections under the National Flood Insurance Program designed to decrease the risk of flooding.
- County rezoning of land adjoining a municipal airport to comply with FAA-mandated operational requirements.

- A phase-out of single hull tankers, a suspension of unsafe commercial aircraft, 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.

* * * * *

I hope this letter serves to clarify several of the important points raised at the April 6 hearing. The Administration is committed to protecting property rights. We believe that the Constitution provides the best protection. Where specific programs 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.

Sincerely,

John R. Schmidt
Associate Attorney General

cc: Senator Joseph R. Biden
Ranking Minority Member

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

DATE: 4/28

TO: Marvin Kristov

FAX NUMBER: 61647

TELEPHONE NUMBER:

NUMBER OF PAGES (including cover): 7

MESSAGE:

FROM: Tom Jensen

TELEPHONE NUMBER: (202) 395-5750

FAX NUMBER: (202) 395-3744

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY

APRIL 28, 1995

MEMORANDUM FOR TAKINGS TEAM MEMBERS

FROM TOM JENSEN TJ

RE ATTACHED WASHINGTON STATE BILL

As promised on this morning's call, I am distributing the regulatory takings compensation bill passed earlier this month by the Washington legislature.

The measure was referred to the legislature by citizen initiative and, as I understand, is not subject to a gubernatorial veto. It is, however, subject to reversal by citizen initiative and, in fact, such an effort is already well underway. The process seems very similar to the experience in Arizona.

attachment

CERTIFICATION OF ENROLLMENT

INITIATIVE NO. 164

Chapter 98, Laws of 1995

54th Legislature
1995 Regular Session

Private property regulatory fairness act

EFFECTIVE DATE: 7/23/95

Passed by the House February 15, 1995
Yeas 69 Nays 27

CLYDE BALLARD

Speaker of the
House of Representatives

Passed by the Senate April 18, 1995
Yeas 28 Nays 20 CERTIFICATE

I, Timothy A. Martin, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is INITIATIVE NO. 164 as passed by the House of Representatives and the Senate on the dates hereon set forth.

JOEL PRITCHARD

President of the Senate
TIMOTHY A. MARTIN

Chief Clerk

CERTIFICATE

I, Marty Brown, Secretary of the Senate of the State of Washington, do hereby certify that the attached is Senate INITIATIVE NO. 164 as passed by the Senate and the House of Representatives on the dates hereon set forth.

MARTY BROWN

Secretary

FILED

April 19, 1995 - 11:15 a.m.

Secretary of State
State of Washington

INITIATIVE MEASURE NO. 164

AN ACT Relating to regulation of private property; adding a new chapter to Title 64 RCW.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

{+ NEW SECTION. +} Sec. 1. This act is intended to provide remedies to property owners in addition to any constitutional rights under the state and/or federal constitutions and is not intended to restrict or replace any constitutional rights.

{+ NEW SECTION. +} Sec. 2. This act shall be known as the private property regulatory fairness act.

{+ NEW SECTION. +} Sec. 3. A regulation of private property or restraint of land use by a governmental entity is prohibited unless a statement containing a full analysis of the total economic impact in private property of such regulation or restraint is prepared by the entity and made available to the public at least thirty days prior to adoption of the regulation or imposition of the restraint. Such statement shall identify the manner in which the proposed action will substantially advance the purpose of protecting public health and safety against identified public health or safety risks created by the

use of private property, and analyze the economic impact of all reasonable alternatives to the regulation or restraint. Should the governmental entity choose to adopt a proposed regulation or restraint on the use private property, the governmental entity shall adopt the regulation or restraint that has the least possible impact on private property and still accomplishes the necessary public purpose.

{+ NEW SECTION. +} Sec. 4. (1) A portion or parcel of private property shall be considered to have been taken for general public use when:

(a) a governmental entity regulates or imposes a restraint of land use on such portion or parcel of property for public benefit including wetlands, fish or wildlife habitat, buffer zone, or other public benefit designations; and

(b) no public nuisance will be created absent the regulation; and

(2) When private property is taken for general public use, the regulating agency or jurisdiction shall pay full compensation of reduction in value to the owner, or the use of the land by the owner may not be restricted because of the regulation or restraint. The jurisdiction may not require waiving this compensation as a condition of approval of use or another permit, nor as a condition for subdivision of land.

(3) Compensation must be paid to the owner of a private property within three months of the adoption of a regulation or restraint which results in a taking for general public use.

(4) A governmental entity may not deflate the value of property by suggesting or threatening a designation to avoid full compensation to the owner.

(5) A governmental entity that places restrictions on the use of public or private property which deprive a landowner of access to his or her property must also provide alternative access to the property at the governmental entity's expense, or purchase the inaccessible property.

(6) The assessor shall adjust property valuation for tax purposes and notify the owner of the new tax valuation, which must be reflected and identified in the next tax assessment notice.

(7) The state is responsible for the compensation liability of other governmental entities for any action which restricts the use of property when such action is mandated by state law or any state agency.

(8) Claims for compensation as a result of a taking of private property under this act must be brought within the time period specified in RCW 4.16.020.

{+ NEW SECTION. +} Sec. 6. No governmental entity may require any private property owner to provide or pay for any studies, maps, plans, or reports used in decisions to consider restricting the use of private property for public use.

{+ NEW SECTION. +} Sec. 7. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Full compensation" means the reduction in the fair market value of the portion or parcel of property taken for general public use which is attributable to the regulation or restraint. Such reduction shall be measured as of the date of adoption of the regulation or imposition of restraint on the use of private property.

(2) "Governmental entity" means Washington state, state agencies, agencies and commissions funded fully or partially by the state, counties, cities, and other political subdivisions.

(3) "Private property" means -

(a) land;

(b) any interest in land or improvements thereon;

(c) any proprietary water right;

(d) Any crops, forest products, or resources capable of being harvested or extracted that is owned by a non-governmental entity and is protected by either the Fifth or Fourteenth Amendments to the U.S. Constitution or the Washington State Constitution.

(4) "Restraint of land use" means any action, requirement, or restriction by a governmental entity, other than actions to prevent or abate public nuisances, that limits the use or development or private property.

{+ NEW SECTION. +} Sec. 8. This act may be enforced in Superior Court against any governmental entity which fails to comply with the provisions of this act by any owner of property subject to the jurisdiction of such entity. Any prevailing plaintiff is entitled to recover the costs of litigation, including reasonable attorney's fees.

{+ NEW SECTION. +} Sec. 9. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

{+ NEW SECTION. +} Sec. 10. Sections 1 through 8 of this act

shall constitute a new chapter in Title 64 RCW.

Passed the House February 15, 1995.

Passed the Senate April 18, 1995.

Originally filed in Office of Secretary of State August 18, 1994.

Filed in Office of Secretary of State April 19, 1995.

--- END ---

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

FAX NUMBER 202/514-4231
CONFIRMATION NUMBER 202/514-1442

DATE: **2-26-95**

FROM: Tim Dowling

PHONE NUMBER: 514-4642

NUMBER OF PAGES TO BE TRANSMITTED (including cover): 35 (2 DOCS: ONE IS 14 PP., ONE IS 20 PP.)

TO:

	FAX	PHONE
Tom Jensen	395-3744	
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Carol Dennis	395-5836	395-4822
Gary Guzy	260-8046	260-8040
Eric Olsen	720-5437	
Marvin Krislov	456-1647	

MESSAGE:

Most recent draft bill attached.
2 versions: one clean, and one redline.

--The bill now focuses on "homeowners, small farms, and small businesses"

--$500,000 cap for claims appears in 5(c)(1)

--"no exhaustion" statement appears in 5(c)(4)

PLEASE CALL ME AT 514-4642 IF YOU SEE ANY MAJOR GLITCHES....THANKS.

104th CONGRESS

1st Session

S. XX

♪TITLE*

♪Rule*

IN THE SENATE OF THE UNITED STATES

♪DATE*

♪SPONSOR* Mr. Bumpers
♪•L♪

♪•L♪

XXXXXXXXX)* introduced the following bill; which was read twice and referred to the Committee on

♪•L♪

♪Rule*

A BILL

♪TITLE*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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title. This Act may be cited as the ''Private Property, Homeowner, and Community Protection Act of 1995''.

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

Sec. 1. Short title; table of contents.

Sec. 2. Findings.

Sec. 3. Purposes.

Sec. 4. Definitions.

Sec. 5. Agency procedure.

Sec. 6. Homeowner, small farm, and small business 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 government takings for public use without just compensation 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 use private property 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) and policies can protect private property from adverse effects resulting from unwise use of the private property of others, thereby aiding individuals and the community as a whole in the advancement of economic stability, public health, safety, the environment and the general welfare;

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

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

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

(8) clarification is desirable_

(A) to help ensure that Federal agencies_

(i) respect the private property rights of citizens;

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

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

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

(9) homeowners, small farms, and small businesses may lack the financial resources to fully and adequately pursue through judicial process claims relating to Federal regulatory effect on their property.

SEC. 3. PURPOSES.

The purposes of this Act are to_

(1) establish new procedures to ensure that Federal agencies consider the effect of their actions on private real property as those actions relate to homeowners, small farms, and small businesses;

(2) ensure that Federal agencies assist homeowners, small farms, and small businesses to comply efficiently and fully with Federal laws by providing timely explanations of requirements and assistance;

(3) assist homeowners, small farms, and small businesses in receiving prompt responses to their requests for consideration of the effect of agency actions on private property;

(4) enhance the opportunities of citizens to participate in the process of government and to achieve greater equity in Federal environmental and land use decisions affecting the rights of homeowners, small farms, and small businesses and the effect of those decisions on their communities;

(5) reduce the cost to homeowners, small farms, and small businesses of pursuing claims that agency action has resulted in a taking of their property; and

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

SEC. 4. DEFINITIONS.

In this Act:

(1) Adverse effect. The term ''adverse effect'' means any substantial limitation on the use or value of property resulting from agency action.

(2) Agency. The term ''agency'' means an agency as defined in section 551 of title 5, United States Code.

(3) Agency action. The term ''agency action'' means an agency action as defined in section 551 of title 5, United States Code.

(4) Homeowner. The term ''homeowner'' means an owner of a qualified residence as determined under section 163(h)(5)(A)(i)(II) of the Internal Revenue Code of 1986.

(5) Property. The term ''property'' means privately-owned real property.

(6) Property owner. The term ''property owner'' means the holder of an interest in a property that may be subjected to an adverse effect as a result of agency action.

(7) Small Business. The term ''small business'' means small business as defined in the agency procedures issued under section 5.

(8) Small Farm. The term ''small farm'' means small farm as defined in the agency procedures issued under section 5.

(9) Taking. The term ''taking'' means a Federal agency action affecting property such that compensation is required by the fifth amendment to the United States Constitution as interpreted by the United States Supreme Court.

SEC. 5. AGENCY PROCEDURES TO ADDRESS ADVERSE IMPACTS ON PROPERTY AND TAKINGS CLAIMS.

(a) Establishment of Procedure. Each agency identified by the Attorney General under subsection (g)(1) shall establish a process or procedure, consistent with its statutory authorities and coordinated with existing processes, for the consideration of the adverse effects of agency actions on property rights of homeowners, small farms, and small businesses that is consistent with the requirements of this section and the guidelines established by the Attorney General under subsection (g)(2).

(b) Requirements. In developing its procedures under section 5(a), the agency shall provide for

(1) the preparation of a publicly available report by the head of the agency addressing adverse effects of agency actions on homeowners, small farms, and small businesses, regardless of whether such adverse effects would constitute a taking, including:

(A) an identification of the statutory authorities administered by the agency

that may adversely affect the ability of homeowners, small farms, and small businesses to utilize their property;

(B) an assessment of such authorities, and the specific rules, processes and mechanisms by which they are administered, to assess adverse impacts on homeowners, small farms, and small businesses, as well as benefits to other property owners and the public interest;

(C) consideration of potential improvements, including but not limited to regulatory changes and legislative proposals, that would reduce adverse impacts on homeowners, small farms, and small businesses; and

(D) consideration of the availability of, and the need for, any special procedures or programs to prevent undue burdens on homeowners, small farms, and small businesses, even where such burdens do not constitute a taking.

(2) consideration by the agency, on the request of a homeowner, small farm, or small business, of a claim that an agency action constitutes a taking, including expedited agency consideration of such claims under subsection (c);

(3) the conduct of adjudications under subsection (d); and

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

(c) Expedited Agency Consideration of Takings Claims._

(1) In general._When an agency identified by the Attorney General under subsection (g)(1)

receives a request from a homeowner, small farm, or small business to consider whether an agency action constitutes a taking of property of a value not exceeding $500,000, the agency shall_

(A) consider the request, including, as the agency deems appropriate, the consideration of_

(i) information supplied by the homeowner, small farm, or small business;

(ii) information provided by other affected persons, including State and local governments, community organizations, and adjacent landowners; and

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

(B) make available to the homeowner, small farm, or small business , on request, its determination in writing, including any publicly available analysis of the effect of the agency action on the owner's property;

(C) if the agency considers it necessary in order to reach an appropriate determination, conduct an adjudication under subsection (d); and

(D) if the matter is referred for adjudication, take prompt action pursuant to subsection (d)(3) in response to the findings made in the adjudication.

(2) Expedition._An agency shall ensure that its procedure provides for expeditious completion under this subsection and adjudication and response to adjudication under subsection (d).

(3) Effect on Agency Action. Consideration of a taking claim under this section shall not stay or otherwise delay the effect of the agency action alleged to constitute a taking.

(4) Exhaustion of Remedies. A homeowner, small farm, or small business need not request consideration of a taking claim under this section as a prerequisite to the filing of a taking claim in federal court.

(d) Adjudication.

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

(2) Basis of decision. The decision of a claim referred under subsection (c)(1)(C) shall include findings of fact and conclusions of law regarding:

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

(B) whether the agency action amounts to a taking of property;

(C) whether modifications are available pursuant to subsection 3(A); and

(D) if a taking is found, the amount of payment necessary to provide just compensation.

(3) Remedies . If the agency determines that an agency action constitutes a taking the agency, in consultation with the Attorney General, is authorized to take one or more of the following actions:

(A) Reverse or modify the agency action so as to avoid or reduce the effect of the agency

action on the homeowner, small farm, or small business, if and to the extent to which a reversal or modification would be consistent with and permit the full enforcement of, the overall purposes of the law under which the agency action is taken, including the protection of other property owners and the public interest;

(B) With the concurrence of the Attorney General, pay just compensation from the agency's appropriated funds;

(C) To the extent statutory authorization exists and to the extent that funds are available in advance through an appropriation, pay just compensation for the taking through other appropriate procedures, including the first section of the Act of February 26, 1931 (40 U.S.C. 258a), to condemn a property interest taken for public use, limited to the interests in property determined to be taken pursuant to this subsection; or

(D) Notify the homeowner, small farm, or small business of other remedies available under the fifth amendment to the United States Constitution.

(e) Alternative Dispute Resolution.

(1) Determination of no taking. If the agency, in consultation with the Attorney General, determines that an agency action does not constitute a taking, or there is a dispute as to the amount of just compensation, the agency shall promptly notify the homeowner, small farm, or small business of the decision.

(2) Consent to alternative dispute resolution. If a homeowner, small farm, or small business brings a claim seeking compensation in the Court of Federal Claims, on the request of the homeowner, small farm,

or small business , the agency and the Attorney General shall consent, where consistent with the interests of the United States, to submit the claim to any process of alternative dispute resolution which has been approved by the Attorney General.

(f) Time For Filing Requests._ A homeowner, small farm, or small business shall submit to the agency a request for expedited agency consideration of a takings claim under subsection (c) not later than 30 days after the date on which the agency action is published or interested parties are otherwise given notice of the proposed or final agency action as required by agency procedures.

(g) Responsibilities of the Attorney General and Agencies._

(1) Not later than 60 days after the date of enactment of this Act, the Attorney General shall publish a list of agencies that must establish a procedure under subsection (a), which list shall include, at a minimum, all agencies the actions of which have a significant possibility of effecting a taking of property;

(2) Not later than 180 days after the date of enactment of this Act, the Attorney General shall publish guidelines for each Federal agency identified under paragraph (1) to ensure that, to the maximum extent practicable, each agency's procedure is sufficient to achieve the objectives of this Act; and

(3) Not later than 240 days after the Attorney General publishes guidelines pursuant to paragraph (2), each agency designated pursuant to paragraph (1) shall prepare and publish, with the concurrence of the Attorney General, final procedures pursuant to subsection (a).

SEC. 6. HOMEOWNER, SMALL FARM, AND SMALL BUSINESS ASSISTANCE PROGRAMS.

(a) Establishment.

(1) In general. The Attorney General shall designate at least 3 of the agencies identified under section 5(g)(1) to establish pilot homeowner, small farm, and small business assistance programs.

(2) Basis for designation. In designating such agencies, the Attorney General shall choose agencies the programs of which have the potential to affect a broad range of homeowners, small farms, and small businesses on a regular basis.

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

(1) Identification of solutions to potential conflicts with homeowners, small farms, and small businesses and application of all available expedited procedures and incentives to achieve those solutions.

(2) Service as a focal point for questions, requests, complaints, and suggestions from homeowners, small farms, small businesses, and the public concerning the policies and activities of the agency that affect property.

(3) Provision of advice to homeowners, small farms, and small businesses on how to comply with applicable requirements of Federal law as efficiently and expeditiously as possible.

(4) Provision of information to homeowners, small farms, and small businesses on the availability of procedures under section 5,

including procedures of the Court of Federal Claims and alternative dispute resolution procedures.

(5) Coordination among designated agencies to ensure consistent responses and communications relating to the homeowner, small farm, and small business assistance programs.

(6) Annual reporting to the head of the agency of information and comments communicated by homeowners, small farms, and small businesses that will better fulfill the mission of the agency while reducing potential conflicts relating to regulatory effects on property.

(7) Annual reporting by the head of the agency to the appropriate committees of Congress describing the information and comments received under paragraph (6).

(c) Prohibition of Advocacy._Agency personnel involved in a homeowner, small farm, and small business assistance program under this section shall not serve as advocates or legal counsel for property owners .

(d) Authorization of Appropriations._There is authorized to be appropriated to carry out this section $1,500,000 for each of fiscal years 1996, 1997, 1998, 1999, 2000, and 2001. [DISCUSS]

SEC. 7. EMERGENCY EXCEPTIONS.

This Act does not apply in a case in which an agency determines that agency action is necessary to_

(1) safeguard life or property;

(2) respond to a state of disaster; or

(3) respond to a threat to national security.

SEC. 8. MODIFICATIONS TO THE CLEAN WATER ACT.

‼TO BE SUPPLIED.¶

SEC. 9. MODIFICATIONS TO THE ENDANGERED SPECIES ACT.

‼TO BE SUPPLIED.¶

SEC. 10. 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 final agency actions pursuant to section 5(d), review of which shall be in the same manner as provided for in the statute authorizing the agency action alleged to constitute a taking.

104th CONGRESS

1st Session

S. XX

)TITLE*

)Rule*

IN THE SENATE OF THE UNITED STATES

)DATE*

)SPONSOR* Mr. Bumpers

)•L)

)•L)

XXXXXXXXX)* introduced the following bill; which was read twice and referred to the Committee on

)•L)

)Rule*

A BILL

)TITLE*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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title. This Act may be cited as the ''Private Property, Homeowner, and Community Protection Act of 1995''.

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

Sec. 1. Short title; table of contents.

Sec. 2. Findings.

Sec. 3. Purposes.

Sec. 4. Definitions.

Sec. 5. Agency procedure.

Sec. 6. ~~Small private property owner~~ Homeowner, small farm, and small business 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~~ government takings for public use without just compensation 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~~ use 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) and policies can protect private property from adverse effects resulting from unwise use of the private property of others, thereby aiding individuals and the community as a whole in the advancement of economic stability, public health, safety, the environment, and the general welfare;

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

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

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

(8) clarification is ~~necessary~~ desirable_

(A) to help ensure that Federal agencies_

(i) respect the private property rights of citizens;

(ii) include as an integral part of their decisionmaking process a consideration of the effect of agency action on privately-owned

property; and

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

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

(9) ~~owners often~~ homeowners, small farms, and small businesses may lack the financial resources to fully and adequately pursue through judicial process claims relating to Federal regulatory effect on their property.~~; and~~

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

SEC. 3. PURPOSES.

The purposes of this Act are to_

(1) establish new procedures to ensure that Federal agencies consider the effect of their actions on private real property as those actions relate to homeowners, small farms, and small businesses ~~small property owners~~;

(2) ensure that Federal agencies assist homeowners, small farms, and small businesses ~~small property owners~~ to comply efficiently and fully with Federal laws by providing timely explanations of requirements and assistance;

(3) assist homeowners, small farms, and small businesses ~~small property owners~~ in receiving prompt responses to their requests

for consideration of the effect of agency actions on private property;

(4) enhance the opportunities of citizens to participate in the process of government and to achieve greater equity in Federal environmental and land use decisions affecting the rights of homeowners, small farms, and small businesses ~~small property owners~~ and the effect of those decisions on their communities;

(5) reduce the cost to homeowners, small farms, and small businesses ~~small property owners~~ of pursuing claims that agency action has resulted in a taking of their property; and

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

SEC. 4. DEFINITIONS.

In this Act:

(1) Adverse effect. The term "adverse effect" means any substantial limitation on the use or value of property resulting from agency action.

(~~1~~2) Agency. The term ''agency'' means an agency ~~(~~as defined in section 551 of title 5, United States Code~~)~~.

(~~2~~3) Agency action. The term ''agency action'' means an agency action as defined in section 551 of title 5, United States Code. ~~proposed action, or a determination not to act or proposed determination not to act, with respect to a project, activity, or program~~

~~funded in whole or in part under the direct or indirect jurisdiction of an agency, including a project, activity, or program that~~

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

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

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

~~(D) is subject to State or local regulation administered pursuant to a delegation of authority by or approval of a Federal agency.~~

~~(3) Community organization. The term ''community organization'' means an entity described in section 501(c)(3) or (4) of the Internal Revenue Code of 1986 that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1986, the charitable purpose of which includes~~

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

~~(B) advancement of the goals of environmental justice,~~

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

~~(4) Indirect regulatory effect. The term ''indirect regulatory effect'' means the regulatory effect of agency action on property other than property that is the immediate subject of an agency action.~~

~~(5) Affected Person. The term ''person'' means an individual, corporation, community organization, or unit of State or local government that claims to suffer an indirect regulatory effect on private property rights as the result of an agency action.~~

(4) Homeowner. The term "homeowner" means an owner of a qualified residence as determined under section 163(h)(5)(A)(i)(II) of the Internal Revenue Code of 1986.

(~~6~~5) Property. The term ''property'' means privately-owned real property.

(6) Property owner. The term ''property owner'' means the holder of an ~~ownership or leasehold~~ interest in a ~~small~~ property that may be subjected to an adverse effect as a result of agency action ~~a regulatory effect or indirect regulatory effect as the result of an agency action~~.

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

~~(8) Small property. The term ''small property'' means a property that~~

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

~~(B) is connected with a farming, ranching, aquaculture, or nonindustrial forestry~~

~~operation with respect to which payments are limited under section 1001 of the Food Security Act of 1985 (7 U.S.C. 1308); and~~

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

(7) Small Business. The term "small business" means small business as defined in the agency procedures issued under section 5.

(8) Small Farm. The term "small farm" means small farm as defined in the agency procedures issued under section 5.

(9) Taking. The term ''taking'' means ~~Federal~~ an Federal agency action affecting ~~with respect to a~~ property ~~[or interest in property? probably not.]~~ ~~to the extent~~ such that compensation is required by the fifth amendment to the United States Constitution as interpreted by the United States Supreme Court.

SEC. 5. AGENCY PROCEDURES TO ADDRESS ADVERSE IMPACTS ON PROPERTY AND TAKINGS CLAIMS.

(a) Establishment of Procedure. Each agency identified by the Attorney General under subsection (~~h~~g)(1) shall establish a process or procedure, consistent with its statutory authorities and coordinated with existing processes, for the consideration of the ~~regulatory~~ adverse effects of ~~the~~ agency~~'s~~ actions on property rights of homeowners, small farms, and small businesses ~~property owners~~ that is consistent with the requirements of this section and the guidelines established by the Attorney General under subsection (~~h~~g)(2).

(b) Requirements. ~~A procedure under subsection (a) shall at a minimum provide for~~

In developing its procedures under section 6(a), the agency shall provide for,

(1) the preparation of a publicly available report by the head of the agency addressing adverse effects of agency actions on homeowners, small farms, and small businesses, regardless of whether such adverse effects would constitute a taking, including:

(A) an identification of the statutory authorities administered by the agency that may adversely affect the ability of homeowners, small farms, and small businesses to utilize their property;

(B) an assessment of such authorities, and the specific rules, processes and mechanisms by which they are administered, to assess adverse impacts on homeowners, small farms, and small businesses, as well as benefits to other property owners and the public interest;

(C) consideration of potential improvements, including but not limited to regulatory changes and legislative proposals, that would reduce adverse impacts on homeowners, small farms, and small businesses, and

(D) consideration of the availability of, and the need for, any special procedures or programs to prevent undue burdens on homeowners, smaller farms, and small businesses, even where such burdens do not constitute a taking.

(~~1~~2) consideration by the agency, on the request of ~~a property owner, of the regulatory effect that an agency action would have on the property of a property owner,~~ a homeowner, small farm, or small business of a claim that an agency action constitutes a taking, including expedited agency consideration of

~~regulatory effects~~ ~~such claims~~ under subsection (c);

(~~2~~3) the conduct of adjudications under subsection (d); and

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

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

(c) Expedited Agency Consideration of ~~Regulatory Effects~~ Takings Claims._

(1) In general._When an agency identified by the Attorney General under subsection (~~b~~g)(1) receives a request from a ~~property owner, or other person indirectly affected, to consider the effect of a agency action on the property owner's use and value of property,~~ homeowner, small farm, or small business to consider whether an agency action constitutes a taking of property of a value not exceeding $500,000, the agency shall_

(A) consider the request, including, as the agency deems appropriate, the consideration of_

(i) information supplied by the homeowner, small farm, or small business ~~property owner~~;

(ii) information provided by other affected persons, including State and local governments, community organizations, and adjacent landowners; and

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

(B) ~~take into account the effect of the~~

~~agency action to the extent consistent with the purposes and requirements of the law under the authority of which the agency action is taken and~~ make available to the homeowner, small farm, or small business ~~property owner~~, on request, ~~a detailed analysis of that effect~~ its determination in writing, including any publicly available analysis of the effect of the agency action on the owner's property;

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

(D) if the matter is referred for adjudication, take prompt action pursuant to subsection (d)(3) in response to the findings made in the adjudication.

(2) Expedition. An agency shall ensure that its procedure provides for ~~the most~~ expeditious completion under this subsection and adjudication and response to adjudication under subsection (d) ~~as the nature and complexity of the agency action in question will allow~~.

(3) Effect on Agency Action. Consideration of a taking claim under this section shall not stay or otherwise delay the effect of the agency action alleged to constitute a taking.

(4) Exhaustion of Remedies. A homeowner, small farm, or small business need not request consideration of a taking claim under this section as a prerequisite to the filing of a takings claim in federal court.

(d) Adjudication.

(1) Hearing. When a claim is referred under subsection (c)(~~3~~)(C), the agency shall consider the claim on the record following an

opportunity for hearing under section 554 of title 5, United States Code.

(2) Basis of decision. The decision of a claim referred under subsection (c)(~~3~~1(C) shall ~~be based on a consideration of~~ include findings of fact and conclusions of law regarding:

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

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

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

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

(3) Remedies ~~Agency Response to Adjudicatory Findings~~. If ~~it is determined in an adjudication~~ the agency determines that an agency action constitutes a taking~~, or that there are sufficiently persuasive reasons why the agency action might be held to constitute a taking as to justify taking 1 of the following actions,~~ the agency, in consultation with the Attorney General, ~~shall~~ is authorized to take ~~1~~ one or more of the following actions:

(A) Reverse or modify the agency action so as to avoid or reduce the effect of the agency action on the homeowner, small farm, or small business ~~property owner~~, if and to the extent to which a reversal or modification would be consistent with and permit the full enforcement of, the overall purposes of the law under which the agency action is taken, including the protection of other property

owners and the public interest.;

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

(B) With the concurrence of the Attorney General, pay just compensation from the agency's appropriated funds;

(C) ~~On the request of the property owner, and~~ To the extent statutory authorization exists and to the extent that funds are available in advance through an appropriation, pay just compensation for the taking through appropriate procedures, including~~, file a declaration under~~ the first section of the Act of February 26, 1931 (40 U.S.C. 258a), to condemn a property interest taken for public use, limited to the interests in property determined to be taken pursuant to this subsection ~~(d), and this Act shall constitute authority for the taking for the purposes of the second sentence of the first undesignated paragraph of that section.~~ ; or

(D) Notify the homeowner, small farm, or small business of remedies available under the fifth amendment to the United States Constitution.

(e) Alternative Dispute Resolution.

(1) Determination of no taking. If the agency, in consultation with the Attorney General, determines that an agency action does not constitute a taking, or there is a dispute as to the amount of just compensation, the agency shall promptly notify the homeowner, small farm, or small business ~~property owner~~ of the decision.

(2) Consent to alternative dispute resolution. If a homeowner, small farm, or

small business ~~property owner~~ brings a claim seeking compensation in the Court of Federal Claims, on the request of the homeowner, small farm, or small business ~~property owner~~, the agency and the Attorney General shall consent, where consistent with the interests of the United States, to submit the claim to ~~the~~ any process of alternative dispute resolution which has been approved by the Attorney General ~~in a form consistent with the practices of the court~~.

~~(f) Qualification To Invoke Proceedings Under This Section. A property owner shall be entitle to invoke proceedings under this section to enforce or protect a use or enjoyment or the value of the property only if the property owner (or, in the case of a property that the property owner acquired by inheritance, a person from whom the inheritance was received) had the use, enjoyment, or value of the property prior to the date on which~~

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

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

(~~g~~f) Time For Filing Requests.

~~(1) Request for consideration.~~ A homeowner, small farm, or small business ~~property owner~~ shall submit to the agency a request for expedited agency consideration of ~~regulatory effects~~ a takings claim under subsection (c) not later than 30 days after the date on which the agency action is published or interested

parties are otherwise given notice ~~of the~~ proposed or final agency action as required by ~~law~~ agency procedures.

~~(2) Request for consent to alternative dispute resolution. A property owner shall submit to the agency a request for consent to alternative dispute resolution under subsection (e)(2) not later than 30 days after the agency notifies the property owner of its determination that an agency action does not constitute a taking.~~

(~~h~~g) Responsibilities of the Attorney General and Agencies. ~~The Attorney General shall~~

(1) ~~N~~not later than 60 days after the date of enactment of this Act, the Attorney General shall publish a list of agencies that must establish a procedure under subsection (a), which list shall include, at a minimum, all agencies the actions of which have a significant possibility of ~~a~~effecting a taking ~~the value, use, or enjoyment~~ of property;

(2) ~~N~~not later than ~~90~~ 180 days after the date of enactment of this Act, the Attorney General shall publish guidelines for each Federal agency identified under paragraph (1) to ensure that, to the maximum extent practicable, each agency's procedure is ~~uniform and~~ sufficient to achieve the objectives of this Act; and

(3) Not later than 240 days after the Attorney General publishes guidelines pursuant to paragraph (2), each agency designated pursuant to paragraph (1) shall prepare and publish, with the concurrence of the Attorney General, final procedures pursuant to subsection (a).

~~(3) not later than 180 days after the date of enactment of this Act, review and approve~~

~~the procedure established by each agency designed to comply with the requirements of subsection (a) and paragraph (2).~~

SEC. 6. ~~SMALL PRIVATE PROPERTY OWNER~~ HOMEOWNER, SMALL FARM, AND SMALL BUSINESS ASSISTANCE PROGRAMS.

(a) Establishment.

(1) In general. The Attorney General shall designate at least 3 of the agencies identified under section 5(~~h~~g)(1) to establish pilot ~~property owner~~ homeowner, small farm, and small business assistance programs.

(2) Basis for designation. In designating such agencies, the Attorney General shall choose agencies the programs of which have the potential to affect a broad range of ~~property owners~~ homeowners, small farms, and small businesses on a regular basis.

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

(1) Identification of solutions to potential conflicts with ~~property owners~~ homeowners, small farms, and small businesses and application of all available expedited procedures and incentives to achieve those solutions.

(2) Service as a focal point for questions, requests, complaints, and suggestions from ~~property owners~~ homeowners, small farms, small businesses, and the public concerning the policies and activities of the agency that affect property.

(3) Provision of advice to ~~property owners~~ homeowners, small farms, and small businesses on how to comply with applicable requirements of Federal law as efficiently and

expeditiously as possible.

(4) Provision of information to ~~property owners~~ homeowners, small farms, and small businesses on the availability of procedures under section 5, including procedures of the Court of Federal Claims and ~~the~~ alternative dispute resolution ~~process~~.

(5) Coordination among designated agencies to ensure consistent responses and communications relating to the ~~private property owner~~ homeowner, small farm, and small business assistance programs.

(6) Annual reporting to the head of the agency of information and comments communicated by ~~property owners~~ homeowners, small farms, and small businesses that will better fulfill the mission of the agency while reducing potential conflicts relating to regulatory effects on property.

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

(c) Prohibition of Advocacy. Agency personnel involved in a ~~private property owner~~ homeowner, small farm, and small business assistance program under this section shall not serve as advocates or legal counsel for property owners ~~seeking to invoke proceedings under this Act~~.

(d) Authorization of Appropriations. There is authorized to be appropriated to carry out this section $1,500,000 for each of fiscal years 1996, 1997, 1998, 1999, 2000, and 2001. [DISCUSS]

~~SEC. 7. WRITTEN PERMISSION FOR ENTRY.~~

~~(a) Compliance With Law. An employee or agent of an agency acting within the scope of the employee or agent's employment or authority shall fully comply with~~

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

~~(2) other applicable law relating to privacy.~~

~~(b) Requirements. An employee or agent of any Federal agency shall not enter a property unless~~

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

~~(2) the interest holder or authorized representative has given written permission for the entry.~~

~~(c) Exceptions. Subsection (b) This section shall not apply in a case of entry for the purpose of~~

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

~~(2) conducting an investigation under Federal law;~~

~~(3) enforcing Federal law; or~~

~~(4) responding to an emergency.~~

SEC. ~~8~~7. EMERGENCY EXCEPTIONS.

This Act does not apply in a case in which

an agency determines that agency action is necessary to_

(1) safeguard life or property;

(2) respond to a state of disaster; or

(3) respond to a threat to national security.

SEC. ~~9~~8. MODIFICATIONS TO THE CLEAN WATER ACT.

!!TO BE SUPPLIED.¶

SEC. ~~10~~9. MODIFICATIONS TO THE ENDANGERED SPECIES ACT.
!!TO BE SUPPLIED.¶

SEC. ~~11~~10. 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 of procedures under to section 5 and to any Federal question that may arise out of section 9 or 10.~~ final agency actions pursuant to section 5(d), review of which shall be in the same manner as provided for in the statute authorizing the agency action alleged to constitute a taking.

~~(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.]~~