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Department of Justice

STATEMENT

OF

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ASSOCIATE ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

THE OMNIBUS PROPERTY RIGHTS ACT OF 1995

PRESENTED ON

APRIL 6, 1995

I. INTRODUCTION

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

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

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

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

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

As a result, passage of these arbitrary and radically new compensation schemes into law will force all of us to decide between two equally unacceptable alternatives. The first option would be to cut back on the protection of human health, public safety, the environment, civil rights, worker safety, and other values that give us the high quality of life Americans have come to expect. The cost of these protections and programs after passage of the proposed compensation legislation would be vastly increased. Ironically, if we chose this path, the value of the very property this legislation seeks to protect would erode as

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

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

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

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

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

As you know, the Fifth Amendment to the Constitution of the United States provides that "private property [shall not] be

taken for public use, without just compensation." That short phrase has provided the compensation standards for takings cases since the founding of our country. Within its contours lies a balance between the authority of the government to act in the public interest and its obligation to provide compensation when those actions place an unfair burden on an individual's property. Before we consider proposals to alter and expand those standards, it is worth discussing what the Constitution provides and why we believe it has served the American people so well over the last 200 years.

The genius of the Constitution's Just Compensation Clause is its flexibility. In deciding whether a regulation is a compensable taking, the Constitution requires the government, and if necessary the courts, to consider the nature of the property interest at issue; the regulation's economic impact; its nature and purpose, including the public interest protected by the regulation; the property owner's legitimate expectations; and any other relevant factors. The ultimate standards for compensation under the Constitution are fairness and justice. Thus, we have never recognized an absolute property right to maximize profits at the expense of the property or other rights of others. For example, reasonable zoning by local governments has long been accepted as a legitimate means to promote safe and decent communities without requiring the payment of compensation to those whose property values might be adversely affected. Indeed, we recognize that the value of property in the community as a

whole is thereby enhanced. On the other hand, when government regulation "goes too far" (in the words of Justice Holmes) and imposes a burden so unfair on an individual property owner that it constitutes a taking, compensation must be paid.

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

It goes without saying that the economic impact of a regulation is an important consideration in deciding whether it would be fair and just to compensate a property owner. But in the very case that established the concept of a regulatory taking -- Pennsylvania Coal Co. v. Mahon (1922) -- the Supreme Court was careful to emphasize that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." From the earliest days of our Republic, we have recognized that the government has a legitimate, and indeed a critical, role to play in protecting all of us from the improper exploitation of property. In America, we have an opportunity to use our property freely -- within the bounds we set through our communities and elected representatives. We have also recognized that our rights

as citizens entail a corresponding responsibility to refrain from exercising those rights in ways that harm others.

As we consider our constitutional tradition and the potential effects of S. 605, it is important to keep the takings issue in perspective. Certain advocates of compensation bills suggest that the government routinely disregards its constitutional obligation to pay just compensation when it takes private property. This is simply incorrect. The Justice Department's regulatory takings docket is actually relatively small. To cite but one example, of the 48,000 landowners who applied for a permit under section 404 of the Clean Water Act in 1994, only 358, or 0.7 percent, were denied a permit. Another 50,000 land-use activities are authorized annually through general permits under the 404 program. And we now have only about 30 takings claims involving the 404 permit program. These figures result from our commitment to ensuring that government programs are implemented in a way that respects property rights.

B. The Compensation Schemes in S. 605

A Radical Departure from Constitutional Tradition: The compensation schemes in S. 605 disregard our civic responsibilities and our constitutional tradition. They replace the constitutional standards of fairness and justice with a rigid, "one-size-fits-all" approach that focuses on the extent to which regulations affect property value, without regard to fairness, to the harm that a proposed land use would cause others, to the landowner's legitimate expectations, or to the

public interest. They ignore the wisdom of the Supreme Court, and they would wipe out many vital protections and generate unjust windfalls.

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

It is important to recognize just how radical S. 605 and similar bills are. In 1993, every Member of the U.S. Supreme Court -- including all eight Justices appointed by Republican Presidents -- joined an opinion stating that diminution in value by itself is insufficient to demonstrate a taking. See Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 113 S. Ct. 2264, 2291 (1993). They not only acknowledged the correctness of this principle, but they characterized it as "long established" in the case law, a principle developed and accepted by jurists and scholars throughout our Nation's history. This constitutional principle does not result from insensitivity to property rights by the Founders or the courts, but instead from a recognition that other factors -- such as the landowner's legitimate

expectations, the landowner's benefit from government action, and the effect of the proposed land use on neighboring landowners and the public -- must be considered in deciding whether compensation would be fair and just. Because S. 605 precludes consideration of these factors, its single-factor test would necessarily result in myriad unjustified windfalls at the taxpayers' expense.

The compensation standard in S. 605 is also flawed because the loss-in-value trigger focuses solely on the affected portion of the property. The courts have made clear that fairness and justice require an examination of the regulation's impact on the parcel as a whole. E.g., Concrete Pipe, 113 S. Ct. at 2290; Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978). By establishing the affected portion of the property as the touchstone, the bill ignores several crucial factors essential to determining the overall fairness of the regulation, such as whether the regulation returns an overriding benefit to other portions of the same parcel. Moreover, under S. 605 a landowner could segment the parcel or otherwise manipulate the loss-in-value calculation in a manner that demonstrates a very high (if not total) loss in value in almost every case. For example, if a developer is allowed to develop 99 acres of a 100 acre parcel, but required to leave one acre undeveloped to protect a bald eagle's nest, the developer could seek compensation for that restriction on a single acre. Or suppose the civil rights laws require a restaurant to make its restrooms accessible to wheelchair users. Under S. 605, the

restaurant owner would not need to show a 33 percent loss in value of the entire restaurant, but only of the affected portion of the restaurant. In other words, it could argue that the space needed for this accommodation is no longer available for tables, and that because this small affected portion has been reduced in value, automatic compensation is required under the bill.

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

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

Think of the consequences of this requirement for just the federal permit programs. A landowner would be able to claim compensation whenever an application for a federal permit is denied. For example, a landowner could apply for a federal permit to build a waste incinerator. If that permit is denied

for whatever reason and the denial decreases the value of the property, the government could be obligated to pay the permit applicant. It is not much of a stretch to conclude that applying for federal permits may become a favored form of low-risk land speculation. The more likely a permit is to be denied, the more attractive it may be under these schemes.

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

A Threat to Property Rights: Although these bills purport to protect property rights, they would undermine the protection of the vast majority of property owners: middle-class American homeowners. For most Americans, property ownership means home ownership. "Property rights" means the peaceful enjoyment of their own backyards, knowing that their land, air, and drinking water are safe and clean. The value of a home depends in large measure on the health of the surrounding community, which in turn depends directly on laws that protect our land, air, drinking water, and other benefits essential to our quality of life.

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

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

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

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

Because the compensation scheme in S. 605 is so broad in scope, it is extremely difficult to provide even a rough estimate of its overall potential fiscal impact. I am told that one proponent of these bills testified, with respect to the Americans with Disabilities Act alone, that potential liability would make administration of the Act prohibitively expensive. A 1992 study by the Congressional Budget Office estimated that application of one takings proposal to just "high value" wetlands -- a proposal that also would have radically revised existing compensation obligations -- would cost taxpayers \$10-15 billion. S. 605 would, of course, apply to far more programs and agency actions than just these two examples. Because S. 605 goes beyond mere land-use restrictions and applies to all kinds of agency actions, it is likely to have many unintended consequences and untoward fiscal impacts that we cannot even begin to anticipate.

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

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

S. 605 also requires the federal government to pay compensation for many State and local actions even where State and local officials would have the discretion to pursue another course of conduct. Imposing federal liability for actions by State and local officials would remove the financial incentive to ensure that State and local action minimizes impacts on private property, and would thereby further expand potential federal expenditures under the bill.

In addition to the compensation costs, S. 605 would exact a tremendous economic toll by preventing the implementation of needed protections. For example, fish and shellfish populations that depend on wetlands support commercial fish harvests worth billions of dollars annually. If compensation schemes render the protection of wetlands prohibitively expensive, the commercial fishing industry would suffer devastating financial losses. Ironically, this bill might require the federal government to compensate the fishery and related economic interests whose profits are reduced by the government's failure to protect

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

At the end of the day, no one can really say how much S. 605 would cost American taxpayers, except to say that those costs would be in the billions of dollars. The answer given by some proponents of these bills is that the costs will depend on how regulators respond. But suppose that every regulator responds by doing everything possible to reduce impact on private property. The compensation costs for carrying out existing statutory mandates and providing needed protections would still be overwhelming. I urge every fiscally responsible Member of this Committee to insist on a realistic cost analysis of this bill before the Committee votes on its merits.

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

Agencies would need to hire more employees to process compensation claims, more lawyers to handle claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property value, and more arbiters to resolve claims. The sheer volume of entitlement requests under these

schemes would be overwhelming. The result would be far more government, not less.

A Threat to Vital Protections: As I mentioned earlier, the passage of any of these compensation bills would pose a serious threat to human health, public safety, civil rights, worker safety, the environment, and other protections that allow Americans to enjoy the high standard of living we have come to expect and demand. If S. 605 were to become law, these vital protections -- which Congress itself has established -- would simply become too costly to pursue.

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

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

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

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

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

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

I am not suggesting that there are no genuine instances of overregulation. We all know of cases of regulatory insensitivity and abuse that are quite simply indefensible. As I will discuss later, this Administration has made great strides in reducing unreasonable and unfair burdens on middle-class landowners, and we are committed to continuing the effort to reinvent government until the job is done.

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

- Suppose a coal company in West Virginia removed so much coal from an underground mine that huge cracks opened on the surface of the land, rupturing gas lines, collapsing a stretch of highway, and destroying homes. If the State refused to take action, and the Interior Department required the mining company to reduce the amount of coal it was

mining to protect property and public safety, the mining company might well be entitled to compensation for business losses under this bill.

- Suppose a restaurant franchisee challenges the Americans with Disabilities Act provisions governing access for disabled individuals in public accommodations. If the franchisee could show that the requirements of the ADA somehow reduced his profits (perhaps by requiring a ramp that reduces the number of tables allowed in the restaurant) and thus diminished the value of the affected property, he could be entitled to compensation.
- Suppose the federal government restricts the importation of assault rifles. If an import permittee could show that the ban reduced the value of his overseas inventory, he could seek compensation under the bill.
- Suppose a group of landowners challenge the federal government's implementation of the National Flood Insurance Program, which imposes certain land use restrictions designed to decrease the risk of flooding. They could argue that such restrictions diminish the value of their land and obtain compensation.
- Suppose the Army Corps of Engineers denies a developer a fill permit under section 404 of the Clean Water Act because such development by the applicant and other nearby landowners would increase the risk of flooding of neighboring homes. Unless the Corps could bear the

difficult burden of showing that the development would constitute a nuisance under applicable state law, compensation could be required.

- Suppose the Coast Guard establishes a phase-out schedule of single hull tankers; or suppose the Federal Aviation Administration orders airlines to suspend use of certain commercial aircraft that raise serious safety concerns; or suppose the Federal Highway Administration issues out-of-service orders to motor carriers directing them to cease using vehicles or drivers that pose an imminent hazard to safety. The bill raises the possibility that the taxpayers would have to compensate affected corporations for economic losses where they have been directed by the government to cease operating unsafe equipment to protect the public.

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

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

Opposition to Compensation Bills: It is because of these far-reaching and ill-conceived consequences that the Administration is in good company in opposing these bills. The National Conference of State Legislatures, the Western State Land Commissioners Association, and the National League of Cities have opposed compensation bills of this kind. Religious groups, consumer groups, civil rights groups, labor groups, hunting and fishing organizations, local planning groups, environmental organizations, and others are on record as opposing compensation legislation. More than 30 State Attorneys General recently wrote the Congress to oppose takings legislation that goes beyond what the Constitution requires. On the other hand, the corporate trade associations and many other organizations that support compensation bills like S. 605 do not purport to represent the interests of most Americans.

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

ago, the citizens of Arizona voted down by a 60 to 40 margin a process-oriented takings bill subject to many of the same criticisms as the compensation bills before the Congress. States are concerned that compensation bills would cost taxpayers dearly and eviscerate local zoning ordinances, and that family neighborhoods would be invaded by pornography shops, smoke-stack industries, feedlots, and other commercial enterprises. The Administration shares these States' concerns that compensation schemes would bust the budget, create unjust windfalls, and curtail vital protections. Indeed, some of the federal compensation bills, including S. 605, would subject various State and local actions to the compensation requirement, raising significant implications for state-federal working relationships.

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

III. A BETTER APPROACH TO PROTECTING PROPERTY RIGHTS

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

As part of our efforts to reinvent government, the Administration has reformed specific federal programs to reduce burdens on small landowners and others. Many individuals and small businesses are already allowed to fill portions of certain wetlands without needing to get an individual permit. Three new initiatives announced on March 6, 1995, will give small landowners even greater flexibility. First, landowners will be allowed to affect up to one half acre of wetlands to construct a single-family home and attendant features such as a garage or driveway. The second initiative clarifies the flexibility available to persons seeking to construct or expand homes, farm buildings, and small business facilities where the impacts are up to two acres. Third, the Administration proposed new guidance that will expedite the process used to approve wetland mitigation banking, which will allow more development projects to go forward more quickly. In addition, the Army Corps of Engineers is reforming its wetlands program to make the permit application process cheaper and faster. These reforms will substantially

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

At the Interior Department, Secretary Babbitt has already implemented several changes to the endangered species program to benefit landowners. For the first time ever, the Interior Department has proposed significant exemptions for small landowners. Under this new policy, activities that affect five acres or less and activities on land occupied by a single household and being used for residential purposes would be presumed to have only a negligible adverse effect on threatened species. Thus, under most circumstances, these tracts would be exempted from regulation under the Endangered Species Act for threatened species. The Interior Department has also announced an increased role for the States in ESA implementation, and new proposals to strengthen the use of sound and objective science. Under a new "No Surprises" policy, property owners who agree to help protect endangered species on their property are assured their obligations will not change even if the needs of the species change over time. And under a comprehensive plan for the protection of the Northern Spotted Owl, the Fish and Wildlife Service proposed a regulation that would generally exempt landowners in Washington and California owning less than 80 acres of forest land from certain regulations under the ESA associated with the Northern Spotted owl.

Proponents of statutory compensation schemes have argued that they are necessary because it is difficult and time-

consuming to litigate a constitutional takings claim in federal court. We note that a property owner who successfully litigates a takings claim is already entitled to recover attorneys fees, litigation costs, and interest from the date of the taking, a powerful aid to vindicating meritorious claims. The Justice Department is also committed to working with the courts on approaches to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute resolution techniques. Again, we believe that solutions that focus on the specific issues of concern are preferable to a rigid, one-size-fits-all compensation scheme.

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

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

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

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

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

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

We are also opposed to the repeal of 28 U.S.C. §1500, which bars the Court of Federal Claims from hearing any claim as to which the plaintiff already has a claim pending in another court. First, there is no need to repeal that section. According to the bill, repeal is necessary as current law "forces a property owner to elect between equitable relief in the district court and monetary relief (the value of the property taken) in the United States Court of Federal Claims." That is no longer the law. Loveladies Harbor v. United States, 27 F.3d 1545 (Fed. Cir. 1994). Second, the repeal of §1500 would create opportunities for savvy litigators to manipulate the courts in bringing not just takings claims but all claims over which the Court of Federal Claims has jurisdiction. For example, if §1500 were repealed, a plaintiff would be able to begin litigating aspects of a contract claim in district court and subsequently initiate a suit before the Court of Federal Claims in an effort to find the most sympathetic forum and to stretch the government's litigation resources. While the government presumably would have the right

to transfer the cases and consolidate them in one forum, the government might not learn until well into the litigation that a complaint filed in the district court involved the same dispute as a complaint filed in the Court of Federal Claims due to the minimal requirements of notice pleading. The government's ability to identify related actions would be further limited by the sheer volume of civil litigation involving the United States.

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

Section 403(a)(1)(B) of the bill would require all agencies to complete a private property taking impact analysis (TIA) before issuing "any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property." The Administration firmly believes that government officials should evaluate the potential consequences of proposed actions on private property. Indeed, we consulted with the Senate last year on a similar requirement during its work on the Safe Drinking Water Act, and we hope to continue to work with Members who are interested in this issue.

Because S. 605 establishes such a broad definition of "taking," however, Title IV would impose an enormous, unnecessary, and untenable paperwork burden on many aspects of government operations. This inflexible and unnecessary bureaucratic burden would apply to all kinds of government efforts to protect public safety, human health, and other aspects

of the public good. The bill would severely undermine these efforts by imposing an incalculable paperwork burden. At a time when the Administration is reinventing government to make it more streamlined and efficient, Title IV would result in paralysis by analysis and generate a vast amount of unnecessary red tape.

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

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

VI. CONCLUSION

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

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

The Administration would like to work with the Congress to find ways to further reduce the burden of regulatory programs on American property owners. S. 605, however, is a ham-fisted, scattershot approach that would impair the government's ability to carry out essential functions and would impose a tremendous cost on the pocketbooks of middle-class Americans. Accordingly, the Attorney General will recommend a veto if S. 605 or any similar automatic compensation scheme or compensation entitlement program were to pass.

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TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

THE RIGHT TO OWN PROPERTY

J-104-17

Washington, D. C.

April 6, 1995

MILLER REPORTING COMPANY, INC.

507 C Street, N.E.
Washington, D.C. 20002
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STATEMENT OF JOHN R. SCHMIDT, ASSOCIATE ATTORNEY
GENERAL, UNITED STATES DEPARTMENT OF JUSTICE,
WASHINGTON, D.C.

Mr. Schmidt. Thank you, Senator. I am happy to be here and have an opportunity to present the views of the Justice Department on this legislation.

We don't think the sun will fall from the sky, but we do think that this is a piece of legislation that presents some major risks to the ability of the Federal Government to function in ways that we have all become accustomed and used to it being able to function. We also think it presents some major risks to the taxpayers of having to pay substantially increased costs in compensation to property owners in circumstances where under current law that kind of compensation would not be required.

We obviously come to this with the premise of support for private property. It is a bedrock American principle; it is a bedrock constitutional principle; and as your own comments have indicated, it is embodied in the Takings Clause of the Fifth Amendment, which the Chief Justice has said recently is as much a part of the Bill of Rights and the Constitution as the First and the Fourth and other provisions, and it has been as much a subject of litigation over the years.

Much of that litigation over the last 70 years or so

There has been much litigation regarding the Takings Clause over the years.

1 has involved the question of when regulation, which does not
2 involve the actual taking of property, nevertheless goes so
3 far that it requires the government to pay compensation and
4 will be deemed to be a taking.

5 In making that judgment, the courts have looked to a
6 number of different factors. They have looked at the extent
7 of the regulation. Does it deprive the property owner of
8 all productive or economic use of the property, or does it
9 just take away one or another particular uses of the
10 property?

11 They have looked at the property owner's reasonable
12 expectations. Is it a form of regulation that one could
13 have reasonably anticipated or is it, to use the Court's
14 phrase, inconsistent with reasonable investment-backed
15 expectations?

16 And They have looked at the nature of the public interest
17 that the regulation is serving. Is it a narrow special
18 interest for which a property owner is being asked to
19 sacrifice or is it a general public interest which is
20 serving the interests of that property owner along with the
21 rest of the public?

22 It is clear that the trend of the law in ^{the} that area has
23 been in favor of increased protection for property owners,
24 but no Supreme Court decision has ever come anywhere close
25 to upholding or maintaining the doctrine which is embodied

1 in this legislation, which is that, regardless of any of
2 those other factors, the government will be required to pay
3 compensation when it takes action that reduces the value of
4 property by a third or more.

5 That is a doctrine which will result in the necessity
6 for compensation in a wide variety of areas where it would
7 not be required under current law, and I think it is
8 important to understand we are not talking just about the
9 environmental laws. A lot of attention has been presented
10 in that area, but we are talking about a whole range of
11 government actions that have an impact on the value of
12 property: agricultural restrictions; the ADA, which requires
13 property owners to provide access for the disabled; a whole
14 of business regulations, ERISA requirements, bank
15 regulations, etc.

16 Those are all areas where over the years people have
17 tried to recover under a takings theory. What this bill
18 would say is that in any area where the government acts, it
19 is required to pay compensation, the result is a reduction
20 in the value of property, or any portion of property, of a
21 third or more.

22 I think in doing that, and in flying in the face of the
23 variety of factors that the courts have considered over the
24 years, it really is running directly counter to two basic
25 principles that the courts have looked to. One is a

1 principle of fairness and community, the notion that, in
 2 general, we own property in this country subject to
 3 reasonable regulation in the public interest and since we
 4 all share in the benefits of that regulation, we should not,
 5 in general, be able to exact a price from our neighbors for
 6 complying with that form of regulation.

7 ^{This principle is easy to see}
~~You can see that~~ if we are talking about regulation to
 8 achieve some general common good, such as clean air or clean
 9 water but the courts have talked about the fact that even
 10 more particular kinds of regulation result in what they have
 11 called an average reciprocity of benefits, where overall we
 12 benefit ^{Thus,} and therefore in any particular case we are not
 13 entitled, absent the special circumstances that the courts
 14 have looked at, to recover just because there has been a
 15 reduction in the value of our property.

16 I think that in trying to enact into law this kind of
 17 across-the-board principle you are also flying in the face
 18 of another basic notion, which is a notion of necessity.
 19 Justice Holmes, in the decision which first enunciated the
 20 regulatory taking doctrine, referred to the fact that the
 21 Government literally could not function if it was required
 22 to pay compensation every time it took action that reduced
 23 the value of property.

24 There really are two alternatives ^{available} with respect to any
 25 significant form of regulation if this bill passes. One is

1 that we will take a look at it and see that the price is so
 2 great that we just won't go forward. I think there is a
 3 tendency when people look at legislation of this kind to
 4 pick some area of regulation ^{they} you don't like and say, well,
 5 that is a good thing; we will bring that to a halt.

6 ^{During the hearings}
~~In the testimony~~ before the House, there was a witness
 7 from the Cato Institute who said one of the reasons he
 8 supported this kind of legislation was it would bring
 9 enforcement of the ADA to a halt. Well, that may be a good
 10 thing from his perspective, but the problem with this kind
 11 of across-the-board legislation is it doesn't apply just to
 12 regulation that he doesn't happen to like or just to
 13 regulation that I don't happen to like or that somebody else
 14 doesn't happen to like. It applies across the board, and I
 15 think there is a real risk here that we will bring to a halt
 16 forms of regulation that the American people have come to
 17 rely on.

18 The other alternative ^{is a better one} however, is that we will look at
 19 ^{the proposed regulation} ~~it~~ and we will say, ^{we} okay, we will go forward. We may do
 20 that because the statute itself provides no discretion, or
 21 ^{may} we do it because the regulators and Congress and the
 22 American people expect action in that area. At that point,
 23 we will have to pay the price, and the price at that point
 24 is paid by the American taxpayers.

25 I don't know what that price ^{is} is. Frankly, nobody knows

1 what that price ^{is} There is one estimate that is cited in
2 ~~the~~ written testimony where several years ago the General
3 Accounting Office looked at a similar statute, applied to a
4 particular piece of environmental legislation, and found a
5 price of \$10 to \$15 billion. But that ^{is} ~~is~~ one estimate; that
6 ~~is~~ one statute.

7 The one thing that is clear is we are talking about
8 multiple billions of dollars, real money by anybody's
9 standards, and it is our money. It is not as though there
10 is some pot of gold somewhere that we go to and we find the
11 money to pay compensation to property owners. If
12 compensation has to be paid, it comes from the taxpayers,
13 which, when you look at who pays taxes in this country,
14 means primarily middle-income, middle-class people who pay
15 the bulk of the taxes in this country. So what we are
16 talking about is requiring middle-income, middle-class
17 taxpayers to pay the cost of increased compensation to
18 property owners.

19 There is another consequence that will flow, and this
20 one, I would say, is absolutely inevitable regardless of
21 what else happens. This legislation will produce a huge
22 volume of litigation. I asked our lawyers in the Justice
23 Department who do work in this area how often it is the case
24 that the difference between our initial estimate of the
25 value of property and a property owner's is more than a

1 third. The answer was ²in virtually every case, ³and remember
2 what we are talking about here is a principle that says
3 every time the government takes action that results in a
4 reduction in value of property or any affected portion of
5 property of a third or more, the government will be required
6 to pay compensation.

7 It is clear to me what we are doing is creating a
8 litigable issue that will be litigated in literally hundreds
9 of thousands of additional cases. So at a time when we are
10 all trying ²to collectively to reduce litigation and reduce
11 the kind of government bureaucracy that is necessary to
12 handle litigation and, in general, reduce the complexity of
13 government, it seems to me this is moving in just the
14 opposite direction.

15 For all these reasons, we do believe that enactment of
16 this bill would be a mistake. The Justice Department ^{will} ~~does~~
17 join the Vice President in recommending to the President
18 that he veto legislation of this kind ^{with} ~~that has~~ an automatic
19 compensation entitlement, but I hope it will not come to
20 that.

21 ^{*It is my understanding that*}
~~I really think that~~ if I understand ²the motivations of
22 this legislation, ~~they really~~ lie primarily in particular
23 problems with particular regulatory statutes, ^{and} particular
24 regulatory actions which people have regarded as problems.
25 If that is true, the answer is to focus on those problems

1 and figure out how to solve them.

2 I don't think there is any substitute for that kind of
3 individual judgment. I don't think you can take refuge or
4 recourse to this kind of really radical, abstract principle,
5 which I do think has a major risk inherent in it that it
6 will make it difficult or impossible for the government to
7 function in a wide variety of areas and, alternatively, has
8 the major risk of imposing some major unpredictable, but
9 clearly massive new costs on the American taxpayers.

10 So, for all those reasons, we are opposed to it, and I
11 will stop at that point and would be glad to respond to any
12 questions.

13 The Chairman. Thank you, Mr. Schmidt. We are glad to
14 have your testimony and the testimony of the administration,
15 but your testimony seems to indicate that, my gosh, if this
16 bill passes, the government is just going to have to pay too
17 much money to take people's property.

18 Much of your argument is based on the supposition that
19 the concept of nuisance is all but non-existent. But as
20 commonly understood, the doctrine of nuisance is quite
21 significant, and I think would nullify the parade of
22 horrors that your statement and you here today claim that
23 the bill will create. For example, dumping toxic pollutants
24 into the water is clearly a nuisance use and would not
25 require compensation, if regulated, and many others as well.

Talking Points on Property Rights

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

These proposals are a bad idea because -

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

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

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

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

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

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

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

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

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

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

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

These bills are budget busters.

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

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

- Huge bureaucracies would be created to process claims.

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

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

There is a better way.

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

June 13, 1995





U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

May 4, 1995

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

Dear Mr. Chairman:

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

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

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

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

The Constitution nowhere suggests that a property owner has an absolute right to use property without regard to the effect of the property use on others. Nor does the Constitution suggest that reasonable government efforts to protect the American people from harmful property use constitute a compensable taking. None of the Founders ever proposed such a radical and destructive theory, and no court has ever read the Constitution in this way. Yet S. 605 would effectively establish these extreme principles as the law of the land.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

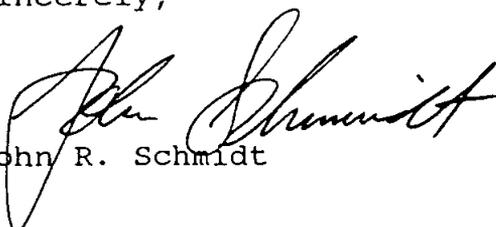
- Prohibitions on the sale of dangerous medical devices.
- Restrictions on the sale of animals and plants necessary to prevent the spread of contagious disease.
- Marketing quotas for crops.
- Restrictions on the sale or production of explosives or dangerous weapons.
- Protections under the National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

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

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

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

Sincerely,



John R. Schmidt

cc: Senator Joseph R. Biden
Ranking Minority Member

5





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

THE DIRECTOR

JUN - 7 1995

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

Dear Mr. Chairman:

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

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

S. 605, however, would go far beyond a reasonable balancing of interests, as required by the Constitution. It purports to entitle property owners to compensation for any agency action that diminishes by one-third the potential value of any affected portion of property -- without regard for the public interests being served by agency actions.

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

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

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

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

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

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

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

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

6



THE COST OF TAKINGS LEGISLATION TO NEW HAMPSHIRE TAXPAYERS

- A STUDY CONDUCTED BY RKG ASSOCIATES, INC. -

For the New Hampshire Wildlife Federation
and
the National Wildlife Federation

Executive Summary

February 1995

Based on conservative assumptions, research reveals that proposed takings legislation would impose a significant burden on local and state government and New Hampshire taxpayers. In the towns examined in this study, for example, the calculations showed that the price tag for takings bills ranges from \$2 million in Dunbarton to \$8 million in Laconia.

I. Background

RKG Associates, on behalf of New Hampshire Wildlife Federation and National Wildlife Federation, has conducted a study that attempts to calculate the financial impacts of legislative "takings" proposals. During the past several years legislation has been introduced in many states addressing compensation of property owners whose land value is limited by land use and other regulations. Though many state legislatures have considered these proposals, there have been no studies to evaluate how state and local governments would be affected by a broadened legislative definition of a takings. RKG's study examines the takings bills introduced in the New Hampshire legislature and illustrates their financial consequences to New Hampshire taxpayers if passed.

Legislative takings proposals have been introduced in 43 states since 1990. Many of these bills, including some introduced in New Hampshire, require compensation in the form of taxpayer-funded payments to owners of private property regulated by state or local governments. Other state legislative initiatives would require exhaustive analyses of the financial impacts associated with state regulatory programs on private property owners. In 1994, 86 takings bills were introduced in 33 state legislatures. Six states passed legislation that was limited in scope or modified before approval. In Arizona, a takings measure that the legislature had approved in 1992 was rejected by Arizona voters on the November 8th ballot, reportedly due to its fiscal implications.

It is surprising then, with this increasing state legislative interest in paying property owners affected by governmental regulations, that there have been no studies designed to measure the financial impacts of takings legislation on state and local governments. While many states prepare fiscal notes for

proposed legislation, the evaluation of takings bills are woefully inadequate. Often these fiscal notes simply recognize that the possible financial impact could be large, but that it is too complex or difficult to prepare an assessment of these costs. In New Hampshire, for instance, a fiscal note accompanying HB 608 in 1993 stated that the bill would have an "indeterminable impact on state, county and local revenues and expenditures."

This study is an attempt to better understand the costs of legislative takings proposals. It is based on an evaluation of two bills introduced in the New Hampshire House in 1993 and 1994. The first bill was designed to provide taxpayer-funded payments for property owners affected by state or local land use regulations such as zoning. The second bill would have authorized the New Hampshire Attorney General to evaluate the impacts of state regulations on private property owners and then, based on this evaluation, prepare an estimate of the financial cost to the state for compensation to owners.

II. The Cost of Takings Legislation to Communities

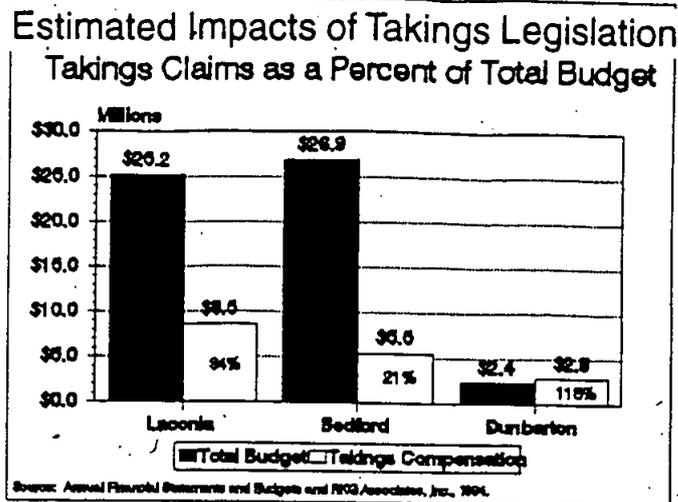
In order to assess the cost of takings legislation to New Hampshire taxpayers, RKG selected three representative New Hampshire municipalities for case study analyses (the City of Laconia and the towns of Bedford and Dunbarton). RKG then designed a "Takings Legislation Impact Model" (TLIM). The research showed that local regulations, which are developed with a great amount of guidance and input from New Hampshire citizens, are the same regulations that are most likely to trigger taxpayer-funded payments under takings legislation. Such local land use ordinances typically have the greatest effect on land values.

RKG's model, which incorporated a very conservative methodology, showed that takings payments would have a significant fiscal impact on New Hampshire municipal budgets and tax rates. The calculations revealed that the price tag for takings bills ranges from \$2 million in Dunbarton to \$8 million in Laconia. These figures are based on the assumption that takings claims will be made for only 2% of the vacant developable land in each community. The costs to communities revealed in these case studies do not account for 98% of each municipality's vacant developable land.

Table A - Comparison of Total Takings Payments to Local Budget Items (1993-94)
Case Study Communities

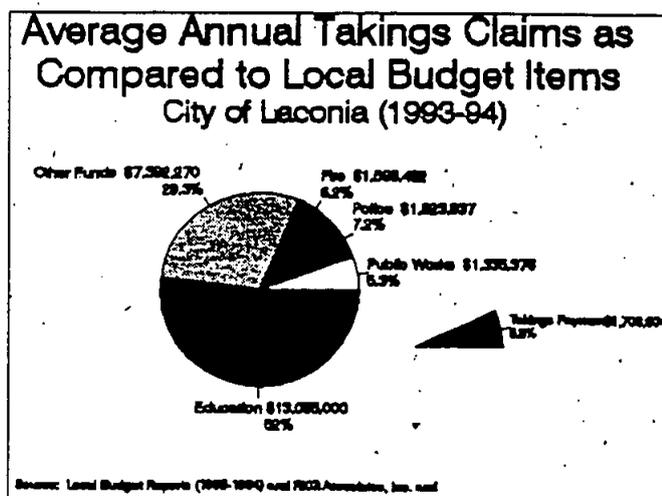
Major Budget Item	LACONIA	% of Total Budget	BEDFORD	% of Total Budget	DUNBARTON	% of Total Budget
Education	\$13,085,000	52%	\$17,390,696	65%	\$1,831,679	76%
Public Works	\$1,335,376	5%	\$1,907,989	7%	\$234,275	10%
Police	\$1,823,837	7%	\$1,465,979	5%	\$22,725	1%
Fire	\$1,566,462	6%	\$831,897	3%	\$54,842	3%
Other Funds	\$7,392,270	29%	\$4,088,463	15%	\$263,637	11%
TOTAL BUDGET	\$25,202,935	100%	\$26,872,040	100%	\$2,407,258	100%
Estimated Takings Payments	(\$8,533,002)	34%	(\$5,533,064)	21%	(\$2,830,792)	118%

Source: Town Budgets, 1993-94 and RKG Associates, Inc.



In order to evaluate the effect of these takings payments on Laconia, Bedford and Dunbarton, Table A compares them to the communities' budgets. As Table A and the accompanying bar graph demonstrate, takings payments would consume from 21% to 118% of each community's total annual budget. These calculations assume that the communities would make the takings payments over a period of one year. Based on these figures, it is clear that takings payments would exceed the expenses for any of the other major items in each community's budget, excluding education.

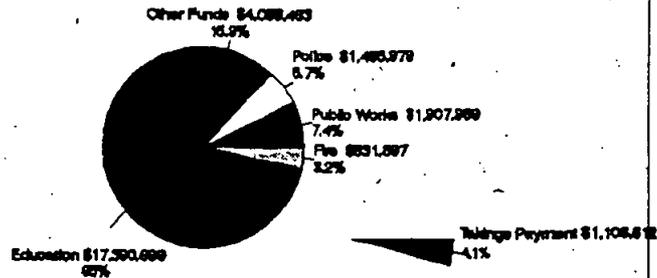
Even if compensation payments were phased over a five year period, the case study communities would incur average budgetary impacts of 4% to 25% annually. At a time when most communities are passing tax freezes or level funded budgets, this would appear to be an unmanageable cost.



This pie chart compares the cost of takings claims to Laconia's budget if takings payments were made annually over a five year period. As it indicates, this payment would be greater than the costs of the fire department and the public works and would increase public expenditures by \$1.7 million a year.

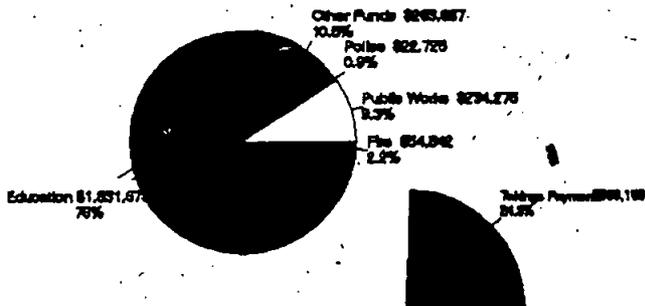
This pie chart compares the cost of takings claims to local budget items in Bedford if the takings payments were made annually over a five year period. The payment would increase community expenditures by \$1.1 million a year, costing almost as much as the police department.

Average Annual Takings Claims as Compared to Local Budget Items Town of Bedford (1993-94)



Source: Local Budget Reports (1993-1994) and RBC Association, Inc.

Average Annual Takings Claims as Compared to Local Budget Items Town of Dunbarton (1993-94)

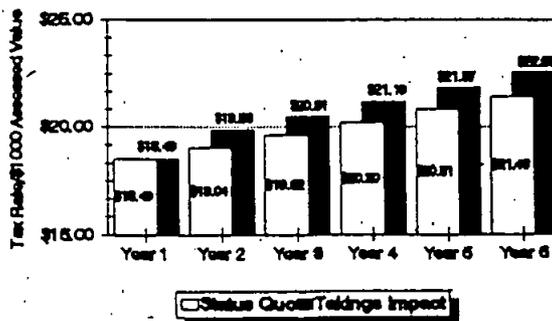


Source: Local Budget Reports (1993-1994) and RBC Association, Inc. and

This pie chart compares the cost of takings claims to local budget items in Dunbarton if the payments were made annually over a five year period. As it illustrates, the payments would cost more than police, public works and other funds combined.

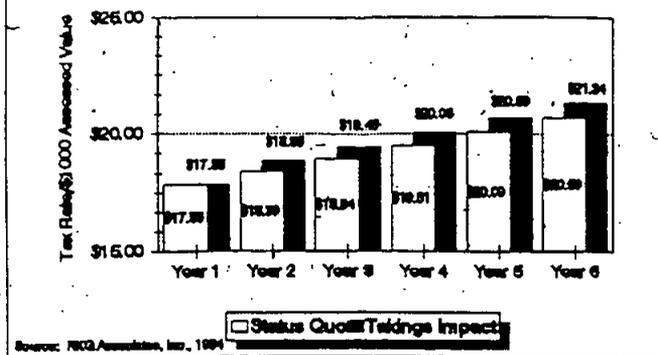
This bar graph illustrates the increase in the tax rate that would occur per \$1000 of assessed value to finance takings payments. The calculation assumes a combination of service cuts and increased taxes. Over a six year period, taxes on a typical \$100,000 home would increase by \$491.

Changes in Tax Rate Due to Takings Claims City of Laconia - Years 1-6



Source: RBC Association, Inc., 1994

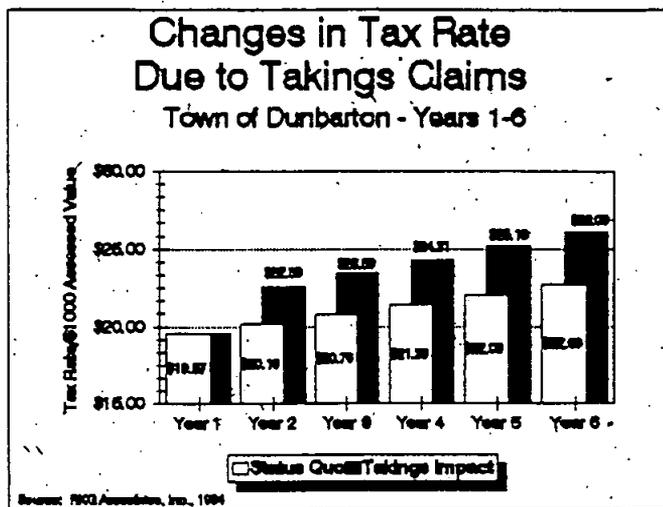
Changes in Tax Rate Due to Takings Claims Town of Bedford - Years 1-6



This bar graph illustrates the increase in the tax rate that would occur per \$1000 of assessed value to finance takings payments. The calculation assumes a combination of service cuts and increased taxes. Over a six year period, taxes on a typical \$100,000 home would increase by \$277

This bar graph illustrates the increase in the tax rate that would occur per \$1000 of assessed value to finance takings payments. The calculation assumes a combination of service cuts and increased taxes. Over a six year period, taxes on a typical \$100,000 home would increase by \$1,439.

Changes in Tax Rate Due to Takings Claims Town of Dunbarton - Years 1-6



Another way to evaluate the impact of takings legislation on communities is to calculate the annual change in local tax rates that may need to occur in order for communities to cover the costs of takings payments. It is difficult to make broad assumptions regarding how communities will ultimately finance takings payments. However, RKG has assumed that takings claims will be financed through a combination of service cuts and increased taxes.

RKG's findings, illustrated in the accompanying bar graphs, shows the increased tax rate that would have to be paid for \$1000 of assessed value of property to finance takings payments. The calculation assumes a combination of service cuts and increased taxes. Over a six year period, taxes on a typical \$100,000 home would increase by \$491 in Laconia, \$277 in Bedford, and \$1,439 in Dunbarton.

The budgetary consequences and the effects on New Hampshire tax rates and service levels explored in RKG's case studies were based on the "Takings Legislation Impact Model." The model is designed to measure differences in the value of land that occur under different sets of land use regulations. This difference in land value provides a basis from which to estimate possible takings payment claims.

The TLIM incorporated a very conservative methodology. RKG's calculations are based on only 2% of the vacant developable land in each community. Also, the model only addresses the impact of density controls under community zoning ordinances and setback regulations from waterways under state and local conservation ordinances. It did not look at other local ordinances that are likely to trigger takings payments such as site plan reviews and subdivision regulations.

III. Budgetary Impact to State Government

In addition to studying the impacts of takings legislation on New Hampshire communities, RKG examined the statewide administrative impacts and associated costs of takings proposals. In order to determine the annual budgetary impact to state government, RKG approximated how many state actions per year would trigger the requirements of takings bills. These estimates were based on representative numbers of rules changes and new laws that are implemented in New Hampshire in a given year. RKG then evaluated the staff time and resources that would be necessary to complete the required takings assessments.

RKG's calculations estimated that the total cost to state agencies could range from \$269,800 to \$2,772,600 per year, depending on whether services are provided by in-house staff or outside consultants. It should be noted that these figures do not include the cost of litigation that could result from challenges to state agency takings determinations.

IV. Conclusion

This study attempts to provide a better understanding of the fiscal impacts of legislative "takings" proposals. While many states have considered takings bills, evaluations of the financial effects of these proposals on state and local governments have been inadequate. Based on conservative assumptions, RKG's research reveals that proposed takings legislation would impose a significant burden on local and state government and New Hampshire taxpayers.

Other states may elect to conduct similar studies of takings bills in their own state legislatures. While the methodology established in this study could be replicated in other states, RKG cautions that the findings of this analysis are relevant to the case study communities in New Hampshire. Hopefully, this effort in New Hampshire will generate additional research and discussion of the merits of takings legislative proposals around the country.

For more information on the takings issue and The Cost of Takings Legislation to New Hampshire Taxpayers, contact the Takings Project of the New Hampshire Wildlife Federation at 54 Portsmouth Street, Concord, New Hampshire 03301.

0927K8



State of Rhode Island and Providence Plantations

DEPARTMENT OF THE ATTORNEY GENERAL

72 Pine Street, Providence, RI 02903

(401) 274-4400

Jeffrey B. Pine, Attorney General

June 13, 1995

Mr. Peter Coppelman
Deputy Assistant Attorney General
9th & Pennsylvania Avenue, N.W.; Room 2609
Washington, DC 20530

Dear Mr. Coppelman:

Per our discussion, this concerns the possible relationship between U.S. Sen. Bill 605; "The Omnibus Private Property Rights Act of 1995," and the emerging "county movement."

As you are well aware, the overall thrust of this Bill is directed at "takings" as that term is defined in the legislation. However, my inquiry relates to another aspect. Specifically, § 503(a)(1) would require that, when "implementing and enforcing" certain Acts of Congress, federal officials "shall comply with applicable state and tribal government laws, including laws relating to private property rights and privacy." According to one particular commentator:

This provision, which is not limited to trespass or other common law provision, is evidently intended to allow state and tribal governments to regulate federal conduct; it would apparently have the effect of ratifying the "Catron County ordinances" now popular in parts of the West, that are intended to declare state control over federal land management or to prohibit federal agents from carrying out functions required by federal law.

J.M. McElfish, A Brief Guide to S.605, p.5 (Envntl. Law Inst. 1995). If Mr. McElfish is correct, this Bill would invite local nullification of federal authority.

This analysis is consistent with the general legal interpretation of the phrase "state laws" as subsuming county and municipal ordinances. E.g., Atlantic Coastline R.R. v. Goldsboro, 232 U.S. 548, 555 (1913) ("a municipal by-law or ordinance . . . is a state law").

I await, with interest, your thoughts and comments.

Very truly yours,

Michael Rubin

Assistant Attorney General; Ext.2297

274 - 4400
TDD - 2354

7



Congress of the United States

House of Representatives

Washington, DC 20515

February 14, 1995

The Honorable Henry Hyde
Chairman, House Judiciary Committee
2138 Rayburn HOB
U.S. House of Representatives

Dear Chairman Hyde:

We write to express our concern over Title IX of H.R. 9, the Job Creation and Wage Enhancement Act, regarding regulatory takings. We overwhelmingly support the intent of this legislation to reduce the regulatory burden imposed on small property owners. We are concerned, however, that Title IX, as written, could have severe and unintended consequences which could potentially harm, rather than help, the average American.

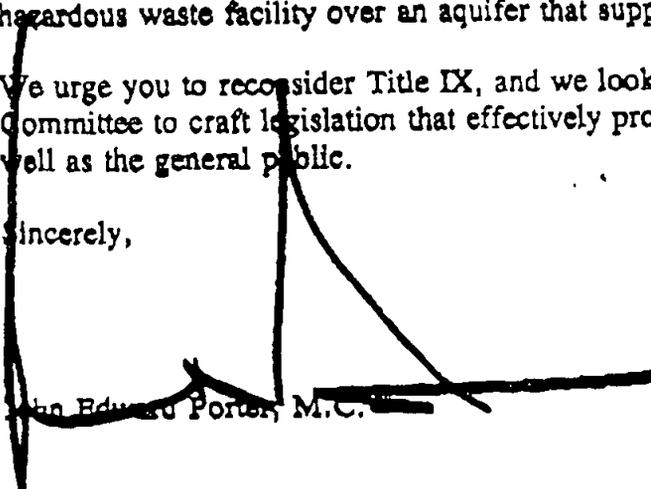
Namely, we are wary of creating a new entitlement program that requires compensation for a devaluation of property value resulting from a regulatory action. Such a program would add to the federal bureaucracy and could lead to endless litigation. At a time when Americans are demanding a streamlined government and tort reform, this is an approach we are reluctant to support.

Furthermore, as fiscal conservatives, we are firmly committed to reducing the federal deficit and balancing the budget and find it difficult to justify the creation of a new entitlement program whose potential costs are unknown and undeterminable.

To keep compensation costs to a minimum, relevant agencies may ultimately choose not to implement regulations for fear of potential compensation costs associated with a diminution in private property value. This approach could inadvertently and indiscriminantly undermine a wide range of federal regulations without a careful analysis of the costs to individual property owners and the benefits to the broader public. For example, if this legislation were to become law, the federal government could be required to compensate a landowner who is denied a permit to site a hazardous waste facility over an aquifer that supplies drinking water to a nearby community.

We urge you to reconsider Title IX, and we look forward to working with members of the Committee to craft legislation that effectively protects the rights of private property owners, as well as the general public.

Sincerely,


John Edwards, M.C.


Sherwood Boehlert, M.C.

Ben Gilman

Ben Gilman, M.C.

Doug Bereuter

Doug Bereuter, M.C.

Scott Kling

Scott Kling, M.C.

Vernon J. Ehlers

Vernon J. Ehlers, M.C.

Porter Goss

Porter Goss, M.C.

Wayne T. Gilchrest

Wayne T. Gilchrest, M.C.

James Greenwood

James Greenwood, M.C.

Marge Roukema

Marge Roukema, M.C.

Curt Weldon

Curt Weldon, M.C.

Christopher Shays

Christopher Shays, M.C.

Connie Morella

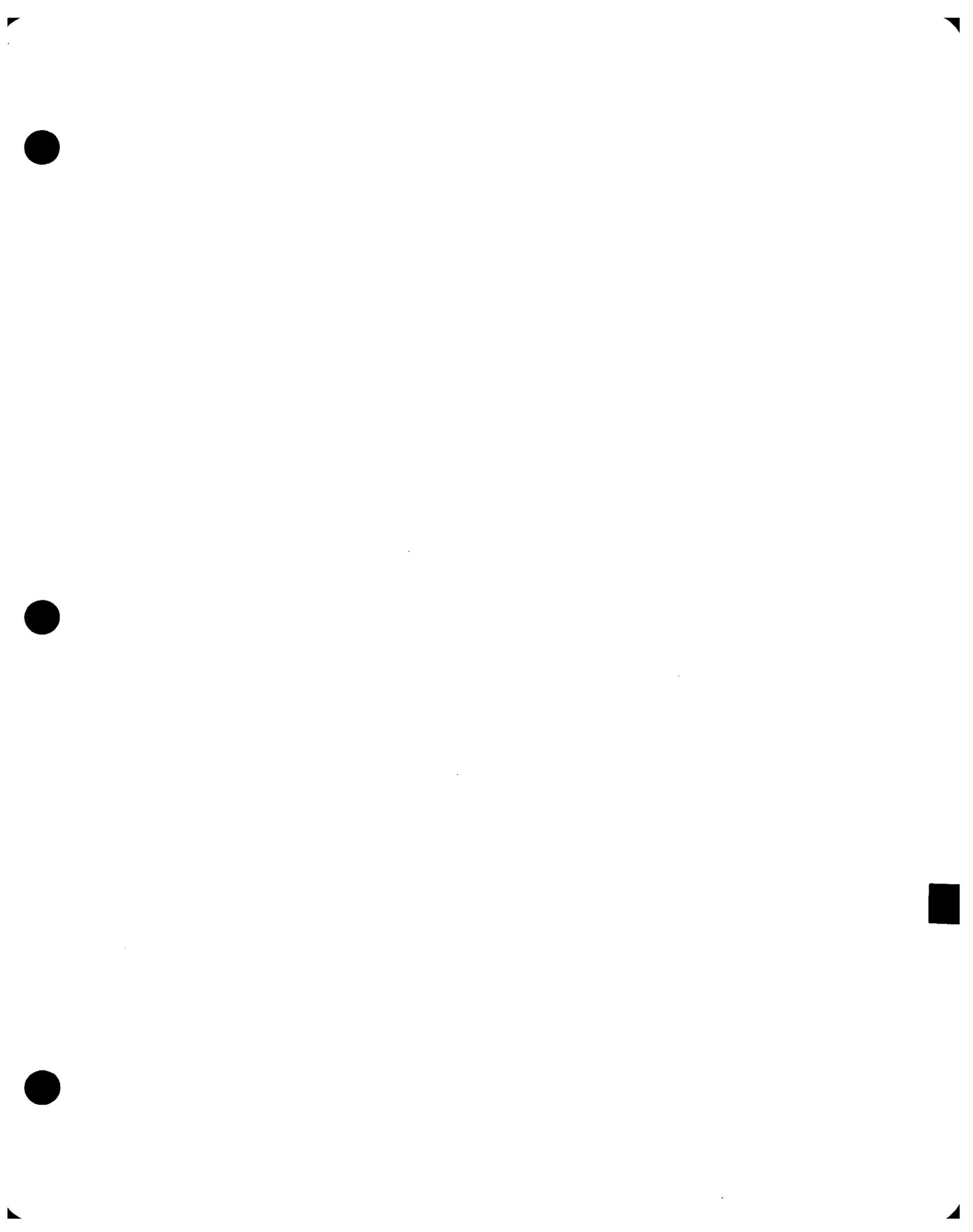
Connie Morella, M.C.

Dick Zimmer

Dick Zimmer, M.C.

Nancy L. Johnson

Nancy L. Johnson, M.C.



FIVE FATAL FLAWS IN ALL COMPENSATION BILLS

I. THEY SUBVERT THE APPROPRIATIONS PROCESS AND THREATEN BUDGETARY LIMITS

By making claims payable out of agency budgets, the bills require the agencies to reprogram (to an unlimited and unpredictable extent) monies appropriated by Congress for specific purposes. Proponents assume the bills will cut down regulation because the regulators will feel the economic pain of paying claims. In many cases, however, agencies do not have authority not to act. Congress, by statute, requires certain actions. As a result, claims will be paid at the expense of other programs the agencies are able to cut back in order to meet regulatory obligations. Appropriators lose control. On the other hand, if Congress appropriates money to pay claims, it will open a budget-draining money spigot.

II. THEIR DIMINUTION-OF-VALUE PERCENTAGES ARE AN ILLUSION

How can you vote against a bill that compensates people who have lost a third or a half of their land's value? Because that's not the way it will really work. Through the miracle of what lawyers call "segmentation", the bills would end up generating claims by owners who have lost as little as 1% or even one-tenth of 1% of their land's value. Here's what really happens:

Let's say a bill provides that an owner can claim compensation for loss of 50% or more in value of its property. A company owns 250 acres, of which 12.5 acres is wetland that it is not allowed to develop. Has the company lost at least 50% of its land value? It seems not. But if the 12.5 acres is "the" property against which loss is measured, the company has lost 100% of that property's value and it gets compensation, even though it has made millions on the other 237.5 acres.

Sound unlikely? It is a real case (*Loveladies Harbor*). Segmentation is exactly the tactic the owner employed successfully in its federal claims court case (a tactic the U.S. Supreme Court has not reviewed or approved), and that would be repeated under any of the compensation bills. The same opportunity would arise if a corporation owns 1,000 acres, of which only 1 acre is regulated wetland.

Percentage-based laws encourage strategic behavior such as separating out the wetlands (or other likely to-be-regulated portions of tracts) so as to ensure a big percentage loss on a small piece of property. Any compensation bill that passes will keep segmentation-generating lawyers busy inventing big percentage losses on made-to-order small properties.

III. THEY OPEN THE DOOR TO PAYMENT FOR PHANTOM LOSSES

Compensating losses an owner has actually incurred is one thing, but these bills all contain a loophole as big as all outdoors. Here's how it works:

Under standard property rules, you can only claim a loss when you actually realize it--for example, when you actually want to build and are denied a permit. Under these bills, however, you claim up front, as soon as a regulation kicks in, though it may not presently impact you at all.

For example, as soon as a strip-mine reclamation regulation is promulgated, every owner of unmined coal could claim compensation, because the regulatory burden would presumably reduce the value of their coal in the ground. Yet much of that coal won't be mined for decades (and some will never be mined). Any actual loss is far in the future. Moreover, by the time the coal is mined, reclamation technology may have advanced (it usually does) so that the cost of compliance is reduced and sometimes even eliminated.

Under these bills the public will have to shell out billions up front to corporations that haven't actually incurred any present loss. Mining companies and other landowners would be able to sit back and collect interest on this taxpayer-provided annuity.

IV. THEY WILL GENERATE A BUREAUCRATIC TANGLE THAT ONLY BIG COMPANIES AND THEIR LAWYERS WILL BE ABLE TO NAVIGATE

Proponents say they are providing a cheaper, simpler, 'bright-line' standard that will help small landowners. In fact they will create a claims industry whose principal product will be litigation. Claims speculators and lawyers will be the big winners, profiting off uncertainty, novelty, and ambiguity. Taxpayers and other property owners will be the big losers.

The segmentation mess has already been mentioned. Small landowners will be left in the dust as lawyers battle over what is a nuisance in various states, the interpretation of the laws of 50 states and thousands of local governments, and the meaning of mind-boggling definitions like "identifiable damage to specific property" or "a particular legal right to use [a] property [which] no longer exists" because of agency action.

V. COMMUNITIES WILL LOSE THE ABILITY TO CONTROL THEIR OWN GROWTH AND DEVELOPMENT

A perverse consequence of these bills will be to undermine local zoning laws. The bills undoubtedly will create an expectation at the State and local level that landowners are entitled to compensation whenever any governmental action--federal,

State or local--results in a diminution of property values of some specified percentage. Legislatures at every level of government will be pressured to respond with proposals as open-ended as those pending in Congress. Zoning imposes far greater restrictions on the use of property than anything the Federal Government does. If the public has to pay each time a local zoning ordinance limits the use of property, it will be the end of local zoning as we know it.

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United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Revised 5/1/95

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

Introduction

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

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

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

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

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

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

It should also be noted at the outset that while the drafters of the bills have appropriated some language from Supreme Court opinions, they have distinctly not adopted the Court's constitutional standard for determining when compensation is due. The Supreme Court has never said that compensation must be paid for value-diminishing regulation unless the conduct in question is a state-law nuisance. For example, the nuisance-oriented standard of the *Lucas*¹ case--language from which is picked up in S. 605--was only applied by the Supreme Court to the extreme and rare case where regulation deprives an owner of all economically beneficial use of land. The Senate bill would apply the *Lucas* language to a far more expansive range of regulation than the Supreme Court has done.

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

¹ 112 S.Ct. 2886 (1992).

² 107 S.Ct. 1232 (1987).

³ p. 1244.

⁴ p. 1245 (emphasis added).

What is Nuisance?

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

The Technical Limits of Nuisance Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Preemption of Nuisance by Federal Regulatory Law

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

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

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

Preemption and Interstate Nuisance

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

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

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

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

that the Clean Water Act preempted the federal common law of nuisance.¹⁴

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

Problems of Proof in Nuisance Law

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

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

¹⁴ Illinois v. Milwaukee, 101 S.Ct. 1784 (1981).

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

¹⁶ Arkansas v. Oklahoma, 112 S.Ct. 1046, 1056 (1992).

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

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

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

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

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

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

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

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

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

Nuisance and the Background Principles of Nuisance

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

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

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

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

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

²² 107 S.Ct. 1232 (1987).

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

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

Public and Private Nuisance

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

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

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

²³ p. 1243.

²⁴ p. 1245.

²⁵ p. 1244.

²⁶ p. 1256.

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

Federal Law Encroachment on State Jurisdiction

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

-end-

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