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[Takings Act Notebook] [Binder] [4]

**Testimony of Roger J. Marzulla Before
The Senate Environment and Public Works Committee
June 27, 1995**

Mr. Chairman and Members of the Committee:

Thank you for inviting me to appear before this Committee today to discuss the current state of infringements upon property rights under the environmental laws and the judicial processes available to remedy these infringements.

I am the head of the Environmental Law Section in the Washington, D.C. office of Akin, Gump, Strauss, Hauer & Feld, where I represent property owners and other clients in a broad array of property rights and environmental matters. I previously served as Assistant Attorney General in charge of the Environment and Natural Resources Division of the U.S. Justice Department, where I was responsible for all environmental litigation on behalf of the United States, including property rights claims arising out of the administration of the environmental statutes. I have worked extensively with virtually all of the major environmental regulatory regimes, including the defense of civil and criminal litigation brought by the United States government to enforce environmental laws.

Despite the fact that the United States Constitution imposes a duty on the government to protect private property rights, in reality property rights are often left unprotected. As reflected

in various provisions of the Constitution, the Framers clearly recognized the need for vigorously protected property rights. They also understood the vital relationship between private property rights, individual rights, and economic liberty. Property rights is the line drawn in the sand protecting against tyranny of the majority over the rights of the minority.

Today, environmental regulations destroy property rights on an unprecedented scale. Regulations designed to protect coastal zone areas, wetlands, and endangered species habitats, among others, leave many owners stripped of all but bare title to their property. In recent years, courts have done much to restore vigor to the Fifth Amendment. For instance, in Nollan v. California Coastal Commission, the Supreme Court held that a land use regulation will be upheld only when it (1) serves a legitimate state interest; and (2) does not deny an owner "economically viable use of his land." Similarly, in Lucas v. South Carolina Coastal Council, the Supreme Court held that denying an owner all beneficial and productive use of land requires payment of compensation unless the prohibited use constitutes a nuisance as defined and understood by background principles of common law.

Nevertheless, cases in which land owners possess the resources and perseverance to prevail against a massive federal government are few and far between. Landowners are increasingly

being deprived of most, if not all, economically beneficial uses of their land by government action and regulation. The Founding Fathers' intent for private property to be protected was clear. They could never have envisioned, however, the growth of a leviathan government which has occurred in recent years. If the Fifth Amendment is going to be worth more than the paper it is written on, private property protection must be strengthened. Adopting legislation to protect property owners will help fulfill the promise of those who wrote the Bill of Rights.

I. The United States Constitution imposes a duty on government to protect private property rights because property rights are an essential element of a free society.

Within the Constitution, numerous provisions directly or indirectly protect private property rights. The Fourth Amendment guarantees that people are to be "secure in their persons, houses, papers, and effects..." The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The Fourteenth Amendment echoes the Due Process Clause, stating that no "State shall deprive any person of life, liberty, or property without due process of law..." Indirectly, the Contracts Clause protects property by forbidding any state from passing any "Law impairing the Obligations of Contracts." U.S. CONST. art. 1, § 10.

The reason why the Constitution places such strong emphasis on protecting private property rights is because the right to own and use property is critical to the maintenance of a free society. Properly understood, property is more than land. Property is buildings, machines, retirement funds, savings accounts, and even ideas. In short, property is the fruits of one's labors. The ability to use, enjoy, and exclusively possess the fruits of one's own labors is the basis for a society in which individuals are free from oppression. Indeed, there can be no true freedom for anyone if people are dependent upon the state (or an overreaching bureaucracy) for food, shelter, and other basic needs. Where the fruits of your labor are owned by the state and not you, nothing is safe from being taken by a majority or a tyrant. As a government dependent, the individual is ultimately powerless to oppose any infringement of his rights (much less degradation of the environment) because the government has total control over them. Peoples' livelihoods, possibly even their lives, can be destroyed at the whim of the state.

One of the most eloquent commentators on the relationship between freedom and property rights was Noah Webster. The noted American educator and linguist said: "Let the people have property and they will have power -- a power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgement of many other privileges." Not surprisingly, the world's greatest oppressors have also

understood the intrinsic link between property rights and freedom. As Karl Marx explained in the Communist Manifesto: "You reproach us with planning to do away with your property. Precisely, that is just what we propose... The theory of the Communists may be summed up in a single sentence: Abolition of private property."

II. Property rights today are under siege from environmental statutes and regulations that have been and continue to be drafted and implemented without respect for or consideration of property rights.

Never before have government regulations threatened to destroy property rights on so large a scale and in so many different contexts as they do today. In just two short decades, the United States has developed from scratch the most extensive governmental regulatory programs in history. Environmental regulations have become an elaborate web of intricate laws and regulations covering every conceivable aspect of property use. For example, we have regulatory programs dealing with marine protection, safe drinking water, and toxic substances control. We have regulatory schemes dealing with coastal zone management, ocean dumping, global climate protection, and clean water (including the wetlands program); we have federal programs regulating air emissions, automobiles, endangered species, wild horses and burros, new chemicals, chlorofluorocarbons, waste disposal, and the cleanup of soils and groundwater; we regulate surface mining, underground mining, forestry, energy production, transportation of all kinds, and every conceivable aspect of the

use and development of land, water, minerals, and other resources.

However, we do not have a single statute dealing with the protection of private property rights. Furthermore, very few statutes, especially the environmental statutes, recognize the fundamental importance of property rights to our Constitution and our system of government under law.

The Clean Water Act ("CWA"), the Clean Air Act ("CAA"), the Resource Conservation and Recovery Act ("RCRA"), and the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") all focus on owners or operators without regard to fault or responsibility. Through generous regulatory and statutory interpretations, the environmental regulatory and enforcement bureaucracy holds liable anyone who commits a broad and sometimes undefined range of acts on property if the person or corporation exercised ownership or control over the property - - regardless of time, intent, volition, or social utility.

Among the most egregious examples of environmental policymaking in a property rights vacuum are in wetlands and endangered species legislation and regulations.

A. The Wetlands Regime

Because the public has an interest in ensuring that its rivers, lakes, and streams remain navigable, and that dredging, filling, and building of obstacles in these watery highways does not occur, the CWA gives the Secretary of the Army regulatory and enforcement power over wetlands. The wetlands permitting program, however, reaches far beyond those waterways owned by the public. Instead, it purports to regulate virtually all land-disturbing activities occurring on 100 million acres or more of privately-owned property.

When these activities and their impacts are confined to the boundary lines of the property itself, there is no rationale -- not even common law nuisance -- for the environmental regulatory and enforcement bureaucracy to usurp the owners' property rights. In these circumstances, the rights of no individual suffer from the owner's use of his private lands. Indeed courts have, in a number of instances, invalidated purported exercises of the Army Corps' of Engineers (the "Corps") wetlands jurisdiction on precisely this ground -- that the regulation of a wetland does not substantially advance a governmental interest in protecting its citizens against pollution or obstruction of navigable waters. See, e.g., 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983). Other courts have labeled governmental regulatory actions as arbitrary and capricious when the impact of the wetlands disturbance is limited to the boundaries of the

private property because no right of the citizenry to be free from pollution or obstruction is implicated. See, e.g., Hoffman Homes, Inc. v. EPA, 961 F.2d 1310, 1320 (7th Cir. 1992), vacated, reh'g granted, 975 F.2d 1554 (7th Cir. 1992), supplemental op., 999 F.2d 256 (7th Cir. 1993).

Ironically, the CWA itself regulates discharges of pollutants only outside the boundaries of the property. Yet the wetlands program, predicating its enforceability on precisely the same provision of the CWA which forbids "discharge of pollutants" into "navigable waters of the United States," purports to regulate all wetlands disturbances even where their impact is confined to the private property itself. Pressed to identify the rights of others that are infringed by the owner's exercise of his right to use and enjoy private property, defenders of this system will assert that wetlands perform important functions such as flood control, filtration of pollutants, and providing habitat for migratory birds.

This argument proves too much, however. It fails to distinguish wetlands from other natural ecosystems -- mountains, meadows, beaches, and prairies -- all of which perform unique functions in maintaining the intricate web of our nation's environment. The class of "wetlands" whose disturbance shows no discernible impact beyond the boundaries of the private property simply cannot be distinguished from a stand of tress, the glen,

the dale, or the brook which likewise have their place in nature. Where no "nuisance exception" applies, the government simply lacks the constitutionally delegated authority to regulate those acts, yet this is precisely what wetlands regulations have done.

B. The Endangered Species Act

The government's implementation of the Endangered Species Act ("ESA") has served to slow economic growth and take private land without just compensation. The ESA is imposing pervasive and extreme burdens on local communities throughout the nation. Threats of criminal and civil prosecution, vaguely worded legal standards, and repeated agency failures to define the geographical scope of ESA restrictions are severely depressing property values and causing widespread confusion and economic losses.

In enacting Section 9(a)(1)(B) of the Endangered Species Act ("ESA"), Congress declared it unlawful for any person to "take" any listed species and appended both civil penalties and criminal sanctions to punish knowing offenders. Understanding the need to identify explicitly the conduct that may subject violators to liability, Congress did not leave the word "take" undefined. Rather, Congress specifically described the conduct that it intended to make punishable by setting forth a precise list of acts that would constitute a take, i.e., "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to

attempt to engage in any such conduct." In a classic example of giving no regard to property rights, the Secretary of the Interior, however, issued regulations defining "harm" for the purposes of the ESA to include significant habitat modification that significantly impairs essential behavioral patterns. 50 C.F.R. § 17.3.

The government's mere suspicion that property may contain potential "habitat" for a protected species brings many owners' activities on their land to a screeching halt, to avoid a "take" as defined in the habitat preservation regulation. The government's suspicion need not even be based on the actual presence on the property of any of the listed species, for the government has construed "injury" to the species to mean essentially "modification of habitat suitable for the species." Thus, the ESA's prohibitions against hunting, wounding, or killing listed species are transformed into the taking of private property through a twisted interpretation of the single verb "harm."

Moreover, the threat to private landowners of being deprived of their constitutionally protected property rights is growing rapidly. Under a little-known legal settlement between the Department of Interior ("DOI") and various environmental groups in 1992, DOI obligated itself to drastically increase the numbers of species to be considered for listing as endangered or

threatened. This agreement -- known in some circles as the "critter quota" -- has resulted in the actual listing of an average of one hundred species per year in the last three years, doubling the average number of listings in the previous twelve years and has dramatically increased the acreage constituting habitat associated with those species. This listing frenzy is resulting in federal protection for an unforeseen number of species, well beyond the wildest dreams of the drafters of the ESA in 1973.

The liberal interpretations and voluminous listings under the ESA lead to severe restrictions on any private activity which may potentially disturb the plants, animals, or habitats that may potentially exist on the land at issue. As the following examples demonstrate, this results in property rights being trampled.

Federal fish and wildlife agencies have used the "taking" prohibition to assert control over a wide range of private activity on private lands. Landowners and businesses, for example, have been threatened with criminal or civil prosecution for clearing a fence of brush, cutting trees, using pesticides, or allowing livestock to graze. Although there is a permit process which allows activities to proceed even if they might "take" a species, these permits are time-consuming and expensive to obtain and require the negotiation and funding of "habitat

conservation plans." A measure of how pervasive and oppressive these ESA restrictions are is that even though listed species can be conserved through the purchase of habitat with funding from the Land and Water Conservation Fund, as well as through the efforts of numerous environmental groups, the primary way species are conserved is through the regulation of private activity on private lands.

At the present time, the likelihood that a species might recover, and the costs of achieving such a recovery, are not considered at the time a species is listed. Likewise, the benefits and economic impacts of protecting a species are deemed irrelevant. Each "species," no matter what its value to humans or likelihood of recovery, is given the same priority and the same degree of protection.

Without realistic priorities, the list of protected species is growing longer and longer. There are thousands of entries on the ESA list, including several entries that represent entire genera or even families which constitute hundreds of additional species. Many of these are obscure plants, fish, snails, clams, worms, and insects. As we speak, federal officials are reviewing several thousand petitions to list additional species and several thousand other species are official candidates for listing.

Instead of concentrating on protecting species, the ESA protects every subspecies or "distinct population segment" of a species, even though the same species may be abundant elsewhere. This process, therefore, allows numerous listings for the same species; differing restrictions for the same species; and the selective use of the listing process by special interest groups to block economic development in specific geographic areas. In some states, for example, the squawfish is a threat to trout and salmon and is killed as a pest, while in other states, where the squawfish is not prevalent, water projects have been delayed to protect it.

Finally, the ESA fails to provide a practical opportunity to resolve conflicts between the rights of property owners and the listing process. If agency consultations or the expensive and arduous "take" permits cannot resolve a potential conflict, the individual whose permit or license has been denied may apply for an exemption. Such an exemption is possible, but only if a committee of seven federal agencies and a representative of the affected state(s) find that the benefits clearly outweigh alternatives; the public interest is served; the action has regional or national significance; no irreversible or irretrievable commitments have been made; and the applicant agrees to mitigate impacts. 16 U.S.C. § 1536. An exemption is also possible if it is necessary for national security. Evidently, under the current approach, constitutional property

rights are not worthy of an exemption or even adequate consideration.

III. Takings Litigation Today is a Long, Expensive, and Arduous Process Which Only the Most Well-Financed and Dedicated Property Owners Can Endure.

To add insult to constitutional injury, the government's means of providing compensation for these takings is woefully inadequate. It is not a sufficient answer to the constitutional concerns that I have raised to suggest that property owners simply file "regulatory takings" suits against the federal government to recover the value of land so taken.

The scales of justice are unfairly tipped in favor of the government when citizens are faced with the threat of losing their property because of regulatory burdens. Not only are the laws drafted to ease the litigation burden of the government, but the cost of takings litigation can range in the hundreds of thousands or even millions of dollars, too high for the average citizen to bear. Consequently, many citizens, when faced with a government takings claim, cannot pursue their rights under the Fifth Amendment. The government, on the other hand, does not face a similar shortage of resources (at least in comparison to the individual property owner) and can often pursue vigorous defense of the case without constraint. Adding to the hardship, procedural hurdles often bar litigation on the merits of takings claims for anywhere from five to ten years. More specifically,

the split of jurisdiction between the claims court and the district court, § 1500 of the Tucker Act, the Dilatory Defenses, and the unyielding litigation posture of the federal government deny not only speedy justice, but in many instances, all justice to those whose property rights have been violated.

A few examples of reported cases demonstrate how arduous and interminable the litigation of takings claims against the federal government can be:

On October 2, 1980, Florida Rock Industries was denied a wetlands permit to mine limestone on its property in Southern Florida. In 1982, the company filed suit against the federal government alleging an unconstitutional taking. Following a 1985 judgment in the company's favor, the government appealed and the case was reversed. In 1990, following another trial, the plaintiff again won, and the government appealed. Again, the case was reversed in 1994 and is now pending yet a third trial. More than 14 years after the original permit denial, the company is still waiting to be paid for the taking.

In 1983, the federal government placed groundwater monitoring wells on land owned by Mr. Hendler in Southern California, and issued various orders forbidding certain uses of the property. In September of 1984, Hendler filed suit against the federal government alleging a taking and, after five years of

IV. Courts cannot adequately protect private property rights.

As those examples suggest, the courts, in addition to Congress and the Agencies, have failed to provide private property rights with the diligent protection that the Founding Fathers contemplated.

In 1922, Justice Holmes declared that a regulation that went too far would be recognized as an unconstitutional taking of private property. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Since that time, courts have struggled with the question of when a regulation does, in fact, go too far. There has been no clear articulation of when the exercise of regulatory authority will violate the Just Compensation Clause. In 1978, after surveying fifty years of takings jurisprudence, Justice Brennan threw up his hands in dismay and declared that "This Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Penn Central Transp. Co. v. New York City, 438 U.S. 124 (1978). Justice Brennan then identified three factors which still guide courts in determining whether the Fifth Amendment has been violated: (1) the character of the government's action; (2) the reasonableness of the owner's investment-backed expectations; and, (3) the economic impact of the regulation.

Despite the Supreme Court's recent efforts to flesh out Fifth Amendment guarantees in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and Lucas v. South Carolina Coastal Council, 112 S. Ct. 2866 (1992), there are many open questions in takings jurisprudence because Justice Brennan's factors are at best both broad and vague. Indeed, the most troublesome question is determining when a regulation goes too far.

V. Congress must pass a property rights bill that protects both property rights and the environment.

The complex web of federal environmental regulations and the ambiguous and underdeveloped property rights caselaw is jeopardizing both the government's ability to foster a free and prosperous society and to protect the environment. Sound property rights legislation will not only cure the injustice when a single property owner is forced to bear a burden which, in fairness, should be borne by the public as a whole; it will also provide guidance for government agencies in implementing their regulatory programs so as to avoid unnecessary government interference with private property rights.

A. Congress must adequately define a taking and provide prompt compensation to the property owner when a taking occurs.

There are two central problems in current takings law: (1) the ambiguity inherent in a case-by-case, ad hoc definition of what constitutes a taking and (2) the interminable litigation

prior to payment of just compensation for the property taken. Legislation must address both of these issues if it is to ameliorate the burden placed on the property owner and to have the salutary effect of providing greater certainty for the guidance of the government and its citizens alike.

As Assistant Attorney General in charge of the Justice Department's Land and Natural Resources Division, I was responsible for the drafting of Executive Order 12,630 signed by President Reagan on March 15, 1988. That Executive Order, titled "Government Actions and Interference with Constitutionally Protected Property Rights", had the same dual purposes which should be served by property rights legislation. Section 1(b) of that Order provides:

Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

This type of approach is commonly known as a Takings Impact Analysis ("TIA"). Regrettably, however, executive agencies have utterly ignored the Executive Order, requiring that Congress act to provide the discipline which those agencies have refused to impose upon themselves.

Thus, private property rights legislation should define a taking in terms which can readily be applied by the courts to specific factual settings. The federal courts have provided at least two approaches to defining what constitutes a taking. The first approach analyzes the issue in terms of the diminution in value caused by the regulatory action. See, e.g., Keystone Bituminous Coal Association v. DeBenedictis, 107 S. Ct. 1232 (1987); Florida Rock Indus. v. United States, 18 F.3d 1560 (1994). The second approach analyzes the issue by ascertaining whether a recognizable property interest, deedable to government, has been taken. See, e.g., Loveladies Harbor Inc. v. United States, 28 F.3d 1171 (1994); Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987). Either of these approaches would provide far greater certainty than the case-by-case, ad hoc approach described so despairingly by Justice Brennan in the Penn Central Transp. Co. decision. By providing government a bright line definition of what constitutes a taking, Congress will not only foreshorten much useless litigation but, more importantly, will allow agencies to craft their own regulatory actions so as to avoid unnecessary takings of private property.

Second, private property legislation should provide prompt and fair compensation when a taking does occur. Current takings litigation is fraught with pitfalls for the property owner. The government routinely asserts defenses such as lack of ripeness, mootness, statute of limitations, and filing in the wrong court

(i.e., District Court versus Court of Federal Claims, lack of jurisdiction, lack of case or controversy -- to name just a few). Eliminating this procedural nightmare would do much to put the "justice" remedy back into "just compensation".

Finally, Congress must be careful to provide in any such legislation the full measure of just compensation. This should include, in addition to the value of the property taken, interest representing the reasonable use value of the money denied the property owner from the date of taking. The successful property owner should also be entitled to recover attorneys' fees and costs of the litigation, including experts' witness fees (such as appraisers); for in many cases these expenses exceed the value of the property taken, at least when the litigation extends over many years.

B. The system of bureaucratic incentives must be radically changed to grant respect to property rights.

The present environmental regulatory and enforcement system, as interpreted by the bureaucracy, sees property rights as an impediment to accomplishing the goals set forth by Congress. Thus, agencies such as EPA, the Corps of Engineers, the Forest Service, and DOI need to know that Congress wants and requires that property rights be taken into account.

To date, Congress has never sent that message. As a result, environmental regulatory and enforcement agencies do not consider constitutionally protected property rights to be part of their

mandate, unlike wetlands protection or endangered species protection. Indeed, most government officials believe that they do not have the discretion to take property rights into account in implementing the programs they administer. Furthermore, despite Executive Order 12,630, I do not know of a single regulation or decision that has been altered by the performance of a Takings Impact Analysis ("TIA"). Government agencies simply dismiss the value of TIAs on the ground that one simply cannot know whether a taking will occur or not.

Thus, Congress must revisit the treatment of property rights in environmental statutes and regulations. As part of this effort, Congress needs to pass some stand-alone legislation that makes it clear to EPA, DOI, the Forest Service, and other environmental regulatory and enforcement agencies that property rights are to be considered in both the drafting of regulations and the implementing of programs. These agencies must give property rights the respect and deference that the Constitution requires.

C. Protection of private property rights need not be the enemy of achieving important social objectives.

Effective and efficient environmental protection is consistent with recognizing and securing peoples' property rights. Legal and economic scholars have long observed that private property owners protect their property from environmental harm with greater vigor than the government. After all, it is

the value of their property that will be diminished if the property is damaged. Nevertheless, there are instances in which the government must act to protect the environment by regulating private property. The purpose of the Just Compensation Clause is not to stop government from acting, but rather, to make government realize that when it acts to achieve social good, it may also be singling out individual property owners to bear the associated costs. If government recognizes and considers these disproportionate burdens on property owners, government will be able to both protect the environment and respect property rights.

By taking into account property rights before it acts, government is forced to weigh the costs and benefits of its regulatory scheme. Thus, this approach protects property owners, government, and the environment.

Property owners are protected from arbitrary government regulations that destroy the economic viability of their land. Government is protected because this approach will slow the government from taking too much land, thus destroying the productive forces of the economy that finance government. The best stewards of the land, the owners, will have the proper incentives to guard and defend their land from environmental destruction with more intensity than any government bureaucrat or agency.

On the other hand, since no one has the right to use his property in a manner which would injure the public, those uses of private property which are public nuisances can be freely prohibited by the government. Finally, those areas deemed by society worthy of investment of resources to protect, or which private incentives fail to protect, can be preserved with limited and targeted regulation.

The public interest in a protected environment and the private right to property can be and must be commensurately harmonized for the good of the Nation and the integrity of the Constitution. I urge this Committee and the rest of the Senate and the Congress to make this happen.

I would be pleased to answer any questions that you may have.

Testimony of Frank I. Michelman
Robert Walmsley University Professor
Harvard Law School, Harvard University

Before the Senate Committee on Environment and Public Works
June 27, 1995

I am here to testify about the bearing of the Constitution, and particularly the Fifth Amendment's requirement of just compensation for takings of private property for public use, on proposed "property rights" legislation. Such legislation would require payments of money to property owners to offset market-value reductions attributable to certain kinds of federal regulatory restrictions on use,¹ regardless of whether a court acting on the basis of the Fifth Amendment would require any such payment.

The bottom line of my testimony is that legislative proposals of this kind rest on a mistakenly oversimplified view of the place of private property rights — basic and important as those are — in our full constitutional scheme. A premise underlying the push for "property rights" laws is the absolute supremacy of owners' freedom to do as they choose with their property, short of the sort of direct or gross interference with the person or property of specifically identified others that makes one suable at common law. The "property rights" view is that this proprietary freedom outranks, in principle, the role and responsibility of government, through its law-making authority, to identify and appropriately defend important interests of other people and of the public. Such private-property absolutism is, however, contrary to historic American constitutional understanding; and without the absolutist premise to support them, "property rights" laws themselves lack any persuasive public justification. Ensuring a fair distribution of regulatory burdens among our citizens is a highly worthy objective, but "property rights" legislation is not a good way to pursue it.

Framing the Constitutional Considerations

The leading current proposals in the Senate for statutory compensation for use-restrictions are found in Titles II and V of S. 605, the proposed Omnibus Property Rights Act of 1995.² Let us look first at Title V. Section 508 would create an entitlement to be paid for diminutions of one third or more in the market value of a parcel of land, or of any "affected portion" of a parcel, as a consequence of use restrictions imposed under either the

¹ Under the pending Senate bill, S. 605, some state-imposed restrictions might also be affected insofar as the impetus for them came from federal law or their imposition was supported with federal funds. See, e.g., S. 605, 104th Cong., 1st Sess., §§203(6), 204(a). *But see id.* §204(b) (apparently precluding suits for statutory compensation against states or state agencies).

² S. 605 was introduced by Majority Leader Dole and several other Senators on March 23, 1995. See 141 Cong. Rec. S 4497.

Endangered Species Act or §404 of the Water Pollution Control Act,³ unless the Government could establish that the restricted use was already a legally actionable nuisance as “commonly understood” within the applicable state background or common law.⁴ The Title V compensation provision would thus have a sharply limited, highly selective application: Its protections would extend only to *landowners*, as distinct from property owners generally,⁵ and indeed they would extend only to *certain* landowners, those whose uses are restricted by agency action under the two specifically named federal statutes.

Title II of S. 605 is much more sweepingly drafted. As does Title V, Title II apparently contains a compensation entitlement for those who sustain reductions of one third or more in the market values of “affected portions” of property resulting from federal-law restrictions of uses not demonstrably common-law nuisances.⁶ By marked contrast with Title V, however, the Title II compensation provision apparently would reach actions pursuant to *any* federal statute (not just two named ones), and apparently would cover *all* property to which the Fifth Amendment might under any circumstances apply.⁷ This means, specifically, not just land and water rights but fixtures and improvements to land, easements, leases, liens, future interests, rents, contract rights, and, indeed “any interest defined as property under State law” or “understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently grounded in law to back a claim of interest”⁸ — an expression that of course potentially encompasses sundry interests in all forms of personal property (tangible goods, securities, intellectual property, commercial contract rights, and other intangibles) as well as real property (land and various claims related to land). S. 605 as currently drafted does not make clear the intended relationship between Titles II and V. For purposes of my testimony here, it will be most helpful to treat the compensation provisions in the two Titles — sections 204 and 508 and their respective surrounding definitional materials — as alternative proposals, one grandly sweeping in its coverage and the other narrowly selective.

³ See S. 605, §§502(2), 502(6), 508(a), 204(d)(2)(A). To be precise, the bill speaks of market-value diminutions of 33 per cent or more.

⁴ See S. 605, §204(d).

⁵ See S. 605, §502(2)(4)(A) (defining protected “private property owner” as an “owner or holder of “property”), and *id.* §502(2)(5) (defining “property” as meaning “(A) land; (B) any interest in land; and © the right to use or the right to receive water”).

⁶ See S. 605, §§203(7), 204(a)(2)(D). The intended meaning of these provisions is not, however, entirely clear to this reader. See *infra* note 29.

⁷ See *id.*

⁸ See S. 605, §§203(5), 203(7).

My topic, as I have said, is how constitutional considerations bear upon appraisals of the merits and demerits of these proposals. Let me make clear at the outset, though, that I do not at any point mean to suggest that there's ground for concern that a court would deny the constitutionality of either compensation provision — Title II's or Title V's — if enacted into law. Measures aimed at equitable provision for those who otherwise would sustain special and unfair burdens from the government's pursuit of its constitutionally granted functions undoubtedly fall within the power expressly granted to Congress by the "necessary and proper" clause,⁹ as well as within the implied supporting powers confirmed by the Supreme Court in *McCulloch v. Maryland*.¹⁰ Of course, the (substantive) due process and (implied) equal protection requirements of the Fifth Amendment would still apply. Our courts, however, would classify these Titles as economic and social legislation which need only pass a rational basis test, or loose scrutiny, in order to satisfy these requirements. Although, as we shall see, the highly selective character of Title V's compensation provision can be strongly criticized as arbitrary, inequitable, and unprincipled,¹¹ existing precedent strongly indicates that the courts would defer to congressional judgments about how to draw the line between those who will and those who will not receive the benefits of ostensibly remedial legislation.¹²

In sum, there seems little practical likelihood that S. 605's compensation provisions would run into constitutionally based judicial resistance. But if that is so, one might well ask, what further attention is required from those considering the bill's merits to constitutional conceptions of property rights and their due protection against infringement?

⁹ U.S. CONST. Art I, §8, cl. 18.

¹⁰ 17 U.S. (4 Wheat.) 316 (1819). If the legislation were to authorize federal compensation suits against states or their agencies, see *supra* note 1, a question of constitutional federalism might arise. Specifically, in order to find sufficient constitutional authorization for such a direct intrusion into state-government affairs, Congress might have to look to section five of the Fourteenth Amendment, which grants it authority to enforce the rights created in section 1 of the Amendment including, of course, the right not to be deprived by any state of property without due process of law (which the Supreme Court has construed as including the right not to have private property taken by a state for public use without payment of just compensation). Because the drafters of the bill apparently do not intend to create any federal remedy against states or their agencies, see *supra* note 1, I have not here tried to analyze the constitutional-legal issues that might otherwise arise respecting section five of the Fourteenth Amendment, although discussion below of the *Lucas* case should begin to suggest the potential complexity of these issues.

Section 204(a) of S. 605 does direct against state as well as federal agencies its prohibition of uncompensated, excessive, regulatory diminution of the market values of affected portions of property. Yet section 204(b) apparently (if puzzlingly) precludes a federal cause of action against noncomplying state agencies. Perhaps the intention — which does not seem to be made explicit anywhere in the bill as currently drafted — is that a claim for compensation will lie against the *federal* agencies respectively responsible for administering the federal laws that propel or support the offending state agency actions.

¹¹ See below, pp. 6, 12.

¹² See, e.g., *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

The answer is that the very question of the bill's merits — the very need to explain what genuine public purpose would be served by transferring funds taxed away from the public at large to certain private owners of property — is closely bound up with the question of how our Constitution has historically been understood to command *both* a due regard for private property *and* a due regard for representative government's capacity for vigorous pursuit of environmental and other public interests. This point, which is crucial to my testimony, requires some explanation.

The compensation provisions of S. 605 deal with so-called "regulatory taking" claims. They deal, that is, with claims by owners that regulatory restrictions on the use of their property are tantamount to takings for public use for which the Fifth Amendment requires a compensation payment. We can start by asking what, in general, has been the judicial response to such claims. While it has varied over time in the details, a constant and central theme in the Supreme Court's response has been that the Constitution only exceptionally, if ever, requires compensation for regulatory use-restrictions, even ones having very substantial effects on market values, as long as the restrictions do not directly impose or conditionally demand any actual entry on private property — any "physical occupation" of it — by the government or the public.¹³ Under this time-honored judicial view of the matter, the overwhelming preponderance of imaginable regulatory-taking claims seem destined to fail. Against such a background, enactment of the compensation provisions of S. 605 would plainly confer a very distinct and palpable benefit on whatever segment of property owners would obtain their protections (under Title V this would be a very narrow segment, that is, owners who are burdened by endangered-species and certain wetlands restrictions). That benefit, of course, would be the prospect of the compensation money to which the provisions would sometimes entitle these owners in circumstances in which courts applying the Constitution would have disallowed their claims.

The bill, then, is precisely aimed at granting certain property owners anti-regulatory protections in excess of those allowed them by courts applying the Constitution. It aims to accomplish this result by setting a sharp and categorical line of compensability, so that whenever that line is crossed, whenever a use restriction reduces by one-third or more the market value of any "portion" of a parcel of property, compensation would be legally due regardless of whether a court in that case would have concluded that the unbolstered Constitution requires any compensation at all.¹⁴

¹³ For recent judicial discussions, see, e.g., *Yee v. Escondido*, 112 S.Ct. 1522 (1992) (O'Connor, J.); *Lucas v. South Carolina Coastal Comm'n*, 112 S. Ct. 2886 (1992) (Scalia, J.). Justice Scalia's *Lucas* opinion is considered at some length below.

¹⁴ Cases in which, according to current judicial doctrine, the Constitution does not itself call for any compensation payment include many in which regulatory restrictions on uses — uses that very likely do not amount to common-law nuisances — reduce market values of entire landholdings by fractions in excess of one third. See the discussion of the *Lucas* case. below. Enactment of either Title II or Title V of S. 605 would substantially change this result. (Footnote continued next page.)

To many who oppose "property rights" legislation or are skeptical about it, it seems that to require in this way the handing over of public funds to particular owners whose land uses have been restricted by otherwise constitutional regulatory laws, when that's not required by the Constitution's own standard of fairness as judicially ascertained, is tantamount to giving away public money for no good public reason. Opponents and skeptics thus raise, in effect, the most fundamental conceivable question concerning the merits of the bill's compensation provisions: What is the supposed public justification for this conferral of monetary benefits at taxpayer expense on a statutorily defined (under Title V it would be an extremely narrowly and selectively defined) subset of citizens?

To this question, the strongest sort of answer would apparently be the kind that supporters of "property rights" legislation in fact mainly give. Supporters say this legislative supplementation of judicial efforts to enforce the government's constitutional compensation obligations is required and justified by respect for private property rights,

Indeed, if either Title were to be enacted in something like its current form, the effect could be extreme. Title V defines protected property as including both "land" and "any interest in land." See note 5, *supra*. Title II contains the most sweeping imaginable definition of protected property, including "inchoate interests," "easements," "security interests," "rents, issues, and profits," "any interest defined as property under State law," and "any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest." S. 605, §§ 203(5)(A)(ii), (iv), (vii), 203(C), (E), (F). By making a sufficiently aggressive use of these definitions, any application whatsoever of any sort of land regulation could easily be held compensable, regardless of how marginal its effect on the market value of a landholding taken as a whole, on the theory that it totally devalues a conceptually severed "portion" of property or "interest" in it that common-law usage and lawyers' customary talk identifies as a servitude or negative easement. (On conceptual severance, see Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. REV. 1667, 1676 (1988).)

Such an extreme result would run against the grain of the Supreme Court's understanding. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1248-49 (1987) (rejecting claim of total taking of certain identifiable tons of coal, required by anti-subsidence law to be left unmined, because the regulation's proportional effect should be measured against the value of the claimant's entire "mining operation": "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." (quoting from *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)); *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 130 (1978) (rejecting claim that prohibition of building in airspace above existing structure totally took the claimant's "air rights," because "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated").

For the current Supreme Court, the question is still open of how to define "the 'property interest' against which the loss of value is to be measured" (in order to determine whether that loss is total). See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n. 7 (Scalia, J.). Taken in light of the prior decisions, which Justice Scalia's discussion reviews, the Justice's tentative suggestion there — that "the answer may lie in how the owner's reasonable expectations have been shaped by the State's law of property" — does not portend the simplistic view (which Title II of S. 605 as drafted could be taken to imply) that every regulatory restriction on property use effects a total, hence compensable taking of whatever conceptually severed "portion" or "interest" is impacted by the regulation.

rights to which they say courts for some reason — perhaps some institutional or structural reason pertaining more to limits on judicial role and capacity than to true constitutional meaning — have failed to give full protection.¹⁵ Supporters say these judicially under-protected rights are nevertheless legal rights for which the Constitution really does in principle demand absolute protection,¹⁶ and furthermore are moral rights whose absolute protection is demanded by principles at the root of American constitutionalism.

It must be said that this high-principle explanation of the public purpose to be served by the compensation provisions of S. 605 rings hollow as applied to Title V in its current form. There is simply no way of understanding how a law in defense of such allegedly exigent moral principles and constitutional rights of private property can respectably confine its protections to that particular subset of landowners who chafe under two selected statutes. This question of selectivity in drafting is one to which I'll return later. First, however, I want to consider in a more general way the force of the "property rights" explanation of the proposed compensation provisions' public purpose: that is, that these provisions serve the purpose of aiding the courts in the defense of constitutional and moral rights of private property to which our system is historically committed.

This explanation of the bill's public purpose might be a very strong one, but only if its supporting historical premise were as a matter of fact substantially true for the United States — its premise, that is, of an overriding constitutional and moral commitment to vindication of private property rights to which the responsibilities of public government are always subordinate. If, on the other hand, that premise is incorrect, then it is very hard to discern any persuasive public purpose at all for S. 605's compensation provisions.¹⁷ The burden of

¹⁵ See, e.g., the statement of Senator Hatch supporting introduction of S. 605, 141 Cong. Rec. S 4497, March 23, 1995. According to § 102(1) of S. 605, the bill's purpose is to "encourage, support, and promote the private ownership of property" and ensure "the constitutional and legal protection" thereof.

¹⁶ That is, in the form of compensation for every infringement beyond what is already contained in common-law nuisance doctrine.

¹⁷ It may be that an anticipated — perhaps a desired — practical consequence of enactment of these provisions would be sharply reduced regulatory activity under certain federal statutes. But if such an expected deregulatory consequence is the true aim of S. 605's compensation provisions, then direct repeal or amendment of the regulatory laws in question is the obviously more straightforward, responsible, and accountable way to pursue that aim.

Some may argue that requiring agencies to cover the private costs of their regulatory actions out of their appropriations will be conducive to economically rational regulatory choices by the agencies. That argument, however, is very frail. In general, it overlooks inefficiencies of private overinvestment in uses destined for regulatory restriction. See, e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986). Even disregarding that objection, the argument in this context is especially ill-considered. S. 605's most directly predictable effect on budget-conscious agencies must be to bias their selection of cases for regulatory enforcement against those in which enforcement might make a one-third-or-more difference in the market value of some "portion" of a private property holding. But there is no *a priori* reason to believe that these cases will tend to be ones where enforcement would produce relatively

my testimony here is that the premise is not, in fact, correct. The correct premise, I suggest, is the one faithfully reflected by the Supreme Court's sustained refusal over the decades to open wide the gates to regulatory taking claims. This consistent stance has not been a result of some quirky judicial inability to go ahead and defend private property to the hilt as the American social contract requires. To the contrary, it has been the entirely appropriate result of the Court's accurate perception that the American social contract — what Justice Scalia has called “the historical compact recorded in the taking clause that has become a part of our constitutional culture”¹⁸ — decidedly does not require such a to-the-hilt insulation of private property from public concerns, but rather requires a much more sensitive mediation between two fundamental constitutional principles: respect for private property, and respect for representative government's responsibility to discern and secure important interests of the commonwealth or of the public considered as a whole.

The Constitutional Analysis: “Regulatory Taking” in Full Constitutional Context

That some disproportionately severe and unforeseeable regulatory restrictions on property use would excite concerns about rights to compensation is entirely understandable and appropriate. As a starting point for analysis, however, we should note that treating use restrictions as compensable takings was no part of what the Framers of the fifth amendment had in mind. As Justice Scalia has confirmed, “early constitutional theorists did not believe the Takings Clause embraced regulations of property at all.”¹⁹ Nor does a literal reading of the clause — “nor shall private property be taken for public use without just compensation” — provide much support for the idea of taking-by-regulation, given that it's obviously *something* of a stretch to say that the government takes your land for public use when what the government precisely does is forbid *you* certain uses of land (as opposed to granting itself or anyone else any use of it) to which you continue to hold an exclusive private title.

None of this means that taking-by-regulation is an insupportable constitutional notion. It only means that the main basis for any such notion is neither the literal meaning of the words of the clause nor the Framers' original understanding. Rather, in entertaining the idea of a taking-by-regulation, we are allowing broader moral and purposive considerations to enter into our determinations of the Constitution's legal meaning. A “regulatory taking” claim is, after all, a claim that a certain governmentally imposed restriction on the use of property *ought*, in all constitutional *reason*, to trigger a governmental duty to compensate.

low (or negative) surpluses of total (public-plus-private) benefit over total (public-plus-private) costs. The opposite seems just as likely to be true. It follows that S. 605's predictable effect on the economic rationality of agency enforcement choices can be no better than random.

¹⁸ See *Lucas, supra*, at 2899.

¹⁹ See *Lucas* at 2900 n.15.

The Supreme Court has not been closed to such claims, but it has found American constitutional reason to be a sufficiently complex matter to preclude anything approaching blanket acceptance of them. The best short way to convey this judicial understanding is by recalling some crucial passages from Justice Scalia's opinion for the Court in the 1992 case of *Lucas v. South Carolina Coastal Council*. Briefly, the background is this: Under the Court's pre-*Lucas* multi-factor balancing test,²⁰ regulatory-taking claimants could hope to succeed only rarely. Prospects might vary from one state judicial system to another (within the federal system, they might vary somewhat among the Claims Court and various federal district and appellate courts), but regulatory-taking claims in general certainly faced what lawyers and judges have always broadly recognized as an uphill fight. The *Lucas* decision somewhat strengthens the prospects of some claimants, by modifying the previous test in one particular: It adds a categorical presumptive rule requiring compensation in those cases — which Justice Scalia took pains to point out would be “relatively rare” — in which a use-restriction denies all economically beneficial or productive use of a parcel of land (and the restricted use is not already a nuisance under preexisting state law).²¹

An obvious question is: Why should the Court have thus drawn the line of presumptive compensability at the seemingly arbitrary point of *total* extinguishment of beneficial use of a landholding? Justice Scalia's explanation of the Court's reasoning for doing so is important for our purposes, because it is quite at odds with the underlying premise of the proposed “property rights” legislation.

The Court's task in this context, Justice Scalia explained, is to keep constitutional law in tune with the American public's deeply shared sense of the basic proprieties of constitutional government in its dealings with private property. Here are Justice Scalia's words explaining both the judicial task and the relevant, entrenched American constitutional understanding:

[O]ur “takings” jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the “bundle of rights” they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from

²⁰ See, e.g., *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 107 S. Ct. 1232 (1987). The test takes into account the extent of the regulatory devaluation of the entire property-holding in question, whether that devaluation destroys a distinct and justified investment-backed expectation, and “the character of the government action” — whether it involves an actual physical encroachment on the affected property and whether it demands to be seen as forcing the claimant to donate his property to production of a new public benefit, as opposed to avoiding uses of the property that infringe harmfully on established public interests. As the Court has repeatedly recognized, none of these factors is susceptible of precise definition or mechanical application: all are somewhat roughly intuitive considerations whose exact force is hard to specify outside the context of particular claims of regulatory unfairness.

²¹ See *Lucas, supra*, at 2894, 2900.

time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; “[a]s long recognized [here quoting from Justice Holmes in a 1923 decision], some values are enjoyed under an implied limitation and must yield to the police power.”²²

Justice Scalia’s meaning is unmistakable: Thoughts of compensation are, by the prevalent understanding of Americans, simply out of place in most instances of regulatory restrictions of property use. The American way, as the Court describes it, is to treat the bulk of these events as belonging to the normal give-and-take of a progressive, dynamic, democratic society; it is to treat regulation as an ordinary part of background of risk and opportunity, against which we all take our chances in our roles as investors in property, and from which we all as actual or potential property investors also reciprocally benefit.²³ Now Justice Scalia did, of course, have a bit more to say:

... [W]e think the notion . . . that title to land is . . . subject to an “implied limitation” that the state may subsequently eliminate *all* economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.²⁴

In other words: The Court accepts a responsibility to deal with taking-of-property claims in a way that is consonant with, and so will help sustain public confidence in, what the opinion calls the historical compact — meaning historic American commitments to respect for common basic principles of constitutional government, including, of course — although not limited to — the institution of private property. The Court perceives that there are some regulatory-taking claims that can’t be rejected without contradicting the country’s commitment to respect for that institution. From its observation and knowledge of the country’s actual constitutional culture, the Court draws the conclusion that tolerance for uncompensated *total* regulatory extinguishment of a land parcel’s economic value would indeed tend to subvert that part of the compact.

²² *Lucas* at 2899.

²³ At this point in American history, it is obvious that any property holding’s market value is what it is because of prior and current governmental actions that could not have occurred without this country’s long-standing endorsement of government’s ability to regulate property, beyond the common law of nuisance, without having to pay for the privilege except in rare and exceptional cases. It would thus be very arbitrary, a step away from distributive fairness and not toward it, to entitle some members of the current generation of property owners to compensation based on comparisons of their holdings’ respective market values before and after application of a *particular* regulatory restriction to *them*. That approach disregards the market-value benefits accruing to every current owner from *the entire* past and present *system* of government action. It exempts the owners it benefits from compliance with the constitutional compact on which *all* property’s market value depends.

²⁴ *Id.* at 2900 (emphasis supplied).

Thus the *Lucas* Court was moved by its knowledge that the constitutional compact includes, as one of its terms, a commitment to firm respect for the institution of private property. No less, however, was the Court moved by its knowledge that the compact also includes principles and commitments that must limit and sometimes compete with private property, in ways that make the bulk of regulatory-taking claims unfit for resolution by any kind of flat and sweeping categorical rule. Specifically — and here I elaborate on what is plainly implicit in Justice Scalia's circumspect treatment of the regulatory-taking question — our constitutional culture and compact include a deep and ancient tradition of expected regard, when you make use of your property, for other people's and the public's interest and concerns.²⁵ It includes a deep and ancient strain that says this expectation of regard for public interest and concerns is subject, when the occasion requires, to legislative definition and regulatory enforcement.²⁶ The tradition, in sum, is one of a law of property that is oriented *both* to fair protection of private advantage *and* to due regard for contemporary community goals, relying, in part, on the police powers of legislatures, alongside common law adjudication by courts, to negotiate and mediate between the two.

This sense of complexity is deeply engrained in the American theory and practice of constitutional government. A clear sign of this, I believe, is the ambivalence we've already noticed in S. 605, as introduced, between an arbitrarily narrow and a sweepingly broad scope for the proposed statutory guarantee of compensation for use restrictions.²⁷ When one looks at Title V of S. 605, perhaps the first question that comes to mind is: Why is the Title's protection confined to land value losses stemming from agency actions under two selected laws? On what remotely principled basis *can* the protection have been so confined? My own answer, offered above, was that in truth there is no such principled basis and the confinement is either arbitrary or reflective of particular anti-regulatory aims that have little to do with a principle of protection for private property rights as such.²⁸

²⁵ See, e.g., FORREST MACDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 9-36 (1985).

²⁶ See, e.g., John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 *COL. J. ENV. L.* 1 (1993).

²⁷ See the discussion above at pp. 1-2.

²⁸ To repeat: I'm not here suggesting for a moment that a court ought to hold the bill unconstitutional on this ground. I'm suggesting that the specifically benefited constituencies here, owners of land burdened by the two regulatory programs picked out by Title V of S. 605, compose an arbitrarily small subset of American property owners whose holdings would be worth substantially more on the market if granted special relief from federal regulatory restrictions of non-nuisance uses — so arbitrarily small as to shed doubt on the idea that Title V is aimed at vindicating a broad, general, and exigent constitutional and moral principle of private-property protection. This highly select group of beneficiaries of public leniency — some of them, I'm sure, exceptionally deserving of the public's consideration, but not nearly all of them and surely not, as a group, any more so than many who've been left out — seem something like the gerrymandered subset of railroad retirees who were grandfathered into "dual benefits" by the legislation upheld against constitutional objection in *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

Why, then, have Title V's drafters declined to extend its protection to all property, as affected by all regulation? One quite imaginable answer is that such a broadly drafted bill would not be politically acceptable to Americans, because it would not comport with prevalent American understanding of the full constitutional compact.

This takes us back to Title II of S. 605, as introduced. Although the matter is not free of doubt, Title II can be read as calling for compensation for market-value reductions of one third or more that are attributable to any federal regulatory laws as applied to property holdings of any kind.²⁹ Let us suppose this is the correct reading. What would be the real-world consequences? In palpable jeopardy, it seems, would be not just two laws of uncertain popularity to which there is strongly organized political opposition, but also the labor and workplace laws, the anti-discrimination laws, the anti-trust and regulated-industry laws, the banking and securities and trade-regulation laws, the food and drug and labeling laws, the air-pollution laws. All of these laws have important applications to property uses that are not legal nuisances under state common law, in ways that it would seem can often have a substantial effect on the market values of property holdings.

Take, for example, a case of property in the form of a manufacturing plant and an owner who makes a credible case that the market value of property holding at this location would be enhanced by, say, 40 percent if all his activities at the site were relieved of either wage-and-hour, workplace safety, or collective-bargaining regulation.³⁰ The activities restricted by these classes of regulation do not resemble common-law nuisances. Does our owner, then, collect compensation for having to pay the minimum wage, or for having to introduce safety routines or devices, or for having to bargain in good faith with a labor-board certified union?

²⁹ See notes 6-8. *supra*. Section 204(a) (2) (D) entitles an owner to compensation whenever, "as a consequence of an action of any agency," private property is taken for public use and, in addition, the action diminishes the fair market value of any portion of the property by one third or more. Section 203 (2) (A) defines "agency action" to include any action by an agency that "takes a property right." Section 203(7) defines "taking of private property" to include "any action whereby private property is directly taken as to require compensation under . . . this Act, including by . . . regulation." There is some undeniable circularity in this combination of provisions as they stand. Nevertheless, a court could very well decide that their intent when taken all together is to provide that an enforced regulatory restriction of property use is a statutorily compensable event when it causes a diminution of one third or more in the market value of any portion of any property.

³⁰ Of course, it would take some serious economic analysis to show this. You'd have to know and show a lot about the competitive structure of the market in which the manufacturer was selling. But suppose he has unorganized competition, or competition from abroad, so that being subjected to collective-bargaining or wage-and-hour or safety regulation does, in fact, seriously reduce the net revenue stream he could otherwise expect from his factory. (The assumption is that he can't raise prices to cover additional labor costs without unacceptable loss of market share, but also that his reduced net revenues still remain his most economically favorable use for the property with its standing factory.)

Would this conclusion be erroneous because these laws don't have the effect of *restricting the use*, and thereby diminishing the market value, of any discrete parcel of *property* — which is the obviously intended concern of Title II? It does not seem so, because our owner can always say: "Look, here is a particular right or interest in property I used to have: the right to use this factory property for a 14-hour-per-day piece-work shop, at a monthly labor cost of \$xxx (here are my books for the past year to prove it), as long as I could find folks willing to work for that (which the evidence will show I still can). May it please the court, my former right and property interest to that effect no longer exists, now that the agency has cited me for violation of the wage law (or the safety law or the bargaining law)." ³¹

Would the American public endorse, as consonant with their constitutional compact, a law having such consequences as these? If you carefully told the people that a bill carried implications as sweeping as what we've just described — all the while assuring them that it did so in the name of a higher-law or moral mandate to respect property rights — would the people understand? agree? approve? or none of the above? Would such a sweepingly drafted property-rights bill command the requisite congressional majorities?

My point in putting these questions is this. Drafters of property rights legislation confront a serious dilemma. Earlier, I suggested that confining the coverage of a "property rights" law to use restrictions imposed under a few selected statutes shows that the law is not really about property-rights protection at all, but rather is about specific anti-regulation objectives. Just now, I have been trying to suggest that the alternative — a broad-based statutory demand for compensation in all cases in which federal government regulation of whatever kind renders a property holding worth substantially less on the market than if unregulated — carries diminutive implications about the powers and responsibilities of government in our system that Americans would not recognize as consonant with their full constitutional compact. The ultimate lesson, I believe, is that the regulatory taking issue cannot be responsibly handled at wholesale, with a simple statutory formula. The problem is obstreperously, recalcitrantly multi-factorial and contextual. It can only be handled at retail, as courts have done with the balancing test. The *Lucas* decision requires nothing different except in the "relatively rare" case of total extinguishment of the economic value of a landholding.

I do not mean that only judicial case-by-case balancing will serve, or that there is no room here for entirely appropriate congressional action aimed at improving the fairness of the distribution of regulatory burdens. I believe it would make a great deal of sense for

³¹ The example is easily extendible to the other classes of federal regulation I mentioned above: anti-discrimination, antitrust and regulated industries, banking and securities and trade regulation, food and drug and labeling, air pollution. A moderately able judge would have little trouble reaching and defending a conclusion (for example) that a divestiture order in a monopolization case, or an order to cease and desist from discriminatory pricing or insufficient labeling of a product manufactured at or sold from a particular location, destroyed a previously existent right or interest in using certain property in a certain way.

Congress to take up regulatory programs one by one, to try to find fair formulas for compensability that are tailored to the various programs. But the case of an owner of a family-sized building lot who unexpectedly discovers it to be the last remaining habitat for an animal species is not the same, morally or (broadly speaking) constitutionally, as the case of an investor in thousands of forest acres who discovers some portion of the acreage to be such a habitat, or the case of an investor (in our times) of thousands of acres of river valley who "unexpectedly" discovers that some of the land is a swamp-as-defined-by-law, even a newly enacted law. Congress ought not to pretend otherwise. Improved responsiveness to property rights will have to be responsive to such differences, too, if it means to claim real resonance with the American historical compact.

STATEMENT

of

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before the

Committee on Environment and Public Works
United States Senate

June 27, 1995

Mr. Chairman, distinguished members of the committee:

My name is Roger Pilon. I am a senior fellow at the Cato Institute and the director of Cato's Center for Constitutional Studies.

I want to begin by thanking Senators Chafee and Baucus for inviting me to speak before the committee on this important and timely subject of property rights and environmental protection. I am especially grateful, let me add, that you have accommodated a conflict in my schedule and consented to my speaking today rather than at the committee's next scheduled hearings on this subject. Because I received the committee's invitation only yesterday, however, I have taken the liberty, in this prepared statement, of simply revising a set of general remarks I delivered on this subject on February 10, 1995, before the House Judiciary Committee's Subcommittee on the Constitution.

Thus, the statement that follows presents a general overview of the problem of protecting both property rights and the environment, with particular attention to recent case law on the subject and the theory that stands behind that law.

In addition, consistent with the scope of these hearings, as set forth in your letter of invitation, I have attached to this statement a memorandum I prepared for interested congressional staff on January 17, 1995, "Comments on the Property Rights Litigation Relief Act of 1995." That Act was introduced by Senator Hatch on January 4, 1995, and has remained largely unchanged since then, I believe, as S.605.

1. Background

As is evidenced by these hearings, and by bills that have been introduced in both houses of the 104th Congress, public efforts in

recent years not only to better protect the environment but to provide all manner of other regulatory goods have led too often to a clash with the legitimate expectations of property owners. As federal, state, and local regulations have increased in number and scope, property owners have frequently found themselves unable to use their property and unable to recover their losses. Today, we have an immense problem across the nation of uncompensated regulatory takings of private property. One result, unfortunately, is an understandable backlash against legitimate environmental protection.

The problem begins, therefore, with the growth of government regulations that deny owners the legitimate use of their property. It should end with the relief that courts might give in the form of compensation to those owners, as required by the Fifth Amendment's Takings Clause. Unfortunately, the courts have been locked into what the Supreme Court itself has called 70-odd years of ad hoc regulatory takings jurisprudence. As a result, they give relief in only a limited range of cases. That means that property owners, both large and small, bear the full costs of the public goods the regulations bring about, when in all fairness those costs should be borne by the public that orders those goods in the first place.

As the voters made clear last November in race after race, the protection of property rights is a burning issue on which they want action. The time has come for Congress to address this issue, to redress the wrongs that have been imposed on individual owners by Congress itself and by countless state and local officials.

To do that, Congress needs to reexamine the vast regulatory structure it has erected--largely over the course of this century--to determine whether those regulations proceed from genuine constitutional authority and whether they are consistent with the rights of the American people to regulate their own lives. But second, and more immediately, Congress needs also to breathe new life into the Fifth Amendment's Takings Clause, making it clear to a Court too encumbered by its past that the clause means precisely what it says when it prohibits government from taking private property for public use without just compensation.

Let me address those two issues, the first briefly, the second in somewhat more detail.

2. Relimit Government in the Constitution

The federal government, as every student of the Constitution learns, is a government of delegated, enumerated, and thus limited powers. Delegation from the people gives power its legitimacy. Enumeration limits that power. Unfortunately, that doctrine of enumerated powers, which the Framers meant to be the centerpiece of the Constitution, today is honored in the breach. Whereas earlier

congresses asked first whether they had constitutional authority to undertake whatever proposal might be before them, and earlier presidents vetoed measures for lack of such authority, the 20th-century concern has been to pursue public ends without even asking whether the Constitution permits those pursuits. And the Court, following Franklin Roosevelt's notorious Court-packing scheme, has largely looked the other way, inventing doctrines about Congress's commerce and spending powers that are no part of the Constitution--indeed, that are in direct contradiction to the very purpose and design of the Constitution. The result has been the regulatory and redistributive juggernaut that has produced the Leviathan we now call government in America.

Because I have addressed this issue in some detail in the Cato Institute's *Handbook for Congress*, which was released here in the Capitol on February 6 and distributed to each member of Congress, I will limit myself today to saying simply that if we are to come to grips with the problem of regulatory takings and environmental protection, the first order of business is to start thinking seriously about rolling back many of the regulations that are doing the taking. And the most fundamental way to do that is to revisit the centerpiece of the Constitution, the doctrine of enumerated powers. Were Congress to do that, it would soon discover, I submit, that much of the regulation that plagues property owners across this nation today--and not property owners alone, let me note--is unconstitutional because undertaken without explicit constitutional authority. Right from the start, that is, there is a constitutional problem. A Congress imbued with the idea that we need to relimit government in fundamental ways, as the 104th Congress surely is, should appreciate that to go forward we need first to look back, to our founding principles.¹

But even if Congress were to do nothing about relimiting its power in so fundamental a way, even if it were to continue on the regulatory path it has followed for most of this century, there would remain the problem of what to do when the exercise of such overweening power takes property--and the courts, acting almost as if they were extensions of the political branches, refuse to order the compensation the Constitution requires. This brings me to my principal concern in these hearings, that Congress make crystal clear its view that the Fifth Amendment's Takings Clause is meant to compensate owners when regulatory takings of otherwise legitimate uses reduce the value of their property.

¹ I have discussed these issues more fully in Roger Pilon, "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," 68 *Notre Dame Law Review* 507 (1993). Since this statement was originally prepared, the Supreme Court has addressed the doctrine of enumerated powers in *United States v. Lopez*, 63 U.S.L.W. 4343 (U.S. Apr. 26, 1995); see my commentary, "It's Not About Guns," *Washington Post*, May 21, 1995, at C5.

3. Breathe New Life Into the Takings Clause

The Fifth Amendment's Takings Clause reads: "nor shall private property be taken for public use without just compensation." As presently interpreted by the Court, that clause enables owners to receive compensation when their entire estate is taken by a government agency and title transfers to the government; when their property is physically invaded by government order, either permanently or temporarily;² when regulation for other than health or safety reasons takes all or nearly all of the value of the property;³ and when government attaches unreasonable or disproportionate permit conditions on use.⁴

Although that list of protections might seem extensive, a moment's reflection should indicate the problem--and it is a very large one. Most regulations do not reduce the value of a person's property to zero or near zero. Rather, they reduce the value by 25 percent, 50 percent, or some other fraction of the whole. In those circumstances--the vast majority of circumstances--the owner gets nothing. Only if he is "lucky" enough to be completely wiped out by a regulation does he get compensation. Surely that is not what the Framers meant to happen when they wrote the Takings Clause.

Plainly, the Court has gone about its business backwards. Rather than ask whether there has been a taking and then ask what the value of that taking is, the Court asks what the value of the loss is to determine whether there has been a taking. And it has done that because it has never set forth a well-thought-out theory of takings, one that starts from the beginning and works its way systematically to the end. It is just such a clear statement of the matter that Congress needs to provide.

A. Provide a clear definition of "property." In providing such a statement, the first and most important order of business is to give a clear definition of "property." In every area of the law except the law of public takings, as every first-year law student learns, "property" refers not simply to the underlying estate but to all the uses that can be made of that estate. James Madison put the point well in his essay on property: "as a man is said to have a right to his property, he may be equally said to have a property

² *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

³ *Lucas v. South Carolina Coastal Council*, 505 U.S. ____ (1992).

⁴ *Dolan v. City of Tigard*, 62 U.S.L.W. 4576, June 24, 1994. I have yet to find anyone who has a clear understanding of the "rough proportionality" test the Court announced in this case.

in his rights."⁵ Take one of those rights--one of those sticks in the "bundle of sticks" we call "property"--and you take something that belongs to the owner. Under the Fifth Amendment, compensation is due to that owner.

When "property" means simply the underlying estate, however, then government can take all the uses that go with the property--leaving the owner with the empty shell of ownership--and get out from under the compensation requirement. That definition is what many opponents of greater protection for property owners have argued for. But it is also, by implication, the definition the Court starts from, making an exception only when the loss of use (and value) becomes near total. When a thief takes 75 percent of his victim's property, no one has difficulty calling that a taking. When government does the same thing, however, the Court has been unable to call it a taking.

Congress must make it clear, therefore, that "property" includes all the uses that can be made of a holding--the very uses that give property its value, the taking of which diminishes that value. When those uses are taken through regulatory restrictions, the owner loses rights that otherwise belong to him.

B. Provide for a nuisance exception to the compensation requirement. Not all the uses an owner may make of his property are legitimate. When regulation prohibits wrongful uses, no compensation is required.

Owners may not use their property in ways that will injure their neighbors. Here the Court has gotten it right when it has carved out the so-called nuisance exception to the Constitution's compensation requirement. Thus, even in those cases in which regulation removes all value from the property, the owner will not receive compensation if the regulation prohibits an injurious use. (Such cases are likely to be very rare, of course, since there is usually some other productive use the property can be put to.)

In carving out such a nuisance exception, however, care must be taken to sweep neither too broadly nor too narrowly. This exception, in essence, is the police power exception. As has long been recognized, a broad definition of the police power will devour the compensation requirement, leaving owners with no protection at all. That has been the trend over the 20th century, with every regulation "justified" as serving someone's or some majority's conception of "the public good."

By the same token, if the police power is defined too

⁵ James Madison, *Property*, 1 NATIONAL GAZETTE, Mar. 29, 1792, at 174. Reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865).

narrowly, then property owners themselves might suffer when their neighbors are thereby able to despoil the neighborhood through injurious uses. This is a concern that environmentalists who oppose greater protection for property owners often misstate, even if the concern itself is not without foundation.

In general, the police power--through which nuisances are regulated or prohibited--needs to be defined with reference to its origins. It is, as John Locke put it, the "Executive Power" to secure our rights, which each of us has in the state of nature, before we yield it up to the state to exercise on our behalf.⁶ Accordingly, just as the origins of the police power are in the power to secure rights, so too the limits of the power are set by the rights that we have to be secured. Properly conceived and derived, therefore, the police power is exercised to secure rights --and only to secure our rights. Its origins, and justification, set its limits.

In defining the nuisance exception, therefore, care must be taken to tie it to a realistic conception of rights, which the classic common law more or less did. Thus, uses that injure a neighbor through various forms of pollution (e.g., by particulate matter, noises, odors, vibrations, etc.) or through exposure to excessive risk count as classic common-law nuisances because they violate the neighbor's rights. They can be prohibited, with no compensation owing to those who are thus restricted.

By contrast, uses that "injure" one's neighbor through economic competition, say, or by blocking "his" view (which runs over your property) or offending his aesthetic sensibilities are not nuisances because they violate no rights the neighbor can claim. Nor will it do to simply declare, through positive law, that such goods are "rights." Indeed, that is the route that has brought us to where we are today. After all, every regulation has some reason behind it, some "good" the regulation seeks to bring about. If all such goods were pursued under the police power--as a matter of right--then the owners from whom the goods were taken would never be compensated. The police power would simply eat up the compensation requirement.

It is important to recognize, however, that relating the police power to the compensation requirement of the eminent domain power is not simply a matter of "balancing" the two. Rather, those powers must be related in a principled way, and that way is found in the classic common-law theory of rights, which grounds rights in property. The principle, in fact, is just this: People may use their property in any way they wish, provided only that in the process they do not take what belongs free and clear to others. My

⁶ See John Locke, *The Second Treatise of Government*, TWO TREATISES OF GOVERNMENT § 13 (Peter Laslett ed., 1960).

neighbor's view that runs over my property does not belong free and clear to him. (If he wants that view, he can offer to buy it from me by purchasing an easement.) His peace and quiet, however, do belong to him free and clear.⁷

Now I enter into details of the kind just discussed because there has been a considerable amount of confusion to date in popular discussion about just how legislation aimed at protecting property owners would work. On one hand, many environmentalists have charged that such legislation would require taxpayers to pay polluters not to pollute. Nothing could be further from the truth. A well-crafted statute would make it clear that property could not be put to injurious uses, as just defined. Regulations prohibiting such uses would thus not give rise to compensation because those uses are wrongful to begin with.

But on the other hand, others have charged that even if such legislation is well-crafted to ensure that people are not compensated for not doing what they have no right to do in the first place, the net effect will still be either a restraint on regulation or a drain on the taxpayer. To that charge, there is a simple, straightforward answer: That is exactly as it should be--exactly what the Takings Clause is for. That is why the Framers put the clause in the Constitution--to restrain government or, failing that, to make the public pay for the goods it wants rather than have the costs of those goods fall on individual victims, as they do today.

C. Paying for public goods. Just as there are no free lunches--someone pays for them--so too there are no free public goods. As noted earlier, every regulation seeks to bring about some public good. Some of those goods are brought about in the course of securing our rights. A good deal of the environmental legislation that Congress has passed, for example, amounts to just that, to prohibiting people from violating the rights of others. That kind of regulation is thus not reached by the Takings Clause.

Other regulations, however, cannot be justified as bringing about anything to which anyone can be said to have a right. We do not have rights to views, for example, even lovely ones, unless we own the conditions that give rise to those views. So too with greenspaces, or historic sites, or habitat for endangered species, and much else. None of which is to say that those goods are not good or valuable. They may very well be. But as with anything else that may be of value, we must obtain those goods legitimately. We cannot just take them. Yet that, too often, is what we do today.

⁷ I have discussed these issues more fully in Roger Pilon, "Property Rights, Takings, and a Free Society, 6 *Harvard Journal of Law and Public Policy* 165 (1983).

Taking something that way does not make it free, of course, except to us. To the person from whom we take it, our action is very costly. Those who are concerned about the effect of takings legislation on the taxpayer, therefore, are asking the wrong question. The proper question is not how much such legislation will cost the taxpayer but how much the goods we acquire through regulation are costing period. Right now we have no way of knowing because we have driven the accounting "off budget." The direct costs are borne by the millions of people we prevent from using their property. The indirect costs, in unrealized opportunities, are borne by all of us. In neither case do we have the remotest idea of the costs. Yet those costs are nonetheless real--as occasionally successful litigation on the first category of costs makes clear.

But our inability or unwillingness to account for the costs of the public goods we acquire through regulation has another effect as well, namely, that we demand more of the goods than we otherwise would if we had to pay for them. Not every species may be worth preserving--except, of course, if its preservation is "free."

The Takings Clause, then, was a brilliant stroke. When they wrote it, the Framers realized that there would be times when the public would have to achieve public ends by taking property from private parties. That "despotic power" of eminent domain had to be accompanied, however, by just compensation, for only if the victim was made whole would the power have any semblance of justification. To do otherwise would be to make the individual bear the full burden of the public's appetite.

But the compensation requirement served to discipline the public's appetite as well, for without it, the demand for public goods would in principle be infinite. That is exactly what has happened today. Without the discipline that is provided by the compensation requirement, regulations have grown and grown. It is time to rein in that growth as the Framers meant it to be reined in. The public appetite has been undisciplined for too long and the victims today, both direct and indirect, are too numerous to let this go on any longer.

4. Conclusion

Properly drafted, then, legislation aimed at better protecting the rights of property owners will in no way impair governmental efforts to prevent environmental harms. The principal function of government, after all, is to secure the rights of individuals and the public against such harm. Nor will such legislation prevent government from providing the public with various environmental goods, provided the public is willing to pay for those goods. It will prohibit government from taking those goods, however. The Constitution, and common morality, require nothing less.

CATO

January 17, 1995

ROGER PILON
Senior Fellow and Director
Center for Constitutional Studies

MEMORANDUM

TO: Interested Congressional Staff

FROM: Roger Pilon *RP*

SUBJECT: Comments on the "Property Rights Litigation Relief Act of 1995"

This responds to a number of requests from congressional staff for my thoughts on the "Property Rights Litigation Relief Act of 1995" (S. 135?), introduced by Senator Hatch. ~~Attached is a copy of the bill with my marginal commentary.~~ I will discuss a number of general concerns here.

If there is any area of our law that calls for a return to first principles, takings law is surely it. As Senator Hatch acknowledges in his remarks introducing this bill (*Cong. Rec.*, Jan. 4, 1995, S389-91.), "judicial protection of property rights against the regulatory state has been both inconsistent and ineffective." After more than 70 years of "ad hoc factual inquiries," he observes, the Supreme Court has produced a body of "sometimes incoherent and contradictory constitutional property rights case law" that has "jeopardized the private ownership of property with the consequent loss of individual liberty."

Yet far from returning to first principles, Senator Hatch's bill does exactly what the Court has done for more than 70 years, namely, draw from and build upon that "sometimes incoherent and contradictory" case law in an attempt at "codifying and clarifying" it. The result--as with the Court's efforts--is uncertainty. In general, the bill is considerably more complicated than it needs to be. As a result, it is unclear just how far it goes toward protecting the rights of property owners.

What property owners are calling for is legislation that goes well beyond the Court's case law--legislation that secures their rights under the Constitution by providing the clear and explicit language that courts might use to do so. As indicated below, one has to struggle with the aims and language of this bill. That is an invitation to uncertain hearings and future litigation, which can only work to the detriment of the bill's intended beneficiaries.

1. The Definition of "Property." The nub of the modern problem concerns the definition of "property," the taking of which, without just compensation, is prohibited by the Fifth Amendment. It is well recognized that if "property" were to refer simply to the underlying estate--the estate that is taken in an ordinary condemnation action--then owners would have no protection against regulations that take any or all uses, yet leave the estate in the hands of the owner. Unfortunately, the Court has been reluctant to apply that insight in a principled way, which might restrain the regulatory state significantly. Instead, it has worked backward from the ordinary condemnation case and afforded only marginal protection against regulatory takings.

What is needed, then, is an explicit statutory definition of "property," a definition that makes it clear, as the law does in every context outside that of regulatory takings, that "property" includes all the rightful--that is, non-injurious--uses that can be made of an estate, uses that give it value, the taking of which diminishes its value. Take one or more of those uses by regulation and you take something that belongs to the owner. Modern takings jurisprudence recognizes that if you take *all* of those uses, thus rendering the estate valueless, compensation is due. It has been unable to say, except through ad hoc contortions about "physical invasions" or "affected portions," that if you take *some* of those uses, thus rendering the property *less* valuable, that compensation is due. That is what this bill needs to do.

Instead, the bill gives a lengthy "hornbook" list of kinds of property. Only at sec. 203 (5)(F) do we find something of a catch-all definition: "any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest." Is that meant to codify current law, including current takings law? If so, then no advance has been made, since that's the source of the problem. The long list probably does not need to be in this bill. An explicit statement to the effect that non-injurious uses are property *does* need to be in the bill. The definition of "property" must address the problem that needs to be addressed.

2. The Definition of "Taking." The definition of "taking" in this bill is circular. Moreover, confusion results from the exclusion of ordinary condemnation actions from the definition of a taking. *All* takings are condemnations, and all condemnations are takings. Some condemnations take the entire estate. Others take uses that go with the estate. Injurious uses may be taken without compensation. When non-injurious uses are taken, with no gain of equivalent value to the owner, compensation is due. It's just that simple. And that is what the definition of "taking" must make clear. Far from excluding condemnations, the definition of "taking" should use that term to capture clearly what is going on

in a taking--including a regulatory taking.

3. When Is Compensation Due? Sec. 204 (a) sets forth the criteria for when compensation is due and so is the heart of the bill. Instead of stating the issue simply and clearly, however, as in point 2 just above, this section tries to reduce recent ("sometimes incoherent") cases to sentence fragments. The result is less than clear, lending itself to several interpretations, some of which I will now raise.

Again, the regulatory takings issue, at bottom, is really quite simple: Does a regulation, to achieve some public good, prohibit or "take" a non-injurious use? If so, then above a certain low threshold of loss (a bow to administrative efficiency), and absent any reciprocal gain of equal value to the owner, the public that wants that good must pay for it by compensating the owner for the loss he suffers.

Thus, it is not necessary to know whether the property is "physically invaded"; or whether a governmental interest is "substantially advanced"; or whether there is "rough proportionality" between some governmental need for a dedication and the impact of a proposed use (whatever that means); or whether the owner loses "substantially all" use. Some or all of those issues may arise in a given case, but they do not go to the essence of a taking. That essence, rather, concerns property (including uses); prohibitions (of non-injurious uses); and whether there are off-setting equivalent gains to the owner. That's it.

As noted above, the kind of inessential detail this section sets forth only invites difficult hearings and further litigation. Moreover, by tracking certain well-known cases, this section can be read to suggest that the bill--apart from important jurisdictional improvements--is indeed meant simply to codify and clarify recent cases rather than to enlarge current protection.

This final concern arises in sec. 204 (a)(D), which provides for compensation if a government's action diminishes "the fair market value of the affected portion of the property" beyond a 20 percent or \$10,000 threshold (emphasis added). Although those threshold provisions do seem to enlarge protection--especially in light of the virtual 100 percent threshold found in *Lucas*--their application looks to be qualified. In particular, what is the force of "the affected portion"? Clearly, that phrase tracks *Loveladies Harbor*, in light of *Penn Central*, which involved restrictions on the use of a portion of a parcel of property. But why is it necessary to add the qualifying language? Does that language limit the application of this key provision of the bill to those kinds of cases alone--that is, cases involving the diminution of only a portion of a parcel? If so, that is a severe limitation.

Given that the provisions immediately above all track identifiable cases--which Senator Hatch's introduction confirms--such a reading is anything but unnatural.

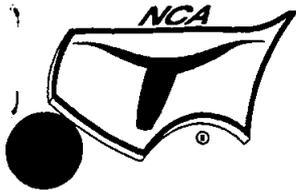
But if "the affected portion" is read more broadly--to enable reference to the entire property--or if the language is changed, as it should be, to read "of the property or the affected portion of the property," then owners would be compensated when their losses exceeded one of the threshold conditions. But if that is so, why do we need any of the preceding conditions? Does this provision not capture any and all situations that require compensation?

There seem to be two possible answers. First, when owners are able to recover for restrictions on "the affected portion," they can meet the percentage threshold more easily since the denominator of the percentage fraction is lower than would otherwise be the case. Second, and more important, in cases reached by sec. 204 (a)(A), (B), (C), and (E), the owner need not meet a threshold of loss before being entitled to compensation. Only in cases arising under sec. 204 (a)(D) does an owner have to pass such a threshold before being entitled to compensation. If those interpretations are right, then more ample protection is afforded by this bill than by certain other property rights bills that have been introduced recently. (The point of sec. 204 (a)(E) is unclear.)

In sum, even when "property" is properly defined, there are both narrow and broad interpretations of the language that should tell a court when compensation is required. That is the kind of ambiguity that needs to be eliminated.

4. Application to the States. Finally, this bill seems to go out of its way to shield the states from its strictures. By implication, it actually lessens protection against state takings by seeming to "disincorporate" the Fifth Amendment. This is not the place for a lengthy discussion of "incorporation," except to say that in 1897 the Fifth Amendment's Takings Clause was the first provision of the Bill of Rights to be incorporated against the states through the Fourteenth Amendment.

I would add, however, that the Fourteenth Amendment's Privileges and Immunities Clause was well defined by the Civil Rights Act of 1866, which Congress reaffirmed in 1870, just after the Fourteenth Amendment was ratified. That Act explicitly protected property rights from infringement by the states. The Civil War Amendments fundamentally changed the relationship between the federal government and the states, not by empowering the former to mandate programs for the states nor by empowering the federal courts to discover affirmative rights but by empowering both to protect rights that had already been discovered and declared. We do not need now to weaken that protection, even by implication.



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Testimony

on behalf of the

NATIONAL CATTLEMEN'S ASSOCIATION

in regard to

Environmental Regulations and Their Impacts

on Private Property Rights

submitted to

Senate Committee on Environment and Public Works

submitted by

Jim Little
Emmett, Idaho

June 27, 1995

The National Cattlemen's Association is the national spokesman for all segments of the beef cattle industry -- including cattle breeders, producers, and feeders. The NCA represents approximately 230,000 cattlemen. Membership includes individual members as well as 75 affiliated state cattle and national beef breed organizations.

**Testimony on Environmental Regulations and Their
Impacts on Private Property Rights
provided by Jim Little, Emmett, Idaho
Senate Committee on Environment and Public Works**

Mr. Chairman and Members of the Committee, good morning. My name is Jim Little, and I am a third generation cattle rancher from Emmett, Idaho. I appreciate the opportunity to address this Committee on the impacts of environmental regulations on private property rights. I am here today on behalf of the National Cattlemen's Association (NCA) which represents 230,000 cattle producers nationwide. I am Chairman of the Private Lands and Environmental Management Committee for the NCA and Chairman of the Endangered Species and Wildlife Subcommittee. I am also past president of the Idaho Cattle Association.

The topic of today's hearing is of major importance to cattle producers. The right to own and make economic use of private property is the heart and soul of our livelihoods. Obviously, cattle production relies on haying, grazing, and normal maintenance activities on pasture, range and hay lands. But cattle producers and others in agriculture rely upon property for more than just producing food. For most farmers and ranchers, property represents a form of collateral for operating loans. Also, the accumulated value of land many times represents the primary source of retirement income for farmers and ranchers. Obviously, the effect of any loss in use or value of these properties can have a profound effect on these small businesses.

Beef cattle production, like other forms of American agriculture, is capital intensive. Land use regulatory regimes such as endangered species protection, wetlands designation, open space preservation, greenbelts, coastal zone protection and zoning all impact property rights. The number of regulations under these programs is staggering. Also, many regulatory schemes are implemented by separate agencies and at the federal, state or local level. The result is that it has become impossible to know what kinds of activities one may conduct on private land. Uncertainty about permissible land uses results in declining land values, causing lenders to shy away from operating and long-term loans secured using land as collateral. Like most businesses, agriculture just does not work well without adequate financing.

Every year, members of NCA are asked to identify priority issues for the association. For as long as I can remember, cattle producers have placed a high priority on their ability to provide a safe, wholesome and inexpensive food product. Americans spend the lowest percentage of disposable income on food in the world. Protection of property rights is now of greater concern, because if we lose our ability to use our property; if we lose our ability to secure loans; we ultimately will lose our ability to provide the safest and most abundant food supply in world.

The NCA applauds this Committee for recognizing the impacts environmental regulations have on private property and your commitment to addressing solutions to the problem. While it is safe to say that all environmental regulations impact private property, there are certain statutes, such as the Endangered Species Act, wetlands laws, the Wild and Scenic Rivers Act, the National Environmental Policy Act, historic and cultural

preservation programs and recreational use schemes such as rails to trails, that are of specific concern to cattle producers. All environmental statutes similarly affect private property because land is so closely tied to the environment. Because of the regulatory nature of these statutes and because they are based on restricting land uses to accomplish their goals, the potential to result in a taking of private property is apparent.

Of particular concern to cattle producers, however, is the Endangered Species Act and wetlands laws. I will discuss those laws in detail and suggest reasons why it is necessary to protect property rights for those laws to accomplish their goals.

The Endangered Species Act

The cattle business is particularly impacted by the Endangered Species Act (ESA). Cattlemen graze livestock on over half the land area of the United States. These pastures and rangelands are, relatively, some of the least manipulated, least touched by the hand of man, of all the lands in this country. As such, these lands provide habitat for many of the species now listed as threatened or endangered. Cattlemen should be endangered species' best friends and we certainly would like to be. However, the current law and its implementation provide nothing but disincentives to those with the greatest opportunity for protecting the species.

As a consequence of this law, ranchers and farmers are less inclined to acknowledge the presence of endangered species on their property. They are apprehensive, and justifiably so, about the severe penalties, lawsuits, land use restrictions and loss in property values that result from this law. This legal situation makes it a curse to be host to listed species on ranches. The good stewardship which has fostered the

protection of endangered species in the past has become a liability for the landowner, rather than the asset which stewardship has represented for generations.

At the heart of almost all problems with the ESA is the absolute inflexibility of its requirements and punitive prohibitions. The inflexibility has been demonstrated in many provisions of the law: from the listing and delisting criteria to recovery plans, from Section 7 consultation to the "take" prohibitions, and from habitat conservation plans to critical habitat designations.

The ESA can be a law that truly accomplishes its objective to protect and conserve endangered species, but not without the support of the private landowners. You will not get the support of the private landowners without amending the ESA to protect property rights.

I was given the opportunity to testify today and asked to provide this Committee with NCA's position on the private property rights implications of our current federal policy. NCA policy is clear on necessary changes to the ESA. Our members support revisions to the ESA which would provide balance to the act so that private property rights are not ignored.

Implementing agencies should be required to prepare an economic impact analysis and an environmental assessment before land uses are regulated due to the presence, movement or relocation of a threatened or endangered species. Such analysis should include an assessment of the impacts these regulations or relocations will have on local, county, state and national economies.

The scientific requirement for listing species and designating critical habitat must also be strengthened. A stronger scientific basis for listing species and designating critical habitat will limit designations to those that are truly necessary and/or capable of recovery, thereby limiting the ESA's impact on private landowners. The scientific integrity of the listing process and the designation of critical habitat can be strengthened by:

- Placing responsibility on listing agencies to identify and collect the best scientific data to support listing and critical habitat designations.
- Requiring that data be field-tested, where feasible.
- Requiring more detailed findings for listings (biological reasons for listing, adequacy of state and local efforts, etc.)
- Requiring scientific peer review of proposed listings and critical habitat designation decisions by outside review panels.
- Ensuring that the definition and listing of species are based on modern scientific procedures.
- Ensuring that habitat designated as critical habitat is truly "critical" by designating only areas actually occupied by the species and requiring areas to be excluded from critical habitat if the costs of inclusion outweigh the benefits.

The recovery planning process can also be reformed to lessen takings of private property. The recovery planning process must be strengthened by establishing it as the focus for formulating management policies and guidance to implement the ESA. This can be done by requiring publication of the draft recovery plan at the time the species is listed and the final recovery plan one year from the date of listing. This would go a long way

toward providing landowners with more certainty by identifying the types of activities they may conduct on their land without violating the ESA. Many times they are uncertain whether they may continue to make economic use of their property after a listing is made because recovery plans are not developed and initiated in a timely manner.

The likelihood of takings could also be reduced in the recovery planning process if the ESA were amended to require:

- That the recovery plans include biological and economic assessments.
- That recovery plans consider more fully socioeconomic impacts (e.g., assessment of direct and indirect economic costs to both public and private sectors, identification of impacts on employment and on the use of private property.)
- That recovery plans assess fully the likelihood of recovery of the species.
- That each recovery plan consider four alternatives: “no action”, “maintenance”, “least socioeconomic impact”, and “maximum recovery”. Each alternative should include an assessment of both the risks posed to the species by the alternative and the direct and indirect costs to the public and private sectors that would result from the alternative.

Finally, and most importantly, the ESA must recognize impacts on private property rights by providing for compensation in cases where significant property rights are lost. Strengthening the scientific requirement for listings and designation of critical habitat, as well as reforming the recovery planning process to require economic assessments should minimize the ESA’s impacts on private lands. But where species are truly endangered, when habitat is truly “critical” for their survival, and when there is a likelihood that the

species can be recovered, impacts on private landowners may be unavoidable. In those cases, private landowners should be compensated.

The Fifth Amendment states that “private property [shall not] be taken for a public use, without just compensation.” Our nation’s environmental regulations are singling out individual property to bear the costs of implementation. Farmers and ranchers are being hit particularly hard by the ESA because their property is being pressed into service to provide habitat for listing species.

Landowners have been prohibited from cutting trees, clearing brush, planting crops, building homes, grazing livestock and protecting livestock from predators. Farmers and ranchers who cannot conduct activities such as these on their land are deprived of their property just as effectively as if the government had built a highway through it.

Despite provisions in the ESA (Section 5) to allow the government to acquire lands and prevent habitat loss on private lands, the government has shown no inclination to compensate citizens for the unconstitutional takings of their property. The ESA must be reformed to establish administrative procedures for private parties to obtain compensation when they are deprived of economically viable use of their property.

The two proposals now before this Congress to protect property rights would alleviate some of the impacts property owners are experiencing due to implementation of the ESA. NCA supports S. 605, “The Omnibus Property Rights Act of 1995”, and would recommend that the provisions of this bill be incorporated into the ESA. We support S. 605 bill because it provides mechanisms to address each aspect of the property rights

problem and most closely mirrors NCA policy. NCA also supports H. R. 925, "The Private Property Protection Act of 1995" which passed the House with strong support, passing by a margin of two-to-one. However, because H. R. 925 only addresses the issue of compensation, NCA does not feel that it adequately protects property rights or eases the burden on property owners.

Wetlands

NCA members are generally very familiar with the affect that designation as a wetlands has on the use and value of pasture land, rangeland and cropland. Additionally, there is a lack of certainty regarding federal wetlands policy which brings land use decisions into question. This uncertainty limits cattle producers' ability to make economically viable use of their property.

Federal wetlands policy is implemented under the Clean Water Act and the Farm Bill. The U. S. Army Corps of Engineers has the authority to regulate and even prevent the normal, established use of ranch and farm land under section 404 of the Clean Water Act. The Secretary of Agriculture has the authority to regulate wetlands on all agricultural lands under the swampbuster provisions of the Farm Bill. Because range lands are not included as "agricultural lands" for purposes of delineating wetlands under the Farm Bill, ranchers often must deal with two separate entities to determine which activities are permissible on their private property. The confusion that this creates for ranchers is apparent.

The confusion is exacerbated due to the fact that Congress has yet to codify a wetlands definition in the Clean Water Act even though, under the Environmental

Protection Agency's wetlands delineation, seventy-five percent of all wetlands is privately owned.

Our nation's wetlands protections laws must be reformed to include all agricultural lands under the jurisdiction of the Farm Bill (e.g., cropland, pasture lands, and rangelands, etc.) and place the Secretary of Agriculture solely in charge of the delineation of wetlands on all agricultural and associated nonagricultural lands.

Distinct criteria for the delineation of agricultural lands as wetlands must also be added to the Swampbuster law. The criteria should include the actual presence of the three wetlands definitive characteristics during the growing season. Hydrophytic vegetation (obligate plant species) and hydric soils must be present at the time of delineation. Hydrology is considered to be adequate if "free water" is at or above the surface for 21 consecutive days or more during the growing season. Additional criteria include a minimum size of 2 acres; the lands are not prior converted croplands or frequently cropped agricultural lands; the area is not an artificially irrigated area that would revert to uplands if the irrigation ceased; or not a temporarily or incidentally created wetland.

If policy changes of this nature are made, the wetlands designation process will be strengthened by ensuring that only those areas which are truly wetlands will be designated as such. Providing clear policy signals to landowners will also benefit wetlands protection. However, those property owners who are faced with land use restrictions due to the occurrence of a wetland on their property must have further protection. Incorporation of S. 605 into our wetlands laws would provide the protection they need. Just as with the

ESA, it is critical that agencies are required to prepare a takings impact analysis prior to taking any action. They must be forced to assess the potential impacts of proposed actions on private property and consider alternatives to their actions if a takings is possible. Agencies must become accountable for designations if our wetlands laws are to be effective.

The litigation relief and compensation measures offered by S. 605 are also necessary procedures that must be included in wetlands laws. If agencies determine that an area must be designated a wetlands, and a property owner loses the value of their property due to a designation, he/she must be compensated for the taking of that property.

While H. R. 925 would provide for compensation in such cases, it unfortunately does not require takings impact analyses. Agencies must be required to search for alternatives and take the course more likely to avoid a taking of private property.

Cultural and Historic Preservation

Cultural and historic preservation programs are also of concern to cattle producers. For instance, with the passage of the National Historic Preservation Act in 1966, our nation embraced a general policy of supporting and encouraging the preservation of historic resources for present and future generations. As with environmentally sensitive areas that have been identified as needing federal protection, historically or culturally significant properties more often than not are found on private property. Federal programs to protect these areas require that agencies seek ways to avoid, minimize or mitigate the effects of an undertaking on designated properties. The

subsequent land use restrictions have the potential to devalue property and infringe on landowners' rights to use their property.

Conclusion

The mandates of environmental statutes impact private property and have the potential to result in a "taking" of private property. These regimes force property owners to give up some of their rights for the good of society. However, the affected property owners, not society as a whole, are forced to bear the direct cost. Landowners are not being compensated for the loss of their private property.

I do not intend to imply that the protection of the environment is not a worthy goal. It is national policy, and there are several laws to prove it. However, individual property owners should not be required to foot the bill by a forced sacrifice of their property use and value. This cost should be born by society as a whole, meaning that the government should seek alternatives which will accomplish the public goal without creating individual sacrifice or else it should compensate for its actions which deprive its citizens of their property rights. It is plain wrong for a government agency to prohibit owners from using their property for the reasonable, productive uses for which it is suited unless the agency is willing to pay for the value it has taken.

The NCA vigorously supports legislation designed to protect our Fifth Amendment rights. The Fifth Amendment simply is not adequate protection in this day and age. The tendency of government agencies to impose excessive regulation with little or no regard for their impacts on private property is resulting in diminished property rights, higher production costs, and greater public resentment.

By and large, the burden has rested upon the property owner to assert his property rights protection under the Fifth Amendment when government action resulted in abuse. However, the legal costs associated with a takings case today were unimaginable at the time the Fifth Amendment was written. Litigation costs in takings cases typically range from a minimum of \$50,000 up to \$500,000 and more. This plainly places the relief afforded by the Constitution out of the reach of most Americans and is the chief reason so few takings cases reach the Supreme Court. Besides, citizens under our form of government should not have to “sue for their rights.” Government agencies should respect those rights without being ordered to do so by the courts.

The NCA supports legislation such as S.605, the “Omnibus Property Rights Act of 1995” and H. R. 925, “The Private Property Protection Act of 1995”. H. R. 925 goes a long way toward lessening the burden on property owners by requiring compensation when endangered species or wetlands are found on private property and uses are restricted as a result. However, because land uses are often restricted under other environmental laws, such as Wild and Scenic Rivers, heritage corridor designations and coastal zone management laws, the NCA does not feel it adequately protects property rights. S. 605 is the better vehicle for providing the protections that property owners need.

S. 605 would require agencies to prepare a takings impact analysis prior to issuing any regulation that is likely to result in a taking. This provision is critical for minimizing takings of private property. By requiring agencies to “look before they leap” they will be more aware of the potential impacts on private property, will be forced to consider alternatives and will be forced to regulate only when necessary.

A takings impact analysis does not impose any great burdens on the agencies. It only says they must “look before they leap” and be mindful of the rights of the citizens they serve. Surprisingly, even the agencies themselves do not believe the passage of legislation to require a TIA would slow down the regulatory process. The Environmental Protection Agency, the Departments of Interior, Agriculture, and Justice, as well as the Army Corps of Engineers are all on record saying that this type of legislation would not create additional burdens for agencies.

S. 605 also provides litigation relief for property owners by providing an alternative to litigation which allows takings disputes to be resolved through settlement or arbitration. S. 605 also requires procedures to be established for landowners to appeal agency actions under the ESA and the wetlands section of the Clean Water Act.

S. 605 also requires the government to compensate landowners for takings that result from their regulatory actions, equal to the loss in property value, if the affected portion of property is diminished in value by at least one-third or more.

In short, this bill embodies the principles that NCA members believe will ensure promulgation of only those regulations that are capable of achieving our nation’s environmental goals and will most effectively resolve the public’s current distrust in the federal government. Requiring agencies to prepare a takings impact analysis will oblige government to control itself. Establishing procedures to simplify the litigation hurdles that landowners must jump through to have their takings claims addressed will allow them to vindicate their constitutional rights in court. Providing mechanisms to avoid courtroom battles through negotiation processes will lessen the financial burdens on landowners and

the government alike. And finally, establishing clear guidelines as to when compensation is required will clarify decades of confusing and conflicting judicial decisions and ensure that landowners are compensated when their property is taken for a public purpose.

An omnibus bill such as S. 605 is necessary, but it does not go far enough. At the root of the current dissatisfaction among property owners is the environmental statutes themselves, and their lack of regard for the importance of the right to own and use private property. This right is a fundamental principle upon which our country was founded and the primary reason that Americans are able to enjoy the standard of living that we do. Erosion of this right erodes cattle producers' ability to provide for their families and remain an economically viable, productive member of society.

All environmental laws must include protection of private property rights. Without such measures, these laws cannot effectively achieve their goals. Property owners will increasingly become unwilling partners in the preservation of our natural resources and the enhancement of our environment. Many of our environmental laws, particularly the ESA and the Clean Water Act are now due for reauthorization. Congress has an opportunity to amend these laws to provide for property rights protections. S. 605 provides a workable standard for protecting property rights by providing guidelines for resolving takings claims and should be included in our environmental statutes. Asking the public to pay for implementation of their environmental goals is a reasonable price to pay for clean water, abundant and diverse wildlife species, rivers and trails for recreation, and preservation of historically significant properties.

I thank you for the opportunity to provide the National Cattlemen's position on environmental regulations and our recommendations for lessening their impacts on private property rights. I would be pleased to answer any questions you may have.



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**STATEMENT OF THE
NATIONAL ASSOCIATION OF HOME BUILDERS**

for the

ENVIRONMENT AND PUBLIC WORKS COMMITTEE

of the

UNITED STATES SENATE

on

PRIVATE PROPERTY RIGHTS

June 27, 1995

Mr. Chairman, on behalf of our 185,000 member firms, the National Association of Home Builders (NAHB) is pleased to have this opportunity to testify on the issue of private property rights and related pending legislation. The protection of private property rights is an issue of utmost concern to our membership, and we believe it is time for Congress to alleviate the crisis facing American property owners. To that end, NAHB has named the protection of private property rights as one of our top legislative issues for the 104th Congress.

BACKGROUND

The National Association of Home Builders recognizes this nation's desire for the development and utilization of its land resources in a harmonious and environmentally acceptable manner. Any land use policy must balance the basic human needs of an expanding population with legitimate environmental concerns. Moreover, any land use policy must also protect private property rights. Within that framework, housing opportunities for Americans at all income levels must be enlarged and their right to mobility and freedom of choice assured.

NAHB is concerned that the proliferation of regulations affecting land development violates fundamental property rights. First and foremost, the issue of takings needs to be addressed through both its definition and government practices, with compensation guaranteed to landowners who suffer regulatory takings. In addition, we cannot ignore the

into the public interest supporting the regulation. David Lucas, a builder who purchased two vacant oceanfront lots and was prohibited from constructing any permanent structure on them under authority of the Beachfront Management Act, was awarded \$1.2 million in just compensation. Since *Lucas* was decided, dozens of cases challenging denial of permits to fill wetlands have been brought, and *Lucas* has been cited in numerous federal and state court opinions.

Most takings claims do not involve a full denial of use, and it is when a government regulation or action deprives the land owner of partial use or economic value of the land that the compensation issue becomes much more contentious. Currently the U.S. Government is facing well over \$1 billion in outstanding taking claims of this type, as thousands of private property owners have been restricted in the use of their property. NAHB believes that it is the burgeoning number of property rights lawsuits that have fueled the constitutional debate. The courts, however, are making little progress in settling this argument.

In 1994, several significant court cases were handed down that illustrate the difficulties many courts have in dealing with private property rights. First, and most important from the property owner's perspective, was *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994). In *Dolan*, the Supreme Court held that if the government imposes a requirement on a property owner as a condition to a permit, the requirement must be "roughly proportional" to the impact caused by the owner's proposed use of his or her property. Additionally, the burden is on the government to demonstrate the rough proportionality. This case represents a major step forward in protecting the rights of property owners and, hopefully, will send a message to local governments that the permit

process cannot be used as a means to take private property without paying just compensation to the owner.

Another step forward occurred in *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171 (Fed. Cir. 1994). After several years of procedural maneuvering by the federal government, the U.S. Court of Appeals for the Federal Circuit finally ruled on the merits of this case on June 15, 1994. The result was an affirmation of a \$2.7 million judgment as just compensation to a New Jersey property owner for the denial of a Clean Water Act (CWA) Section 404 permit. The court held that denial of the permit constituted a taking for which the government must pay the developer. In this case the court recognized that while the protection of wetlands was an important governmental concern, it was improper to impose the burden of preserving this land on one individual. Rather, the societal benefit of preserving wetlands has a cost that must be borne by the society as a whole.

While the *Dolan* and *Loveladies* represent great strides forward, they are the exception to the rule when it comes to courts and property rights. There were several setbacks in 1994 which clearly illustrate the trend in many courts to avoid the "takings" issue. The U.S. Court of Appeals for the Eleventh Circuit dismissed the case of *Reahard v. Lee County, FL*, holding that the takings claim presented in the case was not "ripe"¹ for judicial review. The *Reahard* case involves a county ordinance that designated a property owner's land as wetlands and limited development to one unit per forty acres. In 1991, the trial court held that the ordinance amounted to a taking and awarded the property owner

¹ Ripeness, or the requirement that a property owner try every administrative remedy possible before bringing a claim for inverse condemnation, has served as the escape hatch for many courts to avoid hearing "takings" cases.

\$700,000 plus interest and attorneys' fees. The county appealed to the Eleventh Circuit Court of Appeals which in 1992 decided that the trial court misapplied the legal standard for takings and failed to make adequate factual findings. The case was remanded back to the trial court which, in 1993, followed the Eleventh Circuit's instructions and again found a taking. Lee County again appealed the case to the Eleventh Circuit which has now dismissed the case on ripeness grounds.

Another significant setback occurred in *Hensler v. City of Glendale*. In this case, the California Supreme Court erected a new procedural roadblock to property owners seeking to enforce their Fifth Amendment rights. Under *Hensler*, a property owner must now challenge the validity of the regulation that "takes" his or her property before making a claim for just compensation. The court imposed this new requirement without any supporting authority and contrary to numerous U.S. Supreme Court rulings. There is no question that the government has the right to take private property for the public benefit; however, it must pay just compensation. In *Hensler*, the California courts are now requiring a property owner to challenge that long-recognized government right -- a futile challenge at best. As the Supreme Court has held, the Fifth Amendment is not meant to limit government actions but "to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 264 (1987). The property owner in *Hensler* is currently seeking a writ of certiorari from the U.S. Supreme Court.

The U.S. Supreme Court has recognized that the right to use one's property, subject to legitimate regulations, is not a "benefit" bestowed on the property owner by the

government. *Nollan v. California Coastal Commission*, 483 U.S. 835 (1987). Rather it is a right preserved by the federal constitution. And, as Chief Justice Rehnquist stated for the Supreme Court, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *See Dolan v. City of Tigard*. Unfortunately, courts have not defined the issue so that property owners can understand the extent of that right.

THE NEED FOR LEGISLATIVE REFORM

Property owners can no longer wait for the Judiciary to establish clear grounds for the protection of private property rights. Congress must take the helm in this debate and pass legislation guaranteeing the fundamental and Constitutional rights associated with landownership. Solutions to these problems can be found through the passage of comprehensive private property rights protection legislation, but programmatic reforms within each statute are also needed.

At this time, NAHB supports S. 605, the Omnibus Private Property Rights Act of 1995, as well as the other legislative efforts to protect private property rights. NAHB believes we are at the beginning of a long process of evaluating the elements of the debate and determining the best way to balance environmental protection with economic justice. Collectively the pending bills include critical elements needed to assure the protection of private property rights. The bills have established the foundation which will serve as the catalyst for the evaluation and discussion necessary to formulate comprehensive and useful private property rights policies.

NAHB is pleased that S. 605, and other property rights bills pending in the Senate, include provisions addressing the issue of compensation, recognizing that the Fifth Amendment has not been enforced appropriately. NAHB, however, is concerned with the seemingly arbitrary percentages on which compensation under the different approaches would be required. How did the legislators decide on these numbers? NAHB members believe that in principle any diminution of value brought about through a regulatory taking should be compensated. Our forefathers intended that the government should not use private property for the public good without providing compensation to the landowner. They did not qualify that principle based on a percentage of what land value is lost or how much land is used. NAHB, however, recognizes that compensation for each and every minor diminution in property value may not be feasible. Ergo the need to evaluate and modify the current practices and policies individually of the federal government to reduce the occurrences of regulatory takings and decreasing the financial burden incurred through the proper enforcement of the provisions within the U.S. Constitution.

Secondly, NAHB supports efforts to declare compensation for values relative to the "affected portion" of the property, although this reference needs to be clarified. Basing the compensation threshold on the value of a whole parcel of land would require many land owners to lose the use of thousands of acres before compensation would be required. On the other hand, the affected portion of land can be more than the specific acres taken out of use by a government action. In some cases, only a portion of the property is conducive to development. If federal regulations prohibit action on that limited area of the land, the value of a greater area, including the whole parcel in some cases, is actually affected.

Compensation for only those specific acres would not reflect the entire loss in use and/or value to the property owner. The term "affected portion" must be defined in such a manner that allows landowners the flexibility to assess how a particular land use restriction diminishes the value of his overall project and propose that the effect on his/her land value is greater than to just the acres to which the regulatory action applies.

Finally, NAHB does not support limiting the application of the property rights legislation to only the Endangered Species Act and Section 404 of the Clean Water Act. The use of land is regulated under numerous statutes including those addressing coastal zone management, agri-business, hazardous waste, flood plain management, historic preservation and other water issues. Not only do takings occur under these laws, but government officials, use the authority of these laws to go onto private lands for information gathering and monitoring purposes. Interestingly, many of the landmark cases, such as that of David Lucas in South Carolina whose taking was the result of a coastal management law, would not benefit from this legislation if their problem were to occur in the future. Congress cannot ignore the infringements of private property rights that occur outside of the Endangered Species Act and Section 404 of the Clean Water Act.

ELEMENTS NEEDED IN COMPREHENSIVE PROPERTY RIGHTS LEGISLATION

NAHB is firmly committed to securing legislation that addresses the needs of private property owners. Our members believe that the protection of private property rights is of the utmost importance. Comprehensive legislation needs to be passed which incorporates several basic components.

First, landowners need a resolution to the takings dilemma. Legislation should provide a statutory cause of action against the government if a statute, regulation, permit condition or rule infringes on one's rights to use the property in a way that would be otherwise legal. NAHB members do not believe that market fluctuations in the normal course of business which diminish land values represent actions for which compensation should be paid. Rather, we are discussing regulatory actions that impair reasonable and legal use of land which artificially devalues the property. Compensation should be guaranteed for any diminution of a property's fair market value as a result of government actions, with the value being based on the land prior to the imposition of the government action.

Second, legislation must include provisions to limit entry on to private lands. Government officials should be required to obtain written permission from the land owner and give him prior notification before entering private property. In addition, any information collected on that land should be available to the landowner at no cost, and he should be able to dispute its accuracy before it is used by the federal government for any purpose.

Third, federal government agencies should be required to assess the potential consequences of their actions to determine whether a takings is likely to occur. Requiring a "takings impact assessment" to be completed prior to implementation of regulations and administrative actions will allow the agencies to understand what the potential effects their actions may have and provide an opportunity to choose a less burdensome and/or alternative.

Finally, Congress needs to establish alternative methods for landowners to challenge potential property rights infringements. Currently claimants must go to court to solve their property rights claims, and then they must chose between pursuing monetary relief in the

Court of Federal Claims or equitable relief in the U.S. District Court. Both courts should be able to address either question, or one of the two courts should be given jurisdiction over both issues. In addition, federal agencies need to be required to establish strict administrative processes to handle these issues, rather than forcing claimants into lengthy and expensive legal battles.

INDIVIDUAL STATUTE REFORMS

The promotion of comprehensive property rights legislation should not be at the expense of efforts to reform the individual statutes and programs which provide the basis for the infringements of individual property rights to occur. Addressing as many of the programmatic issues as possible will reducing the occurrence of regulatory takings and other encroachments on the rights of property owners. To follow are several such examples that specifically affect the building industry.

The Endangered Species Act imposes some of the most stringent limitations, both temporary and permanent, on the use of private property of any federal statute. Its prohibitions can restrict, if not outlaw altogether, any development activity on vast areas of private property which harbor a listed species or encompass a listed species' ill-defined habitat. The regulatory strategy for protecting species habitats is to let costs fall haphazardly on those developers unlucky enough to choose areas where endangered species live. Importantly, the Natural Heritage Data Center estimates that approximately 50 percent of all currently listed species are found **only** on privately-owned lands. As a result, the vast majority of endangered species habitat is owned by private citizens, not the federal or state governments. The ESA confers no private cause of action upon a landowner when deprived

of private property. In such situations where landowners are deprived of economically viable uses, the Fifth Amendment's just compensation clause provides the sole remedy for the taking of their property. Accordingly, any remedy rests on the complex and often confusing body of takings law jurisprudence.

Several modifications need to be made to the ESA to support the protection of both endangered species and private property rights. The FWS listing process should be reformed to require a stricter scientific basis and professional standards for the "best available data" requirement so that only those species that genuinely confront endangerment are provided projections under the ESA. Critical habitat for species needs to be designated at the time the species is listed as endangered, and Congress should require that the FWS provide written notice to all landowners within the species habitat. These modifications will provide the landowner with full knowledge of the law and the restrictions on land use he faces. Finally, appropriate remedies for compensation should be crafted into the legislative program, and arbitration should be used as an alternative to litigation for dispute resolution.

In addition to the direct impacts of the Endangered Species Act, the implementation of the National Biological Survey (NBS) also infringes on the rights of landowners. NBS authorizes the federal government to conduct a thorough investigation of private property to catalog rare and endangered species. This information is then used to regulate the land owner's use of the property through the Endangered Species Act. NBS officials should not be allowed to go onto private land without the written consent of the property owner. Further, any data collected on that land should not be used by the federal government until the property owner has had a chance to review the data and dispute it as necessary.

Another statute with private property rights implications is the Clean Water Act (CWA). Both wetlands protection practices and stormwater management under authority of the CWA need to be modified to support private property rights. Comparable to the ESA, implementation of the CWA wetlands program accounts for the lost use of thousands of acres of land, costing millions of dollars to private landowners. The federal government prohibits wetlands to be dredged and/or filled without a CWA section 404 permit. Unfortunately, the regulatory agencies have gone far beyond the Congressional intentions of the Act and landowners are faced with regulatory takings and other problems which could have been avoided.

Most landowners would choose not to have a wetlands on their property, avoiding the lengthy permitting process and potential restrictions on the use of their land. Congress needs to define what constitutes a "wetland" and require consistent interpretation of that definition so that wetlands are easily identified and avoided where possible. This definition needs to be based on sound science and classify wetlands as to their functions and values. When a landowner is forced into the permitting process, administrative deadlines need to be enforced to allow for the property owner to move on to the next phase of the procedure, an arbitration should be used as an alternative to litigation for challenging permit decisions and making takings claims. In addition, compensation needs to be provided in those cases where the government restricts a person from using the land on which a wetlands exists.

CONCLUSION

Property owners rightfully expect to be regulated in a predictable, reasonable, and consistent manner. Unfortunately, many regulations do not accomplish these goals and,

rather, prohibit the reasonable use of one's property without compensating them for any loss and infringing on their basic rights of landownership. The Judiciary has not adequately dealt with the issue of partial takings or other property rights issues. In addition, the courts have shown a reluctance to do so. NAHB believes that the time has come for Congress to take charge in this debate and provide protection for the rights associated with landownership.

NAHB is grateful that there are numerous property rights bills pending in Congress, with the support of so many Members. The pending legislation has created a sound basis on which to build quality land use policies. Discussions must proceed and thorough examination of the issues needs to continue to ensure that any legislation enacted will truly resolve the current problems associated with federal land use policies. NAHB has several questions relating to the provisions included in these bills, but NAHB does support these efforts, as they include crucial elements needed to provide justice to America's landowners. Congress should pass a comprehensive private property rights policy that includes provisions on compensation for takings, limitations on entry and use of data from private lands, takings impact assessments to be completed by the federal agencies and alternatives to the current judicial process for challenging infringements of property rights.

Again, NAHB wants to stress that the issues of concern relating to infringements of private property rights will not be fully rectified with the passage of a property rights bill. Each statute that affects land use needs to be thoroughly evaluated. Reforms to those statutes and related programs should be adopted so that the rights of our land owners are not sacrificed unnecessarily. Federal restrictions on land use and regulatory takings may be needed in some circumstances, but landowners want assurances that those actions are based

on the best scientific data, protecting something that is truly valuable and reasonable. In addition, property owners want to have a reasonable course of action to dispute government actions or make a takings claim.

NAHB is prepared and welcomes the opportunity to work with the committee and the Senate to develop legislation that will truly address the need to rethink how federal land use policies violate the fundamental rights associated with landownership and guaranteed under the U.S. Constitution.

NAHB thanks the Chairman for the opportunity to testify on this important issue.



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STATEMENT OF

THE HONORABLE RICHARD L. RUSSMAN
New Hampshire State Senate

ON BEHALF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES

CONCERNING
PRIVATE PROPERTY RIGHTS AND "TAKINGS" LEGISLATION

BEFORE THE
SENATE COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS

JUNE 27, 1995

INTRODUCTORY REMARKS

Mr. Chairman and Members of the Senate Committee on Environment and Public Works, I am Richard L. Russman, State Senator from Kingston, New Hampshire. In New Hampshire, I am Vice-President of the Senate, Chairman of the Senate Environment Committee and a member of various other committees such as the Senate Rules and Interstate Cooperation Committees.

I appear on behalf of the National Conference of State Legislatures (NCSL) to discuss the concerns of state legislators with federal "takings" legislation. We believe that state concerns need to be addressed in order to obtain a truly equitable and sensible resolution to the problem of unfair government intrusions upon private property rights. At the outset it should be understood that NCSL is prepared to work with Congress to restrict overreaching government actions while respecting measures that are necessary to protect the public health, safety, environment and welfare. However, takings legislation that seeks to create an **expensive new entitlement program** is not the proper approach. Furthermore, as we all know too well, once an entitlement program is created it is very difficult to eliminate.

GENERAL COMMENTS

As a fiscal conservative and believer in limited government, compensation 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. After all, we all live downstream, downwind or next door to property where pollution and other harmful activities have been restrained to protect all of our property values and our collective interest in a safe, healthy and enjoyable community. In cases where there is clearly no constitutional right to compensation, "takings" bills would injure average citizens by forcing an increase in taxes or by diverting limited government resources for a new entitlement program. Such legislation will harm the general public by discouraging government actions that protect the community and neighboring property owners.

As you are aware, the Fifth Amendment to the U.S. Constitution provides that private property shall not be "taken for public use, without just compensation." For over two hundred years, federal courts have enforced our Constitution and have consistently protected private property owners from overreaching government actions. Current takings legislation does not attempt to codify present constitutional protections and guarantees. Rather, legislation such as S. 605 radically expands the definition of a compensable government action and creates an expensive new government program. Such legislation also imprudently elevates the status of property rights over other equally important rights that are guaranteed by the Constitution.

Most troubling of all is that there are no studies nor evidence to support the notion that our nation's institution of private property is under siege or that the judicial branch of

government has abdicated its role in protecting private property owners from overreaching government regulation. Rather, the need for this legislation is predicated upon isolated anecdotal accounts of individual property owners. If anything, recent court decisions such as *Dolan v. City of Tigard*, *Nollan v. California Coastal Commission*, *Lucas v. South Carolina Coastal Council* and *Florida Rock Industries v. United States*, demonstrate a willingness by the U.S. Supreme Court and the lower federal courts to find "takings" of property value when governmentally imposed regulatory land use restrictions go too far. In short, there is no indication that the judicial branch of the federal government is insensitive to the constitutional rights of property owners. Creating a new, cumbersome and expensive government program without a clear factual basis and demonstration of need does not comport with sound notions of responsible government.

The proponents of takings legislation cite the Clean Water Act wetlands program as evidence that America's institution of private property is under attack. However, the EPA and Corps of Engineers claim that fewer than one percent (1%) of wetland applications are denied each year. The day has long since passed when we could afford to presume the existence of societal ills and fashion expensive remedies to address them. To many observers, takings legislation represents an expensive solution in search of a non-existent problem.

S. 605, and other similar bills like it, provide cash payments for any loss in value to any affected portion of property due to restrictions on property use. S. 605 provides for compensation even when the total fair market value of the entire parcel of property is not adversely affected by the land use restriction on the small affected portion of the property. In other words, S. 605 would force the government to pay compensation even when there has been no overall property value diminution. In sum, S. 605 will force the government to pay compensation for purely theoretical "damages". Unfortunately, the entire concept of "no harm, no foul" has been discarded.

S. 605 and other similar compensation legislation propose a dramatic new takings theory that would limit government's ability to respond to public demands and increase the cost and size of government. At its core, such takings legislation would severely limit the government's ability to govern by forcing government to pay for the right to regulate. As Justice Oliver Wendell Holmes stated in *Pennsylvania Coal v. Mahon*, "government could hardly go on if to some extent values incident to property could not be diminished without paying for every...change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

The federal government, through legislation like S. 605, will find itself in the unenviable position of paying polluters not to pollute and paying individuals not to engage in conduct that could damage the health, safety, environment or property values of others. For instance, pursuant to S. 605, if the federal government requires a hazardous waste landfill operator to incorporate groundwater protection safeguards into a landfill's construction design, and the cost of such engineering requirements limit the overall return on the operators' investment by thirty three percent (33%), then the operator would be

entitled to monetary compensation. It is irrelevant that the groundwater protection safeguards are intended solely for the protection of the local communities' drinking water supplies and their property values. The monetary payment would be paid by the federal government agency that required the environmental and public health safeguard.

In essence, bills like S. 605 would force the government to either pay the environmental component of the landfill operator's cost of doing business or allow pollution to continue unabated. In the area of groundwater contamination, where the maxim of an "ounce of prevention equals a pound of cure" most assuredly rings true, the government would have no rational economic choice but to require the appropriate environmental safeguards and pay the landfill operator's environmental compliance costs. It is difficult to understand how forcing the federal government, and thereby the American taxpayer, to pay the cost of such "externalities" either improves government or furthers the public interest.

The magnitude of this type of legislation should not be underestimated. Takings compensation legislation seeks to entirely reverse our present system of environmental regulation. Our present system says that if you are engaged in activities that pose a threat to public health, then you are the entity who should shoulder the cost of limiting the impact of your activities. For instance, if you operate a hazardous waste incinerator, then as the operator of such a business you should pay the cost of installing pollution control devices. The legislation presently before us would require the general public, the average American taxpayer, to pay the costs of such pollution control equipment. This attempt to change our present system of environmental regulation from "polluter pays" to "public pays" is premised upon the notion that if the public wants cleaner air, let the public pay for cleaner air, with their federal tax dollars.

Legislation like S. 605 seeks to dramatically limit government's ability to maintain public health protections by forcing the government, and in turn the average American taxpayer, to pay for any such protections. At its core, if protecting public health costs more, then there will be less public health protection. Ultimately, if there is less public health protection generally, then there is less public health protection, specifically, for my constituents. Additionally, it is crucial to note that that S. 605 applies to all federal laws and all forms of "agency action." It would be a disservice to the breadth of S. 605 to characterize it as only applying to environmental protection and public health and safety measures.

STATE - SPECIFIC IMPACT

Legislation such as S. 605 represents a direct threat to States because many of the federal public health and safety programs that would be jeopardized by federal "takings" bills are implemented in whole or in part by state and local governments. This state-federal partnership is the cornerstone of our present system of environmental and public health protection. In fact, the trend is to shift more responsibility for the implementation of federal programs to the states. Additionally, due to the federal governments' pervasive role in regulating public health hazards and the increasingly interstate and complex nature

of our nations' environmental problems, states have come to rely on the federal government for leadership in this area. In certain fields such as air and water pollution, where polluted media routinely traverse state boundaries, there is no sensible alternative to uniform national treatment and laws. National public health and safety laws provide a baseline for state programs while giving states flexibility to go beyond federal minimum requirements. The end result is that given the federal government's history of leadership in promoting public health and safety, many of the most important laws protecting state citizens' environment, public health and safety are federal laws.

State lawmakers have an acute interest in seeing that federal laws providing significant protections to their residents are not diluted or disabled. Takings compensation legislation not only has the ability to weaken the federal government's resolve to apply its laws, but it also has the ability to financially cripple the federal agencies which implement such laws. Unfortunately, legislation such as S. 605 seeks to "tame" the government by making it prohibitively expensive for government to act, even when such actions further the public interest. States rely on federal agencies such as the Environmental Protection Agency (EPA) for a broad range of services including financial and technical assistance, Research and Development (R&D), standard setting and identification of treatment techniques such Best Available Technology (BAT) and Best Available Affordable Technology (BAAT). Many believe that EPA does not currently have sufficient resources to carry out its many statutory responsibilities. Takings legislation would inevitably further deplete EPA resources to the detriment of the states and communities who rely on EPA for assistance.

One of the best ways to demonstrate how this legislation would hurt states is to provide some illustrations. For example:

- Under S. 605, or other similar legislation, a decision to list a hazardous waste site on the Superfund National Priorities List (NPL) could result in property value diminution and EPA would have to pay the site owner for its decision to make the site a public health priority. The notion that EPA could have to pay a property value diminution claim for making the site a public health priority would have a chilling effect on EPA's willingness to list the site on the NPL. The losers in this scenario would be the state and the particular community who want the site NPL listed in order to have the site remediated faster with Superfund Trust Fund moneys.
- S. 605, or other legislation like it, has the potential to unduly influence state behavior and create litigation between states and the federal government. Under this legislation, the federal agency implementing a law pays compensation when there has been a taking, even if the taking was imposed by a state acting pursuant to federal authority. The problem posed is that federal laws authorize states to impose state standards that are stricter than federal standards. We believe that it is unlikely that takings "damages" imposed pursuant to these stricter state standards are going to be paid by federal agencies. In the absence of a federal payment, pressure will be brought on the states to either eliminate laws that are stricter than their federal

counterparts or to open their treasuries to make similar entitlement payments to landowners. States do not want to find themselves being forced to do either. Even more probable, the issue will end up in court. Given the cost of litigation, we believe that state and federal moneys could be used more wisely.

- States cannot afford to create a new entitlement program similar to the federal entitlement program being proposed under the current takings compensation legislation. One of our many concerns is that if the federal government is successful in creating a culture that government must pay for any restriction on any affected portion of a given parcel of property, even if an entire community's property values are preserved through such a restriction, then pressure will be brought upon states to mimic such an entitlement program. Furthermore, NCSL does not believe that the federal government presently has the resources to create such a new entitlement program. This is especially true given Congress' new attempts to balance the federal budget and gain control of federal spending.
- Takings legislation will have the tendency to lock in the status quo by forcing the federal government to pay any perceived losers when there is a change in the way government conducts business. For instance, S. 605 would prevent any reallocation of water from federal Bureau of Reclamation water projects without paying the parties who have their water allocation diminished. In the arid southwest, agricultural and urban interests differ on how water should be allocated. If agricultural or city interests have water "taken" from them to benefit the other, they will be entitled to compensation under the legislation. It is foreseeable that less water, unaccompanied by conservation measures, could result in reduced crop yields and profits or restricted urban development in cities. The thought of paying billions in "takings" claims will prevent any change in the status quo. Once again, such a limitation on government's ability to respond to changing circumstances could very well be to the detriment of state authority over regional planning and land use.

Finally, states throughout this nation, including New Hampshire, are presently wrestling with the issue of private property rights. Earlier this year the New Hampshire Senate rejected takings legislation. The New Hampshire bill, SB 141, was of the assessment variety. With respect to the assessment provisions in S. 605, NCSL's position is clear: Assessment legislation must not increase the cost or size of government, make government less effective and more bureaucratic, "create paralysis through analysis," or be used as a vehicle to "hamstring" federal agencies that work with states in protecting our mutual constituents and communities. Given the close state-federal partnership that protects our environment, public health and safety, and the increasing trend of delegating more authority to the states, it is crucial that Congress not abandon its commitment to the very laws and agencies that guarantee the success of our partnership.

FISCAL IMPACT

S. 605 and other similar legislation would impose large and unknown new costs. As a fiscal conservative, I expect strong proof of need to justify an expensive new government program. The costs go far beyond compensation awards to persons claiming property value diminution. For the entitlement program conceived in S. 605 to work successfully, additional employees would be needed to process compensation claims, more lawyers would be needed to litigate arbitration proceedings, expert witnesses would be needed to testify at arbitration proceedings, arbitrators would have to be hired to conduct such proceedings, certified real estate appraisers would be needed to determine pre-regulation and post-regulation property values for computing the extent of property value diminution and additional government attorneys would be needed to handle the flood of claims that would be filed in the U.S. District Courts and U.S. Courts of Federal Claims. No one has any clear idea of how much these new administrative and transaction burdens will cost. However, as presently drafted, S. 605 applies to virtually all agency actions by the federal government. Given the sweeping nature of S. 605, and its definition of property, it is difficult to fathom the number of agency actions that could trigger a fluctuation in property value.

Beyond the creation of a larger federal beauracracy, increased processing and transaction costs, litigation fees, expert witness fees and the actual costs of awards under the entitlement program, legislation like S. 605 does not even adopt a fiscally responsible approach to quantifying the amount of compensation that would be paid pursuant to a claim. As written, the law would allow compensation awards to be based on speculation without requiring the owner of the subject land to sell the property to prove his assertion of property value diminution. In essence, one does not even have to realize a loss under the legislation to be entitled to compensation. Rather, all one needs to do is demonstrate, on the basis of subjective expert testimony, that there could be property value diminution in the event that only a sale of the affected portion of property were to occur. Similarly, the law does not provide safeguards to prevent fraudulent claims by landowners who purchase property with full knowledge of existent land use restrictions.

Finally, S. 605's allowance for claims respecting only the affected portion of the claimant's property, rather than the entire parcel, is calculated to increase the number of claims and the total amounts payable pursuant to the entitlement program. The fact of the matter is that land use restrictions that affect as little as one percent (1%) of a piece of property will rarely, if ever, reduce the total fair market value of the entire property. However, under S. 605, the federal government will pay compensation even if there is no decrease in the fair market value of the entire property. In essence, S. 605 is structured to impose the greatest fiscal burden possible on those agencies that are congressionally mandated to regulate property uses. It is this precise structure of S. 605, and similar legislation, that causes one to believe that the purpose of such legislation is to "tame" government. Unfortunately, it is difficult to understand how such legislation either improves government or furthers the public interest.

This type of legislation could also have very unfair results for the federal taxpayer. An example that comes to mind is the landowner who is fortunate enough to have an interstate highway built on a contiguous parcel of land next to his own. Virtually overnight the landowners' property would skyrocket in value due to the federal government's construction of an interstate highway next to his land. However, pursuant to the Highway Beautification Act of 1965, the landowner would be prohibited from erecting commercial advertising signs within 660 feet of the federal right-of-way that are visible from the highway. Under S. 605, the landowner could receive compensation for a regulatory taking. In essence, the federal government would greatly enhance his property's total fair market value while also paying damages for restricting his right to maximize his income earning potential on that portion of his land that falls within 660 feet of the highway. This type of expenditure represents a waste of taxpayers' dollars. Similar examples exist with respect to other federal programs such as the National Flood Insurance Program. Suffice it to say that there are more constructive uses for federal taxpayers' dollars.

An important fiscal implication of S. 605, and similar bills, is the financial impact it would have on land values of neighboring properties close to a parcel which is subject to a claim. It is estimated that there are approximately 60 million homeowners in America. It is this class of persons who truly deserve private property protection. Land use limitations on particular parcels of property often maintain the values of surrounding properties. Our country's land use system has long recognized that incompatible land uses strongly influence the value of property nearby. Furthermore, unrestricted and incompatible land use has never been a right. Therefore, it is important to remain mindful of the issue of property value diminution that could occur in surrounding properties if an individual is given the unfettered right to use his land as he deems fit.

CLOSING REMARKS

Mr. Chairman, I appreciate the opportunity to present the views of the National Conference of State Legislatures to your Committee. I would like to reiterate my previous offer to work with you further on this issue. I will also be glad to respond to any questions.

attachments



NATIONAL CONFERENCE OF STATE LEGISLATURES

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202-624-5400 FAX: 202-737-1069

JANE L. CAMPBELL
ASSISTANT MINORITY LEADER
OHIO
PRESIDENT, NCSL

NOTE: INDIVIDUALLY SENT TO ALL MEMBERS OF THE U.S. SENATE

TED FERRIS
DIRECTOR, JOINT LEGISLATIVE
BUDGET COMMITTEE
ARIZONA
STAFF CHAIR, NCSL

February 1, 1995

WILLIAM POUND
EXECUTIVE DIRECTOR

Honorable John Ashcroft
United States Senate
Washington, DC 20510

Dear Senator Ashcroft:

On behalf of the National Conference of State Legislatures, I am writing to urge you to oppose S. 135, Property Rights Litigation Relief Act of 1995, and other similar "takings" legislation such as S. 145. Both S. 135 and S. 145 propose a dramatic new takings theory that would severely limit government's ability to respond to the public's demand for a safe and clean environment. Equally troubling, both bills would also dramatically increase the cost of government. While the National Conference of State Legislatures is greatly concerned with the impact of overreaching government actions, we are confident that there are less draconian and more constructive solutions to the takings issue than those contained in S. 135 and S. 145.

As you are aware, the Fifth Amendment to the U.S. Constitution provides that private property shall not be "taken for public use, without just compensation." For over two hundred years federal courts have enforced our Constitution and have consistently protected private property owners from overreaching government actions. Current "takings" legislation does not attempt to codify present constitutional protections and guarantees. Rather, the legislation would radically expand the definition of a compensable government action and create an expensive new entitlement program. At its core, this takings legislation would severely limit the government's ability to govern by forcing government to pay for the right to regulate. As Justice Oliver Wendell Holmes stated, "government could hardly go on if to some extent values incident to property could not be diminished without paying for every...change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

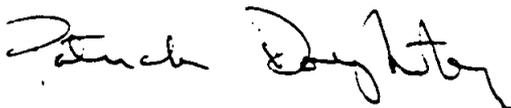
February 1, 1995

Page 2

Under the above "takings" legislation the federal government would find itself in the unenviable position of paying polluters not to pollute and paying individuals not to engage in conduct that could damage the health, safety or welfare of others. For instance, pursuant to S. 135, § 5, if the federal government requires a hazardous waste landfill operator to incorporate groundwater protection safeguards into a landfill's construction design, and the cost of such engineering requirements limit the overall return on the operators' investment by \$10,000, then the operator would be entitled to monetary compensation. The \$10,000 payment would be paid by the federal government agency which imposed the environmental safeguard. In essence, S. 135 would force the government either to pay the environmental component of the landfill operator's cost of doing business or to allow pollution to continue unabated. In the area of groundwater contamination, where the maxim of an "ounce of prevention equals a pound of cure" most assuredly rings true, the government would have no economic choice but to require the appropriate environmental safeguards and pay the landfill operator's environmental compliance costs.

In closing, the National Conference of State Legislatures is prepared to work with Congress to restrict unfair government intrusions while respecting measures that are necessary to protect the public health, safety and welfare. However, we do not believe that S. 135, or similar legislation, provides the appropriate solution to the issue of overreaching government action. If you have any questions regarding our position, please contact John Stanton in our Washington office at 202-624-8698.

Sincerely,



Patrick Dougherty
Chair, Committee on Children, Youth and Families
Missouri House of Representatives
Chair, NCSL Committee on Environment



NATIONAL CONFERENCE OF STATE LEGISLATURES

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JANE L. CAMPBELL
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PRESIDENT, NCSL

TED FERRIS
DIRECTOR, JOINT LEGISLATIVE
BUDGET COMMITTEE
ARIZONA
STAFF CHAIR, NCSL

WILLIAM POUND
EXECUTIVE DIRECTOR

NOTE: INDIVIDUALLY SENT TO ALL MEMBERS OF THE U.S. SENATE

April 19, 1995

Honorable Spencer Abraham
United States Senate
Washington, DC 20510

RE: Takings Legislation

Dear Senator Abraham:

On behalf of the National Conference of State Legislatures, I urge you to oppose S. 605, the Omnibus Property Rights Act of 1995, and other similar compensation "takings" legislation. If enacted, S. 605 would create a costly new entitlement program at the expense of laws that protect our mutual constituents. Besides unnecessarily increasing the cost and size of government, S. 605 would severely limit government's ability to respond to the public's demand for laws protecting their property values and ensuring their public health and safety.

Pursuant to S. 605 the federal government would find itself in the unenviable position of paying polluters not to pollute and paying individuals not to engage in conduct that could damage the health and welfare of others. While the National Conference of State Legislatures is greatly concerned with the impact of overreaching government actions on property owners, we believe compensation legislation will have severe and unintended fiscal and policy consequences.

As you are aware, the Fifth Amendment to the U.S. Constitution provides that private property shall not be "taken for public use, without just compensation." For over two hundred years federal courts have enforced our Constitution and have consistently protected private property owners from overreaching government actions. S. 605 does not attempt to codify present constitutional protections and guarantees. Rather, the legislation would radically expand the definition of a compensable government action and create an expensive new entitlement program. At its core, this takings legislation would severely limit the government's ability to govern by forcing government to pay for the right to regulate. As Justice Oliver Wendell Holmes long ago recognized, "government could hardly go on if to some extent values incident to property could not be diminished without paying for every...change in the general law." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

April 19, 1995
Page 2

In closing, the National Conference of State Legislatures is prepared to work with Congress to restrict unfair government intrusions while respecting measures that are necessary to protect all property values and the public's health, safety and welfare. However, given the close state-federal partnership that protects property values and public health and safety, and the increasing trend of delegating more authority to the states, it is crucial that Congress not abandon its commitment to the very laws and agencies that guarantee the success of our partnership. Compensation legislation does not provide the appropriate solution to the issue of overreaching government action.

If you have any questions regarding our position, please contact John Stanton in our Washington office at 202-624-8698. Thank you in advance for ensuring that our voices are heard.

Sincerely,



Jane Campbell
President, NCSL
Assistant Minority Leader
Ohio House of Representatives



NATIONAL CONFERENCE OF STATE LEGISLATURES

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JANE L. CAMPBELL
ASSISTANT MINORITY LEADER
OHIO
PRESIDENT, NCSL

NOTE: INDIVIDUALLY SENT TO ALL MEMBERS OF THE U.S. SENATE

April 27, 1995

Honorable Robert Dole
United States Senate
Washington, DC 20510-1601

TED FERRIS
DIRECTOR, JOINT LEGISLATIVE
BUDGET COMMITTEE
ARIZONA
STAFF CHAIR, NCSL

WILLIAM POUND
EXECUTIVE DIRECTOR

RE: Takings Legislation

Dear Senator Dole:

On behalf of the National Conference of State Legislatures, I urge you to oppose S. 605, the Omnibus Property Rights Act of 1995, and other similar compensation "takings" legislation. As a fiscal conservative and believer in limited government, S. 605 represents a "budget buster" that will increase the cost and size of government. During a time of tight budgets and scarce fiscal resources it appears imprudent to create a new entitlement program for landowners. Furthermore, as we all know too well, once an entitlement program is created it is very difficult to eliminate.

One of the most disturbing aspects of S. 605 is that the entire need for the legislation is premised upon anecdotal evidence. To date, there are no studies or reports that demonstrate that our nation's institution of private property is under siege. Rather, the need for this legislation is predicated upon isolated accounts by individual property owners. Creating a new, cumbersome and expensive government program without a clear factual basis and demonstration of need does not comport with sound notions of responsible government.

The proponents of takings legislation cite the Clean Water Act wetlands program as evidence that the institution of private property is under attack. However, the EPA and Corps of Engineers claim that fewer than one percent of wetland permit applications are denied each year. In the end, perhaps the facts do not matter; however, we believe they should. The day has long since passed when we could afford to presume the existence of societal ills and fashion expensive remedies to address them. Takings legislation represents an expensive solution in search of a non-existent problem. Furthermore, there is no indication that our judicial branch of government is insensitive to the constitutional rights of property owners or has abdicated its role in ensuring Fifth Amendment safeguards. To the contrary, recent Fifth Amendment jurisprudence leads to a conclusion in precisely the opposite direction.

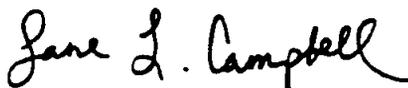
April 27, 1995
Page 2

Another disturbing aspect of S.605 is that it seeks to "tame" government by making it prohibitively expensive for government to act, even when such actions further the public interest. S. 605 seeks to frustrate government's ability to prevent public harms by forcing government to make cash payments in order to prevent such harms. For instance, pursuant to S. 605, if the federal government requires a hazardous waste landfill operator to incorporate groundwater protection safeguards into the landfill's design to safeguard local drinking water supplies, and the cost of such engineering requirements limit the operator's return on his investment by 33 percent, then the federal government must pay the landfill operator for the cost of such safeguards. Pursuant to S. 605, it is irrelevant that such drinking water protections are designed to safeguard the property values and health of an entire community that depends on the groundwater to provide its drinking water supply. In such a clearly foreseeable scenario, the government would ultimately be forced to pay the public health component of the operator's cost of doing business or allow groundwater contamination to proceed unabated. It is difficult to understand how forcing the government to pay the cost of such "externalities" either improves government or furthers the public interest.

Finally, it is important to comment on why federal takings legislation is important to state legislators. Many of the most important laws protecting our constituents are federal laws. Over the past two decades states have come to rely upon the state-federal partnership that is the cornerstone of our system of public health protection. Attempts to cripple federal protections, and the agencies which enforce such protections, directly impacts our constituents. Ultimately, if there is less public health protection generally, then there is less public health protection, specifically, for our constituents. Additionally, it is crucial to note that S. 605 applies to all federal laws. It would be a disservice to the breadth of S. 605 to characterize it as only applying to environmental protection measures.

Thank you for the opportunity to share these thoughts with you. In the interest of economy, I have omitted to discuss many of our concerns and have included our testimony before the House Judiciary Subcommittee on the Constitution to provide you with a further elaboration on NCSL's views. Despite the fact that NCSL's House "takings" testimony concerned H.R. 9, all of the arguments found therein apply with equal force to S. 605. If you have any questions regarding NCSL's comments, please contact John Stanton in our Washington office at 624-8698.

Sincerely,



Jane Campbell
President, NCSL
Assistant Minority Leader
Ohio House of Representatives

enclosure



National Conference of State Legislatures

OFFICIAL POLICY

GOVERNMENT REGULATION AND "TAKINGS" UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The National Conference of State Legislatures strongly opposes any section of legislation or regulation at the national level that would: 1) attempt to define or categorize compensable "takings" under the Fifth Amendment to the United State Constitution; or 2) interfere with a state's ability to define and categorize regulatory takings requiring state compensation. Such questions of constitutional dimension should remain a matter for case by case determination in line with Fifth Amendment jurisprudence.

ADOPTED JULY 1994