PROTECTING PRIVATE PROPERTY RIGHTS FROM REGULATORY TAKINGS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

FEBRUARY 10, 1995

Serial No. 42

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PROTECTING PRIVATE PROPERTY RIGHTS FROM REGULATORY TAKINGS

FRIDAY, FEBRUARY 10, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Charles T. Canady (chairman of the subcommittee) presiding.

Present: Representatives Charles T. Canady, F. James Sensenbrenner, Jr., Lamar Smith, Bob Goodlatte, José E. Serrano, and Barney Frank.

Also present: Kathryn A. Hazeem, chief counsel; Keri D. Harrison, assistant counsel; and Robert Raben, minority counsel.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The subcommittee will come to order.

I am pleased to be holding this hearing today on protecting private property rights from regulatory takings and I look forward to hearing from our witnesses. In the interest of affording members sufficient time to question each of the witnesses, we will place any opening statements in the record and commence with hearing the witnesses.

I will, without objection, submit my statement for the record and will hold the record open for my colleagues to do the same.

[The opening statement of Mr. Canady follows:]

OPENING STATEMENT OF HON. CHARLES T. CANADY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Chief Judge Loren Smith of the Court of Federal Claims recently voiced his concern over the inadequacy of the law of takings at addressing the impact of regulations on private property rights. In the *Bowles* v. *United States* decision, he stated:

> This case presents in sharp relief the difficulty that current takings law forces upon both the federal government and the private citizen. The government here had little guidance from the law as to whether its action was a taking in advance of a long and expensive course of litigation. The citizen likewise had little more precedential guidance than faith in the justice of his cause to sustain a long and costly suit in several courts. There must be a better way to balance legitimate public goals with fundamental individual rights. Courts, however, cannot produce comprehensive solutions. They can only interpret the rather precise language of the fifth amendment to our Constitution in very specific factual circumstances. . . . Judicial decisions are far less sensitive to societal problems than the law and policy made by the political branches of our great constitutional system. At best courts sketch the outlines of individual rights, they cannot hope to fill in the portrait of wise and just social and economic policy. (*Bowles* v. *United States* 31 Fed.Cl. 37 (1994).

Title IX of H.R. 9 is aimed at filling in "the portrait of wise and just social and economic policy" with regard to private property rights.

I agree with Judge Smith that we need to establish a mechanism which represents a "better way to balance legitimate public goals with fundamental individual rights." Currently, the burden of Federal regulations placed on the American public adds up to more than $500 billion per year. That is approximately one-third of the Federal budget. And the scope of Federal regulation continues to expand without agencies acknowledging the impact of their regulations on individual property owners who are singled out to bear the costs of land use regulations. Agencies need to recognize that when they limit the use of an owner's property, there are economic consequences. Agencies should have to weigh the benefits and costs of their actions carefully . . . paying close attention to the impact of those actions on individuals and the general public. Congress needs to require agencies to be more accountable to carry out the true intent of the statutes they are charged with enforcing—rather than continually extending their bureaucratic reach.

Supreme Court Justice Joseph Story stated that, "One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers."

A bill to protect private property owners will help to ensure that property is not subjected "to the will or caprice of" agencies.

Mr. CANADY. I would like to ask now that our first witness——

Mr. FRANK. Mr. Chairman, I have a brief comment.

I first want to apologize to the witnesses and to take exception to the fact that the subcommittee is having this hearing while simultaneously a bill is on the floor that is the business of the Judiciary Committee. We are now debating a prison bill which came out of this committee.

I think the practice of having this committee have an important hearing such as this while this committee's business is simultaneously being conducted on the floor is in error. I think it accounts for what will be a sparse attendance. I apologize to the witnesses.

And I ask unanimous consent that a statement strongly opposing this legislation from our colleague, Representative McCarthy, come in. I would note that she submits this and notes that she is a past president of the National Conference of State Legislatures with a lot of experience on this issue and I ask that her statement be included in the record.

Mr. CANADY. Without objection, the statement will be submitted to the record.

[The prepared statement of Ms. McCarthy follows:]

PREPARED STATEMENT OF HON. KAREN MCCARTHY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

I appreciate the opportunity to comment on Title IX of H.R. 9, the Job Creation and Wage Enhancement Act of 1995. This act is aptly named, because if passed and signed into law it will certainly result in a dramatic increase in both jobs and wages. Unfortunately, the people receiving jobs will be the bureaucrats and lawyers needed to interpret and then litigate vast sections of the bill.

As a past president of the National Conference of State Legislatures, I know that the question of regulatory "takings" is one that has been debated for years in various state capitals. Many states have adopted different strategies to chart and limit the scope of regulatory takings. However, not one state has created a remedy for takings that resembles the remedial structure set forth in Title IX of this bill. No state has opened its treasury to landowners in the manner prescribed by Title IX. In fact, no state has adopted a plan that would entitle landowners to cash payments for unproven regulatory takings. The people of Arizona had an opportunity to vote on a similar takings measure; they recognized the cost and voted it down.

Nevertheless, Title IX codifies these spendthrift practices into federal law and then goes on to do still more damage to fiscal discipline. Instead of borrowing from proven state plans to curb the impact of regulatory takings, the authors of H.R. 9 have set an enormously expensive course. I have two primary concerns with Title

IX as written. First, it would open the federal government up to millions of marginal claims. Second, it makes the federal government pay cash for the right to regulate even the most horrific and dangerous business practices of polluters and dumpers.

The Constitution plainly states in the Fifth Amendment that the government shall not deprive people of their land without compensation. However, it has always been the purview of the courts to decide the meaning and scope of that injunction. This bill wrests that authority away from the courts, which have consistently held that a "taking" occurs when a landowners loses 85% of the value of their land. Under H.R. 9, a landowner could claim that the land would lose 10% of its value under a regulatory action and thereby halt the action. The landowner never has to prove the actual value of the loss by claiming a set amount with the IRS or by selling the land.

If the government wants to proceed with the action, it must remunerate the landowner for the perceived loss. Should the landowner reject the government's offer, the parties settle their difference in arbitration. This seemingly judicious structure conceals the true nature of Title IX, which is, at its core, an entitlement program that shifts hard-earned dollars from middle-class Americans into the pockets of rich landowners.

The landowner receives cash and retains the land. There is no provision in H.R. 9 for the government's action to proceed, to consummate the dearly-bought taking. It is the taxpayer who is actually taken. Their tax dollars go into the coffers of landowners and the government is rendered impotent to execute laws designed to protect the lives, health, safety, and property values of all Americans.

This inequity is the root of my second primary concern with H.R. 9. The construction of the bill is such that the government will be unable even the most basic restrictions on environmental depredations. For example, a company handling nuclear waste could purchase parcels of land in the country. In a few years, houses can spring up on nearby sections. The waste company decides to utilize its land for storage of nuclear material. Except now they are placing their waste in the middle of a residential neighborhood. Can we stop them?

We can't stop the waste company unless we pay them cash first. We can't protect our children and our families from the most hazardous environmental practices without first opening the doors of the Treasury to polluters. Instead of the "polluter pays" concept which has directed our environmental regulations for decades, we have "taxpayer pays." Rather than restricting the destructive practices of one landowner to secure the land values of all landowners, we still have exactly the opposite.

Perhaps the most frustrating aspect of Title IX is that it makes no attempt to draw from the experience of the states. Both the National Governors' Association and the National Conference of State Legislatures oppose compensation-based remedies for takings. States have adopted laws to create "Property Impact Statements," to examine and halt truly devastating takings, and track the cost of regulatory takings for private landowners. Some states have left the takings issue to the courts, which has always been the recourse for landowners who feel their land has been taken without compensation.

The courts have not been abrogating their responsibility to examine these cases. In some instances, such as the recent Supreme Court decision of *Dolan* v. *City of Tigard,* courts have been making new law in the realm of property takings. Our Constitution is a vital document, and we should reexamine the meaning of provisions like those in the Fifth Amendment when appropriate.

As members of Congress, as keepers of the public purse, we should not interfere in an issue that properly belongs in the court. If we decide that takings represents an area of essential public interest, then we should work together in a bipartisan manner to address takings. We should not, however, sacrifice fiscal discipline or basic environmental integrity when the states have charted so clear a course for us. As currently written, we should not approve Title IX of H.R. 9.

Mr. CANADY. We are pleased to have our first witness here today, the Honorable John Schmidt. Mr. Schmidt is Associate Attorney General. He is accompanied by Christopher Schroeder from the Office of Legal Counsel from the Department of Justice. We would ask that you take 5 minutes to summarize your testimony, and without objection, your entire prepared statement, as well as the statements of all other witnesses today, will be placed in the record.

We appreciate your time in being here today and look forward to your testimony.

STATEMENT OF JOHN R. SCHMIDT, ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. SCHMIDT. Thank you, Mr. Chairman and other members of the committee. I am pleased to be here to present the views of the administration on title IX of H.R. 9 and other similar proposals that would establish a new legal regime for the compensation of property owners who are affected by Federal actions.

I think in order to be as concrete as possible, I will concentrate particularly on title IX, which is the part of Contract With America which has had the most attention, although clearly these remarks would apply to other similar proposals as well. This proposal is of great concern to us as the Justice Department and to others in the administration, and I think it should be of great concern to members of this committee and other Members of Congress.

I come to this subject from the perspective of a position in the Justice Department where I have overall responsibility for most of the Federal Government's legal matters that involve relationships with private property owners. And I think it is only when you look at this proposal in relation to the whole range of Federal Government activity that you begin to understand how sweeping and radical and ultimately how dangerous it is.

I think it is dangerous to us as taxpayers who want to avoid indeterminate and potentially massive new costs imposed upon the Federal Government. It is dangerous to us as citizens who want to see government processes simplified rather than adding new layers of bureaucracy and complexity.

It is dangerous to us as property owners ourselves whose homes and businesses depend upon protection which can only be assured through government action. And above all, I think it is dangerous to us as individuals whose families want to live in communities which are healthy and safe and have clean air and water and other qualities which can only be assured through a level of government activity in the modern world.

In saying all this, I do not mean to be understood, and I don't want anything I have said or intend to say to be understood, as diminishing or minimizing in any way the importance of private property. Private property is a bedrock American principle. It is a bedrock principle in our Constitution. It is embodied in the takings clause of the fifth amendment which provides that the Government shall not take private property for public use without just compensation.

The Chief Justice reminded us that the takings clause of the fifth amendment is as much a part of the Bill of Rights as the first or fourth amendments. And I think he is absolutely right about that. And I think we have learned around the world that the values that are embodied in those other amendments can only survive and thrive in an environment where private property is fully respected.

Like those other amendments, the takings clause has been subject to a wide range and volume of litigation over the years. And I want to just, if I could, quote two sentences out of a statement from 126 law professors that was submitted a while ago on this

issue. I think it summarizes where the law currently is. They said, "The courts have developed a complicated body of precedents regarding when property use requires compensation."

Generally speaking, these precedents commit the courts to a fact-specific balancing of economic loss to the property owner, the character and purpose of the Government regulation, and the justifiable expectations of the owner about what he or she would be able to do with his or her property.

I think that these fact-specific decisions over the years reflect what is the essential genius of the American constitutional tradition. The decisions are complicated because the relationship of government to private property is complicated in the modern world. As indicated by the Supreme Court decision that I was just quoting from, this is an evolving body of jurisprudence, and there are a lot of complicated and interesting questions about the direction it should take.

H.R. 9, however, would go far beyond any principle which the courts have ever adopted or even seriously contemplated. It would require compensation by the Federal Government whenever regulatory action is taken which imposes a "limitation or condition on use of property" which "results in a reduction in the value of the property equal to 10 percent or more."

The term "use" is then defined in the most expansive possible terms to mean any prior, existing or potential utilization of property. A new administrative procedure is established for the implementation of this compensation requirement. The only significant exclusions that are established are for situations where the use of the property is in violation of State or local law or where the President makes a determination that the use would pose a serious and imminent threat to public safety.

It doesn't require a lot of reflection to realize how sweeping these provisions are. The fact is that virtually everything that the Government does—whether it is protecting the public health and safety, guarding against natural disasters, or preventing the deprivation of individual rights—imposes some limitation or condition on the use of property and affects the value of property. I think that what this proposal does is turn every government action into a lawyer's argument. It really is a lawyer's dream in which they can then argue about whether the impact in each individual case or any individual case represents a deduction of 10 percent or more. If you find that there is such an impact, then the cost of that compensation must be imposed upon all the rest of us as taxpayers. And if ultimately we are unwilling to bear that burden, then the regulation must be foregone entirely.

I think that this is a consequence which, as I say, has an immense impact on the ability of the Government to function in a whole range of activity. The prepared statement runs through some of those. I really think it is a situation where you could take any area of government activity, sit down and begin to analyze what the impact of this proposal will be, and what you will find is that there is a very significant potential additional cost which is being imposed or, alternatively, that the ability of the Government to function in areas where it is currently functioning, where the American people expect it to function, is going to be affected.

I can see that I have exhausted my time. I am happy to stop and respond to questions. Let me say so there is no ambiguity about it, we are opposed to these proposals.

[The prepared statement of Mr. Schmidt follows:]

PREPARED STATEMENT OF JOHN R. SCHMIDT, ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

INTRODUCTION

Mr. Chairman, and Members of the Subcommittee, thank you for the opportunity to provide the Administration's views regarding various legislative proposals, including Title IX of H.R. 9, the "Job Creation and Wage Enhancement Act of 1995," that seek to expand the traditional concept of "takings." I am pleased to be joined by Christopher H. Schroeder, a professor at the Duke University School of Law and a consultant to the Office of Legal Counsel in the Department of Justice.

It is sometimes worthwhile to state the obvious just to ensure that no one is laboring under any misconceptions. This Administration supports, as do all Americans the protection of private property rights. The right to own, use and enjoy private property is at the very core of our nation's heritage and our continued economic strength. Those rights must be protected from interference by both private individuals and governments. That is why the Constitution ensures that if the government takes someone's property, the government will pay "just compensation" for it. That's what the Constitution says. That's what the President demands of his government. In addition, we are taking measures and pursuing approaches to protect private property similar to those advanced in the legislation by Senator Dole. If governmental regulations impose unreasonable restrictions or unnecessary burdens on the use of private property, this Administration is committed to reforming those regulations to make them more fair and flexible. We are currently developing ways to improve federal programs to eliminate adverse effects on small landowners.

However, most of the takings proposals currently being considered by Congress will do nothing either to protect property owners or to ensure a fairer or more effective regulatory system. Rather, we are convinced that those proposals that require compensation to landowners for government action that reduces the value of that land are a direct threat to the vast majority of American homeowners.

Further, passage of any of these compensation schemes into law will force all of us to decide between two equally unacceptable alternatives. The first option would be to cut back on the protection of human health, public safety, the environment, civil rights, worker safety and other values that give us the high quality of life Americans have come to take for granted. The money cost of these protections after passage of such legislation would be much too high. Ironically, if we chose this path, the value of the very property this legislation seeks to protect would erode. The other option would be to do what these proposals require: pay employers not to discriminate, pay corporations to ensure the safety of their workers, pay manufacturers not to dump their waste into the streams that run through their property, pay restaurants and other public facilities to comply with the civil rights laws. That is, we would be forced to pay large landowners and corporations to follow the law. In the process, we would, of course, end any hope of ever balancing the budget of the federal government.

No matter what avenue we pursue, hardworking American taxpayers will be the losers. Either they will no longer be able to enjoy the clean skies, fresh water, safe and fair workplaces that they have come to expect or they will be forced to watch as their hard-earned wages are collected by the government as taxes and paid out to corporations and large landowners as takings compensation. The Administration will not and cannot support legislation that will hurt homeowners or cost middle-income families billions of dollars. That is why we oppose the takings proposals found in H.R. 9 and similar bills.

The Fifth Amendment to the Constitution of the United States

As you know, the Fifth Amendment to the Constitution of the United States provides that "private property [shall not] be taken for public use, without just compensation." That short phrase has provided the standard for compensation cases since the founding of our country. Before we consider proposals to alter those standards, it is worth spending a moment discussing what the Constitution provides and why we believe it has served the American people so well over the last 200 years.

The genius of the Constitution's Just Compensation clause is its flexibility. In deciding whether a regulation is a compensable taking, the Constitution requires the government, and if necessary the courts, to consider the regulation's economic im-

pact; its nature and purpose, including the public interest protected by the regulation; the landowner's legitimate expectations; and any other relevant factors. The ultimate standards for compensation under the Constitution are fairness and justice. Thus, we have never recognized an absolute property right to maximize profits at the expense of the property rights of others. For example, reasonable zoning by local governments has long been accepted as a legitimate means to promote safe and decent communities without requiring the payment of compensation to those whose property values might be adversely affected. Indeed, we recognize that the value of property in the community as a whole is thereby enhanced. When the government goes too far, however, compensation must be paid.

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

It goes without saying that economic impact is an important consideration in deciding whether fairness and justice require the payment of compensation to a landowner where regulations restrict land use. But in the very case that established the concept of a regulatory taking—*Pennsylvania Coal Co.* v. *Mahon* (1922)—the Supreme Court was careful to emphasize that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." From the earliest days of our Republic, we have recognized that the government has a legitimate, and indeed a critical, role to play in protecting all of us from the improper exploitation of property. In America, we have an opportunity to use our property freely—within the bounds set by our communities. We have also recognized that our rights as citizens entail a corresponding responsibility to refrain from exercising our rights in ways that harm others.

The Pending Compensation Bills

The pending compensation bills disregard our civic responsibilities and set aside our Constitutional tradition. They replace the Constitutional standards of fairness and justice with a rigid, "one-size-fits-all" approach that focuses on the extent to which regulations affect property value, without adequate regard to fairness, to the harm that a proposed land use would cause others, to the landowner's legitimate expectations, or to the public interest. They ignore the wisdom of the Supreme Court and would wipe out many vital protections.

These bills would require the government automatically to pay compensation when regulation decreases property value by a specified amount. Title IX of H.R. 9 is typical. Title IX would require the federal government to pay a property owner for any loss of property value if (a) the reduction in value is caused by a final agency action that limits or prohibits a use of the property that would be lawful but for the agency action, and (b) the reduction in value is equal to ten percent or more. The proposal defines "final agency action" as any action that binds a property owner with respect to the use of the property, including the denial of a permit, the issuance of a permit with conditions and the issuance of a cease and desist order. Although there are other proposals pending in Congress, the basic contours of the compensation schemes are all similar to that reflected in Title IX, and I will therefore use that proposal as a framework for my comments.

We believe that these bills threaten to hurt homeowners, diminish property values and create a budget-busting, bureaucratic maze. In essence, the compensation proposals prevent the federal government from imposing critical limitations on the way private property owners use their land unless the government and American taxpayers are willing to pay the landowners not to engage in the prohibited activity. The breadth of this rule is staggering. First, this limitation on governmental action applies without sufficient regard to the nature of the activity the agency seeks to prohibit or to the harm those activities might cause to the health or property of their neighbors. In many cases, property owners, most typically large corporations, would be free to use their land in whatever reckless manner they desire without regard to the impact their activities have on their neighbors and the community at large. Second, a landowner would be able to claim a taking whenever his or her application for a permit is denied. For example, a landowner could apply for a permit to build a waste incinerator. If that permit is denied for whatever reason, the government could be obligated to pay the permit applicant. I do not think it is much of a stretch to conclude that applying for federal permits may become a favored form of low-risk land speculation. The less likely a permit application is to be granted, the more attractive it may be under these schemes.

By imposing a broad-based compensation requirement based on reductions in property value, without sufficient regard for the public interest, these bills would hurt homeowners, cost the taxpayers billions, create huge new bureaucracies, and undermine the protection of human health, public safety, civil rights, worker safety, the environment and other protections important to the American people.

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

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

Untenable Fiscal Impact: Because these bills are so broad and inflexible, the potential budgetary impacts are almost unlimited. Even if new protections were scaled back, these bills could still have a staggering fiscal impact by requiring compensation for statutorily compelled regulation and other essential government action. The payments would go to those who would like to use their property in a way that would be contrary to federal law, typically large corporations and wealthy landowners who have the economic power to harm others if left unregulated.

These bills would also generate a flood of permit requests to federal agencies by property owners who have no intention of development, but rather seek an unjustified windfall for speculative future uses through a compensable permit denial or permit condition. These bills might be construed to require compensation even where the landowner knew about the regulation when purchasing the property, and even where the landowner's purchase price was reduced due to the restriction on land use. And corporations could keep coming back for more compensation by applying for new permits under different programs. If the restriction is subsequently lifted, the landowner would have no obligation to repay.

These bills would also codify the unreasonable notion that the American people should compensate polluters not to pollute, and that taxpayers must pay people to refrain from using their property in a way that harms others and violates federal law. If we continue to provide needed protections for all Americans, the taxpayer would be forced to find ways to pay the compensation prescribed in the bills to force others to follow the law. By requiring unfair compensation payments to large corporations and other wealthy landowners, these bills would create an entitlement scheme at the expense of ordinary, middle-class taxpayers.

Huge New Bureaucracies: These bills would also require the creation of huge and costly bureaucracies in every federal regulatory agency to evaluate compensation requests. For example, H.R. 9 requires the head of the relevant federal agency to determine whether landowners are entitled to compensation due to some agency action within 180 days of receiving the request of the landowner for compensation. It also provides for binding arbitration if the agency head determines the property owner is not entitled to compensation. We are confident that the sheer volume of entitlement requests under these schemes would be overwhelming. Agencies with little experience in addressing the novel compensation claims under these bills would be called on to resolve countless complicated legal and factual issues. They would be required to interpret and apply the nuisance laws and other laws of all fifty states, thousands of municipal codes, and the vague and ambiguous provisions of these bills. The result may well be more government, not less.

A Threat to Vital Protections: As I mentioned earlier, the passage of any of these compensation bills would pose a serious threat to the health, public safety and environmental protections that allow Americans to enjoy the high standard of living we have come to expect and demand. The costs of these protections should Title IX of H.R. 9 or an equivalent become law will simply become too costly or will bust the budget.

Certain bills apparently attempt to address this concern by providing exceptions to the compensation requirement where the land use at issue would violate state or local law or where it would pose a "serious and imminent threat." We do not believe these narrow exceptions would adequately provide for human health, public safety, and other vital protections that benefit every American citizen.

For example, they do not address *long-term* risks. The discharge of pollution into our Nation's air, land, and waterways for instance, often poses long-term health risks that would not be covered by the exceptions.

Nor do these exceptions to the compensation schemes address *cumulative* threats. Very often, the action of a single person by itself does not significantly harm the neighborhood, but if several people take similar actions, the combined effect can devastate a community. Pesticide use, wetlands destruction, discharges of toxic pollutants to air and water, mining, or other land use by an individual property owner might not constitute a nuisance or imminent threat by itself and, thus, may not violate any state or local laws. However, in conjunction with similar use by nearby landowners, they seriously impact the health or safety of a neighborhood.

Furthermore, there are some critical public-safety issues that are governed exclusively by federal law, such as nuclear power plant regulation. As a result, public safety in these matters could be held hostage to the government's ability to pay huge compensation claims.

Nor do the exceptions address uniquely federal concerns, such as national defense and foreign relations. For instance, had compensation legislation been in effect during the Iranian hostage crisis, federal seizure or freezing of Iranian assets could have given rise to numerous statutory compensation claims.

The state-law exception ignores the critical role that federal legislation plays in protecting the public interest. Pollution and other adverse effects of improper land use do not respect political boundaries. By discarding the advantages of uniform, national standards for federal programs, these bills would leave us with a patchwork quilt of confusing and inadequate health and environmental protection. It is difficult to overestimate the ensuing public confusion, the uncertainty within the business community, the massive litigation, and the damage to human health, public safety, and the environment.

The exceptions also fail to recognize that there are many important public interests that are not related to health and safety and not fully addressed by state law. For example, these bills threaten civil rights protection, worker safety rules, and other protections that might be viewed as a limitation on land use. In the 1960s, segregationists argued that our landmark civil rights laws unreasonably restricted their property use, and that they should be compensated under the Constitution simply because they were required to integrate. The Supreme Court rejected this argument, finding the Constitution flexible enough to allow us to protect basic human dignity, even if that protection restricts land use to some extent. A much different result could occur with respect to new civil rights protections if rigid compensation legislation were to replace the flexible Constitutional standards.

Claims Under Proposed Compensation Statutes

Much of the debate about these issues has been fueled by what appear to be horror stories of good, hardworking Americans finding themselves in some sort of regulatory nightmare where the government is forbidding them from using their land in the way that they want. It is important to look closely at these stories for they often are not as they first appear. But, as I will discuss in a moment, this Administration is committed to reducing unreasonable and unfair burdens on middle-class landowners. Before I address that issue, I want to draw the attention of the distinguished Members to another set of horror stories: those that may result if these compensation bills become law. I am confident that these are not the consequences any of us want:

Suppose a coal company in West Virginia removed so much coal from an underground mine that huge cracks opened on the surface of the land, rupturing gas lines, collapsing a stretch of highway, and destroying homes. If the Department of the Interior required the company to reduce the amount of coal it was mining to protect property and public safety, it is likely that it would have to compensate the company for the profits it was no longer able to generate through its overmining.

Suppose a restaurant franchisee challenges the Americans with Disabilities Act provisions governing access for disabled individuals in public accommodations as a "taking." If the franchisee were able to show that the requirements of the ADA somehow reduced his profits (perhaps by showing that a required ramp reduced the number of tables allowed in the restaurant) and thus diminished the value of his property, he probably would be entitled to compensation.

Suppose a group of landowners challenge the Federal government's implementation of the National Flood Insurance Program which places certain restrictions on the land use of participants designed to decrease the risk of flooding. They may be able to successfully argue that such restrictions diminish the value of their land.

Suppose a property owner proposes to build a hazardous waste incinerator in a residential neighborhood. If the EPA denies the required federal permit due to long-term health risks to nearby residents, the property owner would likely be entitled to compensation under some of these bills.

Suppose the Army Corps of Engineers denies a developer a fill permit under section 404 of the Clean Water Act because such development by the applicant and other nearby landowners would increase the risk of flooding of neighboring homes. Even if the Corps granted a more limited permit that would allow for the safe development of the property, compensation could still be sought from the Corps.

Suppose the Federal government bans the use of a dangerous pesticide such as DDT to reduce long-term cancer risks and birth defects. Compensation might well be required because such a ban could lead to short-term reductions in property values.

These are just a few examples of the type of problems the "one size fits all" approach of these compensation proposals raises. It is worth noting that the first three examples reflect actual situations in which property owners challenged government conduct as constituting "takings" entitling them to compensation. In each case, the court, often after noting the public benefit derived from the government action, concluded that there had been no taking of property. If Title IX of H.R. 9 or an equivalent proposal becomes law, a different outcome in each case may well be the result.

It is because of these far-reaching and ill-conceived consequences that the Administration is in good company in opposing these bills. The National Conference of State Legislatures, the Western State Land Commissioners Association, and the National League of Cities have also opposed compensation bills of this kind. Religious groups, consumer groups, civil rights groups, labor groups, hunting and fishing organizations, local planning groups, environmental organizations, and others are on record as opposing compensation legislation. More than 30 State Attorneys General recently wrote the Congress to oppose takings legislation that goes beyond what the Constitution requires.

More than 20 state legislatures have considered and declined to adopt takings bills. Just a few months ago, the citizens of Arizona voted down by a 60 to 40 margin a process-oriented takings bill subject to many of the same criticisms as the compensation bills. States are concerned that compensation bills would cost taxpayers dearly and eviscerate local zoning ordinances, and that family neighborhoods would be invaded by pornography shops, smoke-stack industries, feedlots, and other commercial enterprises. The Administration shares these States' concerns that compensation schemes would bust the budget and curtail vital protections. Indeed, some of the federal compensation bills would subject various State and local actions to the compensation requirement, raising significant implications for State-federal working relationships. Just as we are working to ease unfunded mandates to the States, these measures could dramatically increase them.

A Better Approach To Protecting Property Rights

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

For example, as part of our efforts to reinvent government, the Administration has reformed specific federal programs to reduce burdens on small landowners and others. Many individuals and small businesses are already allowed to fill portions of certain wetlands without needing to get an individual permit, and they are not required to notify the Corps where land-use activities would affect less than one acre. These situations are covered by a nationwide permit implemented to reduce bureaucratic burdens on small landowners. The Army Corps of Engineers is reforming its wetlands program to make the permit application process cheaper and faster. It is setting deadlines for permit decisions, and not requiring detailed evaluations of small projects that have minor impacts. This will substantially reduce or eliminate the burden for small landowners in many cases.

At the Interior Department, Secretary Babbitt has already implemented several changes to the endangered species program to benefit landowners. Under a new "No Surprises" policy, property owners who agree to help protect endangered species on their property are assured their obligations will not change even if the needs of the species change over time. And just this week, under a comprehensive plan for the protection of the Northern Spotted Owl, the Fish and Wildlife Service announced it will propose a regulation that would generally exempt landowners in Washington

and California owning less than 80 acres of forest land from certain regulations under the Endangered Species Act associated with the Northern Spotted owl.

In addition, we believe regulators should carefully consider the potential impact of proposed rules on private property. In contrast to the approach of the compensation bills, which do not provide tools to prevent burdens on property, we are reinventing government by developing specific ways to prevent federal programs from resulting in unreasonable burdens. The Administration is also taking action to make sure that federal programs are not duplicating State, tribal, and local programs, and transferring authority to those governments that are closer to the people.

We are especially concerned with the fair treatment of middle-class homeowners, small businesses, and family farmers. We are currently developing measures to provide relief by taking action to reform programs to make them more fair and flexible. For example, we are looking at methods in the wetlands and endangered species programs that will ease or eliminate the regulatory burdens on small landowners.

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

In addition, under Title IX of H.R. 9, compensation would be made from the available discretionary funds of the agency involved. If, however, there is insufficient discretionary moneys, reimbursement must be paid from mandatory funds, thus creating new mandatory spending. Title IX, therefore, could affect direct spending, and would be subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990.

CONCLUSION

The Administration supports and values private property rights of all landowners as provided for in the Constitution. We must find ways, however, to ensure that individual property rights are protected in a manner that does not threaten the property rights of others, does not create more red tape, more litigation, a heavier tax burden on the middle class, and does not undercut the protection of human health, public safety, the environment, civil rights, worker safety. Accordingly, we oppose the compensation requirements proposed in the pending Contract Bill or in other pending legislation. Those bills are a blunderbuss approach that would provide unjust windfalls to wealthy corporations at a tremendous cost to the health, safety, and pocketbooks of middle-class Americans.

Mr. CANADY. I am glad you made that clear.

Mr. SCHMIDT. They are really not the right way to get at the problems that I think the people who sponsored these proposals are trying to get at. There are alternatives, and I will be glad to explore those with members of the committee.

Mr. CANADY. Thank you for coming. I appreciate your testimony. I think I understand where you are coming from. I don't want to focus on the issue of the definition of a taking, because we probably would not reach agreement on that. Let me ask you, do you think the current system for compensating people and for people to obtain a remedy when there has been a taking is adequate? Do you think it is an efficient and fair way to deal with these claims?

Mr. SCHMIDT. I think that what the Constitution establishes and what the courts have done in interpreting the constitutional requirement over the years reflect a basically appropriate judgment about when there should be a compensable taking. I am sure that in particular areas we can do a better job in the administration of that compensation scheme.

At the Justice Department, we have been trying to do that. For example, we have been trying to develop alternative dispute mechanisms.

Mr. CANADY. In principle, would be opposed to establishing some sort of mandatory arbitration procedure?

Mr. SCHMIDT. Well, I am willing, and I know the Attorney General is willing, to think seriously about anything not only in the compensation area, but in any area that can present good alternatives to full-scale litigation.

We have been working on trying to move the Justice Department into the area of alternative dispute resolution. It is something our people have talked about, as well as prior administrations, but, when you look at it, not a lot of people have done much about it.

I would start with the fact that we believe in and intend to require people in every area to look at when alternative dispute resolution is possible. And we intend to actually put in place a mechanism to see to it that in all the areas of the Justice Department people do that.

Your bottom line question, would we go so far as to commit the Government to compulsory arbitration? I would personally be willing to think about it. I think that there are some fundamental principles involved in determining whether you want the Federal Government's expenditure of funds to be determined through something other than ultimately an article III court, but I am willing to think about it.

Mr. CANADY. I have a particular question to ask. On December 9, 1994, the Department of Justice settled the case of *Roberge* v. *The United States* and agreed to pay the plaintiffs in that case $338,000. The settlement was compensation for a temporary taking of the plaintiff's property.

During discovery in the case, a memo was found that was sent from an Army Corps of Engineers officer in Maine to an enforcement officer. "The project officer," wrote Roberge, "would be a good one to squash and set an example."

Would you explain why the Department of Justice settled this particular case and whether the discovery of the memo was a factor in the Department's decision to settle?

Mr. SCHMIDT. I don't know the facts of that particular case. I would be glad to get the answer to you and respond to it specifically. But I do not know the particular case.

Mr. CANADY. We would appreciate your responding to that question. And in connection with that, I would also like to know what the original settlement offer was in that particular case and the difference between the original settlement offer and the final settlement. And why there was the difference between the original offer and the final settlement offer.

I would also like to know how much time and money in addition to the settlement amount the Government spent in fighting and in litigating that particular case.

The National Law Journal reported that in its brief filed in *Sweet Home Chapter of Communities for a Great Oregon* v. *Babbitt,* the Government argued that the regulatory harm definition contained in the Endangered Species Act is much more narrow and requires the evidence of actual physical impacts—killing or injury—

to wildlife. But the Fish and Wildlife Service seems to attribute a different definition to harm when enforcing regulations.

Secretary Babbitt said when a species is listed, there is a freeze across all of its habitat for 2 to 3 years while we construct a habitat conservation plan.

Could you explain the discrepancy between the two definitions of harm, the one set forth by the Department of Justice and the one set forth by the Fish and Wildlife Service?

Mr. SCHMIDT. Maybe Chris would be in a position to respond.

Mr. SCHROEDER. Unfortunately, Mr. Chairman, you have both of us at a disadvantage.

Mr. CANADY. Perhaps what we will do on these questions——

Mr. SCHMIDT. You are welcome to submit them.

Mr. CANADY. We will submit them to you in written form and ask you to respond.

Mr. SCHMIDT. If I could just make a general response. It seems to me that what you are asking are questions about the Endangered Species Act. I think our general approach to this area is that the right way to get at problems, if there are problems in the administration of the Endangered Species Act or the Clean Water Act or any other act, is to look at those problems and try to solve them.

If they involve administrative failings on our part, then we should respond to those problems. The fundamental flaw in what is before you is that it does not involve that kind of individualized judgment about what should or should not be done in the endangered species area or the wetlands area or any other. It takes an abstract principle and applies it not only to those statutes but also to every other Federal Government statute in a way which has completely unforeseen and unforeseeable consequences and which imposes costs way beyond where we are now.

I think just to make the general point, which I think is important, is that it is exactly that kind of particularized discussion of problems that we think is the right way to solve them, not the kind of across-the-board proposal that you have on the table now.

Mr. CANADY. Thank you.

Mr. Frank.

Mr. FRANK. Mr. Schmidt, I appreciate your coming, and let's talk about the bill. The one thing we have before us that the Republicans have submitted is title IX of their comprehensive bill. And I want to see if I—if you share my understanding of it.

It is a fairly flat statement, anything that reduces the value of the equal to 10 percent or more and then it has some exceptions and we have seen the most important exception is a limitation on any use of private property imposed pursuant to a determination by the President that the use poses or would pose a serious and imminent threat to public safety where the health and safety of other individuals who are often on the property.

Would that seem to require a determination by the President for each environmental action? How often would the President have to determine that? I would assume that much of what EPA does, for instance, would put a limit of 10 percent on the property use for landfill, other things. What would your interpretation be? How often would the President have to make sump determinations?

Mr. SCHMIDT. Well, I read that as an extraordinarily narrow exception which is intended to get at circumstances where the President of the United States himself literally makes a determination that the imposition of a limitation is necessary and that standard is a very tough one.

I would think if that were the only exemption available, in order for EPA to function or indeed other government agencies to function, we would have to go to the White House every morning and go through a list of things and ask whether the President will approve these. I think what is intended is that it will almost never happen and in the rare circumstance——

Mr. FRANK. I would agree. There are a few other limitations. I don't want to unduly minimize the bill. It does say that any limitation imposed regarding the Federal navigational servitude is prohibited. Somebody who wrote this bill lives by a river, I guess. Although I assume, again, if I were conspiratorial as my colleagues, they would decide that everything impinged on the Federal navigational servitude. I don't know if you could have a back door to a river. A back channel.

And then there would be a limitation only if it violated applicable State or local law. The limitation I bring to you is the only one. The other two limitations are as I read it, a navigational servitude or a violation of State or local law. So any environmental regulation or any health and safety regulation would be exempted. And not only would the President have to do it individually, but the President has to apply—he has to say it imposes a serious and imminent threat to public health and safety.

Since it says serious and imminent, if the President found that it was a serious threat to public health and safety and it was not imminent, would he be able to make such a finding?

Mr. SCHMIDT. No, I don't think he would. He would have to say it was serious and imminent.

Mr. FRANK. If he saw a serious threat coming, he would have to wait until it was imminent before doing anything about it. It also says it would have to be a serious and imminent threat to public health and safety or to the health and safety of workers or other individuals lawfully on the property.

Now, using the only reasonable construction we can, obviously that is differentiating between the public health and safety and workers and individuals. We are talking about a numerical distinction. The public health and safety is the generality of the public, so they say even if it is not going to hurt the whole public, you can make this exception if it is going to be a serious and imminent threat to the health and safety of workers or individuals lawfully on the property.

What about people who happen to be lawfully 100 feet from the property? If there was a facility not large enough to implicate the entire public health and safety, but a worksite 100 feet from the property and something happening on the property was causing a threat, would the President be able to make such a determination in this case under this statute?

Mr. SCHMIDT. Presumably not under that language.

Mr. FRANK. I appreciate that. I understand that we have a serious issue here, but we also have the worst written statute I have

ever seen. And the relevance of that is that we are in a big hurry here with this Republican Contract. We are having this hearing. The chairman is in a rush. We are rushing through it.

No opening statement because we have a bill on the floor and we have other things. And the problem, I am afraid, that we are going to take this complicated subject and under this arbitrary, self-imposed, politically motivated deadline, we are going to deal with this inadequately and the example of this is that this statute is sort of a joke.

If we were, in fact, going to live by the law, administer the Clean Air Act as we now administer it and protect people with regard to hazardous substances and nuclear waste, I wonder if I could get from the administration in writing what would it cost, assuming that the President was not able to make all these findings, what would be an estimate of what it would cost the Government if we wanted to go ahead with the environmental and safety regulations we now have. And I doubt that you have that in your head.

Mr. SCHMIDT. We will try to come up with it. I think one of the problems with this bill is that no one knows what that figure is. I think we know if we take the whole range of government regulation which this bill would affect that the figure is up in the billions of dollars. No one is going to be able to come up with that. We will come up with it as clearly as we can.

Mr. FRANK. Let's not exaggerate. Why don't you give me a figure, then, which it could not conceivably be less than. Thank you.

Mr. CANADY. Mr. Serrano. I have a couple of other questions I would like to ask. We will have a second round of questions with this witness.

Mr. Frank has referred to the circumstances in which compensation is not required as defined in the bill.

He focused on the second section, section B, which requires a determination by the President. I think actually the significant provision in this section is in A, which provides that a private property owner shall not be entitled to receive compensation under this subsection for a limitation on any action that would constitute a violation of applicable State or local law, including an action that would violate a local zoning ordinance or would constitute a nuisance under any applicable State or local ordinance.

We can argue over the scope of this and whether this is a broad enough exemption or not. And I would not be surprised if we see some refinements in this language or other language in the bill. That is certainly not precluded in this process.

But wouldn't it be true that there are at least some Federal regulatory activities that would constitute a nuisance under Federal law and that would for that—I am sorry, a nuisance under applicable State law and would not be subject to the compensation requirements—or that would go to controlling activity that would constitute a nuisance and therefore would not be subject to compensation under this bill?

Mr. SCHMIDT. Well, there would be some. But, of course, if something is in violation of State or local law, then we really are not in a situation where we need the protection of Federal law to deal with the problem. It seems to me where this bill has its impact—and where the dangerous consequences are—is that in any area

where we have determined and Congress has determined that there is a Federal interest, a national interest, and we therefore have passed a Federal statute which presumably goes beyond what is already protected against under local law or deals in an area where local law is not applicable, then this bill is saying that the Federal Government must pay compensation if there is any impact on any private landowner.

So, excluding those situations where there is already a violation of State and local law doesn't seem to do anything to get at the fundamental problem which is what are you doing to our ability to deal with national problems or to solve problems in ways that the Federal Government has decided are necessary, even in the face of existing State and local regulations. So it is correct to say that there would be some situations where that exemption would apply. I don't think it goes very far or gets you anywhere with the heart of the problem.

Mr. CANADY. Let me ask you another question. Mr. Smith specifically asked that I pose this question to you. If the Federal Government decides that private property should be used to preserve wildlife and imposes requirements that essentially prevents a property owner from using the property for any other purpose, do you believe that the owner of that property is entitled to some compensation from the Federal Government?

Mr. SCHMIDT. Well, I think that the existing constitutional standards would come into play. And it is conceivable that under some circumstances that person would be entitled to compensation. I think the whole heart of those standards is that one takes into account whether that person had a legitimate expectation of using its property in that way in the first place.

Mr. CANADY. What way is that?

Mr. SCHMIDT. The way he is proposing to use it.

Mr. CANADY. What if he cannot do anything with it, but pay taxes on it and let the——

Mr. SCHMIDT. If he has lost all ability to use the property in any sort of functional way then it may be that, under the existing constitutional standard, he would, in fact, have a claim. Although even then the courts would take into account the nature of the Federal interest which is being asserted.

But if, in fact, his property was being affected by a statute in ways that he could have anticipated when he originally purchased the property, then that might well undermine any claim that he might have. Those are the factors that the courts have taken into account.

Mr. CANADY. Well, if the landowner is excluded from making any productive use of his property, how is his situation different than the landowner who has the Government come along and pave a highway or an interstate over his property?

What is the real difference between the status of the one property owner who simply cannot do anything with his property and the other property owner whose property has been paved over by the Federal Government?

Mr. SCHMIDT. It seems to me that the fundamental point that the court decisions have made is that we all own property in this country with an expectation that it will be subject to reasonable forms

of regulation which are designed to achieve and to ensure important public interests.

If the Government comes along and takes over somebody's particular property in ways that are particular to that individual's interests, then if that, in fact, involves an actual taking of his property, then he is entitled to compensation. But there are also kinds of situations where day in and day out our property interests are affected by a range of government regulations. And if we say that every time that happens and lawyers can make an argument that the impact is beyond a certain percentage, we are going to have to pay compensation, then what you are saying is that a whole range of government activity which has gone on because Congress has wanted it to go on for an extended period of time becomes subject to very large additional costs. So I think the answer depends on our legitimate expectations as property owners and under what circumstances has the Government violated those expectations in ways that require the payment of compensation.

Mr. CANADY. Thank you.

Mr. Frank.

Mr. FRANK. I appreciate the chairman's point, but I must say I share your view, Mr. Schmidt, that that first limitation means very little—what they are saying is that if you are already violating State or local law—well, as you say, if we are already violating State and local law, there is not a lot of need for Federal regulation, and the argument that most Federal regulations aim at things that are already State and local law seems to be quite wrong.

One of the issues that was very important to many of us in the Northeast was the question of acid rain. And the problem with that was that the people who produced it didn't get it. The acid rain was migratory. And, in fact, the areas where acid rain was being produced or the conditions that led to acid rain had not only no interest in stopping it, but they had an interest in not stopping it because you would be imposing cost on the people who generated it and providing benefits to the people who were the recipients. So would this State and local law issue do us any good there?

Mr. SCHMIDT. No, it doesn't. Is seems to me that it says that if you are already violating State and local law, then you don't have an issue under this statute. But I think where we have Federal statutes we presumably have a reason to have them. If we don't, then we should focus on those statutes. This goes back to the original point that I was making which is that the answer to those problems, if they exist, lies in looking at the particular problems and not in this across-the-board fashion.

Mr. FRANK. Let me ask about one of these, which I think was strongly supported by George Bush, the Americans With Disabilities Act. My recollection is that was passed under President Bush, who was a strong supporter of it. I would assume that many property owners would be able to bring claims under the Americans With Disabilities Act. Am I correct?

Mr. SCHMIDT. If restrictions under that act represented a limitation on use that had an impact of more than 10 percent in value. There is nothing in this statute that distinguishes in any way based upon the nature of the public interest which is being as-

serted. So it could be the largest national security interest or what somebody might regard as a more minimal interest.

Mr. FRANK. The only thing that exempts you is a Presidential declaration of imminent and serious threat to the public health and safety. And I don't think anyone would argue that the Americans With Disabilities Act was aimed in large part at that. There were some health aspects but that was not it.

It also would apply, I assume—let me ask you, under the Americans With Disabilities Act, whether the provision would help us. A violation of applicable State and local law including zoning. In the absence of the Americans With Disabilities Act, would there be any violation of local law if people didn't comply with the tenets of the Disabilities Act?

Mr. SCHMIDT. In most cases, there would not. There may be some States that have their own laws, but in most cases I think the Federal Government was acting in areas where the States and localities have not acted.

Mr. FRANK. What we then have under this bill that has been presented to us is a series of claims presented by property owners who felt that the Americans With Disabilities Act had reduced their property by 10 percent or more and then we would have a series of litigations and factfindings to try to decide that. And, again, I have to say this is the most poorly drafted version.

Let me also say, we have the case of *Dolan* v. *Tigard,* the Oregon case. The bicycle path, et cetera. I assume correctly that is now the law that governs you?

Mr. SCHMIDT. Yes, that is the Supreme Court decision.

Mr. FRANK. So what we have to assume is that the purpose of this law, I gather, is to go beyond that. I guess that is one of the things I will have to have other people tell me. In your view, is this codification of the *Tigard* and——

Mr. SCHMIDT. No one is suggesting that this statute is simply a codification of existing law. It clearly goes way beyond existing law. And one of the points I was trying to make, it seems to me, is that existing law is evolving and, to that extent, there are arguments that are going on today about the exact reach of the takings clause.

And I think some would say that property law has gone from being a boring first-year subject to an area that arouses a lot of interest from scholars. And those are the debates that go on. But this, in a certain sense, would moot the constitutional jurisprudence in this area by taking——

Mr. FRANK. Here is the difference. The Chief Justice's opinion in the *Tigard* case, and I realize there are different standards, but to help us focus on the differences, what this case says, and there are many people who don't like it, but it is now the law. This case says there has to be a rough proportionality. That is, it takes into account the validity of what the Government is trying to do and says what the Government is trying to do has to be roughly proportional to what it is imposing on the property owner.

This statute wipes that out because it says unless the Government is dealing with imminent serious threats to public health and safety, its purpose is irrelevant from the standpoint of this legislation. And whether there rough proportionality or smooth proportionality or jagged proportionality is irrelevant, if there is anything

less than serious imminent threat, then the property owner gets compensated after some problem, and I think that is where it costs a lot of money.

Mr. CANADY. Mr. Sensenbrenner.

Mr. SENSENBRENNER. No questions, Mr. Chairman.

Mr. CANADY. Mr. Serrano. OK.

We appreciate your being here and we will be sending you questions. I appreciate your prompt response to the written questions we submit.

I would like to ask the members of the second panel to now come forward and take their seats.

Mr. FRANK. Mr. Chairman, a question. My staff, working with this on Wednesday night, we were given a witness list for today's hearing, which included the name of Grace Heck from Rumson, NJ, and now we have a witness list, Ms. Heck is no longer here. Is she going to be testifying?

Mr. CANADY. She will not be testifying.

Mr. FRANK. She was going to be testifying?

Mr. CANADY. She was on the earlier list.

Mr. FRANK. I would ask unanimous consent that we put in the record an article from the Tampa Tribune about Ms. Heck's dispute and involving Ms. Heck.

[The article follows:]

[The Tampa Tribune, February 10, 1995]

HISTORY MAY TRIP WITNESS

WHAT PROPERTY RIGHTS COULD TELL CONGRESS ISN'T THE WHOLE STORY

(BY MICHAEL SZAJDERMAN)

WASHINGTON.—When U.S. Rep. Charles Canady, R-Lakeland, bangs the gavel today to launch a congressional hearing on a controversial element of the Republican "Contract with America," he will present a witness he hopes will dramatically bolster the cause.

But that witness, Grace Heck of New Jersey, may do more to damage the cause than help it.

Heck plans to testify about how she and her husband had their property rights "stolen by arrogant, abusive and overzealous bureaucrats" who refused to issue environmental permits that would allow them to develop homes on their land.

According to an advance copy of Heck's testimony, the six-year legal battle has left the Heck's destitute—unable to pay doctor bills or buy hearing aids.

The dramatic testimony is designed to prod lawmakers into adopting a bill that would force the federal government to compensate people when it takes actions that somehow reduces the value of their land.

The "takings" proposal is backed by a host of property-rights groups, land developers and conservative lawmakers. It's opposed by many environmental organizations, state and federal regulators and mayors who fear the measure would create a bureaucratic nightmare that will cost government and taxpayers billions of dollars.

"On behalf of my family, myself and untold numbers of abused mom-and-pop landowners, I am asking you to pass private property rights protections." Heck's statement says, "I am asking our government to buy and pay us for our land if they want to prevent us from using it."

What Heck's statement doesn't say is that the land in question is the last piece of a larger property the Hecks have been developing for years. And that it was state officials in New Jersey—not federal officials—who determined that 21 of the 24 remaining acres were wetlands with a history of flooding.

According to municipal and state records in New Jersey, plus federal records, the 13 acres of wetlands the Hecks proposed to clear and fill for the project would have caused flooding problems for homeowners around the Hecks property. Wetland that was originally developed and sold by the couple.

Amy Collings, spokeswoman for the New Jersey Department of Environmental Protection, said the agency also concluded the project posed a potential pollution problem to the aquifer underlying the Hecks' property, a drinking water source for much of central New Jersey.

Homeowners on the land developed by the Hecks near the property in question have other problems with the couple. According to Marguerite Cusson, mayor of Farmingdale, N.J., the town where the project was proposed, the Hecks never finished paving two streets in the subdivision they developed, leaving residents without a completed roadway.

The Hecks also have failed to pay tens of thousands of dollars in property taxes in connection with land they own, Farmingdale officials said.

People who bought other homes developed by Howard Heck in New Jersey also had problems. According to the state Department of Community Affairs, Heck had his builder's registration revoked in 1991 after he failed to honor home warranties connected to his company. It has not been reinstated.

Canady, chairman of the House subcommittee on the Constitution, which is examining the "takings" bill, said Heck was offered as a witness by the Maryland-based Fairness to Land Owners Committee, a property rights group. He said Thursday evening he would not comment on Heck's background. But he conceded that if the information is true, it would "seriously undermine" Grace Heck's credibility. He said he planned to take a closer look at Heck's activities. In a telephone interview, Grace Heck confirmed the unpaid taxes, saying she and her husband simply could not afford to pay them. She said there was one unpaved street in the development, not two. But she disputes the wetlands issue, saying the land is "dry as a bone," and insists regulators failed to follow their own rules in denying the environmental permits.

"I'll do my talking tomorrow," she said Thursday night.

A representative of Fairness to Land Owners, who declined to give his name, said Thursday night the Hecks' past activities had nothing to do with Grace Heck's testimony.

He said government officials were trying to equate "building a single-family home with creating a toxic waste site. It's just not so."

Mr. FRANK. Looks like Ms. Heck took a couple with her. There are two people missing.

Mr. CANADY. Reverend Campbell and Professor Ely, please come forward. Is Reverend Campbell here? Please make way for Reverend Campbell. Thank you.

Mr. FRANK. Reverend, you are about to miss your calling.

Mr. CANADY. I want to thank each of the members of the second panel for being with us today.

First, we will hear from Prof. James Ely, Jr., of Vanderbilt Law School. He is a noted expert on the history and importance of private property rights in our society and other free societies and has written a great deal on the subject.

Second, we will hear from Prof. Peter Byrne, a distinguished member of the Georgetown law faculty. Third, we will hear from Nancy Cline, a property owner in Sonoma County, CA, whose property rights have been adversely affected by the Federal Government. Mr. Riggs from California was going to be joining us to introduce her. He may be here in a little bit.

We will also hear from Rev. Joan Campbell, the general secretary of the National Councils of Churches of Christ, and finally Roger Pilon, the director of the Cato Institute Center for Constitutional Studies. We would ask each of you to please take 5 minutes to summarize your testimony. Without objection, your entire statements will, of course, be placed in the record.

Thank you for being here. And Professor Ely.

STATEMENT OF JAMES W. ELY, JR., PROFESSOR OF LAW AND HISTORY, VANDERBILT UNIVERSITY SCHOOL OF LAW

Mr. ELY. Thank you, Mr. Chairman. I appreciate this opportunity to be here and to draw upon two areas of my academic background: legal history and property law. I am, in fact, one of those unfortunate individuals who was described in the previous testimony of having to make first-year property interesting to incoming law students. And I must say that some of the recent developments in the takings area have helped a good deal in that regard.

The belief that property ownership was essential to the enjoyment of liberty has long been an essential tenet——

Mr. CANADY. Use the microphone.

Mr. ELY [continuing]. Has long been an essential tenet of Anglo-American constitutional thought. Historically, property ownership was viewed as establishing the economic basis for freedom from arbitrary government and for the exercise of individual liberty. This solicitude for the rights of individual property owners was, in part, embodied in the takings clause of the fifth amendment.

The intellectual origins of the takings clause can be traced to the precepts of natural law as well as to the English common law tradition. The principle of just compensation when private property was taken for public use was closely linked with the concept of natural law. Indeed, it was a central premise of natural law that the State was under a duty to protect the rights of personal liberty and private property.

By the time of the American Revolution, it was also well-settled that under English common law property owners were entitled to an indemnity when their property was taken for the benefit of the community as a whole. Moreover, the just compensation principle was widely recognized and applied in Colonial America.

Certainly by the eve of the Revolution, the just compensation principle had become the norm in the Colonial world. Early State constitutions, as well as the Northwest Ordinance, provided for the right of compensation and were the immediate precursors of the takings clause.

Protection of private property was a central feature of political thought when the Constitution was adopted. As is well-known, the framers assigned a high standing to the rights of property owners. It bears emphasis that the framers did not distinguish between property ownership and other individual rights. On the contrary, to the framers property rights were essential because property ownership was closely associated with the preservation of individual liberty.

The structure of the fifth amendment is revealing as to this point. The placement of property rights provisions next to criminal justice protections in the same amendment underscored the close affinity of property and personal liberties.

The purpose served by the takings clause is straightforward and compelling—the financial burden of public policy should not be unfairly placed on individual property owners, but rather shared by the society as a whole. In other words, the takings clause should be understood as a bar to singling out certain individuals to carry the cost of implementing public policy.

The most vexing problem in modern takings jurisprudence is whether governmental actions short of formal condemnation or physical intrusion effectuate a taking for which compensation is required.

Consistent with the spirit of the takings clause, both courts and legislatures should guard against situations in which the Government proceeds by indirection and accomplishes through regulation what is the equivalent of outright physical seizure of private property. Given the confused state of takings law today, a legislative response seems entirely proper.

The proposed act is fully congruent with the values implicit in the takings clause and the vision of the Framers of the Constitution. The proposal strengthens the vital place of private property in our constitutional polity and extends protection to individual owners who have scant realistic prospect of gaining redress through the political process. Thank you.

[The prepared statement of Mr. Ely follows:]

PREPARED STATEMENT OF JAMES W. ELY, JR., PROFESSOR OF LAW AND HISTORY, VANDERBILT UNIVERSITY SCHOOL OF LAW

Mr. Chairman, and Members of the Subcommittee, I am James W. Ely, Jr., Professor of Law and History at Vanderbilt University, Nashville, Tennessee. I am most appreciative of your invitation to testify on pending legislation to protect the owners of private property from regulatory takings.

My testimony is drawn from my areas of academic expertise American legal history and property law. In particular, I have conducted research and published a number of books and articles that examine the history and development of property rights in the United States. I have been asked to address my remarks primarily to the origins and purpose of the takings clause of the Fifth Amendment.

The belief that property ownership is essential to the enjoyment of liberty has long been a tenet of Anglo-American constitutional thought. Historically, property ownership was viewed as establishing the economic basis for freedom from governmental coercion and the exercise of individual liberty. Protection of the rights of property owners, therefore, was fully consistent with one major theme of American constitutionalism—the restraint of government power over individuals.[1] Leading jurists and commentators have stressed the vital importance of property rights in the constitutional order. Joseph Story, distinguished Justice of the Supreme Court and scholar, aptly observed:

> [I]n a free government almost all other rights would become utterly worthless if the government possessed an uncontrolled power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers.[2]

Likewise, Justice John M. Harlan stated: "Due protection of the rights of property has been regarded as a vital principle of republican institutions."[3]

This testimony examines the history of property rights from the settlement of America to the ratification of the Bill of Rights in 1791. It focuses primarily on the constitutional issues implicit in taking private property for public use, and emphasizes that solicitude for the rights of individual property owners was embodied in the takings clause of the Fifth Amendment. It is important to recognize, of course, that many provisions of the Constitution and the Bill of Rights pertain to property interests. But the origins and purpose of the takings clause is the subject of this testimony.

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[1] This theme is developed in James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York, 1992).

[2] Joseph Story, *Commentaries on the Constitution of the United States*, 2nd ed., vol. II (Boston, 1851), 534–535.

[3] *Chicago, Burlington, and Quincy Railroad Company* v. *Chicago*, 166 U.S. 226, 235 (1897).

To understand the antecedents of the takings clause one must consider both the intellectual sources of the just compensation principle as well as the actual practice of the colonial governments when property was taken for public projects.

INTELLECTUAL BACKGROUND

American thinking about just compensation was shaped by the broad intellectual currents of the 17th and 18th centuries. The principle of just compensation was closely linked with the concept of natural law.[4] Natural law rested on the premise that any governmental system worthy of obedience had to affirm certain basic principles inherent in the natural order of the universe. Under natural law theory, personal liberty and private property existed before the formation of organized government and were not mere creations of the state. Indeed, natural law theorists, such as John Locke, maintained that it was the duty of the state to protect the previously existing rights of liberty and property. The just compensation principle fit neatly within this natural law framework. Thus, in 1672 the prominent natural law jurist Samuel Pufendorf declared that "natural equity" mandated compensation when one property owner was called upon to bear a greater burden than others.[5] One can hardly overemphasize the influence of natural law theory on the American colonists in the years preceding the Revolution. Natural law principles were articulated in both the Declaration of Independence and the first state constitutions. As a continuing legacy of that era, several state constitutions presently contain language associating liberty and property, and affirming the freedom to obtain property. Consider, for instance, language in the constitution of New Hampshire: "All men have certain, natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness."[6]

The central point is that natural law doctrine emphasized limitations on governmental power, and treated property ownership as among the eternal natural rights which the state was bound to safeguard. As the prominent antebellum judge James Kent explained: "A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence, is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law."[7] The origins of the takings clause, therefore, can be traced in part to natural law roots.

The English common law tradition also undergirded the just compensation principle. The right to an indemnity when private property was taken found early expression in Magna Carta (1215).[8] Although Magna Carta only restricted the prerogatives of the Crown, Parliament likewise recognized the compensation principle when utilizing the power of eminent domain. By the 17th century compensation was a standard feature of Parliamentary legislation.[9] In his influential *Commentaries on the Laws of England (1765–1769)* William Blackstone treated compensation as an established principle of the common law. After observing that "[t]he laws of England are therefore, in point of honor and justice, watchful in ascertaining and protecting" the rights of property owners; Blackstone amplified his views with respect to governmental taking of property:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain it may be urged, that the good of the individual ought to yield to that of the community; for

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[4] James W. Ely, Jr., "'that due satisfaction may be made:' the Fifth Amendment and the Origins of the Compensation Principle," 36 *American Journal of Legal History* 1, 16 (1992).

[5] Samuel Pufendorf, *De Jure Natural Et Gentium Libri Octo* (1672) (C.H. Old father and W.A. Old father translation, London, 1934), 1285.

[6] Constitution of New Hampshire, Article 2. For similar language see Constitution of Ohio, Article I, sec. 1; Constitution of Pennsylvania, Article I, sec. 1. Courts also recognized the importance of natural law as a basis for guarding property rights. *Vanhorne's Leesee* v. *Dorrance,* 2 Dallas 304, 309 (Cir. Ct. 1795) (noting that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man").

[7] James Kent, *Commentaries on American Law,* vol. II (New York, 1827), 275–276.

[8] See A.E. Dick Howard, *The Road from Runnymeade: Magna Carta and Constitutionalism in America* (Charlottesville, Va., 1968), 332–340.

[9] William B. Stoebuck, "A General Theory of Eminent Domain," 47 *Washington Law Review* 553, 579 (1972).

it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or not. Besides, the public is in nothing more essentially interested, than in the protection of every individual's private rights, as model led by the municipal law. In this, and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.[10]

COLONIAL PRACTICE

The just compensation principle was widely accepted in colonial America.[11] By modern standards the colonial governments made limited use of eminent domain. Colonial statutes, however, demonstrate that officials were regularly authorized to compel owners to transfer their real or personal property for a variety of public projects. Where private property was taken for the construction of public buildings—courthouses, forts, powder magazine a—colonial lawmakers invariably required an award of compensation to the property owners. Improvement projects in colonial cities, such as the construction of streets and wharves also necessitated taking property. Here too lawmakers adhered to the compensation principle.

Another reason for taking private land during the colonial era was the building of public roads. The colonies did not follow a consistent pattern with respect to the payment of compensation for highways. One group of states provided compensation when any land was taken for road construction. Another cluster of colonies granted compensation only when improved or enclosed land was seized for road building. The practice in other colonies changed over time, making generalization difficult. At first glance the custom in some colonies of taking unimproved land for roads without payment can be viewed as a partial breach of the compensation principle. Yet this practice did not contradict the general right of indemnity. Among other considerations, unimproved land was plentiful. The colonists may well have reasoned that such land was of insignificant monetary value. After all, the economic advantages of a roadway would more than offset the loss of a small amount of unimproved land by the owner. The completed road represented an implicit in-kind compensation. Moreover, as the colonies matured, and underdeveloped land became more valuable, lawmakers increasingly acknowledged the right of landowners to receive compensation when the government took land for roads. By the eve of the Revolution, then, the just compensation principle was well established in practice.

TOWARD THE TAKINGS CLAUSE

The American Revolution set the stage for a great deal of constitutional experimentation at both the state and federal level. A hallmark of American constitutionalism was its insistence on written restraints upon governmental power. Not surprisingly, the initial state constitutions contained guarantees relating to the rights of property owners. More particularly, several states elevated the common law compensation requirement as applied during the colonial era to constitutional status. The Vermont Constitution of 1777 was the first to adopt the compensation principle. The influential Massachusetts Constitution of 1780 followed suit, mandating that "whenever the public exigencies require that the property of any individual should be appropriated to public use, he shall receive a reasonable compensation therefore."[12] These just compensation provisions were clearly precursors of the takings clause of the Fifth Amendment. Moreover, even when the state constitution did not expressly provide for payment, state courts reasoned that just compensation must be made under the principles of common law or natural justice. For example, a New York court declared in 1816 that payment of "a fair compensations" was an indispensable qualification on the authority of the state to take property by eminent domain.[13]

The takings clause was also foreshadowed by legislation at the national level. Congress, under the Articles of Confederation, enacted the Northwest Ordinance in 1787. This measure established a system of government for the territory north of

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[10] William Blackstone, *Commentaries on the Laws of England,* vol. I (Oxford, 1765, facsimile reprint, 1979), 134–135.

[11] The colonial experience with just compensation is examined in Ely, "'That due satisfaction may be made': The Fifth Amendment and Origins of the Compensation Principle," supra note 4.

[12] Massachusetts Constitution of 1780, Part I, Article X.

[13] *Gardner* v. *Village of Newburgh,* 2 Johns. Ch. (New York, 1816).

the Ohio River, and furnished an important model for constitution drafting. The Ordinance provided that if a person's property was taken for public use "full compensation shall be made for the same." The right of compensation was among the numerous provisions of the Ordinance which later found acceptance in the Constitution and Bill of Rights.[14]

Protection of private property was a central feature of political thought when the Constitution was adopted. As a prominent historian has observed: "Perhaps the most important value of the Founding Fathers of the American Constitutional period was their belief in the necessity of securing property rights."[15] The framers undoubtedly assigned a high standing to the rights of property owners. It bears emphasis that the framers did not distinguish between personal and property rights. On the contrary, in their minds property rights were essential because property ownership was closely associated with liberty. The framers saw property ownership as a buffer which safeguarded political freedom by limiting governmental authority over individuals.[16]

As is well known, James Madison, then a representative from Virginia, took the lead in preparing a bill of rights. Not surprisingly, Madison included protection for property owners in the proposed bill of rights. As finally adopted, the Fifth Amendment contains two important property guarantees—the due process clause and the takings clause—along with procedural safeguards governing criminal trials. The structure of the Fifth Amendment is revealing. The decision by Madison and his colleagues to place property rights provisions next to criminal justice protections, such as the prohibitions against double jeopardy and self-incrimination, underscored the close affinity of property and personal liberty. The framers equated arbitrary punishment and deprivation of property, and sought to prevent both types of injustice.

PURPOSE AND SCOPE OF TAKINGS CLAUSE

The rationale behind the takings clause 18 both straightforward and compelling—the financial burden of public policy should not be unfairly placed on individual property owners but shared by society as a whole. In other words, the takings clause should be understood as a bar to singling out a few individuals to bear the cost of governmental programs.[17] This purpose was recognized from the earliest days of the new nation. In 1795, for example, Justice William Patterson, who had been a member of the constitutional convention, declared that "no one can be called upon to surrender or sacrifice his whole property, real or personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large."[18]

The takings clause does not immunize private property from governmental interference. Although the Constitution makes no express mention of eminent domain, such power has long been regarded as an incident of sovereignty. It was well understood that circumstances might arise which would compel the government to seize property for public use. But the takings clause places a significant limit on the exercise of eminent domain by requiring the payment of just compensation.

As further evidence of the importance of the takings clause, it should be noted that the just compensation rule became in effect the first provision of the Bill of Rights to be applied to the states. The Supreme Court held in 1897 that the payment of compensation when private property was taken for public use constituted an essential element of due process as guaranteed by the Fourteenth Amendment.[19]

Living in an era before the emergence of modern land use regulations, the framers likely conceived of a taking of property in terms of either outright appropriation of title or physical invasion. Nonetheless, shortly after ratification of the Bill of Rights, Madison raised the possibility that a regulation might also amount to a taking. In a 1791 essay he addressed the question of taking private property for public use. Stressing "the inviolability of property," he noted that property could not be "directly" taken without compensation. Madison further declared that a government "which indirectly violates their property, in their actual possessions . . . is not a

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[14] Robert M. Taylor, Jr., ed., *The Northwest Ordinance 1787: A Bicentennial Handbook* (Indianapolis, 1987), 59–61.

[15] Stuart Bruchey, "The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic," 1980 *Wisconsin Law Review* 1135, 1136.

[16] Ely, *The Guardian of Every Other Right*, 43.

[17] E.g., *Monogahela Navigation Company* v. *United States*, 148 U.S. 312, 325 (1893); *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

[18] *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas 304, 309 (Cir. Ct. 1795).

[19] *Chicago, Burlington and Quincy Railroad Company* v. *Chicago*, 166 U.S. 226 (1897). See also James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller, 1888–1910* (Columbia, S.C., 1995), 109.

pattern for the United States." Because the value of the property can be diminished by governmental action short of actual seizure, Madison's reference to indirect infringement indicates a generous understanding of the taking clause to encompass more than just the physical takings of property.[20] Madison recognized that lawmakers might be tempted to achieve indirectly, by regulating private owners, a result that would require compensation if accomplished directly by formal acquisition. Such a step would represent a transparent end run around the constitutional protection of property owners embedded in the Fifth Amendment.

CONCLUSION

The most vexing problem in modern takings jurisprudence is whether governmental actions, short of formal condemnation or physical intrusion, effectuate a taking for which compensation is required. Commentators of all persuasions concur that current taking analysis is confusing. The Supreme Court has contributed to this muddle by handling takings cases in an essentially ad hoc manner. The justices have found it difficult to formulate meaningful standards to determine whether there has been a regulatory taking. As a result, there are few clear guidelines for property owners or regulators. To be sure, there have been several important Supreme Court cases in recent years which have sought to clarify the parameters of takings law and to put some teeth into the takings clause.[21] However, there is clearly room for improvement.

Against this background of judicial uncertainty, a legislative response seems appropriate. The proposed Private Property Rights Act offers several advantages:

(1) to provide a degree of certainty and consistency in the application of takings doctrine by establishing a legislative definition of what governmental actions amount to a compensable taking;

(2) to ensure that the burdens of public policy are spread equally and not unfairly heaped on individual property owners;

(3) to cause governmental officials to weigh more carefully actions that infringe the use of private property;

(4) to enhance democratic accountability since government officials would now be compelled to address openly the financial cost of land use controls rather than disguise the cost through regulations.

Moreover, the proposed law is fully congruent with the values implicit in the takings clause and the vision of the framers of the Constitution. This proposal strengthens the vital place of private property in our constitutional polity and extends protection to individual owners who have scant realistic chance to gain redress through the political process. I hope that you will give the proposed law serious consideration.

Mr. CANADY. Thank you, Professor. Next, Professor Byrne.

STATEMENT OF J. PETER BYRNE, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. BYRNE. Thank you for requesting my views today. I want to direct my remarks at title IX of H.R. 9, and in particular at the broad principle that the bill embodies; namely, that a property owner should receive compensation for any nonnegligible reduction in the market value of his property caused by otherwise lawful final agency action.

In brief, I believe that it would be difficult to denounce H.R. 9 with sufficient vehemence. It is profoundly stupid and deeply cynical.

American law is based on a wide respect for property rights. Our property law both enhances the efficiency of our economy and pro-

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[20] "Property" in Robert A. Rutland and Thomas A. Mason, eds., *The Papers of James Madison*, vol. 14 (Charlottesville, Va., 1983), 266–268.

[20] E.g., *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987); *Lucas* v. *South Carolina Coastal Council*, 112 Sup. Ct. 2886 (1992); *Dolan* v. *City of Tigard*, 114 Sup. Ct. 2309 (1994). For a discussion of the judicial move to infuse vitality into the takings clause see James W. Ely, Jr., "The Enigmatic Place of Property Rights in Modern Constitutional Thought," in David J. Bodenhamer and James W. Ely, Jr., eds., *The Bill of Rights in Modern America: After 200 Years* (Bloomington, 1993), 87, 92–99.

vides property owners with a secure basis for personal security and autonomy.

The fifth amendment had long been a symbol of the respect afforded private property by all branches of the Federal Government. But property law necessarily limits an owner's rights in order to preserve the rights of neighboring owners, visitors, and the general public. Just as property law doesn't give owners the right to use their property to injure the interests of others, so the fifth amendment does not prohibit or condition the reasonable regulation of property rights to protect the public health, safety, and welfare.

These principles lie deep in our legal tradition. H.R. 9 would destroy them. It would guarantee owners the dollar value of antisocial property uses against otherwise lawful efforts of the Federal Government to protect the public health and safety and the property rights of neighbors.

One could best understand the radical and destructive nature of H.R. 9 by contrasting it with what the Constitution actually provides. Recall that for the first 130 years of the Republic, Federal courts consistently rejected arguments that the fifth amendment required compensation for any losses in property values caused by regulation.

This is not surprising as the fifth amendment says nothing about regulation, but mandates compensation in terms only for taking understood at the time, and for 130 years, to mean only expropriation or permanent physical occupation.

The Supreme Court accepted the proposition that regulation could work a taking only in 1922 in the case of *Pennsylvania Coal* v. *Mahon*. Two facts stand out about that case. First, the Court insisted that each case must be decided on its own particular facts. As Justice Holmes stated, "government can hardly go on if to some extent if values incident to property could not be diminished without paying for every such change in the general law."

By contrast, compensation arguably would be due under H.R. 9 whenever a Federal agency restrained any use of land no matter how noxious. In these circumstances, government couldn't hardly go on, but that, of course, is the purpose of H.R. 9.

The regulatory takings doctrine the Supreme Court has developed is nuanced and fact-specific. In my testimony I go on and discuss the various factors in the constitutional analysis and show the fact, as the gentleman from the Justice Department said, that they are not followed in H.R. 9 in any sense.

Professor Ely said that there is a confused state of current takings law. I want to suggest that it is confused because it reflects the real tensions in our society between the desire to accommodate reasonable regulations and the desire to protect private rights.

The proposed bill in no way enhances constitutional rights. It effects a radical new departure in the concept of property rights. The rights are shorn of responsibilities. The victim must pay the polluter not to harm her. Accommodation of conflicting uses is precluded. Government is disabled. The very existence of the community and the public interest is denied.

The argument will be advanced that I have overstated the effect of H.R. 9 by ignoring its qualifications that compensation will not be given unless the property use is otherwise lawful. Presumably,

this phrase refers to ancient common law of nuisance and we know it applies, as well, to other State zoning ordinances. But the body of nuisance law provides wholly inadequate protection for the public health and safety and would constitute a bizarre outward limit on land use regulation that the Federal Government may impose without paying compensation.

Nuisance is a confused and stunted area of law. Dean Prosser commented that "there is no more impenetrable jungle in the law than that which surrounds the word, 'nuisance.'"

Second, America's early turned to legislation and regulation because nuisance was so woefully inadequate in an industrial economy. When the Congress began to enact public health, civil rights, and environmental laws, no one claimed that the common law was adequate to deal with such complex problems.

Finally, employing nuisance as a touchstone inappropriately inverts the role of the State courts over elected Federal officials in accommodating the various interests of the American people.

Congress will have numerous occasions to debate the goals of environmental laws. There is a lot of room for improvement. But H.R. 9 in itself is a contemptible attempt to avoid the very debate about specific bills by pretending to enforce the Constitution while frustrating the Constitution's commitment of the resolution of disputes about land use and other social issues to people acting through their elected representatives.

Rejection of this poorly conceived bill may help prepare Congress for a more mature consideration of complex national issues.

[The prepared statement of Mr. Byrne follows:]

PREPARED STATEMENT OF J. PETER BYRNE, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Thank you for requesting my views on legislative proposals to enhance protection against unconstitutional invasions of property rights. I will direct my remarks at Title IX of H.R. 9, as the principal vehicle proposed for protecting private property rights. It is important to address the broad principle that the bill embodies, namely, that a property owner should receive compensation for any non-negligible reduction in the market value of his property caused by otherwise lawful, final federal agency action. I offer these remarks as a law professor who has taught Property and Land Use for several years and given extensive thought to the constitutional relation between public regulation and private ownership of land. In brief, I believe that it would be difficult to denounce H.R. 9 with sufficient vehemence. It is profoundly stupid and deeply cynical.

American law is based on a wide respect for property rights. our property law both enhances the efficiency of our economy and provides property owners with a secure basis for personal security and autonomy. The Fifth Amendment has long been a symbol of the respect afforded private property by all branches of the federal government. But property law necessarily limits an owner's rights in order to preserve the rights of neighboring owners, visitors, and the general public. Just as property law does not give owners a right to use their property to injure the interests of neighbors, tenants, and others, so the Fifth Amendment does not prohibit or condition the reasonable regulation of property rights to protect the public health, safety and welfare. These principles lie deep in our legal tradition. H.R. 9 would destroy them. It would guarantee owners the dollar value of anti-social property uses against otherwise lawful efforts of the federal government to protect the public health and safety, and the property rights of neighbors.[1]

[1] In June 1994, some 128 law professors, including myself, wrote to Congress to oppose somewhat less radical property rights bills then pending. Because I thought that the Committee might find that letter useful for its current deliberations, I have attached it to my current testimony.

One can best understand the radical and destructive nature of H.R. 9 by contrasting it with what the constitution actually provides. Recall that for the first 130 years of the republic, federal courts consistently rejected arguments that the Fifth Amendment required compensation for any losses in property values caused by regulation. This is not surprising, as the Fifth Amendment says nothing about regulation, but mandates compensation in terms only for "taking," understood to mean expropriation and permanent physical occupation.

The Supreme Court accepted the proposition that regulation could work a taking only in 1922, in the famous case of *Pennsylvania Coal Co.* v. *Mahon*. The meaning and wisdom of that case have been debated ever since. But two facts stand out. First, the Court insisted that each case must be decided on its own peculiar facts, because, as Justice Holmes stated, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Second, the Supreme Court did not strike down another regulation on the use of land that did not involve a permanent physical occupation until 1992. By contrast, compensation arguably would be due under H.R. 9 whenever a federal agency restrained any use of land, no matter how noxious. In these circumstances, government could hardly go on, but that, of course, is the purpose of H.R. 9.

The regulatory takings doctrine that the Supreme Court has developed is nuanced and fact-specific. Unless a regulation destroys all economic value of a parcel or mandates a permanent physical occupation, compensation is required only if a review of several independent factors leads a court to conclude that the regulation has gone "too far." H.R. 9 extraordinarily eliminates all consideration of these factors. The pernicious imbecility of the bill can be amply seen by reviewing each factor and considering the consequences of requiring compensation without regard to them.

The first factor that the Supreme Court instructs us to consider is the character and purpose of the government action. H.R. 9 mandates indifference to the gravity and probability of the harms that an unregulated property use may impose on the public health or safety, or on invaluable natural or cultural resources. This is no benefit to most property owners (including nearly all homeowners), who depend on government enforcement of reasonable regulations on others to preserve the value of their property.

For example, a property owner may be using an effective pesticide that the Environmental Protection Agency reasonably concludes causes cancer to farm workers, consumers, or neighbors. H.R. 9 requires that if prohibition of the use of the pesticide makes an owner's farm less profitable, and therefore his land less valuable, that the EPA must compensate the owner for not endangering others. Another example: federal law imposes height limitation on buildings in the District of Columbia. If the responsible agency denied an owner a permit to build a 100 story building at 3d and A Streets, S.E., H.R. 9 would require the agency to compensate the owner for the limitation on the value of his land attributable to the height limitation. Neither limit on property use violates the Constitution because of the importance of the government interest involved and the measured character of the regulation. H.R. 9 would cripple the ability of federal agencies to protect interests of the public that most would concede are legitimate.

The second factor that the Court weighs is the extent to which the agency action destroys distinct investment-backed expectations. Here, the Court concerns itself with unfair surprise that change in law sometimes works when a property owner invests resources in a lawful use that a new statute or regulation suddenly prohibits. H.R. 9 requires compensation even when an owner invests in a use fully expecting that a responsible agency will conclude that his use is unlawful. For example, property owners have sometimes been awarded compensation by lower courts when the Corps of Engineers has denied them permission to fill wetlands for commercial development, but in every case the owner bought the wetland before the 1977 Clean Water Amendments, which stiffened standards. H.R. 9 would not only require compensation for any owner of wetlands, even those who purchase with full knowledge of applicable legal requirements, it perversely would give a major economic incentive to everyone to buy wetlands and seek a permit to fill them, because denial of the permit means free money from the federal treasury. In fact, I might well buy a wetland on the Virginia Eastern Shore cheap, request a permit to fill, get potentially massive compensation under H.R. 9, pay off my mortgage, and have enough left to build a house on the dry land and retire on the interest. One does not need a Ph.D. in Economics to understand that laws should not give people economic incentives to engage in socially costly behavior. But that is what H.R. 9 does.

The third factor the Supreme Court considers is the degree of economic loss that the owner has suffered. The Court has denied compensation in several case where the owner lost over half his market value, and Justice Scalia acknowledged in the

Lucas case that a particularly vital regulation could diminish an owner's value by 95% without requiring compensation. 112 S.Ct. 2886, 2895 n.8. But H.R. 9 would require compensation for any loss in market value more than a trivial amount. Note that this would be true even for wholly unrealized losses. People frequently, for a host of good reasons, use their property for something less than its full market value. Under H.R. 9 someone with no intention to pursue a noxious use could provoke a permit denial, obtain compensation. and continue to use his land as he always had.

This brief comparison of Fifth Amendment law and H.R. 9 demonstrates that the proposed bill in no way enhances constitutional rights, but effects a radical new departure in the concept of property rights. Rights are shorn of responsibilities. The victim must pay the polluter not to harm her. Accommodation of conflicting uses is precluded. Government is disabled. The very existence of the community and of the public interest is denied.

The argument will be advanced that H.R. 9 does not preclude government from imposing any new regulation, but only requires it to compensate owners for the loss they have suffered. To be sure compensating owners on such a basis could cost the public untold billions. But the absence of any special fund from which to pay compensation under H.R. 9 contradicts any claim that its primary goal is compensation. The bill aims to emasculate government power. Presumably, each agency would need to pay compensation from its operating budget; therefore, each agency would forfeit the means for carrying out its mission through the very effort to do so. It makes nearly all regulation actionable, but limits owners to damages rather than an injunction. Although shrinking the size of government is an appropriate goal for legislation, H.R. 9 wields a meat cleaver that would produce consequences that no one can predict and few would relish. Some proponents plainly hope to destroy the regulatory state without debating the merits of specific legal protections that the public overwhelmingly supports. The bill is a monument to hypocrisy as well as stupidity.

But some will contend that I have overstated the effect of H.R. 9 by ignoring its qualification that compensation will not be given unless the property use is "otherwise lawful." Presumably, this phrase refers to the ancient common law of nuisance. But this body of law provides wholly inadequate protection for the public health and safety and would constitute a bizarre outward limit on land use regulation that the federal government may impose without paying compensation. First, nuisance is a confused and stunted area of law. Dean Prosser once commented that there was "no more impenetrable jungle in the entire law than that which surrounds the word, 'nuisance,'" W.L. Prosser, Law of Torts, 571 (1971). Second, Americans early turned to legislation and regulation because nuisance was woefully inadequate in an industrial economy. When the Congress began to enact public health, civil rights, and environmental laws no one claimed that the common law was adequate to deal with such complex problems. Finally, employing nuisance as a touchstone inappropriately inverts the role of state judges over elected federal officials in accodating the varied interests of the American people. Even a brief review of nuisance cases would show overwhelmed judges eagerly looking to statutes and regulations to give their efforts any useful meaning.

No doubt Congress will have numerous occasions to debate the goals and methods of federal regulations and what is due owners who are adversely affected. These debates may lead to reform of some provisions of specific acts. This is a wholly legitimate part of our ongoing national effort to reconcile environmental and economic objectives. But H.R. 9 is a contemptible attempt to avoid that very debate, by pretending to enforce the constitution while frustrating the constitution's commitment of resolution of disputes about land use to the people acting through their elected representative. Rejection of this poorly conceived bill may help prepare the Congress for more mature consideration of complex national issues.

June 29, 1994.

DEAR MEMBER OF CONGRESS: We are writing to express our serious concerns about proposed "takings" or "private property rights" legislation. As professors of constitutional, property, and environmental law, we view such legislation as flawed caricatures of constitutional rules that would impose wholly new and burdensome requirements on Congress and the federal agencies when they seek to protect private property and public health and safety.

The Fifth Amendment to the Constitution requires the government to pay just compensation when it takes private property for public use. The courts have developed a complicated body of precedents governing when mere regulation of property use requires compensation. Generally speaking, these precedents commit courts to

fact-specific balancing of economic loss to the property owner, the character and purpose of the government regulation, and the justifiable expectations of the owner about what s/he would be able to do with his or her property. Under this approach, courts recognize the complexity of contemporary resource use questions, give wide scope to thoughtful regulation, and rarely require the paying of compensation.

The legislative proposals we have learned about are quite different. For example, S. 1915 and H.R. 3875, introduced by Senator Shelby and Representative Tauzin, respectively, would require payment whenever wetlands or endangered species regulations reduce the market value of an "affected portion" of property by 50%. But under established constitutional law, such a diminution of value in itself would not require compensation. Courts would look at the diminution in value of the owner's whole parcel, existing and proposed regulations at the time of purchase, and the character of the values served by the regulation. This legislation seems generously to provide property owners free insurance against applications of or changes to applicable regulations. In fact, courts find regulatory takings in only a small fraction of litigated cases.

Other measures likewise invoke inaccurate portrayals of Supreme Court takings doctrine. Some House and Senate bills would codify Executive Order 12630, which requires all federal agencies to adopt detailed procedures to avoid actions that "may affect the use or value of private property." It is well known that the executive order, issued by President Regan in 1988, grossly misstates applicable takings doctrine in numerous significant respects. It focuses entirely on limits placed on regulated property owners while ignoring harms to the public that the regulation seeks to prevent. Several of us sent a letter to President Clinton last year suggesting that he repeal the executive order for these reasons. Congress should not perpetuate the errors of President Reagan's executive order through such broad codifying legislation.

Some bills pending before Congress also would require agencies to review proposed regulations, policies and other actions to determine whether a taking might potentially occur. Given the highly fact-specific nature of the takings inquiry, such reviews would produce speculative conclusions of dubious accuracy. Additionally, such a requirement would impose a costly new bureaucratic hurdle to effective government actions that respond to actual threats to private property and the public welfare.

Congress should continue to examine environmental and other laws to harmonize the public interest in health and safety with private rights. Congress should also soberly investigate and, when appropriate, redress specific complaints about unduly restrictive federal regulations. And the courts, of course, must stand ready to vindicate individual constitutional property rights. But the proposals discussed above seem to draw much of their appeal from the mistaken belief that they effectively protect constitutional values. They do not. We urge you not to view these proposals as enjoying any special constitutional sanction.

Thank you for your attention on this important matter.

Sincerely,

University of Alabama School of Law: Martha I. Morgan, William L. Andreen, Wythe W. Holt, Jr., Bryan K. Fair, Norman J. Singer; The American University—Washington College of Law: Herman Schwartz; University of Arkansas at Little Rock School of Law: Charles W. Goldner, Jr., John Harbison; University of Arizona College of Law: Grady Gammage, Jr.; Boston College of Law: Charles H. Baron, Zygmunt Plater; University of California at Davis, School of Law: Arturo Gandara, Kevin R. Johnson, Harrison C. Dunning; Alan E. Brownstein; Evelyn Alicia Lewis; University of California, Hastings College of Law: Jo Carrillo, David L. Faigman; University of California at Berkeley School of Law: Joseph L. Sax; University of Colorado School of Law: Charles F. Wilkensen, David H. Geteches; Columbia University School of Law: Frank Grad; University of Connecticut School of Law; Jeremy R. Paul, Terry J. Tondro; Cornell Law School: Sheri Johnson; University of Denver College of Law: George W. Pring; University of Detroit School of Law: Jacqueline Hand; Drake University Law School: James A. Adams; Jerry L. Anderson; Robert C. Hunter; Franklin Pierce Law Center: Arplan Saunders, Bruce Friedman; University of Florida College of Law: Barry A. Currier, Alyson C. Flournoy, Sharon Rush, Julian Conrad Juergensmeyer; George Washington University National Law Center: C. Thomas Dienes, Arnold W. Reitze; Georgetown University Law Center: Hope M. Babcock, J. Peter Byrne; University of Georgia School of Law: James C. Smith, Milner S. Ball, Laurie Fowler; Harvard University Law School: Frank I. Michelman, William W. Fisher, III; University of Hawaii,

William S. Richardson School of Law: Eric K. Yamamoto; University of Idaho College of Law: Dale D. Goble, James S. Macdonald; Illinois Institute of Technology, Chicago—Kent College of Law: Margaret Stewart, Richard W. Wright, A. Dan Tarlock, Stuart L. Deutsch, Harold J. Krent, Katharine K. Baker; University of Illinois College of Law: Eric T. Freyfogle, Stephen F. Ross, Laurie Reynolds; University of Iowa College of Law: Peter Shane, Martha Chamallas, Patricia A. Cain, Jean C. Love, John-Mark Stensvaag, Lea Vandervelde; University of Kentucky College of Law: Alvin L. Goldman; Lewis & Clark Northwestern School of Law: Michael C. Blumm, William Funk, Craig Johnston; Lincoln Institute of Land Policy: Jerold F. Kayden; University of Maine School of Law: Alison Rieser; University of Michigan Law School: Mark Van Putten; University of Minnesota Law School: Daniel Farber; University of Mississippi School of Law: Casey Jarmen, Richard McLaughlin; University of Montana School of Law: Carl Tobias; Nova Southeastern University Law Center: Michael M. Rooke-Ley, Joel A. Mintz; University of North Carolina School of Law: Donald T. Hornstein; Northeastern University School of Law: Lee P. Breckenridge; Pace University School of Law: David R. Wooley, Richard Ottinger, Jeffrey G. Miller, John R. Humbach, Robert F. Kennedy, Jr.; University of Pennsylvania Law School: Bruce H. Mann; University of Puget Sound School of Law: John Weaver; Ohio State University College of Law: Rhonda R. Rivera; University of Oregon School of Law: Michael Axline, John Bonine, Richard G. Huldreth, Mary Christina Wood, Chapin Clark; Rutgers Univ. of NJ/S.I. Newhouse Center for Law & Justice: Frank Asikin, James Pope, Margaret Hyden, Scott Gould, Gary Francione, Judith Levin, Louis Raevson, Charles H. Jones, Jr., Jonathan Hyman, John Leubsdorf; University of Southern California Law Center: Daniel Ortiz, Erwin Chemerinsky; Stanford Law School: Deborah L. Rhode; University of Tennessee College of Law; Dean Hill Rivkin; University of Texas School of Law: Roy M. Mersky; University of Utah College of Law: Robert B. Keiter, Wayne McCormack, William J. Lockhart, John Martinez, Susan R. Poulter; Vermont Law School: Peter Treachout, Norman Williams, Karin P. Sheldon, Patrick Parenteau; Washington University School of Law: Richard J. Lazarus, Daniel R. Mandelker; Washington & Lee University School of Law: David A. Wirth; Wayne State University Law School: Robert Abrams; West Virginia University College of Law: Jeff L. Lewin, Patrick C. McGinley; Williamette University College of Law: Susan L. Smith; College of William & Mary, Marshall-Wythe School of Law: Michael Gerhardt; and Yale Law School: Susan rose-Ackerman, Bruce A. Ackerman, Carol M. Ross.

The inclusion of titles and affiliations is for identification purposes only and is not intended to represent the views of any school.

Mr. CANADY. Thank you, professor. As the bells have indicated, there is a vote on the floor. We will recess the subcommittee while the Members vote. As soon as we have concluded voting, we will return and resume the hearing. Thank you.

[Recess.]

Mr. CANADY. The subcommittee will come to order.

Our next witness will be Nancy Cline. Ms. Cline, would you proceed.

STATEMENT OF NANCY CLINE, MEMBER, THE FAIRNESS TO LAND OWNERS COMMITTEE

Ms. CLINE. Thank you very much for letting me speak today. I am Nancy Cline, mother of five children, and the owner of a small family winery in Sonoma, CA. I am here today to expose the nightmare that we have been living.

For the last several years, the bureaucrats have threatened us and intimidated us into silence. Speaking today, I risk further retaliation by the bureaucrats against my family. However, after a great deal of soul-searching, my husband and I decided that we had very little left to lose.

The Government has shattered our dreams, devastated our family, threatened our financial security and diminished our respect for this Government.

Early in 1989, my husband and I purchased 350 acres in Sonoma. It seemed a perfect place to raise our family, to establish a farm and a small winery. Fred immediately began to farm the land. He worked hand in hand with the Soil Conservation Service, who indicated in August 1990, that the U.S. Army Corps of Engineers wanted to speak to him about his agricultural practices.

The corps official showed up at the property and informed Fred that he believed the property was a wetland. The corps enforcement officer told Fred that plowing was OK, leveling was not. Although Fred agreed to adhere to these orders, the agent went back to his office and issued an intimidating cease and desist order saying that they had discovered an unauthorized activity, filling of a navigable waterway and threatened us with fines and imprisonment of up to 1 year.

It was the first time we heard the term, "wetland," to describe our land. It was the first time we had heard the Federal Government had jurisdiction over farming. We hired an expert attorney on land use and the Clean Water Act, who indicated that since our property had been grazed and farmed since 1930, Fred's farming activities were agriculturally exempt. Fred continued to plow and plant hay, told by both the Army Corps and our attorneys that these farming activities were fine.

In December 1991, the Army Corps issued another cease and desist order. The agencies insist that the flap gate and the mere plowing of our hay field constituted a violation of the Clean Water Act. They wanted the property to be put back the way it was prior to agricultural use.

Obviously, continued farming was out of the question. Throughout this time period, we requested many meetings with the Army Corps. To date—and I mean as of February 10, 1995—they have refused to meet with us or our attorney to resolve this issue.

In January 1994, the FBI and the EPA showed up in Sonoma. We were told to hire a criminal attorney.

I don't know how to convey to all of you the terrifying and gut wrenching experience of being the target of a criminal investigation. We sank into helplessness as we realized they had no intention, and they never had any intention, of resolving our problem.

The FBI and the EPA interrogated friends, neighbors, acquaintances and strangers. They asked these people what our religion was, whether we were intelligent, did we have tempers. They asked how we treated our children. Our property was surveyed by military helicopters, Federal cars monitored our home and our children's school. The Department of Justice accused Fred of paying our neighbors to lie.

The FBI actually told one terrified neighbor that the investigation was top secret with national security implications.

Our personal and business papers were subpoenaed. The grand jury in San Francisco was convened. The Justice Department told our attorneys that unless we pled guilty and surrendered our land to the Federal Government, they would seek a criminal indictment of both Fred and myself.

According to one government attorney, I was to be included in this indictment because I had written a letter to an editor of a local newspaper in his opinion publicly undermining the authority of the Army Corps of Engineers.

After months of anxiety, anger, sleepless nights and over $100,000 in legal fees, we decided there was no way we were going to plead guilty when we were absolutely innocent of any criminal behavior.

We were told that our criminal defense costs would be as high as $500,000. Two months ago, the Department of Justice told us that they were not proceeding on criminal grounds.

We are not alone. And across this country people are being abused. I urge you today to make those Federal agencies accountable to you. They are running amuck in this country and destroying dreams, financial and emotional security of productive citizens.

They had no right to strip Fred and me of our dreams nor of our children's legacy. We did this to protect ourselves from prison? This is not about protecting the environment. It is about agencies out of control and in need of your supervision. This is about their desire and power to control land and their total disregard for private property rights. The agents have stolen our dreams and land. I urge you to make them pay for it if they would like to keep it.

[The prepared statement of Ms. Cline follows:]

PREPARED STATEMENT OF NANCY CLINE, MEMBER, THE FAIRNESS TO LAND OWNERS COMMITTEE

Mr. Chairman and Representatives, I am Nancy Cline, mother of five young children, owner of a small family winery in Sonoma, California and a member of The Fairness to Land Owners Committee.

I am here today to urge you to swiftly pass legislation to ensure the equal protection of the private property rights of those who can't afford to spend their life savings fighting the unchecked power of the federal bureaucrats.

I am here today to expose the nightmare we have been living.

For the last several years the bureaucrats have threatened us and intimidated us into silence. Speaking today, I risk further retaliation by the bureaucrats against my precious family. However, after a great deal of soul searching, my husband and I decided that the government has already shattered our dreams, devastated our family, threatened our financial security and diminished our respect for our government. We also came to the stark reality that if we can be intimidated into silence then the future of our precious children is at great risk—for they will have no freedom in their futures.

Early in 1989, my husband wanted to fulfill his life-long dream of creating and owning a family winery. My husband and I purchased 350 acres in Sonoma; it seemed the perfect place to raise our family, farm and establish a small winery.

Fred immediately began to farm the land. He worked hand in hand with the Soil Conservation Service, who indicated in August 1990 that the U.S. Army Corps of engineers wanted to speak with him about his agricultural practices.

A Corps official showed up at the property and informed Fred that he believed that the property was a wetland. Fred showed the agent that the government's aerial photo of our so-called wetlands was an overflowing watering trough for cattle. Then the agent mentioned an endangered salt marsh harvest mouse.

The Corps enforcement officer told Fred that plowing was okay, leveling was not. Leveling is the spreading of dirt to make a field easier to plant. This is a regular farming practice in our area.

Although Fred agreed to adhere to his orders, the agent went back to his office and issued an intimidating Cease and Desist Order saying that they "discovered an unauthorized activity," and threatened us with fines of up to $25,000 per day or imprisonment of up to a year.

It was the first time we had heard the term wetland to describe our land. It was the first time we heard that the federal government had jurisdiction over farming.

We hired an expert attorney on land use and the Clean Water Act, who indicated that since our property had been grazed and farmed since 1930, Fred's farming activities were agriculturally exempt. Our attorney said he would write a letter and get the Cease and Desist Order rescinded.

Fred continued to plow and plant hay—told by both the Corps and our attorney that both these farming practices were fine.

Daily we expected the Cease and Desist Order to be rescinded.

I think back now, and wonder how we could have been so naive. My God, we had no idea that these people would try to destroy our family. We thought they would recognize the obvious agricultural history of our property and move on.

In December 1991, Corps agents issued another Cease and Desist Order. We met at the property hoping for resolution but the agents insisted that the flap gate and the mere plowing of our hayfield constituted a violation of the Clean Water Act.

We spent thousands of dollars for our attorney to provide exhaustive documentation to the Corps that the property was in agricultural use for the last 60 years and that virtually all of Fred's activities were ag exempt and not regulated by the Clean Water Act or the Corps regulations.

Again, our attorney assured us that our property and activities were exempt. Not to worry, the Corps would see the light.

The Corps responded—that it didn't matter. They wanted the property put back the way it was prior to agricultural use.

In November 1992, a letter arrived from the Corps. Despite the massive and expensive documentation provided by our attorney, we were told we had 45 days to close our flap gates, fill in any ag ditches, restore the site to its pre-agricultural state, post a bond for the Corps to be assured of our intentions, and be prepared to hire an environmental consultant for five years to monitor the site according to the Corps' wishes.

Obviously, continued farming was out of the question.

Throughout this time period, we requested many meetings with the Corps to resolve this issue. They promised to meet yet they wouldn't. To date, and I mean as of February 1995, they have refused to meet with us or our attorney.

In January 1994, the FBI showed up. Obviously the Corps had no desire to discuss or resolve this issue. We were told to hire a criminal attorney.

I don't know how to convey to you the terrifying and gut wrenching experience of being a target of a criminal investigation. We sank into utter helplessness as we finally realized that they had no intention—and never had—of resolving our simple problem.

Their issue was power and control. Their issue was an edict from the U.S. Attorney General demanding more criminal environmental convictions in the Ninth Circuit—apparently short of the prescribed quotas.

The FBI and EPA interrogated neighbors, acquaintances and strangers. They asked about our religion, whether we were intelligent, did we have tempers. They asked how we treat our children.

Our property was surveyed by military blackhawk helicopters. Their cars monitored our home and our children's school. They accused Fred of paying neighbors to lie. The FBI actually told one terrified neighbor that this investigation was top secret, with national security implications. The community reeled, as did we.

Our personal papers were subpoenaed. The grand jury was convened.

We spent thousands of additional dollars to hire more attorneys. The Justice Department told our attorneys that—unless we would plead guilty and surrender our land they would seek a criminal indictment of both Fred and me. According to one government attorney, I was to be included because I had written a letter to the editor of a local paper in their opinion, "publicly undermining the authority of the Army Corps."

Let me tell you—it has been a wretched nightmare. A nightmare for my husband, a nightmare for my children and a nightmare for me. I will never be able to adequately express what this abuse of power, the threat of prison, the use of the FBI, and the intimidation used to get us to plead guilty did to our family this last year.

After months of anxiety, anger, sleepless nights, and $100,000 of legal fees, we decided that there was no way we were going to plead guilty when we were absolutely innocent of any criminal behavior.

I remind you that in the midst of this sinister lunacy, Fred and I had five tender children to nurture and protect. Our decision to stand up for our family, our children's legacy and future, and our dreams has cost us dearly—both emotionally and financially.

With us refusing to surrender, the agencies knew that they did not have a criminal and in our opinion, not even a civil case. Two months ago, they informed our attorney—orally, of course—that they were not proceeding on criminal charges.

To date, the Corps has refused to resolve the issue and rescind the Cease and Desist Orders. With these orders still in effect, half of our farm is restricted from participating in regular farming activity.

The agony of this experience has left deep scars.

We have no idea how to settle this issue or how to resolve the horrible wrenching pain of the last year. We remain at the mercy of the bureaucrats and their next interpretation of their regulations. We are terrified that they might try to retaliate upon learning of my appearance here today.

We are not alone. Across this country the bureaucrats are abusing land owning citizens. The people are rightfully terrified to come forward. They are intimidated into silence.

It's time for Congress to admit that the bureaucratic regulations promulgated from the Clean Water Act, the Endangered Species Act and other federal land-use legislation gives far too much unchecked power to out of control bureaucrats. It's time for Congress to stand up to the tunnel-visioned preservationists who want the government to control every inch of the land, every use and every specie.

It's time for Congress to recognize that compromising our rights under the Fifth Amendment compromises the very foundations of democracy.

Many of our acquaintances advised me that speaking here today was a foolish, naive and risky proposition. Hadn't I gotten a big enough dose of the absolute power of our government? Hadn't I learned to quietly disappear and let them attack someone else?

I have listened to their comments, but have chosen to ignore them. I am here today—asking for your help and your solution—because I refuse to give up on our American system.

I urge you to make these abusive federal agencies accountable to you. They are running amuck in this country—destroying the dreams, financial and emotional security of decent, productive citizens.

They had no right to strip Fred and me of our dreams. They had no right to force us to spend our children's legacy to protect ourselves from incarceration; from prison.

This is not about protecting the environment. It's about agencies out of control and in need of adult supervision. This is about their desire—and power—to control land and their total disregard for private property rights. And it is about the future of this great country.

These agents have stolen our dreams and our land. If they want our land, I urge you to make them pay for it. Thank you.

DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, CORPS OF ENGINEERS
211 MAIN STREET
SAN FRANCISCO, CALIFORNIA 94105 - 1905

CERTIFIED MAIL

15 AUG 1990

Regulatory Branch

SUBJECT: File No. 18193N34

Fredrick Kline
24737 Arnold Drive
Sonoma, California 95476

Dear Mr. Kline:

We have discovered an unauthorized activity involving a land leveling activity, which involves fill into an adjacent wetland of Sonoma Creek, on the parcel located south of the Schellville Airport, town of Sonoma, Sonoma County, California.

You are hereby directed to CEASE AND DESIST immediately from further activity in our jurisdiction.

All discharges of dredged or fill material into "waters of the United States" below the "high tide line" in tidal waters, and below the "ordinary high water mark" in non-tidal waters require Corps of Engineers authorization under Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344). "Waters of United States" include, but are not limited to, coastal and inland waters, lakes, rivers and streams that are navigable waters of the United States, including adjacent wetlands; tributaries to "navigable waters of the United States," including adjacent wetlands; interstate waters and their tributaries, including adjacent wetlands; and all other waters of the United States.

Our regulations (33 CFR 326.3) state that when the District Engineer becomes aware of any unauthorized work, he shall commence an immediate investigation to determine the appropriate administrative and/or legal action to be taken. Legal action could include either civil or criminal proceedings and might result in a court directing the removal of existing material or structure .

Section 309 of the Clean Water Act (CWA) (33 U.S.C. 1319) provides that upon conviction for violation of Section 301 of the Clean Water Act (CWA), which makes illegal the discharge of any dredged or fill material without a permit issued pursuant to Section 404, a person is subject to a fine from $2,500 to $25,000 for each day of violation, or imprisonment of up to one year, or both.

You are requested to provide this office, within 15 calendar days from the date of receipt of this letter, with information showing the history of your activity. A questionnaire is enclosed to guide you in your submittal of the information. You are also advised that the information provided on this questionnaire may be used against you in any subsequent legal action.

It is further requested that you allow Corps of Engineers inspectors free access to the property referenced above. If you have any questions, please call Mr. Eric Bahn of our Regulatory Branch (telephone 415-744-3318 Ext. 227). Please address all correspondence to the District Engineer, Attention: Regulatory Branch, and refer to the file number at the head of this letter.

Sincerely,

Thompson F. Keesling
Acting Chief, Construction-Operations Division

Enclosure

Copy furnished w/o encl:

US F&WS, Sacramento, CA
US EPA, S.F., CA
CA F&G, Yountville, CA
CA RWQCB, Oakland, CA
US Attorney, S.F., CA

DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, CORPS OF ENGINEERS
211 MAIN STREET
SAN FRANCISCO, CALIFORNIA 94105 - 1905

CERTIFIED MAIL 12/91

Regulatory Branch

SUBJECT: File No. 18193N54

Mr. Fredrick Kline
24737 Arnold Drive
Sonoma, California 95476

Dear Mr. Kline:

We have discovered an unauthorized activity involving the construction on a tidegate and the discing of the field located south of the Shellville Airport which our historical aerial photography interpretation shows was nonagricultural. The location of this activity is 24737 Arnold Drive, Sonoma, California.

You are hereby directed to CEASE AND DESIST immediately from further activity in our jurisdiction.

The Corps of Engineers requires authorization for work conducted below mean high water (MHW) under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) and for all new work occurring in unfilled portions of the interior of diked areas below former mean high water.

All discharges of dredged or fill material into "waters of the United States" below the "high tide line" in tidal waters, and below the "ordinary high water mark" in non-tidal waters require Corps of Engineers authorization under Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344). "Waters of United States" include, but are not limited to, coastal and inland waters, lakes, rivers and streams that are navigable waters of the United States, including adjacent wetlands; tributaries "navigable waters of the United States," including adjacent wetlands; interstate waters and their tributaries, including adjacent wetlands; and all other waters of the United States

Our regulations (33 CFR 326.3) state that when the District Engineer becomes aware of any unauthorized work, he shall commence an immediate investigation to determine the appropriate administrative and/or legal action to be taken. Legal action could include either civil or criminal proceedings and might result in a court directing the removal of existing material or structures.

Section 12 of the Rivers and Harbors Act of 1899 (33 U.S.C. [illegible]) provides that persons or corporations convicted of violating Section 10 will be fined between $500 and $2,500 or imprisoned for up to one year in jail, or both. Section 12 also authorizes the court to enforce removal of any illegal structure or materials when such removal is considered appropriate.

Section 309 of the Clean Water Act (CWA) (33 U.S.C. 1319) provides that upon conviction for violation of Section 301 of the Clean Water Act (CWA), which makes illegal the discharge of any dredged or fill material without a permit issued pursuant to Section 404, a person is subject to a fine from $2,500 to $25,000 for each day of violation, or imprisonment of up to one year, or both.

You are requested to provide this office, within 15 calendar days from the date of receipt of this letter, with information showing the history of your activity. A questionnaire is enclosed to guide you in your submittal of the information. You are also advised that the information provided on this questionnaire may be used against you in any subsequent legislation.

It is further requested that you allow Corps of Engineers inspectors free access to the property referenced above. If you have any questions, please call Mr. Eric Behn of our Regulatory Branch (telephone 415-744-3318 Ext. 227). Please address all correspondence to the District Engineer, Attention: Regulatory Branch, and refer to the file number at the head of this letter.

Sincerely,

for

Max R. Blodgett
Acting Chief, Construction-Operations Division

Enclosure

Copy Furnished:

US F&WS, Sacramento, CA
US EPA, S.F., CA
US NMFS, Santa Rosa, CA
CA F&G, Yountville, CA
CA RWQCB, Oakland, CA
CA SLC, Sacramento, CA
US Attorney, S.F., CA

Mr. CANADY. Thank you, Ms. Cline.
Next Reverend Campbell.

STATEMENT OF REV. JOAN CAMPBELL, GENERAL SECRETARY, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE USA

Reverend CAMPBELL. My name is Joan Campbell. I serve as the general secretary of the National Council of Churches of Christ in the USA. The National Council is comprised of 32 member churches whose combined membership is 49 million people. We have long been concerned about how to maintain the balance between the private side of our life, including personal choice, property, and voluntary association, and our social responsibility. Finally, it is our caring for one another that concerns us.

More than 30 years ago, the council spoke specifically on how we use property and the wealth that derives from it. Then, and today, the council saw the issue as fundamentally moral. The council advised that the exercise of the traditional right of private property must be conditioned by the rights of all, including the right of future generations to enjoy the resources and fruits of the earth. Legal ownership of resources does not confer unlimited right of use or misuse.

It has always been the religious insight that self-interest, greed and self-aggrandizement need no advocates. They can be counted on to defend themselves. I suspect we will also agree on that religious view of human reality.

It is rather the delicate and precious part of life, the common good, that needs our voice. It is the social compact that is always attacked and threatened by the excessively private. Who shall speak for the whole family and its well-being if other voices are privatized and self-serving?

We have a religious heritage and I have said again and again to those who handle public power, your business under God is primarily the common good, not private consolation. It is clearly the heritage of the Scripture. The kings of old were judged for their exercise of power, the character of their rule, not their private rectitude nor their personal religious piety.

The rights of private property have always been conditioned in the Judeo-Christian tradition by God's insistence on the well-being of all. The law, as described in Deuteronomy, is careful to spell this out. For instance, the obligation to see that the hungry are fed was considered a higher calling than the right to reap all the fruits of your labor, even on your own land. Even oxen were not to be muzzled while they tread grain so that they might also eat.

Our social compact that allowed all to enjoy the fullness of life as God intended has been a key aspect of the Protestant Christian spirit. The reforming spirit led to covenantal visions of commonwealth, a more just social contract and representative government.

The biblical image of the kingdom of God has long been understood to include the economic and political well-being of all. The prophets of the social gospel sought common ground among divided churches for the sake of those who were hungry, thirsty, naked, sick, prisoners or strangers.

Thirty years ago, the churches engaged in an earlier debate over the "takings" provisions of the fifth amendment. At that time, it

was a ruse to block racial inclusiveness. Allowing persons of color to live next door, it was argued, would reduce the value of their white neighbor's property and amount to "taking" something away. Overlooked was what racism took away from its victims, an issue at the heart of the common good.

As one who participated in the civil rights marches, I am not surprised to see the issue raised again as a way to avoid the claim of the common good. We support the importance of protecting private property from callous and unneeded encroachment by the Government, even as we heard from the witness before. But we call on the Government to enact laws and set policies that are informed as much by the well-being of all as the private protection of anyone's property.

Laws restricting what property owners can do with their property have long been considered both morally good and appropriate social policy. William Penn, the Quaker founder of Pennsylvania, passed laws requiring that 1 acre of forest remain standing for every 5 acres that were cleared.

The new debate about "takings" attempts to impose a radical reinterpretation of the fifth amendment that would curtail government's ability to protect the common good. It would take us back to an age of excessive individualism where the interests of the greedy override the public's well-being.

We see it in public health, civil rights, environmental protection, and safe working conditions. In all these areas, we believe the basic issue is about respect and balance.

While recognizing the legitimate rights of individuals, will we at the same time expect every property owner to respect social covenants? The new battle over "takings" is an old confrontation between those who give primacy to private property in its most narrow sense and many in our society who favor the other, the poor, the abused, those who are passionately, even religiously concerned for the future of God's creation as a home for us all.

The common good also is an old idea with a new urgency. It is an imperative to put the welfare of the whole ahead of our own narrow interests. It is an imperative which we fervently hope will guide our people and our leaders in this new moment.

Thank you for the privilege of testifying.

Mr. CANADY. Thank you very much, Reverend Campbell. Our final witness on this panel is Roger Pilon.

STATEMENT OF ROGER PILON, PH.D., J.D., SENIOR FELLOW AND DIRECTOR, CENTER FOR CONSTITUTIONAL STUDIES, CATO INSTITUTE

Mr. PILON. Thank you very much, Mr. Chairman. And thank you for the invitation to speak before this committee. I would ask that my prepared statement be put in the record.

I want to join Reverend Campbell by saying that the basic issue is indeed respect, but I would add that it is respect for property owners as well. The story that you heard from Ms. Cline, based upon my experience in this area for a number of years, is not an aberration. It has happened over and over across this country that property owners are being harassed by bureaucrats in what can be called nothing less than police-State action to take away their prop-

erty rights, with threats of the kind she has spoken about. This we see over and over.

What is to be done about it? I want to make basically two points. That we need to think seriously about relimiting government, number one, and number two, we need to revive the fifth amendment's takings clause.

What we are talking about here today is regulatory takings. With the growth of regulation over the course of the 20th century, we have seen every aspect of life regulated, especially in the property rights area. As a result, you can barely turn around without getting official permission to do so.

Let's remember that this is a Constitution of delegated, enumerated, and thus limited powers. I would urge, first of all, that this committee take the lead in issuing a statement from the Congress that, despite the growth of government over the course of the 20th century, the Constitution remains a document of delegated, enumerated, and thus limited powers.

Unfortunately, we have honored that principle, that centerpiece of the Constitution, in the breach and as a result, we have regulation after regulation, many of which are taking what belongs to property owners. And that takes me to my second point with respect to reviving the fifth amendment's takings clause.

We need a clear definition of "property," one that is found in every other area of the law except the takings area. Second, we need a clear definition of the nuisance exception, and, finally, we need to pay for public goods.

With respect to a clear definition of "property," today, unfortunately, in the takings jurisprudence area we have had what the Supreme Court itself has called 70-odd years of ad hoc regulatory takings jurisprudence, which has given as the chaos that we have in this area of the law. "Property" needs to be defined to include all the uses that go with it. As Madison put it, "As a man is said to have a right to his property, he may be equally said to have a property in his rights."

All those uses are themselves property. With respect to that "bundle of sticks," take one of those "sticks," one of those uses, and you have taken something that belongs to the owner. You have taken a right of his and you now must pay him for it.

Regrettably, under current law, only if you have a complete wipe out, only if you have near total loss from a regulation, do you get compensation. That is to say, in most cases where regulations take 25 percent, 50 percent, 75 percent, you are out of court.

Now, none of us would have any difficulty in saying that if a thief took some of your property, he had taken your property, and yet if the Government does it, we say that is not a taking. That is the kind of errant nonsense that must be brought to an end by a clear definition of "property."

Secondly, you must create a clear nuisance exception to the compensation requirement. When Professor Byrne said that this is a bill that calls for the Government to pay polluters not to pollute, I can only conclude that he hasn't read the bill. Look at the bill. It makes it clear that you do not get compensated for nuisances. He says the nuisance law is inadequate. Well, let's make it adequate.

The nuisance law exception is meant to capture a whole range of environmental protection. Nobody is to be compensated for not polluting his neighbor's property. That should be clear in this legislation.

Finally, we have to ask who is going to pay for the public goods that we have brought about by regulation? Earlier, Mr. Frank asked the gentleman from DOJ, what will this bill cost? Well, that is up to you, Mr. Frank. It depends on whether you want to go on regulating as you have for your tenure here in this Congress. If you do, it is going to cost the taxpayer a pretty penny. I submit that after the last election, you are not going to want to do that.

However, it is going to be a payment that is going to be fair because the public that wants such goods is the public that must pay for them. Right now the costs of those goods fall on innocent people like the Ms. Clines of this world. And, again, she is representative of many, many other people in her place. These are the people that we are making pay for the whole costs of our public appetites.

If you don't enforce the takings clause, which gives us the balance that Reverend Campbell called for, if you do not enforce the takings clause, then you have the kind of "off-budget" accounting for these public goods that we have today. And to be sure, no one knows what they cost because those costs fall silently on the Ms. Clines of this world, and they fall in addition on all of us in the form of lost opportunities.

What this bill would do is make us have a public accounting so that we could determine whether this view was worth it, whether this historic site was worth it, and so forth. It may turn out that not every species may be worth saving. Let me repeat that. Not every species may be worth saving—although a species may seem to be worth saving if saving it is "free," which is exactly the way it seems today because we, who want that species saved, are not paying for it. It is the Ms. Clines of the world who are being asked to pay for it.

Let me conclude by saying we need this legislation. We need it desperately to stop what is going on in this country. What is going on in this country is described by a single word: "Theft."

[The prepared statement of Mr. Pilon follows:]

PREPARED STATEMENT OF ROGER PILON, PH.D., J.D., SENIOR FELLOW AND DIRECTOR, CENTER FOR CONSTITUTIONAL STUDIES, CATO INSTITUTE

Mr. Chairman, distinguished members of the subcommittees, 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 Congressman Hyde for inviting me to speak before this subcommittee on the subject of Protecting Private Property Rights from Regulatory Takings. I want also to thank Congressman Canady for calling hearings so early in the term of the 104th Congress on so important and timely a subject.

Uncompensated regulatory takings of private property have become an immense problem across the nation. As federal, state, and local regulations have increased in number and scope, property owners have increasingly found themselves unable to use their property and unable to recover the losses that result.

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.

1. 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 new *Handbook for Congress,* which was released here in the Capitol and distributed to each member just this week, I will limit myself today to saying simply that if we are to come to grips with the problem of regulatory takings, 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. If this subcommittee were 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 this Congress surely is, should appreciate that to go forward we need first to look back, to our founding principles. And what better part of Congress to do that than this Subcommittee on the Constitution?[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.

2. 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 tempo-

[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).

rarily;[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 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 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.

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[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.

[5] James Madison, *Property*, 1 National Gazette, Mar. 29, 1792, at 174. Reprinted in 4 Letters and Other Writings of James Madison 480 (1865).

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 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

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[6] See John Locke, *The Second Treatise of Government*, Two Treatises of Government § 13 (Peter Laslet ed., 1960).

[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).

those goods legitimately. We cannot just take them. Yet that, too often, is what we do today.

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.

Mr. CANADY. Thank you very much for your testimony. We appreciate each of you being here.

Let me ask Reverend Campbell a question. Let me first observe, I think you make a very good point. We need to be concerned about the common good and that is one of the things that we in Congress obviously have to focus on.

Of course, the question here is, how much can we interfere with the rights of an individual in pursuing the common good, and whether, when we do that for the common good, the cost is going to fall on the individual or is it going to be paid for by the society as a whole?

And that is why this is a difficult issue. Now, let me just give you an example that we have talked about earlier—and you may have been here when this point was raised. But assume that a regulatory scheme prohibits a landowner from making any use of his property because there are certain endangered species on that property. And in order to protect them, it is necessary to basically preclude any productive use of the property.

Further, assume that the landowner acquired that property without knowing that the endangered species were there. That is one additional assumption. Do you think it is right for that landowner to bear the full costs of preserving those species on his land or should that cost somehow be shared by the whole society?

Reverend CAMPBELL. Well, all of these questions obviously have huge ambiguities in them. That is the nature of moral questions and moral arguments.

Mr. CANADY. Let me say this. I appreciate your putting the moral perspective on this because I think these are moral questions. I think most of the things we deal with go back to moral

questions. And there is a very important moral question, and a moral point of view can be argued on both sides of it and I accept that. But I am sorry to interrupt you.

Reverend CAMPBELL. It would seem just on the face of that argument if you take it exactly as you stated it without knowing all the surrounding issues, and presuming it is just an imaginary case, that shared costs would be a reasonable answer. If you are thinking about balance.

I think as I listened to my neighbor here, to Nancy, I think one of the issues there that is raised is—and you raised it in your example, which is presuming that he did not know that there were endangered species on that land, the whole question of what people know, for instance, when they purchase land which is exactly the question that I thought that she was raising; that partly someone came and said this is the reality after the fact.

Now, whether or not there is a way to inform people ahead of time, I also know the limits to that. But that seems to me also a complexity of the issue is what is it when regulations are put into place?

I think our concern about the takings legislation is that it has the potential to overcorrect a problem and to make absolutes of something that can be extremely ambiguous. For me, as an old worker in the civil rights movement, the minute I began to work with this, it reminded me of my days in the civil rights movement where the arguments were always made that a person who bought a home, who believed that if a person of color moved in next door to them it would reduce the worth of their property, had the right to limit who lived next door to them.

And we know the history of that and we know how we had to, in fact, say that person did not have an absolute right to that, thus limiting the rights of the person who had both the resources and the ability to purchase the house next door.

Mr. CANADY. Let me give you one other example here. There are various governmental entities which impose regulations to preserve historically significant properties. That has been focused in many cases on churches where there are grand churches built many years ago which are of historical significance. And these regulatory schemes would attempt to ensure that they are preserved.

In many cases that has caused problems for the particular church involved because the church may have a desire to expand its ministry and one way to do that is to sell or at least change the nature of the particular building.

Do you think it is right for the Government to tell a church that, no, you cannot change this particular building. You must preserve it exactly as it is, even though that may cause great hardship on the church in carrying out its religious ministries?

Reverend CAMPBELL. And, of course, I know stories on both sides of this. I know of a church that, in fact, was helped by the Government to preserve its historical——

Mr. CANADY. That is not what I am talking about. I understand that may happen and that is one thing. It is one thing if the Government wants to help somebody, but when the Government comes in and says we are going to require you to do this, that is a different matter.

Do you think that it is right for the Government to do that to a church?

Reverend CAMPBELL. I just find that a hard question to answer in an absolute because I know too much about it.

Mr. CANADY. I would imagine.

Reverend CAMPBELL. I think moral arguments, you have a lot of trouble—you are trying to get me to answer a question in an absolute. And I am saying this is an issue I know very well and on many of these there are two sides to those issues. Sometimes it is absolutely right for the Government to and this is because sometimes the church would, in fact, not take seriously a national treasure. And if we had time I would give you an example.

Mr. CANADY. You believe in most cases the Government should enter in?

Mr. FRANK. Let me follow up. I can't think of any cases where—we are talking about the Federal statutes dealing with the Federal Government. All the church preservation cases I can think of were State and local.

Are there any cases where the Federal Government requires someone to preserve a church that you can think of? I can't think of it.

Reverend CAMPBELL. I don't know personally.

Mr. FRANK. That would seem totally irrelevant to this bill because preservation issues have been State and local ones. I think of New York and others. But that is State and local. And according to this bill, if the Federal Government helped with that, it would be OK because this bill says if it is in support of a State or local law, that would be all right or local zoning.

Ms. Cline, let me say you expressed some fear of retaliation. I would hope that no Federal agency would even think remotely of taking any action because any citizen came before this Congress. And if you have the slightest hint that anything happened because of your appearance here, I urge you to tell all of us and we will stop it.

Let me ask you, too—the FBI and the EPA came, when was that? I was trying to get the chronology.

Ms. CLINE. They slowed up in January.

Mr. FRANK. January of when?

Ms. CLINE. 1994.

Mr. FRANK. And when did this dispute start?

Ms. CLINE. The first cease and desist was August 1990.

Mr. FRANK. And then this all played out from there. Let me ask Mr. Pilon, and Professor Ely, too, do we restrict this to only physical property? You talked about the bundle of sticks that represent property rights and people can have property in their right and right in their property. People do have property other than physical tangible property.

Would you restrict this just to physical pieces of land and buildings or would you include other property?

Mr. PILON. I would not restrict it in the least. Property is property.

Mr. FRANK. So you would change the bill. The thrust of your philosophy is that it would not simply be property that would be so restricted by my right to earn a living. However, I wanted presum-

ably that is a property right, so if we restricted people from earning a living in ways that diminished their earning capacity, that would also be a compensable taking. Mr. Ely.

Mr. ELY. I think it is well settled that the fifth amendment——

Mr. FRANK. Time out. Nothing is well-settled. The revolution is in town. We are going to do everything new. We are making public policy. This is not a case of what the fifth amendment compels, but what my colleagues decide to do. And the question is do you advise us when we pass this bill to broaden it beyond the physical land as property and should we, as Mr. Pilon said, take into account all forms of property, 15 of which are more important to people than their physical property?

Mr. ELY. That is certainly true. My sense is that it might be proper for the Congress to focus on the immediate issue, which is excessive land use regulation and consider the issues posed by personal property, right to earn a livelihood or intellectual property as a separate matter.

Mr. FRANK. That is a question of legislative scheduling. As a matter of intellectual consistency and the application of principle is there any basis for differentiating given the thrust of the argument of other forms of property from physical tangible property?

Mr. ELY. All forms of property, in my opinion, are entitled to legislative protection.

Mr. FRANK. So we should be clear that, in fact, if we were to go forward with this, that these two witnesses both think that that is just the first step.

Mr. PILON. It is only the beginning. Absolutely.

Mr. FRANK. Mr. Pilon, the Americans With Disabilities Act, you said how much regulation would cost would be up to us. Would you advise us to repeal that?

Mr. PILON. Are you giving me a reductio ad absurdum? You know that I am with the Cato Institute, don't you?

Mr. FRANK. I am asking you a question, Mr. Pilon. Let me say this, if your immediate response to being asked a question about a piece of legislation is that it is a reductio ad absurdum, it doesn't speak well for your self-confidence.

Mr. PILON. Oh, no, no, you——

Mr. FRANK. Wait a minute. This defensiveness of yours is inappropriate. You came here and you said to me that the amount—I raised the question with regard to the Americans With Disabilities Act. I asked Mr. Schmidt about that and I said how much would that cost us. And you said that is entirely up to us.

I asked you a reasonable question based on what you said and your defensiveness that that is reductio ad absurdum seems inappropriate.

Do you think that we should repeal the Americans With Disabilities Act?

Mr. PILON. Absolutely. Absolutely. No, let me take that back. Either repeal it or pay for it.

Mr. FRANK. But you said it would be up to us. How much do you think it would cost us to pay for the Americans With Disabilities Act?

Mr. PILON. If you don't know, I am sure I don't know.

Mr. FRANK. There is a basic thing you do not understand here. We don't ask you to come here to tell us things we already know. The notice is that you come here to give us some advice. And I have to say, that I find your backing away here a little bit——

Mr. PILON. It is not backing away. It is a rhetorical answer to your rhetorical question.

Mr. FRANK. But you would agree that under your definition of this, we would have to pay for the Americans With Disabilities Act and it would cost billions of dollars, would you assume?

Mr. PILON. If you want it badly enough you should pay for it. Isn't that the way most people——

Mr. FRANK. I asked you a simple question. You say you are an expert on this stuff. In your judgment would it require billions of dollars to pay for the Americans With Disabilities Act under your principle?

Mr. PILON. I did not say I was an expert on how much the——

Mr. FRANK. You have no idea how much it would cost?

Mr. PILON. When you order people to put elevators in——

Mr. FRANK. Stop the rhetoric and give me an answer. What is the answer?

Mr. CANADY. Mr. Frank——

Mr. PILON. I will give you the answer. I don't know. It is billions.

Mr. FRANK. That is what I asked.

Mr. PILON. That is the closest I can come, and are you prepared to pay for it?

Mr. FRANK. That is closer than you have come in anything else I have asked you, so I will stop.

Mr. CANADY. Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I appreciate all of you coming to provide your viewpoints on this. Do any of you, assuming that we are going forward with the principle that we have enunciated here, do any of you have specific changes that you would like to bring up that address any of the concerns that Mr. Frank has raised?

Mr. PILON. Yes, I think that the nuisance law area does need to be spelled out a little more fully. What we are dealing with here is balancing the police power with the eminent domain power. If the police power is defined too broadly it has a way of gobbling up the compensation requirement.

If, on the other hand, it is defined too narrowly then what you have is property owners themselves suffering because people can pollute and get away with it because there is no police power available to preclude that kind of pollution. So what you have got to do is trace the police power back to its origins and you go back to look at the executive power that each of us has to secure his rights in the state of nature. And you can spell out the scope of the police power. You may, for practical reasons, want to exclude such things as local zoning from that. But that is the kind of thing that you are going to have to come to grips with.

Mr. GOODLATTE. Would you exclude local zoning?

Mr. PILON. Again, standing on principle, I would not. I think the *Euclid* zoning case was wrongly decided by the Supreme Court—argued for the State, interestingly, by Senator Howard Metzenbaum's grandfather.

Mr. GOODLATTE. Anybody else have recommendations that would help address? Ms. Cline, anything that you would change in this that would help address the problem that you experienced, which I find to be an amazing experience that you have been through.

Ms. CLINE. Well, we have had such a horrendous experience that I cannot say anything except that we have seen unleashed power against a family. And to the degree that that can be balanced, it needs to be. Because the cost, as I said, the cost of what we—the burden of bearing this on our shoulders, if it had gone to the criminal arena as far as an indictment, was told to us to be $500,000 to protect ourselves.

Now, a lot of people—a percentage of that would break them. And for that to be the only recourse to exert your rights is a scary proposition. You can call it a police State, you can call it whatever you want, but it is just not fair.

Mr. GOODLATTE. What do you think about adding an attorney's fees provision to cover the circumstances that you are in? If there is an unlawful taking and there is a certain threshold that is met before reasonableness sets in and you have to go beyond that threshold to get justice, should you be entitled to attorney's fees.

Ms. CLINE. I think absolutely. I don't even know what the recourse is now. I don't think there is any provision in this for us to be—we consider the money we have spent completely lost.

Mr. FRANK. There is under the Equal Access to Justice Act, there is a trigger figure, and it would depend on how big the business is. But we do have a Federal law that compensates people against whom regulatory action has been launched under certain circumstances, depending on the—if they qualify as a small business. I don't know the exact figures, but you might want to check.

Mr. BYRNE. Parties that prevail under compensation actions against the United States also get attorney's fees.

Mr. PILON. There is a section in this bill on arbitration that seems to me could withstand closer scrutiny in that it allows the agency to appoint the arbitrator. It seems that there is a better way to do that, and it is the way it is done in real estate contracts, and oftentimes construction contracts, in which both parties appoint a neutral who then appoints an arbitrator.

That would avoid any possibility of collusion between an agency and a select group of arbitrators, or the appearance of collusion.

Mr. BYRNE. I would like to make the suggestion that you really throw this bill out and start by trying to find out what the facts are. And one way to do that would be to ask either the Department of Justice, or if you think that they have an institutional point of view, ask the Congressional Research Service or the General Accounting Office to provide you with annual accounts of the kinds of takings actions that have been filed against the United States, not just the ones that have been settled, but the ones that have been filed.

And I would urge the Congress to look at that and to identify areas where, in your judgment, Federal agencies are applying existing laws in an inappropriate or oppressive manner and change those laws. Look at the laws that really raise concerns, find out what they are, and get the facts, not on the basis of highly emotional testimony, and fix the laws that need to be fixed.

Mr. PILON. Could I respond to that? I think you would find that a very skewed set of numbers because most people who are affected by regulatory takings do not bring legal action. They are either highly intimidated by the fact that they are being challenged by the Government or highly intimidated by the sheer cost of bringing an action, so they don't come close to a court. The number of cases that get to a court are minuscule in comparison to the number of cases that are out there. Most people suffer in silence.

Mr. GOODLATTE. Thank you.

Mr. CANADY. Thank you. I want to thank each member of this panel and we appreciate your being with us.

We have one additional panel and the members of the third panel, if you would—if the members of the third panel will come forward and take their seats.

I am going to have to ask that you please take your conversations outside. We need to move on with the hearing. I appreciate your being here.

First, we will hear from Roger Marzulla, chairman of the Defenders of Property Rights. Mr. Marzulla was the Assistant Attorney General for the Environment and Natural Resources under President Ronald Reagan.

Second, Alletta Belin will testify on behalf of Tom Udall, the attorney general of New Mexico. Ms. Belin is the assistant attorney general of New Mexico.

Third, we will hear from Mr. James Miller III. Mr. Miller is counselor to both Citizens for a Sound Economy and the Tax Foundation. He was Director of the Office of Management and Budget under President Reagan.

Fourth, we will hear from Senator Richard Russman, the chairman of the New Hampshire Senate Environment Committee. Finally, we will hear from Jonathan Adler from the Competitive Enterprise Institute.

I will ask each of you—is Mr. Miller behind those boxes?

We would ask each of you to summarize your testimony in 5 minutes. And without objection, as with all the other witnesses, your testimony—your full statement will be placed in the record. We thank you for being here.

Mr. Marzulla.

Mr. MARZULLA. Thank you, Mr. Chairman. Thank you for inviting me to speak——

Mr. CANADY. Mr. Marzulla, I will ask you to withhold at this point because of this vote. And rather than listening to you and then racing off, we will recess the committee now and we will come back after the vote and we will hear the whole panel at that time. Thank you.

[Recess.]

Mr. CANADY. The subcommittee will come to order.

Mr. Marzulla, please start again. I apologize for the delay.

STATEMENT OF ROGER J. MARZULLA, CHAIRMAN, BOARD OF DIRECTORS, DEFENDERS OF PROPERTY RIGHTS

Mr. MARZULLA. Indeed. Thank you, Mr. Chairman.

Thank you for inviting me here to speak on behalf of the thousands of Americans whose homes, farms, small businesses, whose

pensions, livelihoods and dreams have, in many instances, been wantonly taken from them by excessive government regulation.

Three and a half years ago, my wife Nancy and I founded an organization called Defenders of Property Rights to help people like that, people whose property had been taken and had not the means to defend themselves against their own government. People, I might add, who never thought they would find themselves in a pitched battle for their way of life in dealing with government agents.

The reason this has arisen, Mr. Chairman and members of the subcommittee, is that over the past two decades this Nation has created the most massive, the most complex regulatory scheme ever in history. There are thousands and thousands of pages, statutes and regulations impacting the use of property rights, and yet there is not one single provision dealing with the rights of the property owners themselves when they are faced with excessive governmental regulation.

The boxes here to my left, Mr. Chairman, contain the letters and documents, the pleas for help that daily arrive at Defenders of Property Rights from property owners across this Nation whose land, whose farms and livelihoods have been taken and affected by excessive governmental regulation. Regrettably, of course, we are only able to help a small proportion of those people, and most of their pleas and demands and needs go unanswered.

There are those who suggest that the current situation is just fine, that the fifth amendment to the Constitution satisfactorily provides redress for those whose property has been taken from them by their Government.

I am here to tell you, having been on both sides of the fence—that is, having defended these cases for the Federal Government and now being a representative of the property owners in those same kinds of cases, that it simply is not adequate. That, in fact, the law is tilted sharply in favor of the Federal Government in this litigation.

First, there is a whole panoply of procedural defenses which are asserted routinely by the Federal Government in defending those takings claims that are brought—lack of rightness, mootness, lack of jurisdiction, filing in the wrong court, the Anti-Assignment Act and a whole raft of other legal defenses that sometimes take years to litigate.

Next is the complexity of the case-by-case, ad hoc, factual increase of whether or not a taking has occurred. Congressman Frank pointed out, and the Associate Attorney General agreed, that *Dolan* is now the law of the land. But a year ago the Solicitor General of the United States could file a brief saying that the *Dolan* theory was wrong and that it was not the law of the land.

Indeed, it is precisely that kind of litigation which has stretched out in cases like *Loveladies Harbor, Inc., Hendler* and others, litigation which involves takings that occurred a decade or more ago and required the expenditure of hundreds of thousands in those cases, in some cases more than a million dollars in attorney fees to bring to resolution.

Obviously, then, only the most tenacious and well-heeled of property owners is able to bring those cases in the first instance to the Claims Court and see them through.

Thus, property rights legislation is needed to address the requirements of the ordinary American who lack fairness and certainty in their dealings with their Federal Government with respect to their property rights. That legislation must, first of all, address the certainty question. It must provide a bright line definition of what constitutes a taking.

There are various ways you can approach that. One is to speak in terms of reduction in value of the property. Another is to speak in terms of the taking of a cognizable property interest, but there must be a definition better than saying that it is an ad hoc, factual inquiry.

Second, there must be procedural fairness. It just can't continue to take a decade or more to try the ordinary takings case, and it can't cost the kind of money that it has—has been expended by litigants in past years.

And, finally, there must be full compensation. There must be compensation not only for that which was taken but reimbursement for attorneys' fees, treasurers' fees, expert witness costs and all the other expenses inherent in the property rights prosecution.

It is only by the passage of this kind of property rights legislation that we will put the justice back in the just clause.

Mr. CANADY. Thank you, Mr. Marzulla.

[The prepared statement of Mr. Marzulla follows:]

PREPARED STATEMENT OF ROGER J. MARZULLA, CHAIRMAN, BOARD OF DIRECTORS, DEFENDERS OF PROPERTY RIGHTS

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to appear before this Subcommittee today to discuss the vital need for private property rights legislation. The need for property rights legislation was well described in a recent decision by Chief Judge Lorin Smith of the Court of Federal Claims:

> This case presents in sharp relief the difficulty that current takings law forces upon both the federal government and the private citizen. The government here had little guidance from the law as to whether its action was a taking in advance of a long and expensive course of litigation. The citizen likewise had little more presidential guidance than faith in the justice of his cause to sustain a long and costly suit in several courts. There must be a better way to balance legitimate public goals with fundamental individual rights. Courts, however, cannot produce comprehensive solutions. They can only interpret the rather precise language of the fifth amendment to our constitution in very specific factual circumstances. To the extent that the constitutional protections of the fifth amendment are a bulwark of liberty, they should also be understood to be a social mechanism of last, not first resort. Judicial decisions are far less sensitive to societal problems than the law and policy made by the political branches of our great constitutional system. At best courts sketch the outlines of individual rights, they cannot hope to fill in the portrait of wise and just social and economic policy. *Bowles* v. *United States* 31 Fed.Cl. 37 (1994).

I serve as chairman of the Board of Directors of Defenders of Property Rights, the nation's only nonprofit legal defense foundation dedicated exclusively to the protection of constitutionally-guaranteed property rights. Through a program of litigation, education and legislative support, Defenders seeks to realize the promise of the Bill of Rights of the U.S. Constitution that private property shall not be "taken for public use without just compensation." Defenders has a large national membership who are property owners, users and beneficiaries of the rights protected by the Constitution and traditional Anglo-American property law. Defenders has participated in many of the most important property right cases in recent years, including *Lucas* v. *South Carolina Coastal Commission, Dolan* v. *City of Tigard* and *Reahard* v. *Lee*

County Florida (for which we will seek Supreme Court review in a petition to be filed next week). Defenders has also devoted a significant amount of resources to analyzing legislative proposals concerning property rights at both the state and federal levels.

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 in the Constitution, the framers of our Constitution 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 habitants, 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 ruled 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 economically 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 landowners possess the resources and preserverence 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 Obligation 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 labors 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. People's 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 abridgment 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 AND COURTS HAVE NOT GONE FAR ENOUGH IN PROVIDING FOR THEIR PROTECTION

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 environmental protection 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. But we do not have a single statute dealing with the protection of private property rights.

A. Courts cannot adequately protect private property rights

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.

Since 1978, the Court has identified at least three areas which also constitute per se violations of the Fifth Amendment. In *Hodel* v. *Irving,* 481 U.S. 704 (1987), the Court held that destruction of the right to devise private property violates the Fifth Amendment. *In Nollan* v. *California Coastal Commission,* 483 U.S. 825 (1987), the Court determined that a property regulation which does not substantially advance its avowed governmental purpose also constitutes a taking. Most recently, in *Lucas* v. *South Carolina Coastal Council,* 112 S. Ct. 2866 (1992), the Court held that destruction of all productive and beneficial uses of private property violated the Fifth Amendment. Despite these efforts by courts to flesh out Fifth Amendment guarantees, there are still many open questions in takings jurisprudence. Indeed, the most troublesome question is determining when a regulation goes too far.

B. Takings litigation today is a long, expensive and arduous process which only the most well-financed and dedicated property owner can endure

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 costs 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 a 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.

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 the 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 bitter litigation, the case was dismissed in December 1989. Hendler appealed, and the case was reversed by the Court of Federal Appeals in the Summer of 1991. The matter is now set for trial in 1995, more than twelve years after the government first physically invaded Hendler's property.

In January 1979 Whitney Benefits Corporation was denied a permit to mine coal on its land located in Wyoming. The company filed suit in the claims court in August 1983, and the case was dismissed the next year. In January 1985 the Court of Appeals reversed the dismissal and, following several years of litigation, the trial court entered judgment in favor of the plaintiff in October 1989. That judgment was affirmed in 1991, but has been followed by four more years of motions. Thus, more than 16 years after the permit denial, Whitney Benefits has not yet received payment for the taking.

In May 1982 Love ladies Harbor Inc. was denied a wetlands permit to develop property it owned in New Jersey, and filed suit in the Claims Court in April 1983. After extensive litigation in both the Federal District Court and the Claims Court, plaintiff was awarded judgment in 1990. The government appealed, then moved to dismiss the appeal. Finally, in 1994, the Court of Appeals for the Federal Circuit affirmed the judgment for plaintiff—more than twelve years after the original permit denial.

III. PROTECTION OF PRIVATE PROPERTY RIGHTS NEED NOT BE THE ENEMY OF ACHIEVING IMPORTANT SOCIAL OBJECTIVES

Legal and economic scholars have long argued 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 will 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 avoid individual property owners from being singled out to pay the costs of achieving social good.

We have heard the government regulators argue that requiring compensation for takings will prohibit the government from protecting enough land. Economically speaking, the Just Compensation Clause ensures that only property worth the cost of protecting will be regulated. By requiring compensation for takings, the government is forced to weigh the costs and benefits of its regulatory schemes. The Just Compensation Clause thus 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 the Clause will slow the government from taking too much land, thus destroying the productive forces of the economy that finance government. The best stewards of 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. 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.

Critics of property rights proposals assert that such legislation is unfair because it only allows for the payment of compensation if property is taken. To be equitable, they assert, property owners should pay government for the benefits bestowed on them by regulation. The straight forward legal response to this position is that the Constitution does not speak to this issue. The Fifth Amendment, which contains the only express money guarantee in the Constitution, states simply that "[N]or shall private property be taken for public use without just compensation." The obligation to pay property owners for property which has been taken simply attaches whenever government action works a taking. *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960). Federal property rights legislation would merely enforce this constitutional

right because courts have such difficulty in applying it in situations where property is taken due to confiscation regulations.

IV. A SOUND PROPERTY RIGHTS BILL MUST CONTAIN AN ADEQUATE DEFINITION OF "TAKING" AND PROMPT COMPENSATION TO THE PROPERTY OWNER

Thus, the central problems of current takings law are dual: First, the ambiguity inherent in a case-by-case ad hoc definition of what constitutes a taking, and second, 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. I wish to underscore the point that 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.

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 12630 signed by President Reagan on March 15, 1988. That Executive Order, titled "Governmental 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.

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) and *Florida Rock Indus.* v. *United States* 18 F.3d 1560 (1994)]. The second approach analyzes the issue by ascertaining whether a recognizable property interest, deed able to the government, has been taken. [See e.g. *Loveladies Harbor Inc.* v. *United States* 28 F.3d 1171 (1994) and *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 Railroad Decision. By providing to the 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, 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" back in "just compensation." Providing an arbitration remedy might also serve to minimize the time and expense invested by both sides in litigating these complex and frustrating cases.

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 expert 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.

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

Mr. CANADY. Next, Ms. Belin.

STATEMENT OF ALLETTA BELIN, ASSISTANT ATTORNEY GENERAL, STATE OF NEW MEXICO

Ms. BELIN. Thank you, Mr. Chairman.

I am Alletta Belin, assistant attorney general for New Mexico. I am here to present the comments of New Mexico Attorney General Tom Udall. Regrettably, he couldn't be here because he is in Dallas attending a meeting of the National Association of Attorneys General of which he is both the president-elect and the chair of the Environment and Energy Committee.

Before I begin, I would like to ask that the record be held open for a brief period after this hearing in order to allow us to submit additional materials as we did not have very much time at all to prepare anything today.

I urge you to vote against title IX of H.R. 9 and other similar takings legislation. Rather than protecting private property rights, the legislation would diminish property values, undermine two centuries of constitutional law, create a new layer of bureaucracy and require taxpayers to foot a very large bill.

Last fall 33 attorneys general, Republican and Democrat, wrote to Congress asking you to reject takings legislation such as title IX. I will summarize today the reasons for our letter.

I also note that a number of other State and local governmental organizations have taken similar positions against takings legislation. Those include the National League of Cities, the National Conference of State Legislatures and the Western States Land Commissioners Association.

While takings proposals such as title IX are cloaked in the language of the Constitution, they actually have little to do with it. The fifth amendment guarantees that if an individual is singled out to bear a severe burden for general public benefit, it is the public that benefits that must pay. That is only fair. Takings laws such as title IX would require the public to pay far more often than the Constitution actually requires.

In essence, title IX would make the public pay polluters not to pollute, pay property owners not to harm their neighbors and pay companies not to interfere with the public health, safety and welfare.

The Supreme Court has observed that takings jurisprudence presents problems of considerable difficulty because it requires a careful analysis and balancing of the interests involved on a fact-specific, case-by-case basis. An across-the-board diminution formula, such as the 10-percent formula in H.R. 9, does not solve or begin to address any of those difficulties. It represents an inflexible and arbitrary meat cleaver approach to a subtle issue.

Taxpayers would see at least two economic consequences of this legislation. Property values would go down, and taxes would go up.

Clean air and clean water laws, limits on the siting and operation of landfills, restrictions on hazardous waste disposal, all protect homeowners' property values. This is because the value of a family's home depends upon the health and attractiveness of the surrounding community. If the public had to pay any time any regulation affected property, enforcement would become prohibitively expensive.

In addition, taxes would have to go up to pay for the flood of claims invited by title IX. The Congressional Budget Office estimated that a proposal in the last Congress to redefine property rights under the Clean Water Act would have cost taxpayers in excess of $10 billion.

This particular bill would not require preparation of takings impact statements, as do other bills before this Congress. Like those bills, however, it, too, would be a full employment act for lawyers and bureaucrats. It is guaranteed to bog down agencies in mounds of paperwork and ensure that they get so involved in the minutiae that they will never see the big picture.

That is a big stack of papers next to Mr. Marzulla, but it is nothing next to the amount of paper that would be generated by this bill.

All of us, I am sure, know of instances where the conduct of regulators has been heavy-handed, stupid or both, but the answer is not found in takings legislation such as title IX. Takings issues are best dealt with by courts. Congress should not adopt a radical new takings theory that says that Government must pay individuals in order to govern. Title IX serves neither the property values it seeks to promote nor the public interest.

I urge Congress to reject the imposition of a mandate that comes at the expense of the taxpayer and the Constitution.

Thank you.

Mr. CANADY. Thank you.

[The prepared statement of Mr. Udall follows:]

PREPARED STATEMENT OF TOM UDALL, ATTORNEY GENERAL, STATE OF NEW MEXICO

Mr. Chairman, members of the Subcommittee, I am Tom Udall, Attorney General of New Mexico. I also serve as President-Elect of the National Association of Attorneys General ("NAAG") and Chair of NAAG's Environment and Energy Committee. I appear today not on behalf of NAAG but as Attorney General of New Mexico.

I urge you to vote against Title IX of H.R.9, the "Job Creation and Wage Enhancement Act of 1995," and other similar takings legislation. Rather than *protecting* private property rights, such legislation would *diminish* property values, undermine two centuries of constitutional law, create a new layer of bureaucracy, and require taxpayers to foot a very large bill.

Last fall, thirty-three Attorneys General—Republican and Democrat—wrote to Congress asking you to reject "takings" bills which purport to implement property rights protection but instead compromise public protection. I will summarize today the reasons for our letter. I also note that a number of other state and local governmental organizations have taken similar positions against takings legislation. These organizations include: the National League of Cities, the National Conference of State Legislatures, and the Western States Land Commissioners Association. Copies of those resolutions, as well as the Attorney General letter, are attached hereto.

TITLE IX OF H.R. 9 RUNS COUNTER TO THE FIFTH AMENDMENT

While takings proposals such as Title IX are cloaked in the language of the Constitution, they actually have little to do with it. The Fifth Amendment guarantees that if an individual is singled out to bear a severe burden for general public benefit, the public that benefits must pay. That is only fair.

"Takings" laws, however, such as Title IX, would require the public to pay far more often than the Constitution actually requires. In essence, Title IX would make the public pay polluters not to pollute, pay property owners not to harm their neighbors, and pay companies not to interfere with the public health, safety, and welfare.

Over the last 200 years the courts have developed a substantial body of case law to determine when regulation of property use requires compensation under the Fifth Amendment. Generally, the courts apply a balancing test, weighing a property owner's justifiable expectation about what he or she would be able to do with the property and the public interest served by the regulation.

The United States Supreme Court has observed that takings jurisprudence presents problems of "considerable difficulty," because it requires a careful analysis of the interests involved on a fact-specific, case-by-case basis. An across the board diminution in value formula, such as the 10% formula included in H.R. 9 does not solve or begin to address any of those difficulties and represents a meat cleaver approach to a subtle issue.

TAKINGS LEGISLATION WOULD INCREASE COSTS TO TAXPAYERS

Taxpayers would see at least two economic consequences of takings legislation: property values would go down and taxes would go up.

Clean air and clean water laws, limits on the siting and operation of landfills, and restrictions on hazardous waste disposal, for example, all protect homeowners' property values. This is because the value of a family's home depends on the health and attractiveness of the surrounding community. If the public had to pay every time any regulation affected property, enforcement would become prohibitively expensive. Government's capacity to prohibit landfills next to homes or incinerators next to schools would be severely limited by cost.

In addition, taxes would have to go up to pay for the flood of claims invited by these bills. The Congressional Budget Office estimated that a proposal in the last Congress to redefine property rights regulated under the Clean Water Act would have cost taxpayers in excess of $10 billion.

TAKINGS LEGISLATION WOULD INCREASE THE SIZE, COST AND INEFFICIENCY OF BUREAUCRACY

This particular bill would not require preparation of "takings impact statements," as do other bills before this Congress. However, like those bills, it too would be a full employment act for lawyers and bureaucrats. It would require a government lawyers and bureaucrats to devote a great deal of time and resources to determining the fair market value of every piece of property potentially affected by government action and then estimating the dollar impact on all such properties. This is a daunting task—one that is guaranteed to bog down agencies in mounds of paperwork and ensure that they get so involved in the trees that they cannot see the forest. In addition, a whole new work force of government lawyers would have to be hired just to defend all the claims filed under the provision.

All of us, I'm sure, know of instances where the conduct of regulators has been heavy-handed or stupid or both. And we can cite examples of legislation and regulations that sometimes hinder rather than advance the public purposes for which they were enacted. But the answer is not found in takings legislation such as Title IX. Takings issues are best dealt with by courts; Congress should not adopt a radical new takings theory that says that government must pay individuals in order to govern. That does not protect constitutional values, nor does it do anything to protect the interests of the public.

Title IX of H.R. 9 serves neither the property values it seeks to promote nor the public interest. I urge Congress to reject the imposition of a mandate that comes at the expense of the taxpayer and the Constitution.

Attorney General of New Mexico

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TOM UDALL
Attorney General

MANUEL ELERINA
MARIAN MATTHEWS
Deputy Attorneys General

September 26, 1994

Dear Members of Congress:

We the undersigned Attorneys General are writing to urge you to oppose the "takings" bills currently pending in Congress. These bills, like similar bills we have seen introduced in state legislatures across the nation, purport to implement constitutional property rights protections, but in fact they promote a radical new takings theory that would severely constrain the government's ability to protect the environment and public health and safety. They also would greatly increase the costs of government, creating costly new bureaucratic paperwork requirements with no corresponding benefits.

As you know, the Fifth Amendment to the U.S. Constitution guarantees that private property shall not "be taken for public use, without just compensation." Over the last 200 years, the courts have developed a substantial body of case law to determine when regulation of property use requires compensation under the Fifth Amendment. Generally, the courts apply a balancing test, weighing a property owner's justifiable expectations about what he or she would be able to do with their property against the rights and interests of the public as embodied in the government regulation in question. That system has worked well, and it has permitted the courts to tailor their rulings to the circumstances in particular cases.

Some of the "takings" bills now pending in Congress would change all that. For example, S. 1915 and H.R. 3875, introduced by Senator Richard C. Shelby (D-AL) and Representative W.J. Tauzin (D-LA), respectively, would flatly require payment whenever wetlands or endangered species protections reduce the market value of an "affected portion" of property by 50% or more. Compare that to current settled constitutional law. Under present law, a loss in value on part of someone's property would only begin the inquiry. The courts would also evaluate:

- the impact of the government action or regulation on the value of the owner's entire property (not just the portion directly affected);

- the rules and restrictions in effect at the time of purchase, to determine the owner's reasonable expectations; and

- the public interests and values served by the regulation.

Obviously, the Shelby-Tauzin proposal and others like it would force the government to pay private property owners far more often than the Constitution requires. They would, in effect, write into law the dubious principle that the government must pay polluters not to

pollute, pay property owners not to harm their neighbors or the public, and pay companies not to damage the health, safety, or welfare of others.

A second set of "takings" proposals would require agencies to prepare voluminous "property rights impact statements" every time they contemplate any kind of regulatory action, or to develop detailed procedures to prevent any actions which "may affect the use or value of private property." Those proposals would require agencies to speculate about the precise amount by which the value of all affected private property might be diminished, then speculate about how much diminution in value would be caused by various alternative courses of action, and then speculate about what the courts might decide in any potential lawsuit challenging the regulation. Since agency attorneys already review new proposals for potential takings problems (as well as for a myriad of other potential problems), this new paper-shuffling requirement would do nothing to reduce the likelihood of unconstitutional takings.

More important, however, some of those proposals would also give individual property owners the right to sue to stop any new regulation in its tracks, if they do not believe the property rights impact statement is adequate or do not believe the agency has given sufficient weight to their interests. Not only would these bills saddle agencies with an extremely costly, if not impossible, bureaucratic task, but they would create a powerful new weapon to bar agencies responsible for protecting the public welfare from acting at all. Obviously, that is not what the Constitution requires, nor is it a policy Congress should adopt.

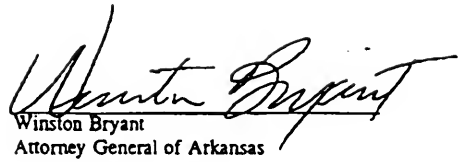
Of course, we believe that Congress is careful to evaluate the impact on private interests whenever it considers new legislation to protect the public health and safety. Likewise, we know the courts stand prepared to require compensation in those few situations when regulations go too far and abridge individual constitutional rights. What Congress should not do, however, is adopt a radical new "takings" theory that says that government must pay individuals in order to govern. That does not protect constitutional values, nor does it do anything to protect the interests of the public.

We urge you to preserve the 200 year tradition of allowing courts to decide takings issues by voting against takings legislation.

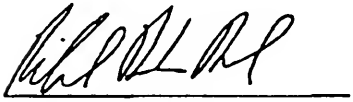
Very truly yours,

Tom Udall
Attorney General of New Mexico

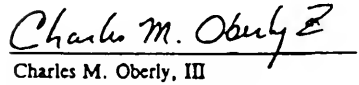
Bruce M. Botelho
Attorney General of Alaska



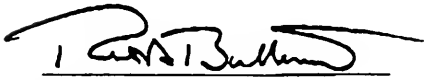
Winston Bryant
Attorney General of Arkansas



Richard Blumenthal
Attorney General of Connecticut



Charles M. Oberly, III
Attorney General of Deleware



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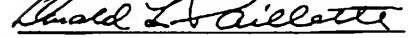
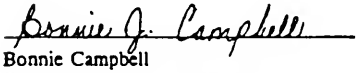


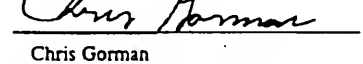
Donald L. Paillette
Acting Attorney General of Guam

Robert A. Marks
Attorney General of Hawaii

Pamela Fanning Carter
Attorney General of Indiana



Bonnie Campbell
Attorney General of Iowa



Chris Gorman
Attorney General of Kentucky

Michael E. Carpenter
Attorney General of Maine

J. Joseph Curran, Jr.
Attorney General of Maryland

Scott Harshbarger
Attorney General of Massachusetts

Frank J. Kelley
Attorney General of Michigan

Hubert H. Humphrey, III
Attorney General of Minnesota

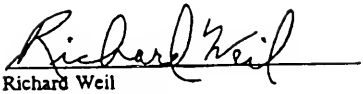
Mike Moore
Attorney General of Mississippi

Joseph P. Mazurek
Attorney General of Montana

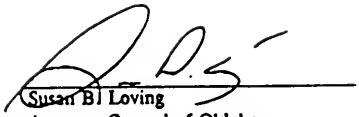
Jeffrey R. Howard
Attorney General of New Hampshire

Deborah T. Poritz
Attorney General of New Jersey

G. Oliver Koppell
Attorney General of New York

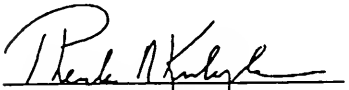


Richard Weil
Attorney General of
the Northern Mariana Islands

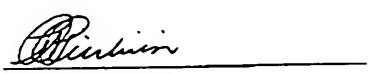


Susan B. Loving
Attorney General of Oklahoma

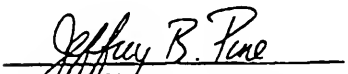
Lee Fisher
Attorney General of Ohio



Theodore R. Kulongoski
Attorney General of Oregon



Pedro R. Pierluisi
Attorney General of Puerto Rico



Jeffrey B. Pine
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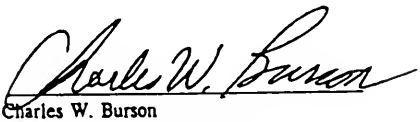
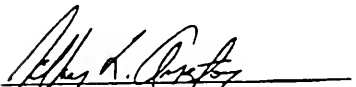
T. Travis Medlock
Attorney General of South Carolina



Charles W. Burson
Attorney General of Tennessee



Jeffrey L. Amestoy
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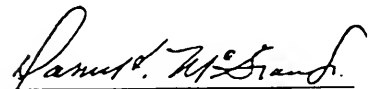
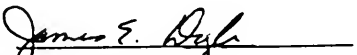
Rosalie Simmonds Ballentine
Attorney General of Virgin Islands



Darrell Vivian McGraw, Jr.
Attorney General of West Virginia



James E. Doyle
Attorney General of Wisconsin

RESOLUTION ADOPTED BY THE NATIONAL LEAGUE OF CITIES

MINNEAPOLIS, MINNESOTA
DECEMBER 4, 1994

RESOLUTION - #1

OPPOSING FEDERAL RESTRICTIONS ON MUNICIPAL REGULATORY AUTHORITY

WHEREAS, the subject of "takings" is the subject of legislative debate and litigation and this debate and litigation is expected to expand and continue; and

WHEREAS, proposals to regulate "takings" increasingly propose restricting governmental actions which do not place property in government ownership but instead create situations in which it can be asserted that the governmental action results in a reduction in the value of a property or restricts the future growth in the value of that property; and

WHEREAS, the very reason for the existence of municipal government is to protect the health, welfare and safety of the public; and

WHEREAS, this protection of health, welfare and safety involves city and town governments on a daily and continuing basis in a myriad of regulation of private property including such actions as zoning, planning and licensing; and

WHEREAS, the Fifth Amendment of the United States Constitution contains language prohibiting the taking of property without just compensation; and

WHEREAS, all municipal regulatory actions must be taken within the constraints of the Fifth Amendment which is subject to continuing refinement by the courts; and

WHEREAS, a number of state municipal leagues have been involved in efforts to stop or modify such "takings" initiatives at the state level and such efforts will be undercut if federal actions preempt the field on this subject.

NOW, THEREFORE BE IT RESOLVED that the National League of Cities opposes any federal regulation, statute, or constitutional amendment which would place restrictions on state and local government actions regulating private property or requiring additional compensation beyond the continually evolving judicial interpretations of the Fifth Amendment of the United States Constitution.

NATIONAL CONFERENCE OF STATE LEGISLATURES

1560 BROADWAY SUITE 700 DENVER, COLORADO 80202
303-830-2200 FAX: 303-863-8003

ROBERT T. CONNOR
SENATE MINORITY WHIP
DELAWARE
PRESIDENT, NCSL

JOHN TURCOTTE
DIRECTOR, JOINT P.E.E.R. COMM
MISSISSIPPI
STAFF CHAIR, NCSL

WILLIAM POUND
EXECUTIVE DIRECTOR

Governmental Regulation and "Takings" Under the Fifth Amendment

NCSL 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 States 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.

PROMOTING RESPONSIVE, EFFECTIVE AND COST-EFFICIENT ADMINISTRATION OF STATE TRUST RESOURCES.

Whereas, Congress and most state legislatures are being asked to enact laws requiring "takings" assessments or requiring compensation when none would be required by the fifth amendment to the United States constitution; and

Whereas, member organizations of the Western States Land Commissioners Association promulgate rules and regulations governing the use and disposition of state trust lands, and so may be subject to these laws; and

Whereas, laws requiring "takings" assessments or compensation for the promulgation of regulations could result in lengthy and expensive litigation; and

Whereas, "takings" legislation may be contrary to two hundred years of federal and state judicial decisions, and the application of property and contract law; and

Whereas, "takings" legislation may interfere with the realization of the maximum economic value of the state trust lands to the detriment of the trust beneficiaries by unduly restricting the ability of the trustees to manage those lands; and

Whereas, "takings" legislation requiring assessments or compensation could increase the costs of trust administration; and

Whereas, "takings" legislation may result in the solidification of leasehold values in state trust land to the detriment of its beneficiaries; and

Whereas, "takings" legislation may attempt to establish potentially destabilizing and unproven "property" rights in state trust lands, and improperly transfer such rights from the beneficiaries to certain users of trust lands; and

Whereas, "takings" legislation could subject local and state governments to potential financial risk of compensation claims for alleged "takings", thereby reducing bonding capacity for capital improvement projects; and

Whereas, "takings" laws may be unnecessary because property owners in the United States have ready recourse through the courts to challenge any unconstitutional property taking;

NOW THEREFORE BE IT RESOLVED, that the Western States Land Commissioners Association affirms its commitment to responsive, effective, cost-efficient administration of state trust lands, including the proper promulgation of necessary regulations; and

BE IT RESOLVED, that the Western States Land Commissioners Association strongly supports property rights as envisioned and enforced by the Constitutions of the United States and the respective states; and

BE IT FURTHER RESOLVED, that the Western States Land Commissioners Association urges its member states to oppose the passage of "takings" legislation that would diminish the value of the trusts they administer or diminish their ability to administer these trusts.

Approved this 12th day of January, 1995.

GARY GUSTAFSON, PRESIDENT

MAX VEZZANI, SECRETARY

Mr. CANADY. Senator Russman, we will go ahead with your statement, but I am going to have to leave in 5 minutes in order to go vote. And we will come back and conclude with Mr. Adler.

STATEMENT OF SENATOR RICHARD L. RUSSMAN, NEW HAMPSHIRE STATE SENATE, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. RUSSMAN. Thank you so much.

Mr. Chairman, members of the committee, I am Rick Russman. I am a Republican State senator from New Hampshire. I am a supporter of term limits—sponsor of the bill, as a matter of fact—line item veto, balanced budget amendment, the return to biennial sessions where we meet every other year.

I am here on behalf of the National Conference of State Legislatures, and I would like to indicate to you that the National Conference of State Legislatures is prepared to work with Congress in terms of trying to find common ground and deal with overreaching government regulations.

These types of bills, though, are clearly having Congress go in the wrong direction. I think out in the hinterlands where I come from there is no question that there is a feeling, a good feeling that Congress is doing what it is doing in terms of limiting government and making things smaller. At the same time, this type of legislation in terms of takings legislation are clear budget busters—absolutely.

Certainly, there are anecdotal stories about problems that have occurred. And if there are, they ought to be fixed. If there is something wrong with the statute, it ought to be amended. It is almost like Congress saying they can't get it fixed so they are going to do it another way. Obviously, those things need to be addressed.

At the same time, we all live downstream or downwind or next door to some property where pollution exists. Obviously, all our property values are enhanced by some regulation over those types of properties so they should do what they are doing.

You can't expect the people to pay to allow polluters or to have polluters not pollute. I think that that is only going to raise taxes, and it is going to discourage good regulations that are going to protect the community and neighboring property owners.

There has been no studies that I have heard of or read that are fully scientific or comprehensive in terms of the scope of this problem outside of the anecdotal stories we have heard. I think that certainly, if there is that type of thing, that we need to deal with it. We ought to fix it.

At the same time, it strikes me that this is simply a solution looking for a problem.

What we are primarily concerned about and one of our big things with the National Conference of State Legislatures is what will this do with the States? Clearly, if this starts a culture from the Federal Government, we in the States are going to be forced to do the same thing. The localities and municipalities are going to be forced to do the same thing.

The next thing that we know, if a town decides to go from perhaps 1-acre zoning to 2-acre zoning for the general good, will the town be forced to buy every other lot in town? We can't afford that.

Certainly nobody has begun to put any type of figure on what this is going to cost the Federal Government today. At a time the Federal Government is going in the right direction in other areas, certainly this is not the time to go off on a tangent in terms of trying to make the public pay instead of the polluter pay.

States simply cannot afford a new entitlement program, which I think is being espoused here today as a good thing. The Federal Government has said with the new administration that one size doesn't fit all. Yet this type of legislation does just that, one size fits all, that in dealing with a specific problem we will use this one size fits all.

As a lawyer I can tell you certainly I would be wanting to become an expert in this area and represent people because why not ask—why not see if there is a taking? No harm in trying. The assessments, expert witness fees, appraisals, they are going to be huge.

With that, I will close. And I thank you for your attention.

Mr. CANADY. Senator, we appreciate your being here.

[The prepared statement of Mr. Russman follows:]

PREPARED STATEMENT OF SENATOR RICHARD L. RUSSMAN, NEW HAMPSHIRE STATE SENATE, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

INTRODUCTORY REMARKS

Mr. Chairman and Members of the House Judiciary Subcommittee on the Constitution, I am Richard L. Russman, Republican State Senator from Kingston, New Hampshire. In New Hampshire, I am known for my strong support for term limits, the line item veto, the balanced budget amendment and a return to biennial meetings for our state legislature.

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 made clear 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 and welfare. However, takings legislation that seeks to create an *expensive new entitlement program* is not the proper approach.

GENERAL COMMENTS

As a fiscal conservative and believer in limited government, compensation-type "takings" bills represent expensive "budget-busters." Their purpose is to give taxpayer subsidies to those who have to comply with requirements designed to protect *all* property values, and the health and safety of average Americans. 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 increasing taxes or by diverting limited government resources for a new entitlement program. Such legislation will harm the general public by raising taxes and 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 H.R. 9, Title IX, radically expands the definition of a compensable government action and creates an expensive new government program.

Most troubling of all is that, beyond a few isolated anecdotal accounts, there are no studies or evidence to support the notion that the judicial branch of government has abdicated its role in protecting private property owners from overreaching gov-

ernment regulation. If anything, recent court decisions such as *Dolan* v. *City of Tigard, Nollan* v. *California Coastal Commission and Lucas* v. *South Carolina Coastal Council* demonstrate a willingness by the U.S. Supreme and the lower federal courts to find "takings" of property value when governmentally imposed land use restrictions go too far.

To many observers, current takings legislation represents a solution which is searching for a problem. All of this, of course, brings to mind the old adage that "if it ain't broke, don't fix it."

H.R. 9 provides for cash payments for any reduction in property value of 10 percent or more due to certain restrictions on property use. H.R. 9 and other similar "compensation type" 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 H.R. 9, 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 or property values of others. For instance, pursuant to H.R. 9, 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 percent, 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 which required the environmental safeguard.

In essence, H.R. 9 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 economic choice but to require the appropriate environmental safeguards and pay the landfill operator's environmental compliance costs.

This type of 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. This legislation 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.

STATE-SPECIFIC IMPACT

Legislation such as H.R. 9, and similar "compensation-type" takings legislation, represents a direct threat to States because many federal public health and safety programs, which would be jeopardized by federal "takings" bills, are actually implemented in whole or in part by state and local governments. In fact, the trend is to shift more responsibility for the implementation of federal programs to the state level. 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. 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' public health and safety are federal laws.

State lawmakers have an acute interest in seeing that federal laws providing significant protections to state residents are not diluted or disabled. Compensation-type takings 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. 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 H.R. 9, 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.

H.R. 9 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 which 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 which 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 compensation-type takings legislation. One of our many concerns is that if the federal government is successful in creating a culture that government should pay for any restriction on 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, H.R. 9 would prevent any reallocation of water from federal 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.

H.R. 9 delegates to a private arbitrator the authority to decide important questions of state law. Section 9002(a)(3) provides that an arbitrator appointed by a federal agency would determine whether a particular land use violates any provision of state statutory law or constitutes a nuisance under state common law. The arbitrator's ruling would be final without any avenue of appeal. NCSL believes that such questions are best decided by duly appointed judicial officers.

Finally, states throughout this nation, including New Hampshire, are presently wrestling with the issue of private property rights. The results to date are that every state has rejected attempts to create compensation-type legislative schemes. The most recent example is Arizona, where voters soundly defeated a proposal that would have forced government to write a check every time it wanted to protect a

community, and their property values, through the application of intelligent land use planning.

States that have passed takings legislation have adopted the "property impact statement" approach. We in state government feel that federal lawmakers can learn much from state experiences. After all, under our system of federalism, it is the states who are the laboratories for change. As NCSL's takings policy indicates, the federal government should not attempt to legislate what a "takings" is and the issue should be left to the states.

FISCAL IMPACT

H.R. 9 and other "compensation-type" takings 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 H.R. 9 to work successfully, additional employees would be needed to process compensation claims, more lawyers would be needed tc litigate arbitration proceedings, expert witnesses would be needed to testify at arbitration proceedings, arbitrators would have to be hired to conduct such proceedings and certified real estate appraisers would be needed to determine pre-regulation and post-regulation property values for computing the extent of property value diminution. No one has any clear idea of how much these transaction expenses will cost. However, as presently drafted, H.R. 9 applies to all permit renewals by the federal government as well as many other agency actions.

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, H.R. 9 does not even adopt a fiscally responsible approach to quantifying the amount of compensation owed 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 if a sale 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.

The legislation could also have very unfair results for the federal taxpayer. An example which 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 which are visible from the highway. Under H.R. 9, the landowner could receive compensation for a regulatory taking. In essence, the federal government would greatly enhance his property 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. In total candor, 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 H.R. 9 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 Subcommittee. 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.

OFFICIAL POLICY OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

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.

Mr. CANADY. I apologize, but this is my last warning for the vote so I will go over and vote.

The committee will stand in recess. As soon as the vote is concluded, the committee will resume.

[Recess]

Mr. INGLIS [presiding]. The subcommittee will come to order.

Chairman Canady asked me to fill in for him. He is over on the floor. I know he wishes he could be here, but he is over dealing with a bill on the floor.

I think this is the third panel and our fifth witness.

Mr. Adler was about to begin, so we will proceed with you, Mr. Adler.

STATEMENT OF JONATHAN H. ADLER, ASSOCIATE DIRECTOR OF ENVIRONMENTAL STUDIES, THE COMPETITIVE ENTERPRISE INSTITUTE

Mr. ADLER. Thank you, Mr. Chairman, for the opportunity to present testimony before this committee today.

I am Jonathan Adler, associate director of environmental studies at the Competitive Enterprise Institute here in Washington.

CEI is a nonprofit, nonpartisan research and advocacy institute dedicated to the principles of free enterprise and limited government. CEI's work includes efforts to advance the public understanding of the hidden costs of government overregulation and to research and promote the development and promotion of free market approaches to environmental policy questions.

Much of the debate over property rights and whether the Federal Government should compensate the victims of regulatory takings is focused in the environmental arena. Therefore, in my testimony I will focus on issues of uncompensated regulatory takings as relate to the environmental policy. It is common to view property rights and environmental protection as conflicting ideals. In fact, properly understood, they are mutually reinforcing.

In addition to my prepared comments I am submitting several attachments to the hearing record for your information.

The strongest opposition to the protection of property rights comes from the Washington environmental lobbying organizations. These groups maintain that environmental protection and protection of property rights such as that contained in H.R. 9 are incompatible. The standard charge against paying compensation for regulatory takings is that this would involve paying polluters not to pollute and, therefore, undermine the protection of public health and safety.

This represents a fundamental misunderstanding of the nature of property rights and the proper role of government in protecting them, as well as the mischaracterization of the provisions in H.R. 9. Indeed, the current controversy over property rights is not about pollution control efforts or Federal protection of public health and safety. Most takings cases arise not when public health is at risk but when the rights of landowners are suppressed by the exercise of majoritarian power for nonessential, in some cases even aesthetic, reasons.

Under current policy, public goods such as military bases and highways are created by purchasing lands from private property owners. On the other hand, public goods like wetlands preserves and wildlife refuges are created by bureaucratic edicts that systematically deny property owners the use of their land.

This is not how it should be. If the public wants to protect the habitat of endangered species or protect an ancient stand of trees for some aesthetic or spiritual value the public should be willing to pay for it, just as it pays for other public goods. The costs should not be imposed on whoever is unfortunate enough to hold title to a coveted piece of land.

Given the fact that the Government does not pay for the costs of regulatory takings, it should be no surprise that the Government typically opts for coercive land use controls to achieve environmental goals, even when other approaches are available. For example, protecting wetlands, under the section 404 program can be orders of magnitude more expensive than other available alternatives, in some cases 300 times more expensive than protecting wetlands through other nonregulatory programs.

When institutional arrangements shield actors from the true costs of their actions, it distorts their behavior. Thus, for the same reasons governments will overregulate when there are no effective limits to their regulatory authority, so, too, will resource users overexploit resources where property rights are ill-defined or held in common.

This phenomenon is traditionally known as the tragedy of the commons and was first popularized by the ecologist Garrett Hardin. Under common ownership, it is in no one's interest to forgo using the resource as the benefits of such conservation measures. Moreover, there is no incentive to care for the effect on one's resource use on the other shareholders in the common property, and no incentive to care for future generations, as individual shareholders have no ability to ensure that that which they save can be passed on.

Given the incentive that common ownership creates, it is no wonder that the vast majority of environmental problems occur in the vast unowned commons of the world. Private ownership creates wholly different incentives and is far more compatible with sound environmental stewardship. It is the owner that bears the cost, both in terms of dollars and in terms of lost opportunities.

Conversely, the owner is the prime beneficiary of any improvements made to the property. Seeking a profit on the property or not, self-interest still provides a powerful incentive to preserve, if not enhance, the value of one's own private property.

Of course, private stewardship does not always require one always act in pursuit of profit. The principle of private ownership enables conservation groups—the Audubon Society, the Nature Conservancy, Ducks Unlimited, and many others—to take those actions necessary to preserve resources. Those activities could not take place were it not for the institution of private property.

A private landowner is far more capable of instituting true resource preservation than any government entity, should that be the landowner's desire.

Now while private rights can play an essential role in environmental conservation, government infringement upon private property rights in the form of regulatory takings can have negative environmental impacts as well. If the specter of environmental regulation hangs over private land use decisions, private landowners will be less likely to invest in environmental improvements on their lands. Such stewardship actions will entail costs to the landowner with no reasonable expectation of receiving any future benefits.

One can understand this phenomenon if one thinks of the likely result were the Government to declare a policy protecting pretty houses by prohibiting families from living in any homes that met the Federal definition of pretty. Under such a regime, no rational homeowner would make improvements to his or her home that would make it more attractive lest it fall prey to government regulation that could result in their eviction. Rather than preserve the stock of pretty houses in America today, such a policy would likely prevent the construction or restoration of pretty homes ever again.

Much the same is occurring under the Endangered Species Act. In fact, many environmental organizations and wildlife commissioners have recognized that the act often encourages the destruction of habitat more than it does its preservation.

It is important to recognize that environmental protection and compensation for regulatory takings can go hand in hand and that what is in H.R. 9 is essential for this country.

Mr. INGLIS. Thank you, Mr. Adler. I appreciate your testimony.

[The prepared statement of Mr. Adler follows:]

PREPARED STATEMENT OF JONATHAN H. ADLER, ASSOCIATE DIRECTOR OF ENVIRONMENTAL STUDIES, THE COMPETITIVE ENTERPRISE INSTITUTE

Thank you Mr. Chairman for the opportunity to present testimony before this Committee. My name is Jonathan Adler, and I am associate director of environmental studies at the Competitive Enterprise Institute in Washington, D.C. CEI is a non-profit, non-partisan research and advocacy institute dedicated to the principles of free enterprise and limited government. CEI's work includes efforts to advance the public understanding of the hidden costs of government overregulation and to research and promote free market approaches to policy issues.

CEI has long been involved in the property rights debate. CEI analysts have analyzed the impact of regulatory takings on private landowners, as well as the environmental implications of different property rights regimes. In January, CEI published a *Property Rights Reader* that collects essays by CEI staff on the subjects that this issue raises. CEI also engages in direct legal action where necessary, and has represented victims of regulatory takings before state and federal courts.

In my testimony I will focus on the issue of property rights and regulatory takings in the context of environmental policy. It is common to view property rights and environmental protection as conflicting ideals. I will argue that they are actually mutually reinforcing. With these written comments, I have included some attachments which elaborate on some of the points that I will raise.

INTRODUCTION

The emergence of property rights as a national political issue over the past five years has the potential to transform public policy. The growth of federal land use regulation over the past two decades has sparked a fire storm of grass roots opposition. Property rights organizations are now active in every state in the nation. As of October 1994, a dozen state had enacted property rights protections of some kind.

Much of the debate over property rights and whether the federal government should compensate the victims of regulatory takings is focused in the environmental arena. For two decades, federal land-use control has been the dominant means of achieving many environmental objectives. As a result, the federal government has denied countless landowners the reasonable use of their land in the name of environmental protection; property owners are finding their land effectively taken from them without compensation.

The two federal laws responsible for the lion's share of regulatory takings are the Endangered Species Act and Section 404 of the Clean Water Act, the source of regulations limiting the development of wetlands. These laws are particularly contentious. In the case of wetlands, approximately three-fourths of the lands that meet the federal government's definition are on private land. A similar percentage of listed endangered species rely upon private land for their survival. Thus, as long as the federal government insists upon relying upon regulation to conserve these resources, conflicts with private landowners are inevitable.

Not only does the current approach to environmental protection engender conflict, it tramples on the property rights of individual Americans. Public costs that should be borne by all are foisted upon those landowners unfortunate enough to own the exact parcels of land that the government covets for environmental purposes. Moreover, there is mounting evidence that the reliance upon federal regulation has foreclosed alternative approaches to environmental protection—alternative approaches that are fully compatible with this nation's history of private ownership and recognize private property rights as an ecological asset, and not a liability.

PROPERTY RIGHTS VS. THE ENVIRONMENT?

The strongest opposition to the protection of property rights comes from representatives of Washington's environmental establishment. These groups maintain that environmental protection and the protection of property rights are incompatible. The standard charge against paying compensation for regulatory takings is that this would involve "paying polluters not to pollute" and therefore undermine the protection of public health and safety. This represents a fundamental misunderstanding of the nature of property rights and the proper role of government in protecting them.

Indeed, the proper aim of federal government efforts to protect "the environment" is to prevent the imposition of harmful substances upon unconsenting persons and their properties; and, barring that, punishing those who transgress against others in this manner. This is the aim of controlling pollution—controlling the unwanted imposition of wastes or toxins by one party on another. Pollution is a "trespass" or "nuisance" under the principles of common law. If the imposition is so minor that it creates no impact or inconvenience for the property owner, it will normally be tolerated. Otherwise it will likely result in legal action of some kind.

Many of the pollution problems with which people are familiar are not the result of too much property protection, but too little. These problems are often the result of what is essentially a universal "easement" granted by the state to polluters, even to producers of significant and damaging pollution. This action by the state is of the same kind as regulatory takings—in each case the government is violating the rights of property owners in order to pursue some conception of the "public good." In the case of easements that permit "acceptable" levels of pollution the "public good" is efficiency or some other utilitarian measure. In the case of most current federal land use restrictions, such as those issued under the Endangered Species Act or Section 404 of the Clean Water Act, the "public good" is the preservation of an environmental amenity or value that "the public" has deemed worthwhile.

PUBLIC GOODS VS. PRIVATE COSTS

If the protection of property rights entailed compensating landowners each and every time a government action conceivably impacted the value of his or her land, environmental concerns would possibly be justified. Under such a scenario, it would certainly be possible for a corporation to demand compensation when prevented from injecting toxins into neighboring groundwater. However, this is not what protecting private property rights is about.

Indeed, the current controversy over property rights is not about government pollution control efforts or federal protection of public health and safety. The many thousands of groups and individuals that make up the property rights movement are not rebelling against government attempts to protect their neighbors. They are rebelling against federal government regulations, largely environmental, that restrict the reasonable use of private land, such as building homes and planting crops. Most "takings" cases arise not when public health is at risk, but when the rights of landowners are suppressed by the exercise of majoritarian power for non-essential, often aesthetic, purposes.

Under current policy, "public goods" such as military bases and highways are created by purchasing lands from private owners. On the other hand, "public goods" like wetland preserves and wildlife refuges are created by bureaucratic edicts that deny property owners the use of their land. This is not how it should be. If the public wants to protect the habitat of an endangered species or preserve an ancient stand of trees for some aesthetic or spiritual value, then the public should be willing to pay for it, just as it pays for other "public goods." The costs should not be imposed on whoever is unfortunate enough to hold title to a coveted piece of land. As the Supreme Court held in *Armstrong* v. *United States*, the Constitutional prohibition on uncompensated takings "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[1]

Requiring the federal government to pay compensation when reasonable land uses are restricted or prohibited can also encourage a more proper calculation of the costs and benefits of proposed regulatory actions. If political entities are able to effectively take property through regulatory activities without paying compensation, there is no incentive to consider the costs of the proposed regulation and such costs are likely to be ignored. There is thus no incentive to prioritize, and every incentive to take as much as possible. This was explained by the New York State Court of Appeals in *Fred F. French Investing Co.* v. *City of New York:*

> [T]he ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding. . . . When [the social cost is] successfully concealed, the public is not likely to have any objection to the "cost-free" benefit.[2]

So long as the government can provide for public goods through the imposition of regulatory takings, it will continue to do so, with little regard for the impact that such actions have on landowners.

THE INEFFICIENCY OF LAND-USE REGULATION

Given the fact that government does not pay for the costs of regulatory takings should be no surprise that the government typically opts for coercive land-use regulations to achieve environmental goals, even when other approaches are available.

Consider the example of wetlands regulations. The federal government currently spends millions of dollars each year administering the Section 404 program, which regulates the development of wetlands by private citizens. Small landowners are routinely denied the right to build homes, fill depressions, and the like due to the presence of federally-designated wetlands. This is a tremendously inefficient means of protecting wetlands. The total cost to public and private parties of protecting wetlands through Section 404 can reach $300,000 per wetland-acre. Other programs have demonstrated the ability to restore wetlands at less than $1,000 per wetland-acre—a figure which includes the cost of purchasing a permanent easement on the restored wetland to prevent future development.

Not only is the Section 404 wetland program grossly inefficient, it is of little environmental value. The program only controls development on a small fraction of U.S. wetlands, and is largely irrelevant to current wetland trends. The Wetland Reserve Program and other efforts that rely upon positive incentives, rather than uncompensated regulatory takings, have been far more successful in ensuring the maintenance of wetlands. Indeed, for the past several years more wetlands have been restored in the United States than have been lost to development or other uses.[3] Even were the enforcement of Section 404 on wetlands eliminated, America would still, on net, be gaining, not losing, wetlands every year. America has achieved "no net loss" of wetlands and wetlands regulations were unnecessary to achieve that goal.

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[1] 364 U.S. 40, 49 (1960).

[2] 39 N.Y. 2d 587, 596–7, 385 N.Y.S. 2d 5, 11 (1976).

[3] See Jonathan Tolman, *Gaining More Ground: An Analysis of Wetlands Trends in the United States* (Washington, D.C.: Competitive Enterprise Institute, October 1994).

Nonetheless, the regulatory taking of private land for the ostensible purpose of wetlands protection continues apace.

THE TRAGEDY OF THE COMMONS

When institutional arrangements shield actors from the true costs of their actions, it distorts their behavior. Thus, for the same reason governments will overregulate when there are no effective limits to their regulatory authority, so too will resource users over exploit resources where property rights are ill defined or held in common.

This phenomenon is traditionally known as the "tragedy of the commons" and was first popularized by the ecologist Garrett Hardin (although others as far back as Aristotle have pointed to the problems of communal ownership).[4] As Hardin pointed out, when land is owned in common, it is effectively unowned; land owned by everyone is owned by no one. The primary result of this is that individuals who have access to the common resource have every incentive to use as much they can as soon as they can, lest they forfeit benefits to others. Under common ownership, it is in no one's interest to forgo using the resource as the benefits of such conservation measures. Moreover, their is no incentive to care for the effect of one's resource use on the other shareholders in the common property, and no incentive to care for future generations, as individual share holders have no ability to ensure that that which they save can be passed on.

Examples of the tragedy of the commons are omnipresent. The loss of wildlife species such as the passenger pigeon and heath hen are largely attributable to the commons problem. The tragedy was most recently when Georges Bank, once one of the world's richest fishing grounds, was effectively closed due to dwindling stocks. Such examples demonstrate the urgent need to remove much of the natural world from the commons, but there is little discussion in policy circles today of extending the institution of private property into these areas. Instead, the dominant policy approach is to penalize private property by regulating its use.

THE PRIVATE PROPERTY ALTERNATIVE

Given the incentives that common ownership creates, it is no wonder that the vast majority of environmental problems occur in the great unowned commons of the world. Private ownership, on the other hand, creates wholly different incentives, and is far more compatible with sound environmental stewardship. As Garrett Hardin himself noted, "The tragedy of the commons as a food basket is averted by private property, or something formally like it." Far from being an enemy of the environment, private property can be the environment's best friend.

The ownership of property encourages the owner to care for that property; if the value of that property is reduced, it is the owner that bears the cost—both in terms of dollars and lost opportunities. Conversely, the owner (and his or her heirs) is the primary beneficiary of any improvements that are made to the property. Whether or not the owner is seeking a profit on the property or not, self-interest still provides a powerful incentive to preserve, if not enhance, the value of the resource. Not all property owners will follow the incentives, but, in the aggregate, property owners will. The institution of private property promotes stewardship and conservation.

Of course, private stewardship does not require that one always act in pursuit of profit. The principle of private ownership enables conservation groups and other landowners to purchase and protect vital habitat and empowers stewards to take those actions that are necessary to preserve vital resources. A private landowner is far more capable of instituting true resource preservation than any government entity, should that be the landowners desire.

Moreover, landowners also have an economic incentive to observe and respond to the noneconomic values held by others. One does not have to have a personal interest in conservation in order to have an incentive to manage land in an ecologically sound manner. If there is a high demand for fishing, hiking, bird-watching and other recreational activities, private landowners such as timber companies have an incentive to meet those needs. Some timber companies have done exactly that, recognizing that there are benefits to be gained—economic and otherwise—from serving community needs in this manner.

As a result of these incentives, we see the private sector providing a wide array of environmental amenities, typically in a more effective and responsive manner than the federal government. Private landowners conserve lands for both consumptive and nonconsumptive uses. As CEI senior environmental scholar Robert J. Smith has documented:

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[4] Garrett Hardin, "The Tragedy of the Commons," Science, 162 (December 13, 1968).

> Private ownership includes not only hunting preserves, commercial bird breeders, parrot jungles, and safari parks, it also includes wildlife sanctuaries, Audubon Society refuges, World Wildlife Fund preserves, and a multitude of private, nonprofit conservation projects.[5]

Private ownership also increases the ability to resolve conflicts over potentially competing land uses. In the environmental area, where such conflicts can be extremely contentious, this is critical. Private property rights give the owner the authority to make decisions about how his or her land is to be used. It also empowers the owner to be flexible in adjusting to changing conditions and the needs of others. This enables owners to accommodate the wishes and needs of others and to arrive at mutually agreeable situations.

This phenomenon can be seen in the case of the Paul J. Rainey Wildlife Sanctuary in Louisiana. Owned and operated by the National Audubon Society, this 26,800-acre refuge serves as the nesting and breeding grounds for many species migratory birds. The sanctuary is off-limits to bird watchers, yet Audubon has allowed oil drilling in Rainey for nearly 30 years. Through careful negotiations with oil companies and the encouragement of innovative extraction techniques, Audubon's ownership and control of the refuge has enabled it to protect its ecological resources while at the same time realizing the economic benefits of oil development. Such win-win situations have been typically precluded on politically-controlled lands.

THE ENVIRONMENTAL HARM OF REGULATORY TAKINGS

While private property rights can play an essential role in environmental conservation, government infringement upon private property rights in the form of regulatory takings can have negative environmental impacts. Not only have individuals been sentenced to jail for undertaking environmental improvements on private land, but others are discouraged from taking steps to improve habitat and environmental amenities due to the threat of government regulation.

In the commons, individuals are loath to invest in environmental improvements because they are unlikely to receive the benefits of their own conservation actions. Similarly, if the specter of environmental regulation hangs over private land use decisions, private landowners will be less likely to invest in environmental improvements on their lands. Such stewardship actions will entail costs to the landowner with no reasonable expectation of future benefits. One can understand this phenomenon if one thinks of the likely result were the government to declare a policy of "protecting" pretty houses by prohibiting families from living in any homes that met the federal definition of pretty. Under such a regime, no rational homeowner would beatify his or her home, lest it fall prey to government regulation that could result in their eviction. Rather than preserve the stock of pretty houses in America today, such a policy would likely prevent the construction or restoration of pretty homes ever again.

This dilemma is illustrated by the case of Ben Cone, the owner of 8,000 acres of timberland in North Carolina. Over the years Ben Cone has deliberately managed much of his land in such a way so as to attract wildlife to his property. Mr. Cone has actively and intentionally created wildlife habitat. Through selective logging, long rotation cycles, and understory management, Mr. Cone has been very successful in these efforts, attracting many species to his land, from wood duck and quail to black bear and deer.

Mr. Cone has also provided habitat for the red-cockaded woodpecker, an endangered species. In response, the federal government has placed some of his land off limits to logging, and the value of his land has been reduced by approximately $2 million. This has taught Mr. Cone a lesson: He should no longer manage his land in a way that attracts red-cockaded woodpeckers if he wants to be able to use it. Rather than allow trees to mature for 75 to 80 years before cutting them, Mr. Cone now cuts them much earlier, as red-cockaded woodpeckers prefer older stands. Moreover, Mr. Cone has accelerated the rate of clearing on his land.

Ben Cone is not the only landowner to respond to the incentives created by regulatory takings in this manner. Officials at the Texas Parks and Wildlife Department have argued that adding the golden-cheeked warbler and the black-capped vireo to the endangered species list has encouraged the rapid clearing of their habitat. As a result of the Endangered Species Act, a law that is enforced on private land

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[5] Robert J. Smith, "Resolving the Tragedy of the Commons by Creating Private Property Rights in Wildlife," *Cato Journal* 1 (Fall 1981), p. 456. See also, "Special Report: The Public Benefits of Private Conservation," in *15th Annual Report of the Council on Environmental Quality* (Washington, D.C.: Government Printing Office, 1984).

through regulatory takings, more habitat for these birds may have been destroyed than if the government had not acted at all.

The lesson is that federal efforts to regulate land use—to "take" private land without compensation—is often bad for both landowners and the environmental values that the government regulation is designed to protect. This is to be expected. As economist Bruce Yandle explains:

> Timber owners in the Eastern U.S. who find red-cockaded woodpeckers nesting on their property quickly learn that they must provide habitat for the endangered species. Trees occupied by and in the range of woodpecker colonies cannot be harvested. What is otherwise private land is common access to woodpeckers, which by statute hold a superior claim on the property. Timber owners then logically increase the cutting of unaffected trees, attempting to get while the getting is good.
>
> A lose-lose situation is the result. The woodpeckers lose access to what might be superior habitat. The landowner loses wealth. There is an alternative: Those who value red-cockaded woodpeckers can organize and pay for habitat and then use private rights to protect it. A lose-lose becomes a win-win. The woodpeckers have secure habitat. The landowner has engaged in a voluntary exchange of wealth, and those who love red-cockaded woodpeckers can be secure in their property.[6]

What Yandle describes is the free market method of protecting valued species and their habitat. With property rights protected by the government, there is an enhanced incentive to take direct action on behalf of imperiled species and protect them voluntarily. The security of property rights mitigates the likelihood that a political decision will trump the effort to protect the species, or, for that matter, the wetland, wilderness area, or scenic vista that is privately protected.

PROTECTING NON-COMMERCIAL VALUES

It will be claimed that such approaches can only work for those environmental amenities and species for which there is commercial potential. Yet the available evidence does not support such an objection. There need not be any commercial value in the endangered species; it merely needs to be valued by a sufficient subset of the population to ensure its protection. Americans spend millions, if not billions, each year on protecting their pets, contributing to zoos, and donating hard-earned dollars to environmental organizations not because they expect a financial return, but because they want to—because they believe that spending their money in this manner will advance their preferences.

Moreover, the subset of the population required to protect an environmental value privately is far smaller than that needed to move the political process in support of a new nature preserve or land-use restriction. Indeed, sometimes all it takes is a handful of committed individuals, empowered by the principle of property rights, to protect the value with which they alone are concerned. By contrast, when one relies upon political entities to attain conservation objectives, one's successes are only secure until the next election cycle. As the most recent election shows, political reversals are always a distinct possibility. If the new political climate results in a dramatic reduction in federal environmental regulation with no corresponding enhancement of the private sector's ability to pursue conservation goals, environmental values will pay dearly for the over-reliance on politics for their protection.

If private property rights are respected by the federal government, then those lands protected privately are not dependent upon the vicissitudes of politics for their preservation. Consider the case of Hawk Mountain. The Hawk Mountain Sanctuary is a 2,000-acre wildlife refuge located in eastern Pennsylvania along the Appalachian Mountains. It was founded in 1934 by a Mrs. Rosalie Edge, a conservationist concerned about the local slaughter of migrating hawks and other raptors. While the Pennsylvania government was paying bounties on certain birds of prey and national conservation groups were focused on other causes, Mrs. Edge was raising money to purchase the land and protect these birds from decline. So long as the government respected and protected her property rights, Mrs. Edge was capable of protecting the species about which she cared. As a result of her efforts, the sanctuary soon became an important raptor research site and a stopping-off point for many migratory species. Legislation to protect migratory birds was not forthcoming for many years after Hawk Mountain was founded.

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[6] Bruce Yandle, *Regulatory Takings, Farmers, Ranchers and the Fifth Amendment* (Clemson: Center for Policy Studies, October 1994), p. 14.

CONCLUSION

It is time to recognize that property rights are important for both economic and environmental reasons. Compensating landowners when they are deprived the reasonable use of their land will not produce environmental catastrophe. Far from it. In many cases it will eliminate the negative environmental incentives created by the heavy hand of existing government regulations. Properly understood, property rights do not undermine sound environmental conservation, they lie at its foundation.

Compensation to landowners is a simple matter of justice; private parties should not bear private costs. Protecting private property can also be a matter of environmental protection. In the words of Robert J. Smith:

> Adopting a property system that directs and channels man's innate self interest into behavior that preserves natural resources and wildlife will cause people to act as if they were motivated by a new conservation ethic.[7]

This is a result that both property rights advocates and environmental activists should applaud.

[7] Smith, p. 456.

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PROPERTY RIGHTS AND 'TAKINGS'

The "takings clause" of the Fifth Amendment to the Constitution reads, "nor shall private property be taken for public use without just compensation." Despite this clear admonition, federal environmental regulations routinely "take" the property of American citizens without compensation. In the interests of fairness and Constitutional integrity, it is important that landowners be compensated for government takings of their land.

In the 1960 Supreme Court decision of *Armstrong v. U.S.*, the Supreme Court wrote that the primary purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." When a landowner is forced to provide a portion of his or her land for public purposes — such as species habitat, "greenways," and so on — this principle should apply.

Environmental laws, such as the Endangered Species Act, were passed by Congress to benefit the public as a whole. It is only fair that the burden of these laws be paid for by the public as a whole, rather than by those unfortunate landowners whose property happens to have characteristics that are valued by the public at large.

Consider the following examples:

- Just outside Moab, Utah, a small town known for its scenic beauty and proximity to two national parks, Brandt Child planned to build a campground and golf course on his property. The project came to an abrupt halt when the Fish and Wildlife Service declared that the natural springs on Child's property were habitat for the endangered Kanab Ambersnail. The site was fenced off and Child was forbidden to work in the area. Child's land has been effectively taken by the federal government because he can no longer use it. He has estimated his losses at $2.5 million. Child is being forced to bear the financial burden of protecting an endangered species, while the public as whole benefits.

- In the case of *Dolan v. City of Tigard*, the Dolans learned that they could only receive a permit to expand their plumbing supply store if they gave the city of Tigard 10 percent of their land for use as a bike path and "greenway." The Supreme Court ruled in 1994 that this amounted to a taking of private property without just compensation.

Congress should reaffirm the Constitutional protections afforded to private property rights. In particular, Congress should:

- Explicitly instruct regulatory agencies to analyze their regulations to determine when takings will occur;

- Require that compensation be paid directly from the budget of the agency responsible for the regulation that resulted in a "taking."

Property rights are the foundation of a free society and a free market economy. They must be protected.

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Q: *Isn't the "takings" movement really about forcing the taxpayer to pay polluters not to pollute?*

A: Not at all. All individuals should have the right to use their property as they see fit, provided that they are not inflicting harm upon others. This means that there is no right to pollute the property of one's neighbor. Compensation for "takings" is about compensating landowners when the government tells them that they cannot make *reasonable use* of their land, such as building a home, planting crops, or perhaps just maintaining species habitat. Yet these are all examples of actions that have been prohibited by the government on private lands. These are the type of injustices that the "takings" movement seeks to redress.

Q: *Will compensating landowners for "takings" bankrupt the government?*

A: If regulatory agencies continue to conduct business as usual, it will certainly cost the government a lot of money to compensate landowners. However, ensuring that landowners are compensated for regulatory actions that deprive them of the reasonable use of their land will restore accountability to regulatory actions by forcing agencies to consider the costs, economic and otherwise, of their regulatory decisions.

Q: *Will forcing regulatory agencies to engage in "takings" assessments bog them down in red tape and prevent them from fulfilling their duties, such as protecting the environment?*

A: Adding this small requirement onto existing review, public notice and comment procedures should not hinder any agency from achieving its mission. The federal government is always required to file an environmental impact statement when undertaking a new initiative. All that "takings" advocates ask, is that the federal government give the same deference to the Constitutional rights of American citizens and assess how those rights may be impacted by regulatory activities.

Q *Shouldn't landowners and developers be expected to anticipate possible regulatory actions and to take those considerations into account when purchasing land?*

A. In many of the "takings" cases that are mentioned, individuals owned their land well in advance of any regulatory action. It was only after the fact that government agencies decided to bar reasonable land-uses, such as farming or building a home. More importantly, the fundamental issue is what types of land-use should be barred without compensation from the government.

JONATHAN ADLER

Seeing red over green in the Contract

The GOP "Contract with America" encompasses "a secret war on the environment" and a "polluter's bill of rights," according to the Sierra Club.

New York Times columnist Anthony Lewis agrees, calling the Contract's regulatory reform provisions "the Death and Desertification Act." Jessica Matthews, environmental pundit and senior fellow at the Council on Foreign Relations, charges that the Contract "would do nothing less than dismantle environmental law." In pursuing regulatory reform, "extremists are trying to take away the ability of Americans to act through their government to protect neighboring property owners and the public welfare," according to National Wildlife Federation attorney Glenn Sugameli.

What has environmental leaders so upset is the eighth bill of the Contract, "The Job Creation and Wage Enhancement Act" that, among other things, is designed to rein in the regulatory excesses of the federal government. If passed, the law will require federal agencies to evaluate the scientific justification, costs and benefits of new proposed rules, limit the imposition of unfunded regulatory mandates upon state and local governments and create due process protections for subjects of regulatory proceedings.

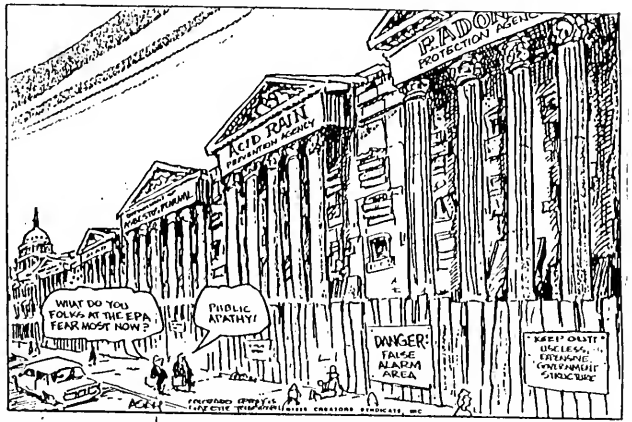
Such reforms are long overdue. This year, Americans will spend well more than $150 billion complying with environmental laws, and there is increasing evidence that these massive expenditures are purchasing little environmental protection. Indeed, the Environmental Protection Agency's own Science Advisory Board has concluded that the lion's share of the EPA's budget goes to inconsequential or unproven environmental risks.

The most contentious plank in the GOP's agenda for regulatory reform is the so-called "takings compensation" provision. This portion of the bill would increase the protection of private property rights by requiring the federal government to compensate landowners when regulations deprive them of the reasonable use of their land. If this provision passes, according to Jessica Matthews, "government would have to pay polluters not to pollute." In fact, property rights protection would do no such thing.

A "takings compensation" law is about compensating landowners when the government denies reasonable uses of private land, i.e. those land uses that do not directly infringe upon the person or property of another. Compensation would be required when the federal government tells a landowner that he cannot build a home, cut a tree or plant a crop. Compensation would not be required when the federal government prevents a landowner from harming the person or property of his neighbor.

Hyperbole is to be expected from environmental leaders, especially when the proposals that they are attacking are popular with the American people. The push for regulatory reform and protection of private property rights is not "anti-environment." It is about restoring accountability to the federal regulatory process and ensuring that the burdens of federal regulation are borne fairly, and not imposed on an undeserving few.

In the case of property rights, the arguments for compensation are rather simple. If the public wants to protect endangered species or preserve a scenic vista, the public should be willing to pay for it, just as it pays for highways, military bases, parks and other "public goods." The costs should not be imposed on whoever is unfortunate enough to hold title to a coveted piece of land. This is the principle behind the Fifth Amendment to the



Constitution's admonition, "nor shall private property be taken for public use without just compensation." Polling data demonstrates that the American public endorses this principle, and candidates that campaigned on property rights were victorious in several states, including Idaho, Washington and Arizona. Property rights' biggest political victory came in Texas, where Republican George Bush Jr. rode the issue to victory in the gubernatorial race due to the concerns of many landowners about the reach of federal regulation.

Washington's environmental lobbyists are concerned that the Contract's regulatory reforms will restrain the tentacles of big government. If regulators are forced to justify the strictures they wish to enact on private business, fewer new regulations will get enacted. In the future, the federal government might not enact strictures requiring local governments to test the water supply for chemicals that have never been detected or rules that bar landowners from clearing fire-breaks to protect their homes. Under the current approach to federal regulation, such rules have been and will continue to be enacted.

After passing the Job Creation and Wage Enhancement Act, Congress needs to begin re-examining the premises and performance of every major regulatory law on the books, from the Endangered Species Act to the Public Utility Regulatory Policies Act. The nation can no longer afford for policy-makers to labor under the assumption that only regulations written in Washington can address social ills. Passing the Contract should be only the beginning of regulatory reform.

Jonathan H. Adler is associate director of environmental studies at the Competitive Enterprise Institute.

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(The Wall Street Journal, Monday, January 16, 1995)

Property Rights and Wrongs

By Jonathan Tolman

Over the last decade the environmental movement has undergone a subtle but profound shift. Originally, environmental laws were designed to curb the pollution of large corporations. But as Congress and federal agencies have expanded the scope of these laws, they have begun to reach far beyond big industry polluters.

Russell Jacobs, for example, is not a tycoon. Married, he lives in Raymond, Wis., and works for the post office. His wife, Gail, provides day-care for neighborhood children while their own three children are in school. In 1990, Mr. Jacobs did what many middle-class Americans dream of—he bought a plot of land in the suburbs to build his family a home. Before buying the lot he checked with the Racine County government, which assured him that he could build his house. The house would have been 80 feet from his neighbor's house and 50 feet from the highway.

Unfortunately for Mr. Jacobs, the federal government considered his small plot of land in the suburbs a "calcareous fen." For those unfamiliar with bureaucratic jargon, a fen is an area not quite wet enough to be a marsh but still wet enough to qualify as a wetland. Calcareous only means that it sits on top of limestone, typical of much of Wisconsin.

The Army Corps of Engineers told Mr. Jacobs that he needed a permit in order to build in his calcareous fen. He applied for his permit and received a letter, 242 days later, informing him that his permit had been denied. Richard W. Craig of the Corps of Engineers wrote, "The purpose of the project is to facilitate the construction of a single family home. I have determined that issuance of the requested permit would be contrary to the public interest."

Why the federal government concluded that Mr. Jacobs's half an acre of "calcareous fen" was ecologically vital remains a mystery. Nonetheless, the government decided that the public should continue to enjoy benefits from the calcareous fen. With the stroke of a pen, the federal government effectively stripped Mr. Jacobs of the right to use his property. Mr. Jacobs's case represents a glaring violation of the Takings Clause of the Fifth Amendment, which reads, "Nor shall private property be taken for public use without just compensation."

The new 104th Congress has an opportunity to step in and ensure that federal bureaucracies adhere to the Fifth Amendment. Well-designed property rights legislation, such as a bill sponsored by Texas Sen. Phil Gramm in the last Congress or the current property rights provisions in the House GOP's Contract With America, would go a long way in preventing the type of abuse suffered by Mr. Jacobs.

Not all property rights legislation would solve the problem, however. Proposition 300, a property-rights ballot initiative that failed in November in Arizona, is an example. Under the proposition, the state would have had to establish a five-step review process for all regulations prior to their enactment. In addition, the state attorney general's office would have had to develop takings guidelines that would cover all regulations. In essence, Proposition 300 attempted to solve the problem of overzealous bureaucracies by creating another bureaucracy that could have cost hundreds of millions of dollars.

The Contract With America avoids the problem of Proposition 300 and focuses on the direct compensation of individuals when their property is taken for public use. When a municipality decides to build a park, or an agency decides to create a wildlife refuge, the government must compensate the landowners for the use of their property. The case of land-use regulation should be no different. When the Fish and Wildlife Service prohibits activities because of endangered species, the agency in effect creates a wildlife refuge. Unfortunately, when regulations take away property rights, individuals are rarely, if ever, compensated.

Environmental groups have argued that compensating people when government regulations restrict their ability to develop land is tantamount to paying people not to pollute. Nothing could be further from the truth. Property rights do not include the right to pollute. Pollution, like many other activities, is considered a public nuisance because it infringes on the property rights of others.

Governments have and will continue to regulate nuisances like noise pollution. The critical difference is that in the case of taking property, the actions the federal government prohibits are not considered nuisances. A home, for example, is generally considered a necessity of life no less basic than food or clothing; few would consider a single-family home pollution.

Taking away a landowner's property rights decreases the value of his property. But the current House GOP legislation does not tie compensation solely to the economic value of the property. Many kinds of government actions can affect the value of land without infringing on property rights. Interstate highway construction, for example, can raise the value of the land near the interstate exits while lowering the value of land on the previously used roads. Route 29 used to be one of the only highways into Washington, D.C. from the west. When Interstate 66 was built the land in many of the small towns along Route 29 understandably declined. But building the Interstate did not violate anyone's property rights along Route 29; their ability to use their land was in no way limited by I-66.

In the 1960 decision *Armstrong v. U.S.*, the Supreme Court determined that the primary purpose of the Takings Clause was "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." When a landowner is forced to provide a portion of his or her land for public purposes this principle should apply.

This is the fundamental reason why the government must compensate when it prohibits people like the Jacobses from building their house. A house does not infringe upon anyone else's property rights. The government prohibition did not seek to protect the property rights of others, rather it sought to benefit the "public interest." Hundreds of other government actions are also designed to benefit the public interest.

Whether the government builds a school, a park or a military base, the government must compensate when it takes the property of landowners, regardless of how important the activity is to the public interest. The case is no different with regulations, even when they protect "public interests" as important as calcareous fens.

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INTRODUCTION: PROPERTY RIGHTS FACT AND FICTION

by Jonathan H. Adler

The rise of property rights activism was one of the untold stories of 1994. For without significant economic resources or political expertise, the property rights movement came of age in the last year, growing from a dispersed, loosely-organized collection of grass-roots groups and concerned individuals into an important political force.

Conventional wisdom in Washington, D.C. is that the environment was not an issue in the 1994 election. This may be true of the environment, per se, but property rights was a hot button issue in many parts of the country. Candidates in California, Idaho, Texas, Arizona, Washington, and elsewhere made property rights an issue and responded to the concerns of landowners who are subject to federal land-use regulation. Property rights was one of the central issues in the Texas gubernatorial campaign — George Bush Jr. rode the property rights issue to victory, despite efforts by the Clinton administration to aid his opponent through announcements of planned regulatory relief. Increased Property rights protections are also contained in the GOP "Contract with America," the national platform upon which Republican House candidates campaigned and won. Voters did not cast ballots against the environment, but they did register a call for reining in environmental regulation.

The organizations that represent America's environmental establishment have not taken this news all that well. The Sierra Club, for instance, claims that regulatory reform proposals, including increased protection for property rights, amount to a "war on the environment." Glenn Sugameli, an attorney with the National Wildlife Federation, charges that under the guise of protecting property rights "extremists are trying to take away the ability of Americans to act through their government to protect neighboring property owners and the public welfare." *Washington Post* columnist Jessica Mathews agrees with that sentiment, claiming that proposed property rights laws would mean "the end of government's role as protector of the little guy and provider of amenities the market alone cannot provide."

In fact, the property rights movement is not "anti-environment," nor is it about eviscerating the government's ability to protect the American people. The property rights movement is about compensating landowners when they are denied the reasonable use of their land, such as when the federal government prevents a landowner from building a home on a designated wetland, or bars a timber company from cutting trees on private land when an endangered owl lives nearby.

When the federal government denies reasonable land uses — i.e. those land uses that do not directly infringe upon the rights of others — it is referred to as a regulatory "taking." Most "takings" cases arise not when public health is placed at risk due to the actions of a landowner, but when the rights of landowners are suppressed by the exercise of government power.

If the public wants to protect an endangered species or preserve a scenic vista, the public should be willing to pay for it, just as it pays for highways, parks, military installations, and other "public goods." The costs should not be imposed on whoever is unfortunate enough to hold title to a coveted piece of land. When the government wants land for a military base, it seizes the necessary land, and the landowners are compensated. However, when the government wants someone's land to create a wildlife preserve, the land is not bought and paid for. Rather, government can simply prohibit use of that property without paying compensation. It is this sort of situation that property rights legislation is typically designed to address.

Laws that propose requiring the federal government to compensate landowners are routinely portrayed as anti-environmental laws. If compensation were required, "government would have to pay polluters not to pollute," according to Jessica Mathews, and "the rest of us [would] have to buy off landowners who are prevented from using their property in ways that endanger their neighbors," according to the Sierra Club. This is a gross distortion of the position espoused by most "takings" compensation proponents.

Respecting property rights requires protecting landowners from both excessive government regulation as well as infringements caused by private actors. A private corporation should have no more right to dump toxic sludge onto someone else's land without permission than should the government have the right to effectively seize private lands through regulatory fiats. This point has been made abundantly clear by University of Chicago law professor Richard Epstein, author of *Takings: Private Property and the Power of Eminent Domain*. Epstein writes:

> Two justifications for uncompensated takings are in principle available to the government in all cases. It can show that regulation is reasonably calculated to prevent the infliction of some present or threatened harm to others, or it can show that the in-kind benefits the regulation provides the landowners offset the losses that it imposes.

There is simply a fundamental difference between preventing a property owner from despoiling the property of his neighbor and enacting land-use controls in order to provide "public goods." (Perhaps the D.C. environmental establishment's insistence to the contrary is due to the fact that most environmental regulations would fail to pass the criteria outlined by Epstein.)

Opponents of compensation also argue that regulating property should simply be a prerogative of legislative majorities. In other words, if the majority of voters wants your land, you are out of luck. Such arguments are typically cloaked in the rhetoric of empowering communities to make collective decisions. Yet communities are routinely prevented from infringing upon individual rights, such as those protected in the Bill of Rights. Opponents of property rights seem to forget about the "takings clause" of the Fifth Amendment to the Constitution: "nor shall private property be taken for public use, without just compensation." Requiring the government to pay compensation, as is Constitutionally required, forces public officials to consider the costs of "public goods" — officials must consider whether the benefits of such goods outweigh the costs of compensation. Those restrictions that are truly beneficial will be imposed, even with a compensation requirement.

Another anti-compensation argument is the idea that since government provides benefits to citizens, it is acceptable for the government to impose regulatory costs through land-use controls. "Recent complaints about the 'taking' of private property ignore 'givings' that have increased the property's value in the first place," argues Edward Thompson, Jr., director of public policy for the American Farmland Trust.

It is certainly true that the government provides benefits to citizens by building roads and bridges, providing police and fire protection, and so on. However, such benefits are paid for through taxes and user fees for government services. Arguing that the generic "giving" of roads and the like justifies stringent land-use controls is absurd, as these are "givings" for which taxpayers have already paid.

In those cases where there is a specific government "giving" to particular landowners, as in the case of subsidized crop insurance, land-use controls may be justified if they are designed to control potential side-effects of the government

program, i.e. a requirement that beneficiaries of subsidized crop insurance adhere to responsible farming practices. However, in these instances as in most, it would be preferable for the government to neither "give" nor "take." If the government is concerned about the potential environmental impact of subsidized coastal development, then the government should simply end the subsidies.

It is difficult to oppose the idea that landowners should be compensated when they lose the right to use their land. Polls indicate that a clear majority of Americans supports compensation for regulatory takings. Perhaps this explains the insistence by environmental lobbyists that the property rights movement is the result of a massive corporate lobbying effort and that environmental laws are not denying property owners the use of their land.

William Callaway, Washington representative of the National Parks and Conservation Association, claims that "oil, gas, mining, and timber companies, along with ranching interests, are the major supporters" of property rights. Yet studies conducted by the Wilderness Society and the W. Alton Jones Foundation have come to the opposite conclusion. These studies found that the property rights movement is a truly grass-roots phenomenon and that it is popular with the American people.

Claims such as Callaway's are further belied by the fact that property rights groups are simply not well funded, whether by corporate interests or anyone else for that matter. When Greenpeace compiled a list of "anti-environmental organizations," including many groups supportive of property rights, the combined annual budgets of the fifty-plus groups listed was still less than Greenpeace's budget alone. When environmental groups have budgets in the tens of millions of dollars, property rights groups can only compete through the mobilization of genuine grass-roots support.

John Kostyack, counsel to the National Wildlife Federation, makes even more outrageous claims than most, arguing that horror stories of property owners losing the right to use their lands are simply myths. According to Kostyack, the Endangered Species Act (ESA) "has never prevented property owners from developing their land." Interior Secretary Bruce Babbitt, whose agency administers the ESA, takes quite a different view. In a speech before the Society of Environmental Journalists, Secretary Babbitt, himself the former head of the League of Conservation Voters, explained:

> Why do you keep reading stories about hardships? The tough case is a small landowner on a strategic piece of property. When a species is listed, there is a freeze across all of its habitat for two to three years while we construct a habitat conservation plan which will later free up the land.

Sometimes the land is not freed up; conservation plans inevitably free up some land while restricting or prohibiting the use of other land. Indeed, at the time of Kostyack's statement, the federal government had already initiated legal proceedings to prevent the Anderson and Middleton timber company from harvesting timber on 72 acres of its own land. Why? Because a pair of spotted owls had been discovered nesting on government land over a mile away. Wetlands laws infringe on property rights too, such as when Howard and Grace Heck, 81 and 76, were barred from building homes on their 25-acre plot once the land was classified as a wetland. The wetland designation ruined the Hecks economically, and as a result a Florida bank foreclosed on their home. Clearly such cases belie the claims of property rights opponents.

The property rights issue is not going to go away. Landowners, enraged at their government for its regulatory excesses, are demanding increased protection of private lands. Such protections are long overdue.

RECONCILING PROPERTY RIGHTS AND ENDANGERED SPECIES

by Ike C. Sugg

There is little doubt that the Endangered Species Act (ESA) needs to be reformed. Even A. A. Berle, president of the National Audubon Society, acknowledges that "unfortunately, the [A]ct is not working well enough to accomplish its purpose."

The purpose of the ESA is to "recover" threatened and endangered species — i.e., to bring them to a point where the ESA's regulations "are no longer necessary," at which time the species is pronounced "recovered" and removed from the list. Not only has the ESA failed to achieve this goal, it has also wreaked immeasurable havoc on local communities and especially, individual liberties. Unfortunately, however, the prospects for ESA reform are not as great as the need.

Generally, mainstream environmentalists support more funding, broader application and stronger enforcement of the ESA. Such changes do not constitute reform. Indeed, if all else remained the same, they could be expected to exacerbate the very problems that need to be solved, particularly the ESA's impact on private landowners. Corporate America, while widely viewed as being against the Act, has not called for fundamental reforms, but only marginal changes. Members of industry trade associations must weigh the risks of appearing 'anti-environment' against the costs of complying with the ESA. Unlike many corporations, most individuals cannot easily afford the costs imposed by regulations. A cost of doing business for some is enough to propel others into bankruptcy. Moreover, small property owners, the real victims of the ESA, have no such organized representation in Washington.

Small property owners, the real victims of the ESA, have no organized representation in Washington.

While fundamental reform may not appear likely at present, as a result of the spotted owl embroglio and other ESA-engineered "train wrecks," the prospects for serious reexamination of the ESA are increasing. In describing what might be an increasingly common sentiment held by elected officials whose constituents share land with listed species, Senator Mark Hatfield (R-OR) told *The Washington Post*:

> I have supported — and I continue to support — the Endangered Species Act. I helped write it. I offered the 1972 version of the act that eventually became law in 1973. I want it to survive. But unlike many of my colleagues from urban areas, I also have to deal with the human side of this act, and thus have special reason to know that it has come to be an environmental law that favors preservation over conservation. There is no question that the act is being applied in a manner far beyond what any of us envisioned when we wrote it 20 years ago. But today the act is being applied across entire

states and regions, with the result that it now affects millions of acres of publicly and privately owned land, and many thousands of human beings. The fact is that Congress always considered the human element as central to the success of the ESA. The situation has gotten out of control.

Perhaps Congress did once view the human element as central to the ESA's success. Over time, however, the human element has become peripheral in our nation's campaign to save each and every species, "whatever the cost." Not only is it unrealistic to expect that any society can or will abide by such a mythical standard, it is also unrealistic to expect that the present ESA will save many species. Environmentalists are learning this crucial lesson elsewhere in the world, where such political luxuries as the ESA are unaffordable. In Zimbabwe, for example, previously imperiled species are recovering and more land is being dedicated to wildlife since the government rejected the centralized western model of wildlife protectionism, and devolved proprietary rights to wildlife to the people who bear the costs of having wildlife on their land.

The act is being applied across entire states and regions, with the result that it now affects millions of acres of publicly and privately owned land.

Adopting approaches such as those utilized in Zimbabwe and elsewhere will be extremely difficult in the United States. First, the Lacey Act, which effectively outlaws interstate commerce in native wildlife taken against state law, would probably have to be repealed. Second, a federal statute would have to be enacted to preempt state laws that preclude or otherwise thwart the sustainable utilization of wildlife on private property. Ultimately, management authority over native, non-migratory wildlife would be granted to landowners. Federal, state and private landowners could then contract with third parties — including environmental organizations — to manage their wildlife resources. In this way, wildlife producers could meet the desires of wildlife consumers.

By establishing and enforcing such property rights, economic and ecological concerns could be equitably and effectively integrated. Yet, given our history of government-owned wildlife and the anti-commercial bias that has been the hallmark of U.S. wildlife law, the trend toward this type of arrangement is extremely controversial.

Short of privatizing wildlife, however, there is much that can and should be done to better protect native species and their habitat, while also protecting private property rights in land. The most important reform would be to eliminate the perverse incentives created by the ESA. "I am convinced," Dr. Larry McKinney of the Texas Parks and Wildlife Department recently testified, "that more habitat for the black-capped vireo, and especially the golden-cheeked warbler, has been lost in those areas of Texas since the listing of these birds than would have been lost without the ESA at all." Fearing the loss of their property rights and income from their land, landowners are intentionally destroying endangered species habitat because of the ESA.

One of the more instructive examples of this phenomenon is the case of Benjamin Cone, of Greensboro, N C. Mr. Cone is unable to harvest trees on 2,000 of his 8,000 acres because of the presence of red-cockaded woodpeckers, which are listed as endangered under the ESA Mr Cone has already lost some $2 million because the old trees attract woodpeckers "I cannot afford to let those woodpeckers take over the rest of my property," he says "I'm going to start massive clear-cutting I'm going to a 40-year rotation instead of a 75 to 80-year rotation " Red-cockaded woodpeckers prefer old-growth pine trees Had Mr Cone exploited his timber resource for short-term gain, he would be much richer, and freer, today Had the ESA not punished him for electing not to harvest that timber, there would likely be more habitat for Red-cockaded woodpeckers as well

Landowners are intentionally destroying endangered species habitat because of the ESA.

Pitting people against wildlife in this way is good for neither We would do well to remember and heed a warning that the Supreme Court made over seventy years ago "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change "

Thus, compensating property owners for the lost use of their land would be a significant improvement over the current ESA Without such profoundly negative incentives, at least landowners would not destroy habitat that would otherwise remain intact Indeed, there is ample evidence that landowners would go out of their way to help imperiled wildlife Over the years, landowners did exactly that, putting up tens of thousands of nesting boxes for wood ducks and erected countless nesting platforms on Maryland's eastern shore for ospreys These efforts have been of tremendous help in recovering both species Indeed, the wood duck would probably have become extinct without the assistance of private landowners

However, one can safely surmise that such assistance would not have been provided had either species been listed under the ESA Few landowners, no matter how conservation-minded, would have sought to attract listed species to their property if doing so would risk losing the use of their land

Compensating property owners for the lost use of their land would be a significant improvement over the current ESA.

Whatever course Congress chooses to follow in the near future, it is clear that we must eventually clear a path on the road to reform. The biggest step in that direction will require fundamentally changing our collective attitude toward wildlife and property protection arrangements The urban public may well have a strong interest in preserving wildlife, but the individuals who own the land on which the wildlife depends have rights. Until such time as markets are allowed to develop freely, we should recognize that providing habitat for America's wildlife is a public good, not unlike national defense Our society does not compel individuals to provide for our nation's defense, and we pay those who do These costs should be made explicit Only then will the consuming and taxpaying public have a legitimate basis upon which to determine how much they value wildlife

If we continue to abide by the myth that "only in the absence of markets can wildlife thrive," we will continue failing in our efforts to conserve wildlife.

Ultimately, if we continue to abide by the myth that "only in the absence of markets can wildlife thrive," we will continue failing in our efforts to conserve wildlife. If we cling to the canard that "any material benefits should be allocated for the public good by law and not by marketplace," we will fail to make wildlife conservation a viable option for private landowners and to encourage private conservation efforts. In short, if we maintain our antipathy toward markets and private property, we will destroy our best hope of creating the infrastructure for a successful and sustainable wildlife conservation movement in America.

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PROPERTY-BASED CONSERVATION: The Free-Market Approach

by Robert J Smith

Few people doubt that America's natural heritage, its abundant natural resources, could be best developed through private ownership, but most have traditionally believed that only the government can protect it However, a of free-market environmentalists are beginning to popularize the superiority of private ownership of land and resources for conservation as well as development

Perhaps the most compelling argument for private ownership is that it would remove resource-management decisions from the realm of politics Surely, people on both sides of the so-called "preservation vs development" debate can agree that there must be a better way to manage scarce resources than subjecting them to the vagaries of the political tides with every change of administration Just as Interior Secretary James Watt changed the direction of the buffalo on his department's official seal from face-left to face-right, so can each succeeding administration reverse the politics of its predecessor If the goal of environmentalists is the careful use, management, and conservation of our unique natural resources, then they should seek to bypass the never-ending tug-of-war for political power to achieve this goal.

The most compelling argument for private ownership is that it would remove resource-management decisions from the realm of politics.

The concept of "the public domain" has been with us for so long that most Americans have difficulty believing that Yosemite National Park could be preserved in any other manner than through government ownership. For that matter, a system of common property appears to have worked well because for most of this century the demands placed upon the carrying capacity of the public domain have been relatively insignificant.

Many ecologists and economists have pointed out that when there is little demand for land and resources it matters little what system of property management is employed because the negative results of common property management will not be felt But we have long since passed that day in America There are no longer any lands that nobody wants. Ecologist Garrett Hardin has written that using property as a commons "may work reasonably satisfactorily for centuries because [use is] well below the carving capacity of the land Finally, however, comes the day of reckoning At this point, the inherent logic of the commons remorselessly generates tragedy "

Hardin's concept of the "tragedy of the commons," articulated in his 1968 essay by that name, is crucial to an understanding of the inherent problems in managing "public" lands and resources as common property, and the growth of a free-market environmentalist movement By definition, a commons is property or resources that "everyone" owns and has an equal right to use But such a system gives each user an incentive to use as much as he can — because if he doesn't,

someone else will. This leads to deterioration and depletion of the resource, until nothing usable is left. Yet no one person can be held responsible, for was not everyone told that everyone had a right to use the resource? Hardin contrasts this system to private ownership where, for example, "each herdsman owns the pastureland on which his cows graze. He has an *intrinsic* responsibility, because if he makes the wrong decision, he's going to suffer from it" (emphasis in the original).

Under "the logic of the commons," appeals by environmentalists to raise public consciousness of the need to treat publicly held resources wisely will do no more than postpone the day of reckoning, not avert it. The commons system, by itself, includes no way to settle equally valid but mutually incompatible claims by a wide variety of potential users. In a commons system, all of these decisions must be made politically.

Under the present system, each user group pushes for an ever-expanded share of the public domain to be reserved for its special interest — whether it be backpacking or cutting trees.

The day of reckoning has come. The public domain is already being overused and overexploited at today's population level. In recent decades an ever growing population, with larger discretionary income, a growing desire for recreation, and more interest in the outdoors and nature, has quickly pushed against the carrying capacity of almost all the public domain. The more spectacular and popular areas are rapidly beginning to deteriorate in quality. Some areas are now so overused and crowded that they appear ravaged and seem to have lost many of the very environmental amenities they were set aside to maintain. This is especially true of the national park system — several government studies have documented their deplorable state.

But the only answer of the environmentalists and bureaucrats has been to "take" more land and expand the parks. Given the growth of competing demands for scarce resources, this response hardly seems to be appropriate. We are no longer in a position where we can treat what is now the public domain as a static common pool. We have reached the point where attempting to satisfy some users has begun to impinge on others who can also legitimately claim their equal share of "the people's" lands through right of common ownership and payment of taxes to manage these lands. Under the present system, each user group pushes for an ever-expanded share of the public domain to be reserved for its special interest — whether it be backpacking or cutting trees. If users could no longer rely on the political process to obtain use of areas they desire, and could no longer tap the resources of another gigantic common-pool resource, the federal treasury, to pay for management costs, we would soon see the beginning of a far more rational society.

All of the lands now considered "public domain" could be allocated and transferred to applicable user groups. For instance, if the off-road vehicle associations were able to obtain their own lands — say so many tens of thousands of acres of desert land in southern California and Nevada, allocated so as to avoid destruction of archaeological sites and danger to plants and wildlife — then they could not pass to others the costs of their recreation. If they destroyed their lands they would be in the same situation as a farmer who kills or eats his breeding stock, or

a tree farmer who neglects his seedlings. The officers and managers of these areas would then have a direct incentive to carefully manage and protect their lands, for those would be the only lands they would have. They would not be able to leave them degraded and then move on to other public lands. They would have to develop a careful program to avoid overuse, to restore eroded lands, prevent gullying, and replant and reseed denuded areas. And, of course, with adjacent lands also in private ownership, the activities of the vehicle users would be monitored to ensure that they were not causing harm to their neighbors. If there were harm, the aggrieved parties could obtain court injunctions or collect damages.

Those who fear potentially adverse environmental consequences of private ownership should recognize that there is a centuries-old tradition of successful private environmental-protection. In fact, in recent years private actions have been among the most effective in promoting conservation: In the 1970s alone, more than 1.6 million acres were acquired by private organizations for preservation purposes. Groups such as the Nature Conservancy, the Audubon Society, and the World Wildlife Fund in particular have done magnificent work in privately preserving wildlife, wetlands, coastal barrier islands, estuaries and tidal marshes, colonial nesting areas, cypress swamps, tall grass prairies, and an entire range of areas of unique natural diversity. Owning these areas privately, the environmental organizations have had all the advantages absent in public ownership. The security and exclusivity of their ownership means that owners and managers of these refuges and preserves can determine the optimal use of resources and then manage them accordingly *in perpetuity* — free from all the problems of conflicting multiple uses in the public domain, free from the uncertainties and vagaries of changing political priorities, and free from the pressures of the political decision-making process.

Those who fear potentially adverse environmental consequences of private ownership should recognize that there is a centuries-old tradition of successful private environmental-protection.

If, for example, the Nature Conservancy or the Audubon Society decides that an area is too sensitive environmentally for visitor use, then they can exclude visitors without fear that the next administration or Congress will determine that backpackers should be allowed to have access, or that cattle grazing is compatible, or that the public domain also belongs to off-road vehicle aficionados, or that 40 percent of the wildlife refuge should be made available for waterfowl hunters. However, if they do find that there are compatible multiple uses for all or part of their preserves, then they can allow carefully prescribed multiple uses that generate income to pay for management, educational activities, publication of conservation magazines and books, and the purchase of additional lands.

There are many examples of relatively small organizations, associations, and groups that have acted privately to preserve special areas, types of habitat, or wildlife. Groups throughout the Midwest have privately purchased or obtained nesting areas for prairie chickens and conservation easements for mating grounds, and have developed observation blinds and towers for birders and photographers. One of the most important private conservation efforts in the nation's history is the Hawk Mountain Sanctuary, located in the Appalachian Mountains of Pennsylvania. Purchased quietly by conservationists for $3,500 in 1934 to protect hawks against bounty hunters and "sport" shooters, it is now a self-supporting research and

educational center that attracts as many as 2,000 people a day from around the world to view the spectacular autumn hawk migration

The familiar equation of private ownership with environmental ruin is patently false.

Thus it is evident that a substantial private demand for environmental preservation and conservation exists today in the United States, a demand that has been translated — even in a market heavily distorted by government intervention — into millions of acres held privately for environmental purposes. The familiar equation of private ownership with environmental ruin is patently false.

Of course, any process of privatization of public lands would mean that some formerly public lands could fall under the ownership of commercial and pro-development interests. Yet, from an environmentalist's point of view, this should not be viewed with alarm, particularly in comparison to the situation that exists at present. A profit-oriented entrepreneur would be hard put to find an economic justification for building a shopping center, a high-rise apartment building, or an industrial plant in a wilderness area hundreds of miles from the nearest population center or economic base — especially if his neighbors, the owners of adjacent stretches of land, could bring suit against him if he were to affect adversely their property rights. As for those interests seeking to develop and exploit such resources as timber and minerals, the present system of the commons, or government ownership, actually encourages waste, destruction and mismanagement by forcing the taxpayers to subsidize activities and practices that would not occur in a free market. Private ownership, on the other hand, would encourage careful, responsible development, managed with long-term conservation in mind.

Private ownership encourages careful, responsible development, managed with long-term conservation in mind.

Even in a "worst case" scenario, with a developer who, through ignorance or malice, actually does irreparable damage to his land, environmental losses would be held to a minimum — that is, to the extent of the developer's own holdings. He would not be free to claim and destroy additional land or resources under some notion of "common" ownership, or by grabbing control of the political process. In comparison, the "worst case" potential for destruction under the present system is virtually limitless. Conservationists must rely solely on the good will of government managers and the "wisdom" of the political process. Such faith hardly seems justified — for years, many of the federal government's land-management policies have been environmentally destructive, and in the event of some "national emergency" and accompanying calls for, say, rapid extraction of strategic raw materials, concern for future generations would be unlikely to carry much weight in the Pentagon or the halls of Congress. Such a situation would quickly reveal whether or not the "public" lands are truely "owned by everyone."

Many of those who are both pro-free-market and pro-environment have put forth proposals for the actual method by which what is now the public domain can be transferred to private ownership. These range from giving land to environmental groups to gradual, parcel-by-parcel disposition over a period of years, to modern versions of homesteading, to wide-scale auctioning off of public property to the highest bidders. All such proposals merit at least further study. But more important is increasing people's recognition that government ownership and

management of our cherished land and other natural resources is a policy that is failing, hurtling toward disaster with increasing speed, and that if the future of our environment is to be bright, we must turn to the alternative solutions offered by private ownership

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This article is adapted from "Getting the Government Out of the Environment," published in the September 1982 issue of Inquiry.

Government ownership and management of our cherished land and other natural resources is a policy that is failing, hurtling toward disaster with increasing speed.

APPENDIX:
ARE PROPERTY RIGHTS POPULAR?

by Brian Seasholes

Conflicting sides in the property rights debate claim popular allegiance. Yet there is not a wealth of publicly available polling data on property rights with which to evaluate the competing claims of public support. Nonetheless, a review of public survey data over the past several years suggests that a majority of Americans support property rights in principle and believe that strong property rights protections do not conflict with sound environmental protection.

Americans have long supported the idea of property rights. In 1964, Gallup conducted a poll where the following question was put to survey participants: "Here are several statements that people critical of the government sometimes make. Just tell me whether you agree or disagree. The government is interfering too much with property rights." 40 percent agreed with this statement, 38 percent disagreed and 23 percent did not know.

In the 1970s two separate property rights polls were conducted by Louis Harris and Associates: in 1973 and 1975, which asked the following questions:

1) "Here is a list of things some people think made America great. For each item, do you feel this was a major contributor to making America great, a minor contributor or hardly a contributor at all? Allowing people to own private property." The responses were as follows:

	1973	1975
Major contributor	88%	87%
Minor/Hardly a contributor/Not sure	12%	13%

2) "Here is a list of things some people think made America great. In the next 10 years, do you think each of these items will be a major contributor to making the country great, a minor contributor, or hardly a contributor at all? Allowing people to own private property." The responses were as follows:

	1973	1975
Major contributor	84%	82%
Minor/Hardly a contributor/Not sure	16%	18%

Both of these polls revealed strong support for property rights in principle.

A third poll taken in 1974 by Yankelovich, Skelly and White asked the following: "Here are some statements which represent some traditional American values. How do you feel about each one? The right to private property is sacred." The responses again indicated support for private property.

I believe strongly in this statement	70%
I partially believe it	23%
I don't believe it	8%

While these three polls do not explicitly address the issue of when governments should or should not be allowed to infringe upon private property rights, they do indicate very clearly that Americans have a basic grasp of the importance of the ability for citizens to own property. This suggests that the growth of the property rights movement over the past several years, far from being a recent "backlash" against government regulation, is a result of a genuine appreciation of the importance of property rights among the American people. Given the significant increase in federal regulation of private land over the past two decades, this data would suggest that the "backlash" was inevitable.

Recent polling data supports the contention that property rights enjoy general support from the American people. In 1992, Gallup conducted the first National Environmental Forum for Times Mirror Magazines. In this poll, participants were asked "should the government compensate private property owners" in the following instances:

1) When "land is devalued by the need to protect an endangered species," in this instance, 59 percent of respondents answered yes while only 28 percent answered no,

2) When "land is devalued by classification as a wetland," in this instance, 52 percent answered yes while 32 percent answered no.

These results are quite interesting because this same poll also found that, with regard to current endangered species and wetlands regulations, 51 percent and 52 percent of Americans, respectively, did not think they had gone far enough, 26 percent and 24 percent, respectively, think a good balance has been struck while 16 percent and 9 percent, respectively, think regulations have gone too far. Majorities both supported the idea of increased federal environmental regulation in these areas while also supporting compensation to landowners, which is not current federal government policy. Americans want strong environmental protection, but they also want to ensure that property rights are protected in the process.

Indeed, Democratic pollster Celinda Lake told the *Times-Picayune* (July 3, 1994) that 80 percent of Americans consider themselves to be environmentalists, but 66 percent of Americans think property rights are not protected adequately under current law. These results reflect the data in the Times Mirror polls, namely that environmental protection, as an abstract idea, is widely supported, but that when confronted with the question of how government should or should not go about protecting environmental quality, Americans have also demonstrated a desire to see that private property is protected.

A number of regional polls have been conducted that also indicate support for private property. In October 1994, Florida people of voting age were asked by Fabrizio, McLaughlin and Associates to respond how they would vote on "a [state] ballot measure that would require state or local governments to fully compensate home or other property owners for any damages or losses that result from governmental decision or actions." 59.5 percent responded that they would definitely vote for such a measure, 16.3 percent said that they would probably vote for the bill and 9.5 percent said they probably or definitely would vote against the proposed measure, 14.7 percent were undecided.

The same firm conducted a similar poll in Georgia in December 1992. In this poll the following question was put to people of voting age, "do you agree or disagree that the government should be required to compensate private property owners if environmental regulations reduce the value of their property?" 63.3 percent of respondents were in favor of compensation, 29.5 percent were against, and 7.3 percent did not know or had no opinion.

Property rights was a pivotal issue in the 1994 Texas gubernatorial race, and as a result groups on both sides of the issue conducted statewide opinion polls. The consumer advocacy group Public Citizen released a poll on October 8, 1994 in which a number of questions about the environment, economics and property rights were asked.

1) When asked whether Texans have a "moral obligation to future generations to protect the diversity of wildlife from pollution and extinction, even if they have no current economic value," 80 percent of respondents agreed (39 percent strongly), 16 percent disagreed (4 percent strongly) and 3 percent fell into an unspecified "other" category.

2) When asked whether more or less public land needs to be set aside to protect endangered species, water quality and for recreation, 60 percent thought more public land should be set aside while 25 percent thought less should be set aside and the remaining 15 percent fell into an unspecified "other" category.

3) When the statement "allowing some people to do whatever they want with their land harms the common rights of all citizens to clean air, clean water, and wildlife diversity" was pitted against the opposing statement "governmental environmental laws are unfairly taking away the rights of some landowners to use their property however they want," 44 percent agreed with the former while 39 percent agreed with the latter.

4) When asked to choose one of the following two statements: "taxpayers are already paying for too much and can't foot the bill to compensate landowners," and "when some uses of a piece of land are prohibited or limited because of environmental laws, the taxpayers should be required to compensate the landowners," 56 percent chose the first statement while 29 percent chose the second.

5) When presented with the statement, "Texas charges property taxes on land set aside as habitat for endangered species or to preserve water quality. Some countries have a program that allows landowners to pay no taxes on land that is set aside for this purpose," 67 percent agreed with this policy and 25 percent opposed it, while 8 percent fell into the "other" category.

As the first statement shows, most people favor blanket statements about the need to protect the environment. Yet the other questions in the Public Citizen poll are worded in such a way as to make it appear that the people of Texas are not supporters of property rights, either in theory or practice. While 60 percent may believe more public land needs to be set aside to protect endangered species, water quality and for recreation, it is unclear whether respondents were advocating state acquisition of more land or specific uses for the land already in state ownership.

Perhaps the most misleading of the questions was the juxtaposition of the statement "allowing some citizens to do whatever they want with their land harms the common rights of all citizens to clean air, clean water, and wildlife diversity" with "governmental environmental laws are unfairly taking away the rights of some landowners to use their property however they want." These two statements are not mutually exclusive. Indeed, many property rights advocates would agree with both statements as property rights have never meant that people can do "whatever they want" with their property. Under takings compensation proposals such as that proposed in the Republican "Contract with America," if the activity in question can be construed as a public nuisance by a court of law then that activity can be enjoined without requiring compensation.

The third question was similarly misleading, as it presupposed that requiring compensation would necessarily result in a tax increase to pay for it — something that most Texans would oppose. When government agencies are going to be forced to pay compensation for regulatory takings, they always have the option to rescind the regulatory action that would

have caused the taking. The resulting prioritization of regulatory activities within government agencies will greatly reduce the cost of paying compensation, as agencies will engage in fewer actions for which compensation is requried.

The Texas Farm Bureau commissioned a poll in July 1994 that had very different results from the Public Citizen poll. A total of 78 percent of Texans disagreed (64.5 percent "strongly") with the statement, "in general, the government should have the right to restrict how private property is used." Only 12.3 percent agreed (4.3 percent "strongly") with this statement, while 9.8 percent were neutral.

In this poll, when presented with the statement "to protect the environment, the government should have the right to restrict how private property is used" the results were closer. 39.8 percent disagreed (22.3 percent "strongly"), 38.0 percent agreed (14.5 percent "strongly"), and 22.3 percent had no opinion or were undecided. Yet again, many of those who believe that the government should have the right to restrict the use of private property for environmental protection may still desire compensation.

This was borne out by responses to the following two statements in the Texas Farm Bureau poll:

1) "In general, property owners should be compensated if the value of their property is reduced by government-mandated restrictions on land use." 81 percent agreed with this statement (59.5 percent 'strongly"), 9.6 percent disagreed (5.8 percent "strongly"), and 9.5 percent were neutral.

2) "In general, property owners should be compensated if their ability to earn money is reduced by government-mandated restrictions on land use." 72.8 percent agreed with this statement (48.3 percent "strongly"), 11 percent disagreed (6 percent "strongly") and 16.3 percent were neutral.

The responses to these two statements show that an overwhelming majority of Texans still would favor compensation for takings.

The survey even went so far as to pose a legislative hypothetical with the statement "I would support a law that grants financial reimbursement to property owners who suffer financial losses due to government-mandated restrictions on land use." 73.0 percent agreed (47.0 percent "strongly"), 9.1 percent disagreed (5.3 percent "strongly"), and 18.0 percent were neutral. That Texans advocate passing a law to insure takings compensation indicates broad belief in property rights.

The most extensive state property rights poll was taken in May 1994 for Arizona Citizens for Property Rights in conjunction with the state property rights ballot initiative, Proposition 300. Like the other polls it showed strong support for property rights. For instance:

1) When given the statement "people have a constitutional right to be compensated for a loss of value in their property," 65 percent agreed while only 27 percent disagreed.

2) When asked to evaluate government efforts aimed at "protecting the rights of property owners," only 5 percent felt that the government is doing too much while 48 percent felt that the government was not doing enough. The remainder either did not know or believe that government is protecting private property sufficiently.

3) When given the statement "the initiative is needed to protect property owners against the power of state government," 63 percent agreed, and only 27 percent disagreed. The remainder did not know or refused to answer.

While the poll showed strong support for property rights, Proposition 300 failed, largely because the bill was poorly worded and anti-property rights groups widely outspent property rights proponents.

The failure of Proposition 300 could have been foreseen from the results of the Arizona poll. When characterized in certain ways, property rights proposals lose public support. Consider two examples:

1) When given the statement "people should be compensated for losses in property value, but I won't support a property rights law if it means higher taxes," 66 percent agreed, 29 percent disagreed, and 6 percent did not know.

2) When given the statement "the last thing Arizona needs is another Proposition that requires government bureaucrats to write more reports and do more studies," 74 percent agreed, 22 percent disagreed, and 3 percent did not know.

These responses show that while Arizonans strongly support the concept of property rights they do not support compensation for public nuisances, compensation through taxes or compensation requirements potentially leading to more bureaucracy. These sentiments are consistent with the other polls that asked similar questions. Given Arizonan's strong support for property rights, the failure of the supporters of Prop. 300 to include provisions addressing the above three issues and the ability of the opposition to capitalize on them in large part explains the failure of the initiative.

The polling data on property rights is not overwhelming. Nonetheless, what limited evidence there is suggests that Americans support property rights in principle, and do not see strong property rights protection as something that conflicts with the protection of environmental quality.

Brian Seasholes is an environmental research associate at CEI.

January 1995

Mr. INGLIS. Mr. Miller, I appreciate having you here. I was in Budget with you earlier so we see each other in both places. That is why all Members of Congress are running around in various areas. So thank you for being here.

I recognize you for your testimony. And we have a vote on, but you have 5 minutes, and I will run after you testify.

STATEMENT OF JIM MILLER, COUNSELLOR, CITIZENS FOR A SOUND ECONOMY

Mr. MILLER. Thank you, Mr. Chairman. This is déjà vu for me. I was here in this very room testifying on regulations earlier in the week.

Before us is an issue that is quite important and I think represents one of the reasons you have had substantial turnover in Congress. People are tired of the excesses of government, and regulatory takings is one of them.

You have an issue here that has two ramifications—one is regulatory, the other is budget. Counsel asked me to address the budget part.

Let me first say something about the regulatory part. It is extremely important that agencies perceive what costs they are imposing on the private sector, that they receive signals from the private sector about what is truly important to the private sector and unimportant to the private sector and to have a price on things will rivet the agencies' attention.

That is one reason I think you ought to revise the provision in title IX—that allows the agency to go to general funds to pay compensation for some of these land takings. I think it ought to be in the budgets of the agencies. You will cause the agencies to do a better job of regulating in a cost-effective manner if they understand the costs that they are imposing.

Now there is a relevant question here. Would this be a budget buster? I don't think it would be. I think the agencies will figure out ways to minimize costs.

I do think, Mr. Chairman, the Congress has enormous responsibility in revising some of these statutes. If you have a statute that is very broad and open-ended, that you can have the EPA identifying practically every mud hole in the country as a wetland, then something is wrong, and Congress bears the responsibility for giving the Agency that much discretion.

But by its very nature regulation is something where the Congress says we don't have time to do all the details, and we authorize you to do it in our place.

When you do that, you have to understand the incentives that the agencies face. Their raison d'etre is to issue regulations. So it may take several kinds of controls and influences on the regulators to get them to do the right thing.

Centralized review of regulations is one answer. A regulatory budget is another answer. Forcing agencies to compensate the victims of regulatory takings as required by the fifth amendment is another one.

For that reason, I congratulate you on this approach, and I urge you to give favorable consideration to this legislation. I speak not

only for myself but on behalf of the 250,000 members and supporters of Citizens for a Sound Economy.

Mr. INGLIS. Thank you, Mr. Miller.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF JIM MILLER, COUNSELLOR, CITIZENS FOR A SOUND ECONOMY

Good morning. Mr. Chairman and Members of the Committee: Thank you for the opportunity to present the views of Citizens for a Sound Economy, a 250,000 member research, education, and advocacy group that promotes market-based solutions to public policy problems.

In both Congress and the courts, there has been a renewed interest in protecting private property rights. Although enshrined in the Constitution, property rights have been neglected in recent history, and many government actions have infringed upon the rights of private property owners. As the scope of regulation has expanded—most notably environmental regulations—there has been increasing pressure to evaluate the impact of government regulations on property owners. Government regulations that restrict the use of private property can have an impact that is substantially the same as a physical taking of the property by the federal government.

Briefly, Title IX, "Private Property Protections and Compensation," of the Job Creation and Wage Enhancement Act of 1995 (H.R. 9) would introduce safeguards that private property owners receive compensation from federal regulations or policies that reduce the value of the property. Quite frankly, such a policy not only seems fair, but is *required* by the "just compensation" clause of the Fifth Amendment of the U.S. Constitution.

REGULATORY TAKING

In recent decades, federal regulations have increased dramatically, and some new government regulations impose substantial restrictions on a property owner's land use decisions. The result has been an increase in litigation directed at protecting the rights of landowners. Much of this litigation has been based on the theory that a particular federal land use regulation has violated the rights of property owners guaranteed under the Fifth Amendment.

To protect private property rights and excessive government intrusion on private property, the Founding Fathers added the Fifth Amendment to the Constitution, which requires the federal government to fully compensate property owners for any property taken by the federal government. In recent years, regulatory takings—i.e., restrictions imposed on property not through physical takings but through regulations—have been addressed by the Supreme Court. Unfortunately, the exact scope of the rights guaranteed by the "just compensation" clause have been hard to define. Those landowners who seek to determine their rights under the Constitution face the burden of expensive and time consuming litigation with no clear indication of outcome. At the same time many agencies are uncertain about their responsibilities regarding property rights and the Constitution. Title IX of H.R. 9 provides the legislative guidance necessary to ease the legal burden on consumers while clarifying the obligations of federal agencies.

Currently, the federal government imposes a regulatory burden on the American public of more than $500 billion per year—roughly one-third the size of the total federal budget. (See attached figure for an historical perspective.) The regulatory burden is tantamount to a hidden tax on the American public. By its very nature, then, this "tax" does not elicit the same public scrutiny that changes in the fiscal budget generates. In fact, there is often an element of bureaucratic discretion in the rulemaking process that entrusts the promulgation of regulations to unelected officials. Individuals have fewer avenues of recourse for questions over the regulatory burden than the tax burden.

Much of the hidden tax of regulation has been imposed on property owners who have been forced to alter or limit the use of their property. Requiring a federal agency to compensate these individuals has two important effects. First, individual property owners are not forced to bear the costs of environmental goods demanded by society as a whole. There may indeed be a value that society places on environmental goods; however, individuals should not be forced to bear the costs of such collective goods alone. If the government determines a specific use for a piece of property is more preferred than others, then, as stipulated in the U.S. Constitution, the government should compensate the property owner for taking the land for that use.

Perhaps just as important, a requirement for federal compensation in instances of private property takings will make the costs and the debate public. The budgetary implications of the provisions for compensation will force agencies to assess more carefully the programs they choose to implement. At the same time, however, the fiscal consequences will also generate input from the public. In this case, the demand for environmental goods will be debated along with the demand for other public goods, such as crime prevention, low-income assistance programs, and so forth. We live in a world where resources are scarce and we must make decisions between competing ends. Legislation requiring compensation for environmental goods will ensure an effective balance in the goods and services provided to the public by the government.

BUDGET IMPLICATIONS

There have been concerns that Title IX could have adverse budgetary implications that would increase the federal deficit. For the most part, I believe these concerns are exaggerated. Title IX would institute changes in agency behavior that would alleviate budgetary pressures. However, there are a few minor changes that I believe would further minimize the budgetary impact of the legislation.

The first change addresses Sections 9002(i)(1) and (2) of Title IX, which describe the source of funds for compensating private individuals. As currently written, compensation would be made from an agency's annual appropriation, except in those cases where the agency does not have the necessary funds. In this case, other federal funds are to be used for compensation. Allowing agencies to resort to general revenues would dilute the incentives of agencies to weigh the benefits and costs of a proposed taking. The result would be higher costs to the federal government, as well as skewed decisions with respect to takings. I would recommend the Subcommittee eliminate the availability of general funds provision. Instead, agencies should be required to make any compensation from the next year's appropriations. The costs of compensation should be internalized to the agencies, with each agency having a responsibility to include resources for compensation in its annual budget.

Another area of concern may be found in Section 9002(i)(3), which allows the government to enter into land exchanges in lieu of monetary compensation. Although the intention of this provision may have been to offer the federal government a cheaper solution to compensation, it may impose costs on the federal government. Specifically, in a takings situation, the federal government would have to offer land of similar value to a property owner. Under the current budget act and the 1990 PAY–GO requirements, this may be scored as a revenue loss due to a loss of royalties from mining, timber, and so forth. Eliminating this section of Title IX would eliminate this concern while still providing property owners the opportunity for meaningful compensation.

With these technical changes, I do not believe that Title IX will have a significant negative impact on the deficit; even if it did, this would simply be a *revealing* of costs already imposed by the federal government but not accounted for in our formal budget accounts. Moreover, Title IX is ultimately regulatory reform legislation. With requirements for the protection of private property, individual agencies will adjust their behavior to avoid unnecessary or excessive costs. It is not as if these costs do not already exist, they are simply being imposed on private individuals. Compensating these individuals will more clearly identify the costs of regulations and allow agencies to more carefully select their priorities.

The incentives created by Title IX have the potential to reduce the costs to the federal government by making the federal government more prudent with respect to regulatory policy and takings. Agencies would evaluate their regulatory programs more carefully, and Congress would also have incentives to examine the fiscal consequences of legislation, because the Congress would ultimately have to increase appropriations for an agency if it pursued policies that increase private property takings. In some instances Congress may choose to do so; unlike the current system, however, this decision would be made in a public forum.

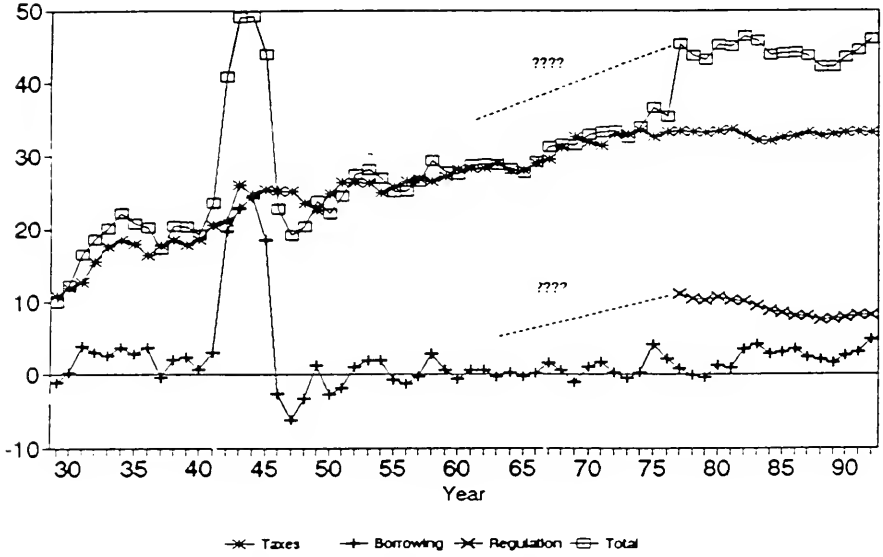
Finally, Title IX provides an important opportunity to reflect more accurately trends in legal thinking on takings. In recent years the courts have been revisiting the issue of property rights, often to reaffirm their protection in the U.S. Constitution. Recent settlements have provided substantial compensation to landowners for government takings. Title IX would require more prudence on the part of agencies, which could reduce the number of judicial decisions that require federal compensation of property owners. At the same time, property owners would avoid costly litigation when seeking recourse for takings.

CONCLUSION

Private property rights are a fundamental component of the market system that has provided tremendous benefits to consumers in the United States. Federal interventions that limit property rights can have a significant effect on U.S. productivity and employment. Title IX of H.R. 9 introduces incentives to ensure that agencies carefully weigh the benefits and costs of their actions, with close attention to the impact on the public. I urge the Committee to act favorably on this legislation.

Mr. Chairman and Members of the Subcommittee, thank you very much.

Total Cost of Government
As a Percentage of GNP



Mr. INGLIS. I very much appreciate your testimony and Mr. Adler's testimony. I am sure the other testimony was excellent as well. I am sorry I was not able to hear all of that.

I would just make this comment, particularly, Mr. Miller, your observation that the reason for the existence for the agencies is truly probative I think. That is, that any human being in such a structure would establish a system like that. That is the reason they come to work. That is the reason they exist. And, therefore, they go out and regulate and don't understand, in many cases I suppose, the costs they are imposing external to their own cocoon there.

Certainly a point well taken, I believe.

With that, you hear the bells going off. That means we have another vote. I think there are 10 minutes left, and since I am the only Member here I guess that means I have to run quickly to make that vote.

I very much appreciate each of you taking time to testify. I am sure Members who were here earlier benefited from earlier testimony, and I benefited from the testimony this afternoon.

Thank you for your time.

Mr. MILLER. Thank you, Mr. Chairman.

The committee stands adjourned.

[Whereupon, at 1:30 p.m., the subcommittee adjourned.]

APPENDIX

Additional Material Submitted for the Hearing

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
SENIOR VICE PRESIDENT,
MEMBERSHIP POLICY GROUP

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

February 9, 1994

The Honorable Charles Canady
Chairman
Subcommittee on the Constitution
House Committee on the Judiciary
2206 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The U.S. Chamber of Commerce Federation applauds your leadership in addressing regulatory "takings" of private property and appreciates this opportunity to share its views on an issue of major concern to thousands of businesses and communities across America. We also request that this letter be included as part of the hearing record on this issue.

In recent years, a proliferation of regulatory "takings" of private property value has occurred as millions of acres of private land have been designated as "wetlands" or endangered species "habitat" under the Federal Water Pollution Control Act and the 1973 Endangered Species Act. In these instances, farming, homebuilding, logging, and other just uses of land are severely restricted and the enormous financial burden of providing public goods like endangered species and wetlands preservation falls solely upon the individual who happens to own property in the regulated area. The only available recourse for the aggrieved property owner is through the court system where, at an enormous expense of time and money, he/she can seek protection of his/her Constitutional rights.

Despite recent Supreme Court decisions such as *Florence Dolan* v. *City of Tigart* and the 1991 *Lucas* v. *South Carolina Coastal Commission* that have favored the rights of private property owners, several lower court "takings" cases have underscored the urgent need for Congress to develop a clear policy to guide federal agencies with respect to potential conflicts between property rights and regulations affecting the use of private property.

The Chamber's Board of Directors adopted a policy declaration urging federal agencies to avoid regulatory "takings" whenever an alternative course of action can achieve the desired result. In cases where "takings" are unavoidable and necessary to implement federal law, owners should be justly compensated for the loss of substantial property value through an expedited and cost-efficient process.

The federal government can and must meet the goal of environmental protection without sacrificing the constitutional rights of private property owners. Adoption of this policy will interject accountability and balance into those federal programs that seek to limit the use and control of private property. It will not relieve businesses and private property owners from their responsibility of being stewards of the land but simply require this government to live up to its obligations under the Fifth Amendment of the Constitution.

The U.S. Chamber Federation of 215,000 businesses, 3,000 state and local chambers of commerce, 1,200 trade and professional associations, and 72 American Chambers of Commerce abroad thanks you for your efforts to protect the sanctity of private property ownership. We look forward to our continued work together on this important effort.

Sincerely,

R. Bruce Josten

cc: Members of the Subcommittee on the Constitution

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
SENIOR VICE PRESIDENT,
MEMBERSHIP POLICY GROUP

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

February 16, 1995

The Honorable Charles Canady
1107 Longworth House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Canady:

I am pleased to take this opportunity to inform you of the business community's strong support for your property rights amendment to H.R. 9, the Job Creation and Wage Enhancement Act of 1995. By setting the compensation threshold at 33.3 percent, and by focussing on regulatory takings under the Endangered Species Act and the Section 404 wetlands program, your amendment convincingly responds to many of the concerns that have been raised about the potential cost of federal compensation to property owners. At the same time, we applaud your recognition that the real issue is not the level of compensation, but rather the implementation of a policy that will strongly discourage federal agencies from engaging in regulatory "takings" in the first instance.

The U.S. Chamber Federation of 215,000 businesses, 3,000 state and local chambers of commerce, 1,200 trade and professional associations, and 72 American Chambers abroad thanks you for your leadership and efforts to protect the sanctity of property ownership.

Sincerely,

R. Bruce Josten

c.c. Members, Judiciary Committee

NATIONAL ASSOCIATION OF REALTORS®

The Voice for Real Estate®

NATIONAL ASSOCIATION OF REALTORS®
700 Eleventh Street N W
Washington D C 20001-4507

Edmond G. Woods, Jr., President
Dr. Aumea R. Smith, CAE, Executive Vice President
Stephen D. Driesler, Vice President & Chief Lobbyist
Government and Political Relations

202-383-1238
202-383-1134 Fax

February 15, 1995

Dear Representative

On behalf of the NATIONAL ASSOCIATION OF REALTORS®, we urge your support of Title IX of HR 9 which seeks to address the issue of takings of private property

In recent years, as efforts to protect the environment have escalated, legislative and regulatory restrictions on the use of private property have become more stringent While we do not disagree with the importance of protecting our natural environment, we feel that any such restrictions on the use of property should be balanced with the constitutional rights guaranteed to us under the 5th Amendment Unfortunately, this balance has often tilted in favor of environmental protection at the expense of property rights

HR 9 will restore that balance It allows property owners who, as a result of federal agency action, are deprived of ten percent or more of the value of property to seek compensation for such takings It does not affect state or local governments ability to zone Nor does it result in people who pollute being compensated by the government HR 9 specifically bans compensation for any private action that would result in a nuisance

Over the past few years, the federal courts have increasingly recognized the validity of claimants who have argued that their property rights have been infringed by government regulation In the recent Dolan v City of Tigard, the Court made it clear that it considers private property rights to be of equal importance with environmental regulation Writing for the Court Chief Justice Rehnquist stated, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First or Fourth Amendment, should be relegated to the status of a poor relation "

By supporting Title IX of HR 9, you, and the Congress, will be sending a similar message The National Association of REALTORS® strongly urges your support

Sincerely,

Gill Woods
1995 President

AMERICAN
FOREST &
PAPER
ASSOCIATION

1111 19TH STREET N.W. SUITE 800 WASHINGTON DC 20036
PHONE (202) 463-2700 DEPARTMENT FAX (202) 463-2424

GOVERNMENT AFFAIRS

February 14, 1994

The Honorable Charles T. Canady
Chairman
Subcommittee on the Constitution
House Judiciary Committee
2138 Rayburn House Office Bldg.
Washington, D.C. 20515

Dear Chairman Canady:

On behalf of the membership of the American Forest & Paper Association (AF&PA), I would like to submit the following comments for the record with regard to the February 10, 1995 hearing on Title IX (Private Property Rights and Compensation) of H.R. 9, the "Job Creation and Wage Enhancement Act of 1995".

AF&PA member companies own more than 70 million acres of private forestland and influence the management of and process the wood products from an additional 276 million acres of forestland held by private non-industrial landowners. Our industry, therefore, has a direct and substantial interest in the constitutional protection of private property rights.

AF&PA strongly supports legislative efforts that ensure that private property rights are accorded adequate protection by federal agencies during the normal process of regulatory activities. Just compensation should be provided when private property is taken for public use. We support the private property rights protection concepts of Title IX of H.R. 9. However, enclosed are our specific comments to the language of Title IX which we hope the Subcommittee will consider during its deliberations on this legislation. Also attached is a copy of AF&PA's five "Private Property Rights Principles" which we urge your Subcommittee to consider during its review of private property rights legislation.

I thank you for your consideration of our views. AF&PA looks forward to working with you and your Subcommittee in support of the protection of private property rights. If you have any questions with regard to our comments, please contact Jane Turner (202/463-2748) or Mark Rentz (202/463-2744) on our staff.

Sincerely,

B. Roland McElroy
Vice President

Enclosures (2)

AMERICAN FOREST & PAPER ASSOCIATION

COMMENTS ON
TITLE IX - (PRIVATE PROPERTY RIGHTS PROTECTIONS AND COMPENSATION)
H.R. 9,"JOB CREATION AND WAGE ENHANCEMENT ACT OF 1995"

[Add to current language: language highlighted in **bold**]

1. Sec. 9002. Compensation for Federal Agency Infringement or Deprivation of Rights to Private Property

(a) Eligibility (**page 112, lines 16-21**)
(1) In General - A private property owner is entitled to receive compensation from the United States in accordance with this section for any agency infringement or deprivation of rights **including reduction in value, or reduction in the economically viable use, of property or the affected portion of property** that is owned by the private property owner.

[Explanation: "Economically viable use" language is from 1980 Supreme Court decision -- Agins vs. City of Tiburon. "Affected portion of property" - the bill should provide that an action be maintained for a parcel or portion of property. The property at issue should be specified to be the property within the project area affected by the action. (ex. 40 acre site intended to be developed out of a 140 acre parcel - the 40 acre site should be the "property" at issue.)]

(2) Agency Infringement or Deprivation of Rights to Property Defined (**page 112, lines 22-26; page 113, lines 1-5**); - For purposes of paragraph (1), the term "agency infringement or deprivation of rights to property" means a limitation or condition that --

(A) is imposed by a final agency action on a use of property that would be lawful but for the agency action, and
(B) results in a reduction in the value, **or reduction in the economically viable use, of the property or the affected portion of property** equal to ten percent or more. (**page 113, lines 4-5**)

[Explanation: see #1 above]

(c) Agency Determination and Offer - (**page 115, lines 1-13**)
(1) In General -
Upon receipt of a request for compensation, submitted in accordance with subsection (b), with respect to any agency action affecting private property as described in subsection (a), the head of the agency that took the action **shall stay the agency action** and shall determine whether the private property owner submitting

the request had demonstrated entitlement to compensation under subsection (a). If the head of the agency finds that the private property owner has so demonstrated, the head of the agency shall offer to compensate the private property owner for the reduction in the value of the affected property, as demonstrated by the property owner. **All legitimate rights of the landowner with regard to the affected property should remain with the landowner unless acquired by and compensated for by the government.**

(g) Nature of Remedy - **(page 117, line 15)**
(3) A property owner may file a civil action to challenge the validity of any agency action that adversely affects the owner's interest in private property in either the United States District Court or the United States Court of Federal Claims. This section constitutes express waiver of the sovereign immunity of the United States. Notwithstanding any other provision of law and notwithstanding the issues involved, the relief sought, or the amount in controversy, each court shall have concurrent jurisdiction over both claims for monetary relief and claims seeking invalidation of any Act of Congress or any regulation of an agency as defined under this Act affecting private property rights. The plaintiff shall have the election of the court in which to file a claim for relief.

2. Sec. 9004. Definitions **(page 119, line 19)**

(2) Agency Action -- **(page 120, lines 1-3)**
[The definition of "agency action" in the bill includes failure of agency to act -- you may want to add agency inaction after a definite period of time (e.g., 6 months or 12 months), to trigger compensation. Alternatively, this provision could provide for compensation for a federal agency's unreasonable delay (e.g. delay beyond that provided by law or regulation or specific number of months (9 months)) in acting upon a complete permit application. Otherwise, you have the problem that, so long as the government does not make a decision, they don't have to compensate you for otherwise impermissible takings.
Need to clarify that this is federal agency action.]

(3) Fair Market Value **(page 120, line 4-9)**
- Unless stated otherwise, the term "fair market value

of the property" means the fair market value of the **affected** property determined as of the date on which the private property owner makes a claim under this title with respect to the property.

(5) Private Property Owner (**page 120, lines 24-25; page 121, lines 1-8)**
- The term "private property owner" means a person (other than the United States, a department, aency, or instrumentality thereof, or an officer, employee, or agent thereof when acting on behalf of his or her employing authority) that -
(A) owns **or holds a legal interest in** property referred to in paragraph (6)(A)-(6)(E); or
(B) holds property referred to in paragraph (6)(C)

(6) Property **(page 120, lines 9 -11)**
- The term "property" means -
(A) land; and
(B) **improvements associated with the land;**
(C) **any proprietary water right;**
(D) **any contract right associated with the affected land; or**
(E) **any crops, forest products or resources.**

PRIVATE PROPERTY RIGHTS PRINCIPLES

The following principles should be considered for any federal legislation designed to protect private property rights.

Principle 1. **Takings Impact Analysis (TIA):** Before an agency issues a regulation or policy that may restrict the use or development of property that would otherwise be lawful, the agency should conduct a takings impact analysis.

- A TIA will assist government decisionmakers to understand the effect of administrative, regulatory and legislative actions on private property rights.
- By performing a TIA analysis before implementing a regulation or policy, government decision makers will be better informed about the potential effects of proposed actions.
- A TIA would identify those takings that are, or will be, necessitated by statutory mandate.
- A TIA would identify the potential costs associated with takings claims.
- A TIA could assist decisionmakers to identify alternative approaches that, to the extent permitted by law and consistent with an agency's statutory obligations, may minimize the impacts of governmental actions on private property.

Principle 2. **Administrative Review Process:** A process should exist that would require the responsible agency, upon request by a claimant, to make a determination whether or not a taking has occurred, and if so, what constitutes just compensation.

- The process should provide for a timely determination.
- The process should minimize the financial burden to the claimant.
- A party will have standing as a claimant for the purposes of requesting an administrative review if the party is either the owner of, or has a legal interest in the property allegedly affected by the government action.
- The claimant should have the right to reject the agency's determination and, at the claimant's option, submit the matter to binding arbitration.
- The fact that an administrative process is provided for should not restrict any remedy or right that the claimant has under current law or the Constitution.

Principle 3. Takings Compensation: All legitimate rights of the landowner should remain with the landowner unless acquired by and paid for by the government. The costs imposed by government use or regulation of private property should, as a matter of fairness, be borne by the public as a whole rather than disproportionately impacting individuals who have a legitimate interest in the land.

- Legislation should provide a party with a statutory cause of action against the government if a governmental statute, regulation, rule, policy, action or permit condition restricts, limits or otherwise infringes on a right of the party that would otherwise be legal. Such a cause of action would be prospective.

- No compensation would be required if the use, or proposed use, amounted to a public nuisance because it presents a real and substantial danger to public health or safety.

- Federal private property rights legislation should recognize that zoning and land-use regulation is a matter properly withinthe authority of state and local government.

- The government shall have the burden to prove that the use, or proposed use, constitutes a public nuisance as a real and substantial danger to public health or safety.

- Any non-governmental entity that holds a legal interest in property shall have standing to bring a cause of action for a taking of private property.

- The "property" at issue should be that which is affected by the governmental action. "Affected property" may include property which is not directly subject regulatory action but is adversely affected by such action.

- "Property" means: (1) land; (2) improvements associated with the land; (3) any proprietary water right; (4) any contract right associated with land; or (5) any crops, forest products or resources.

- Any action which results in a diminution of a property's fair market value, or its economically viable use, will constitute a takings and require timely compensation.

- Compensation should be for the fair market value of the land prior to being impacted by the new government action.

- Compensation for a takings should be paid from the agency, or agencies, taking the action for which payment is required.

Principle 4. **Entry on to Private Lands:** A federal agency must obtain written permission from the property owner (or claimant) before entering upon the land to gather information pertaining to the takings claim.

- Information obtained by a federal agency should be made available to the claimant.

- A claimant should have an opportunity to review and comment on the information before the agency initiates an action or makes a determination on the takings claim.

Principle 5. **Legal Jurisdiction:** Existing statutory provisions require that a property owner elect between equitable relief in the federal district court and monetary relief in the Court of Federal Claims. Failure to file in the appropriate court could result in a dismissal of the claim.

- A claimant should be allowed to file a civil action challenging any agency action that adversely affects the claimant's in interest in private property in the United States District Court or the Court of Federal Claims.

- Each court should have concurrent jurisdiction over claims involving either monetary or equitable relief.

EVANGELICAL LUTHERAN
CHURCH IN AMERICA

LUTHERAN OFFICE FOR GOVERNMENTAL AFFAIRS
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Statement of the

Lutheran Office for Governmental Affairs

Evangelical Lutheran Church in America

To the
Civil and Constitutional Rights Subcommittee
of the
House Judiciary Committee

February 10, 1995

Re: Takings Legislation

As a reflective body engaged in continual moral deliberation, the Evangelical Lutheran Church in America commonly finds itself confronted with difficult, often complex ethical questions, not unlike the questions now facing Congress regarding the proper role of government in regulating private affairs, and the appropriate balance of individual rights and communal responsibilities. Our community of faith responds to these concerns with careful deliberation, culminating in the procurement of official positions which are outlined in our social statements.

Through the social statements of the present church and those of its predecessor bodies, the Evangelical Lutheran Church in America speaks to the ethical debate surrounding the "takings" issue.

In response to the criticism that takings legislation is intended to undermine the regulatory role of government, the ELCA social statements uphold the value of a regulating entity in our society and impose certain responsibilities on that body:

> Legitimate governmental activity normally includes such functions as: protection of workers, producers, and households from practices which are unfair, dangerous, or degrading; protection of the public from deceptive advertising and from dangerous or defective products or processes; encouragement and regulation of public utilities, banking and finance, science and education; environmental protection; provisions for the seriously ill and disabled, needy and unemployed; and establishment of an equitable system of taxation to support these functions. (Lutheran Church in America, Economic Justice: Stewardship of Creation in Human Community, 1980)

Furthermore, the Church strongly believes that it is the duty of government to mediate between sometimes conflicting goals of private parties, recognizing that individual rights need to be carefully balanced with communal responsibilities:

> While the holder of wealth-producing property is entitled to a reasonable return, as determined contextually by the society, the holder of such property may not assert exclusive claim on it or its fruits ... Private property is not an absolute human right but is always conditioned by the will of God and the needs of the community. (Lutheran Church in America, Economic Justice: Stewardship of Creation in Human Community, 1980)

> There are limits on private property rights. But some forms of private responsibility seems needed if the public good, the well-being of all, is to be met (Lev. 25:13). (American Lutheran Church, The Land, 1982)

> Because the larger community has an interest in how the land is cared for, the larger community has a right to make and enforce certain rules of land care. (American Lutheran Church, The Land, 1982)

Although the Church is a firm supporter of private property rights, it affirms that individual rights are balanced by the rights of the community to establish laws providing protections for clean water, clean air, persons with disabilities and laborers in all of our nation's workplaces. We are concerned that any of the proposed takings bills would undermine these protections. We seek alternatives that would maintain property rights while concurrently upholding these fundamental safeguards for the whole community.

For more information contact Paula Johnson at (202) 626-7945.

General Board of Church and Society of The United Methodist Church
100 Maryland Avenue, N.E., Washington, D.C. 20002 • (202) 488-5600

February 10, 1995

Dear Representative,

I am writing to you to express our concern regarding the proposed private property takings bills currently before you. These takings bills are based upon a radical reinterpretation of the "takings clause" of the Fifth Amendment. Although we agree with the need for just compensation for "private property taken for public use", the new "takings movement" is expanding the takings definition to include such things as regulations limiting grazing areas, zoning, medicare fees, pollution controls, and wetlands preservation.

If these bills were to become law the inevitable result would be to severely curtail the government's ability to protect public health and safety. Specifically they would undermine health, safety, labor, civil rights, consumer, and environmental protection laws. This legislation will also end up costing the government billions in new tax dollars.

As you debate these "takings" bills we ask that you consider certain ethical questions which the "takings movement" has left unanswered. How do property rights coexist with public rights? How do we strike a balance between an individual's right to property and the community's right to clean water, clean air, safe workplaces and safe playgrounds? Is it right to use taxpayers money to pay corporations for the decline in their profits caused by health, safety, and pollution regulations or should we expect all persons and corporations to bear a responsibility for the common good and for assuring that their neighbors are not harmed by their actions?

Sincerely yours,

Dr. Thom White Wolf Fassett
General Secretary

WASHINGTON OFFICE
NATIONAL MINISTRIES DIVISION

PRESBYTERIAN CHURCH (USA)

February 10, 1995

TO: House Judiciary Committee, sub-committee on the Constitution

From the colonial struggle to establish the United States of America to our present day, Presbyterian national decision-making bodies called General Assemblies have exercised their moral responsibility to witness in the political arena as an integral dimension of Reformed faith. In that sense, General Assemblies have understood themselves to have a normative function of speaking to the church and to the world.

The concept of stewardship is a central tenet in providing ethical guidance as to how to live individually and within community. The manner in which we as stewards deal with choices is one of the clearest indications of our values. Our faith compels us to acknowledge the need for the well-being of others as well as for self and for the environment, at a time in our nation when individual rights are not only raised above rights of the community but even threaten to damage them. As stewards of the earth's resources, we have the role to manage, not to dominate the land or water just for our own personal advantage. This includes the responsible use of property.

"Christian Responsibility for Environmental Renewal" is a Presbyterian General Assembly statement that relates to the issue of proposed legislation on private property takings. An excerpt states:

> ***While the ecological crisis threatens catastrophe, it also offers unprecedented opportunity for social reconstruction, protection of nature, and more rewarding life styles. A new order of values comes into view, shaping an "eco-ethic" which can displace the present ethos. The new order of values revolves around a turning away from the amassing of physical power and consumer goods, and a movement to nurture deeper and unifying, but fragile, qualities...***
>
> ***<u>Rights of Life over Property Rights.</u> People and all other living things are to be valued above rights of property and its development...The structures of modern society and the priorities of contemporary politics seem to work in the opposite direction. Our laws and customs often function to give precedence to property rights over the rights of people and other life.***

There are ethical implications to legislating private property rights that go beyond constitutional guarantees. We should not forget that the Preamble to the Constitution commits representative government to "ensure domestic Tranquility" and to "promote the general Welfare." This ethic is similar to the Christian one that features the concepts of neighbor love and social responsibility --the obligation to care about the impact on others due to economic endeavors and private practices.

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For Immediate release
February 10, 1995

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Mennonite Central Committee Washington Office Opposes "Takings" Legislation

The debate over private property "takings" is a debate over the relationship between private property and public interest, as represented by the government. Mennonites have traditionally understood their relationship to private property as one of stewardship; God is the owner of the earth (Psalm 24:1-2) while humans are but temporary stewards of creation (Gen. 1:26-28; Ex. 20:8-11; Lev. 25 and 26; and Luke 4:16-22). This stewardship involves being aware of how our actions impact the local and global environment and the lives of our sisters and brothers sharing God's earth with us.

It is the role of government to act justly and provide order as a separate, institutional servant of God. In dealing with private property, the government must be responsible for looking after the interests of all, from local to national to global. Government must not overextend its authority; indeed, as stated in the Fifth Amendment, just compensation should be given for "private property taken for public use." Society, however, can not afford for government to avoid using its authority in regulating land use when pursuing the common good. Government can play a crucial role in justly seeking the reconciliation of private interests with individuals, communities and with the earth.

Mennonite Central Committee Washington Office supports the emphasis of community and is concerned that the proposed "takings" legislation elevates property rights to the detriment of the common good and the environment. The earth belongs to no one, it is a sacred trust for which we are temporarily responsible. Is it not all our responsibility, including the government's, to ensure that we treat God's earth well?

OFFICE FOR CHURCH IN SOCIETY • UNITED CHURCH OF CHRIST
110 MARYLAND AVENUE, N.E., SUITE 207 • WASHINGTON, D.C. 20002 • (202) 543-1517

May 4, 1994

Dear Senator:

I am writing in opposition to S. 2006, the Private Property Rights Act.

The Private Property Rights Act makes the mistake of trying to expand legitimate purposes and values in absolute ways that destroy other legitimate purposes and values. We support private property rights as one element of our society, economy and environment. But it is a right which must be held in balance with public rights. The constitutional establishment of "taking" which requires the government to reimburse a private property owner when property is taken is a good example of such a balancing mechanism. This principle establishes both a public and a private right.

The Private Property Rights Act would substantially upset the balance of public and private rights that has served this nation well by:

- breaking the social contract that requires private property owners to use their property without hurting specific others and without hurting the public good.
- enormously burdening the procedures and treasury of the government.

The proper legislative balancing of public rights and individual property rights needs to be weighed on an issue by issue basis and the balance of effect on individual property owners through administrative and judicial procedures.

Though it has much broader application, we are particularly concerned that the Private Property Rights Act has the intent of destroying public protection against environmental degradation. We need clean air, clean water, and protection against toxic poisons. Just because someone owns land they must not be allowed to hurt the land and the life of others. The government has the right to act for the public good without paying off private property holders. This is the difference between a democratic and a feudal understanding of property. WE URGE YOU TO OPPOSE THE PRIVATE PROPERTY RIGHTS ACT AS A FEUDAL ASSAULT ON DEMOCRATIC VALUES.

It is appropriate to weigh both the public and private good on a case by case basis. As a person with responsibility for the whole "polis" we trust you to keep the needs of the whole polis in mind in your demanding and complex duties.

Respectfully yours,

Dr. Patrick W. Grace Conover

Dr. Patrick W. Grace Conover
Policy Advocate

THAT THEY MAY ALL BE ONE
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VALERIE E. RUSSELL EXECUTIVE DIRECTOR DAVID P. HANSEN CHAIRPERSON

LET JUSTICE ROLL DOWN

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