



HOW TO TALK ABOUT
PROPERTY RIGHTS:
WHY PROTECTING
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Policy Analyst*

INTRODUCTION

The federal government increasingly passes the costs of its policies on to private property owners. To protect species under the Endangered Species Act, to preserve wetlands under the Clean Water Act,¹ or to effect some other such goal, the government typically prohibits or constrains property owners from using their property as they wish—for example, by forbidding them to build on their land. And when the government wants to build a new federal facility, the property owner can be forced to surrender title through eminent domain. To be sure, when the government wants to take privately held property for its own purposes, it has the power under the Constitution to force a sale of the property. But in these cases, it at least has to pay the owners just compensation for their property. The problem is that when government regulates how private owners may use their land, it typically does so without any recognition of, or compensation for, the costs.

This *de facto* taking of property—the practice of restricting a person's right to use his property without compensating him for losses caused by the restriction—is now being questioned. Under this type of regulatory taking, property owners can face heavy financial burdens or even have their entire life savings wiped out.² For example:

- ✗ John Sabanovich, an elderly man from Reading, California, saw his net worth plummet from \$900,000 to \$3,000 after being successfully sued in March 1996 for the purchase price of land he had sold: land that subsequently had been designated a wetland.³
- ✗ Bob and Mary McMackin of Arrowhead Lakes, Pennsylvania, built their retirement home and planted trees and shrubbery on dry land in 1989 after obtaining all necessary permits. But the couple were threatened by the Army Corps of Engineers four years later with \$50,000 daily fines unless they quickly dug up their entire yard and created a wetland surrounding the house—just five feet away from the structure—thus threatening the house's structural integrity. They were instructed to do this to restore the site to wetland status, and also to create another wetland off-site

1 For a discussion arguing wetlands regulations are not fully authorized under the Clean Water Act, see John Shanahan, "A Guide to Wetlands Policy and Reauthorization of the Clean Water Act," Heritage Foundation *Issue Bulletin* No. 195, June 22, 1994. See also William G. Laffer III, *The Meaning and Scope of the Clean Water Act, and Especially Section 404, As Applied To Wetlands*, February 14, 1992 (revising original dated January 21, 1991), comments filed with EPA pursuant to 56 Fed. Reg. 40446.)

2 See Craig E. Robinson and Geoff E. Ziebart, *Red Tape in America: Stories from the Front Line* (Washington, D.C.: The Heritage Foundation, 1995), pp. 24-48.

3 Telephone interview of John Sabanovich by Gareth Davis, Research Assistant, The Heritage Foundation, May 1996.

two times the size of the house to mitigate the lost wetland area on which the house sat. No one, including the government authorities who issued the various permits, had informed the McMackins that a wetland permit might be necessary for dry land.

Despite the belief of most Americans that seizing people's property by regulation without compensating them is inherently unfair and somehow un-American, few people—including policymakers—understand why protecting property rights is so essential.⁴ This is why Congress has yet to complete serious action to stop federal regulators from forcing individuals to surrender their property rights without compensation.

Numerous bills have been introduced in the 104th Congress to address this problem, but none has become law. In March 1995, the House passed H.R. 925, the Private Property Protection Act of 1995. Introduced by Representative Charles Canady (R-FL), and part of the Contract with America, the bill as passed would require compensation by the regulating federal agency whenever regulatory restriction of property rights under the Endangered Species Act and Section 404 of the Clean Water Act exceeds 20 percent of the value of the regulated parcel. It also would allow the owner the option of requiring the federal government to purchase the entire parcel whenever governmental restrictions cause more than a 50 percent reduction in the value of the land—in short, when the government's interest in the property exceeds the owner's—and would establish procedures for resolving disputes.

The Senate has not acted on H.R. 925, but is considering the Omnibus Property Rights Act of 1995 (S. 605), also introduced in March 1995 by then-Senator Robert Dole (R-KS).⁵ S. 605 would require compensation by federal regulating agencies whenever the taking of some "portion" of property diminishes the value by 33 percent. The Senate bill also would establish voluntary alternative dispute resolution, would require a takings impact analysis, and would establish certain administrative rights for property owners under the Endangered Species Act and Section 404 of the Clean Water Act. Majority Leader Trent Lott's (R-MS) office has indicated plans to bring the bill to the floor for a vote this legislative session.

While lower percentage thresholds are preferable because more property owners will be provided relief, the difference in devaluation levels before compensation is required is not the most significant distinction between the House and Senate bills. More significant is that the Senate bill is more expansive in holding regulators accountable for their actions—for example, by requiring that they assess the monetary impact to property owners of regulatory takings. Moreover, it uses a more expansive definition of property, including protection of contract rights, than the House version. The scope and focus of the Senate bill would be clarified if this definition were narrowed—perhaps to real property, fixtures, and water rights.

Despite Senator Dole's departure, property rights legislation should not be shelved in the Senate this year. Property owners deserve protection from federal bureaucrats who increasingly resort to these regulations to take control of private property without regard to the burden imposed on American citizens and families.⁶

4 For in-depth research and clear analysis of the legal and constitutional issues surrounding regulatory takings, see Steven J. Eagle, *Regulatory Takings* (Charlottesville, Va.: Michie Law Publishers, 1996).

5 S. 605 incorporates provisions contained in previous bills by Senator Dole, as well as in bills by Senators Orrin Hatch (R-UT), Phil Gramm (R-TX), and Richard Shelby (R-AL).

6 For further information on the importance of legislative protection, see Jonathan H. Adler, "Property Rights, Regulatory Takings, and Environmental Protection," *Competitive Enterprise Institute*, April 1996.

THE IMPERATIVE OF PROPERTY PROTECTION

There are important constitutional, economic, and fairness reasons for protecting private property rights. To understand why legislative protection is necessary, one must understand why property rights exist.

The U.S. Constitution recognizes the importance of property rights.⁷ The Fifth Amendment implicitly recognizes that the federal government may take property for public use. In fact, the implicit power of government to take property—known as eminent domain—was recognized by the Supreme Court as early as 1795 in *Vanhorne's Lessee v. Dorrance*, in which the Court found that “the despotic power, as it has been aptly called by some writers, of taking private property, when state necessity requires it, exists in every government.... [G]overnment could not subsist without it.”⁸

The Fifth Amendment, however, explicitly mandates that government must pay the property owner for the land confiscated. Although the government may take private property for public use, the clause “nor shall private property be taken for public use, without just compensation,” ensures that the cost is borne by those who benefit—the public—and not by the citizen unfortunate enough to own the land the government requires. The Constitution does not balance the importance of such governmental action against the importance of compensating individuals. The right to compensation is absolute. Thus, balance is built into the system: The government is permitted to take property unilaterally for public use, but at the same time is required to pay for it and protect private owners from having to bear the financial burden of pursuing that new use. In its most basic sense, compensation is a fairness issue. Why should one American bear the entire burden of the government’s pursuit of a national good?

Just compensation for regulatory takings preserves individual civil rights. Having seen the detrimental effects of King George’s policies, the founders understood that property rights are essential to preventing the usurpation of other rights under the Constitution. It is this relationship to which Supreme Court Justice Potter Stewart was referring in *Lynch v. Household Finance Co. Inc.* when he stated that there is a “fundamental interdependence... between the personal right to liberty and the personal right to property.”⁹

Practically speaking, governments can control a wide range of individual activity if they can control whether individuals remain financially secure or surrender their property. Thus, the majority truly can tyrannize a disfavored minority. As James Madison wrote in *Federalist 10*, “[pure] democracies have ever been spectacles of turbulence and contention; have ever been incompatible with personal security or the rights of property.” It was the desire to restrict just such tyranny over individuals that motivated the framers to put severe limits—like the requirement of just compensation—on the unchecked will of the majority.

Property protection reduces the incentive for the federal government to confiscate property. If property is to be put to its best and most highly valued use, it must be owned by individuals who appreciate its fair market value. The nation’s founders well understood the positive economic consequences of protecting owners’ investments in their property.

If government had a free hand to take property without payment, the incentive to confiscate property that conferred only a small public benefit would be overwhelming. In fact, that is exactly what has happened. The federal government now owns 30 percent of America’s land, with even higher percentages in the West (for instance, 61 percent of Idaho), and is using regulatory takings with increasing frequency to

7 Constitution of the United States, Amendment V, clause 3.

8 2 U.S. (2 Dall.) 304, 311 (1795).

9 405 U.S. 538, 552 (1972).

enhance its effective control over even more extensive tracts. The rationale: The cost to the government of compensating owners of the land would be too high. The problem with this approach is that the potential for relatively small public benefits through regulatory takings can lead to ruinous costs to private owners, who must shoulder costs the government deems too steep for itself.

In reality, federal enforcement officials have found that they can use regulations to gain control of property while circumventing the just compensation requirements of the Constitution. Federal property rights legislation thus is needed to provide a standard that will force federal regulators to consider the costs and benefits of taking private property. When the government decides it is in the public interest to constrain the use of private property for the public good, compensating the property owner at least ensures that the cost of providing the public good is spread fairly across all taxpayers and not just a few unfortunate individuals.

THE NEED FOR LEGISLATIVE PROTECTION

The Supreme Court has been clear in requiring federal, state, and local governments to pay just compensation whenever they take or occupy land or real estate.¹⁰ Essentially, the Court has held that, even if just a square foot of land is taken and less than one percent of the value is lost, a taking has occurred and just compensation is required.¹¹

Unfortunately, the Court's decisions regarding regulatory takings have been less clear and consistent, leaving executive branch agencies with wide latitude in decisions regarding the enforcement and interpretation of laws. Thus, the federal government can take property through regulations in most cases without payment. Legislative protection is therefore necessary, both as a philosophical and as a practical matter. Only then can property owners be secure in the knowledge their rights will be respected, and able to invest their savings accordingly.

CONCLUSION

Although the United States was founded on the principle that government should not be allowed unfettered power to impose its will on law-abiding citizens or seize their property, federal agencies have found a loophole that allows them to usurp property through regulation. These regulatory takings can strip any American of the right to use his land as he wishes. In some cases, they even can almost wipe out the value of that land—and with it, the life savings of individual citizens.

In light of the ambiguous and limited nature of existing protections against uncompensated regulatory takings, compounded by the increasing tendency of bureaucrats to use this ill-considered and unwise approach, legislative action is necessary to ensure that private property rights are fully protected.

10 The requirement of just compensation by the federal government under the Fifth Amendment is extended under the 14th Amendment to the states and, by extension, to localities.

11 *Loretto v. Teleprompter Manhattan CATV Corp.*, 58 U.S. 419 (1982).