

THE HERITAGE LECTURES

No. 598

This Land Is Our Land

by Representative Richard W. Pombo



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Private property rights is a misleading term. Private property, of course, has no rights; it's individuals that have the rights. That bundle of rights, guaranteed by our Constitution and by our Creator, that your private property is yours to possess and control is extremely important because once any part of that bundle of property rights is taken away, you begin to lose your right to do anything with your private property or to control your private property.

The Fifth Amendment of our Constitution states, "Nor shall private property be taken for public use without just compensation." There's a real reason that our Founding Fathers decided that it was so important to protect the right to private property in the Constitution. At the time of our country's founding, one of the first actions that kings or regimes would take upon coming to power was to take away the private property of their opponents. Doing this, they took away their opponents' ability to respond. They took away their ability to fight back. They took away their wealth. They took away their freedom. They took away their individuality by taking away their private property.

Our Founding Fathers were not going to allow that to happen, but they understood that there could be a time when the government needed property for some official government function, like military bases. That is why the Fifth Amendment contains the line "without just compensation." If the government needs your ranch or your farm to construct a military base, it must at least pay you for that land. If it needs to put a road across part of your property—a postal road, as they called them in our Constitution—it must at least pay you to put that road across your piece of property. And that was a protection that applied to each of us.

WHAT IS A WETLAND?

Over the years, however, we have allowed the gradual erosion of our individual rights, and one of those rights has been private property. We have been willing to give up our individual rights in exchange for something that we felt was a greater good. In many cases recently, that perceived greater good has been the environment. We have said, "It is so important to protect our environment, we are willing to give up part of our individual rights in order to do that."

Look at what has happened with the Clean Water Act. When the Clean Water Act was passed, it said nothing about wetlands. It said that you could not pollute or dump a fill material into a navigable water of the United States. But that language came to apply also to wetlands.

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He spoke at The Heritage Foundation on July 29, 1997.

ISSN 0272-1155 © 1997 by The Heritage Foundation.

When people think of wetlands, they naturally think of something that's wet: something like a swamp with cattails and birds. But when asked for the definition of a wetland, one Army Corps of Engineers employee answered, "Whatever we say it is." And that's why we have such problems today.

There is, in my district, farmland that is now considered a navigable water of the United States and a protected wetland. This is not river bottom land, but land up in the rolling hills of California. This is a dry area; we average about ten inches of rain a year. But in the winter, for about a week or two out of the year, there may be standing water in the bottom of those areas. Well, those have now become protected wetlands, according to the federal bureaucrats.

This is a lot more than a bureaucratic annoyance. It has a severe impact on working people. Recently, a farmer came to me to complain that he could not plant a crop on his property because of a federal regulation. He wanted to plant vineyards on property he had used for cattle grazing. This was an important business decision for this farmer: The cattle business over the past several years has not been very good, and cattle owners have been losing money. So if the only thing you can do with that piece of property is run cattle on it, and you're going to lose money by running cattle on it, what is the value of the property? It's zero, because if you tell a potential buyer that the only thing he can do is put cattle out there, and he looks into the money-losing cattle market, there's no value to your property. So to save the value of his property, this farmer tried to move to a different crop—vineyards—which right now is making money. But the federal government told him he couldn't do that because it would somehow destroy these mud puddles on his property.

This happened with several different farmers in my area. So we had a meeting. About 50 farmers came, and there were representatives from the Army Corps of Engineers, the Environmental Protection Agency, and the Department of Agriculture. We wanted to find out exactly what the situation was and whether or not the government representatives truly were telling these folks that they could not farm their property.

I sat quietly in the back of the room and listened as the farmers asked all kinds of questions. And at one point, the person from the EPA said, "Well, before you do anything, before you decide to plant a crop or to do anything with your property, you'd better come in and talk to us. And we will sit down and determine whether or not we're going to let you plant your field." So before he makes his decision whether or not to plant, the farmer has to get permission to plant from the federal government. That's what these farmers were told.

The government people went through this whole process. They said, "These are the different steps that you have to go through: the Environmental Impact Statement, the Wetlands Delineation—all the different things you have to go through in order to get permission to plant a crop on your farm."

One of the farmers stood up and asked, "How long is it going to take to go through this process?" The answer: "Well, if everything goes right, we should be able to do it in as little as six months. We should be able to tell you whether or not you can farm." Another farmer stood up and said, "Well, what if everything doesn't go right?" And he was told, "We've had it take as much as five years."

So this farmer is supposed to sit on his piece of property. He's supposed to pay his property taxes, pay his mortgage, while the government takes anywhere from six months to five years to decide whether or not it is going to allow him to plant a crop on that piece of property. Now, I don't know about you, but I consider that a taking of that piece of

property because now the government essentially owns it. They control it. They are the ones making all the decisions as to what you're going to do with your property. That is a taking.

In the Constitution, it says that if they take your property, they have to pay you for it. And in that particular instance, I would say that those farmers have a legitimate case to go to court and claim that there has been a taking, that their property right and their property has been taken away from them. The government didn't take all of the bundle of property rights away from them. The owners are still allowed to pay their taxes and pay their mortgage. But it took away the economic value of their property. It took part of that bundle of property rights away from them.

But we're doing it in the name of the environment, you see, so nobody wants to speak out and say that it's wrong because then you're against the environment and in favor of the polluters. We've all seen the ads. We've all heard the argument. We've all heard the rhetoric. They want to pay polluters not to pollute because we say that if you take away somebody's property you have to pay them for it. Well, these farmers just want to plant a crop. These farmers just want to farm their land, and they're not being allowed to do that.

PROTECTING RATS AND FLIES

The Endangered Species Act has precipitated a number of cases around the country where people's rights were taken away from them for the greater good—to protect what society has decided was a priority. We have all decided that we want to protect endangered species; that is a societal decision. But the person who pays the bill for this societal decision is the individual property owner.

You may have heard about the farmer in Kern County, California, who ran over a rat that was suspected of being an endangered kangaroo rat. (The last I heard, they were still doing DNA testing to determine for sure whether it was an endangered rat.) And as a result of that, they arrested him and put him in jail. They confiscated the murder weapon, which was his tractor, and seized all of his assets. For several months, this farmer was under the threat of serving time in a federal jail and being fined \$50,000 for each rat that he ran over with his tractor.

The outpouring of public sentiment against this absurdity was so great that the government dropped the charges against him personally, but it maintained the charges against the corporate entity, his company, that legally owned the piece of property and pursued litigation against that company. As part of all of this, they checked his INS records, his IRS records, his banking records, his driving records, whether or not he paid his taxes, how he came into the country, whether or not he legally immigrated into the country. They used the entire federal apparatus to go after this man because he may have broken an environmental law by running over a rat with his tractor.

That's what we've come to. That's why, in many parts of the country, there's such an outcry against these environmental laws. We recently had a report from Southern California that an endangered fly in Riverside County held up the building of a hospital. The conclusion finally was reached to set aside part of the land that had been purchased to build this hospital on as fly habitat because they had found eight flies. It's a flower-loving desert sand fly, a little bit bigger than a common house fly, but it was an endangered fly, and they found eight of them. The cost to set aside this habitat for the fly: about \$400,000 per fly.

But it gets even better! They even considered slowing the speed limit on Interstate 10, which is a major freeway in Southern California, from 65 down to 15 miles per hour during the mating season of this fly so that cars driving through the area wouldn't hit the flies. They seriously considered this. Fortunately, they didn't proceed with that because too many people would have been too angry at being forced to drive 15 miles an hour on this particular stretch of freeway. It's a lot easier for the government to go after individuals or small groups of people than it is to make a lot of people suffer. So they dropped that part of it. But as part of the settlement agreement, anybody who develops anything in that particular area in Riverside County will now have to set aside fly habitat as part of their mitigation requirements, as part of the deal. That's part of what's going on.

It has gotten to the point where there's nothing that is more sacred than the Endangered Species Act. It is the supreme law of the land today. Nothing trumps it. Think about the main reason that we have a federal government: the defense of our country. If the military has a problem with an endangered species, the endangered species wins. If our troops are training in an area that has been declared the habitat for an endangered species, they can no longer do it there. If an existing military facility needs to be expanded into endangered species habitat, they can't do it. There is nothing that takes precedence over the Endangered Species Act.

PEOPLE DIE BUT BEETLES LIVE

Now, you may say, "Wait a minute, what about human life? Human life still has to be a priority of the federal government." Well, recently there was massive flooding in the Central Valley of California. One of the things that came to light after all the devastation was that the routine maintenance of our flood control system—the levees, the rivers, the banks—had not been done because the banks had become endangered species habitat.

You see, there were elderberry bushes growing on the man-made levees. Elderberry bushes are the home of the elderberry beetle, and the elderberry beetle is an endangered species. If you have bushes—even if you don't have beetles—you have potential habitat. So any routine maintenance, the fixing of the levee system, plugging holes in the levee system, would have to be held up until you had gone through several months if not years of environmental impact statements to determine whether or not you were going to damage the elderberry bushes in the process.

As part of that, they would go out and count the number of branches on those bushes. You had to guarantee them that ten years from now, you would have five times the number of branches you have today. And you would have to purchase a piece of property off-site and plant elderberry bushes on it. And then you would have to put up a ten-foot-tall fence with barbed wire on the top of it to protect the bushes so that people wouldn't go in there and destroy these bushes. And you would have to hire someone to monitor how good a job you were doing in growing these elderberry bushes in the hope that someday an elderberry beetle might land on those bushes and make it their home.

As we went through all of this, the maintenance wasn't done. It was just impossible to do. Ten years ago, the Army Corps of Engineers warned that if a particular levee wasn't fixed, there was a chance that it would break with imminent loss of life. And over a period of ten years, they were never able to get agreement to proceed with the work. Well, that particular levee broke, and as the Army Corps predicted, there was a loss of life. Three people died as a direct result of that break, which happened because maintenance work was not being done on that levee.

We brought a bill to the House floor that would waive the Endangered Species Act for routine maintenance on the levee system if there was a chance of imminent loss of life or serious property damage. And we lost. Ever since then, I keep going back and reading that line. It said if people are going to die, you can fix the flood control system—the man-made, built-by-human-hands levee system—to protect people’s lives. But a majority in Congress decided that was not important. The Endangered Species Act trumps all other laws, all other common sense. Protecting human life, protecting private property is not as important as protecting that law—not necessarily the endangered species themselves, but the law itself, because it’s been proven that the law has been a total and complete failure in protecting endangered species.

There is not a single species that they can point to and say the reason that this species was recovered or the viable population has improved is because of the Endangered Species Act. But I can point to cases where habitat was destroyed and where species numbers have declined as a direct result of actions taken under the Endangered Species Act. It’s been bad for species. It’s been bad for property owners. But Washington needs to protect that law because it means their ability to control private property. That’s the bottom line.

A NEW FEDERAL ZONING SCHEME: THE AMERICAN HERITAGE RIVERS

Now we come to the latest idea attacking private property—the American Heritage Rivers scam. It’s so badly defined that you can’t really put your finger on what would qualify in this area, but it seems to work like this: If somebody comes forward and says, “We want to protect this river; we’re going to call it an American Heritage River,” the government will appoint a river navigator to control that area. It’s a great-sounding thing: A river navigator is now going to control that area.

What that area would encompass is anybody’s guess at this point. Maybe it is the entire watershed from mountaintop to mountaintop; maybe it is just a certain part of the river or the river itself. But they want to control everything that has to do with that river. They want the local land use that goes on around there and the activity that happens on the river to become a federal responsibility.

So if you want to put a boat dock on the river, on property you own, I can foresee having to go to the federal government to get permission to put that boat dock in. It will no longer be going to your country board of supervisors or your county council or your city council. It will be going to Washington to ask federal regulators for permission to do something with your private property. And they’ll tell you “No,” so then you’ll have to come to your congressman, who will then try to get a bill through that solves your problem. But the control will be centralized here in Washington, and that scares a lot of people. It scares a lot of people that this will just be further control that they will be giving away to Washington, further eroding that bundle of property rights that I think that we should all be fighting to preserve.

IT COULD HAPPEN TO YOU

Many people don’t understand that when we’re talking about somebody’s farm or somebody’s ranch, we’re talking about something that could have an impact on them. Let me put it to you another way. Let’s say you live in a single-family home in a modern subdivision in any city surrounding this capital. The city fathers, however, did a very poor job of planning and didn’t put in enough parks for the kids to play in, and it’s become a problem. People have been going to the city council meetings and showing up every

Wednesday night and complaining that there are not enough places for the kids to play. So the city decides it has to do something.

But the city doesn't own property for a park, so they start looking around and find a perfect location. It's a corner with easy access. They could put in a tot lot—swings, slides, maybe a little lawn for the kids to play on. There's even space for a little barbecue pit over in the corner so you can go barbecue some hot dogs. It'll be the ideal place to send the kids to play. There's only one problem: That ideal place happens to be your backyard. One day, they show up and knock down your back fence. They put in their slides and swings and announce, "This is the tot lot. This is the neighborhood park."

"Well, wait a minute," you complain. "You can't do that. You can't come onto my private property and build this and let all my neighbors come over without my permission." And their response to you is: "It's all for the greater good. We all care about our children. We're trying to keep them out of trouble. The greatest thing that we can do as a society is to take care of our children. They are our future. Now, if one property owner has to give up his private property to protect our children, we all think it's a good idea. We're sorry that you're the one who is going to suffer for it, but we have decided as a society that the ideal place to put that park is in your backyard."

Now, you may say, "Well, they couldn't do that. How could they possibly come onto my private property and do this?" Well, how could they come onto *my* private property and tell me that my ranch is habitat for some endangered species and I can't use it anymore, that I can't farm it anymore, that I can't have any economic value from it anymore, but I can continue to pay the taxes and continue to pay the mortgage? The same laws protect all of us. The same underlying civil right that was guaranteed to us by our Constitution is the same right protecting me that's protecting you. And if they can establish that it's okay for the government to come in and take away my rights, they've established that it's okay for the government to come in and take away yours.

So anytime we see this happening, we have to rebel against it. Anytime we see this happening, we have to join together to fight against it. It may not affect you today. It may not be your state, your city, your community. But if we don't band together and fight for everybody's property rights, then none of ours are worth anything. That's why it is so important that this fight continue. The backbone of the free enterprise system is private property. It is what makes the capitalist system work. It is the one thing that makes you work harder than the guy next to you. It is the one thing that makes you take a risk to start a business and create jobs. If you can't build something to pass on to your kids and your grandkids, then why would you do it? It's not worth it.

We saw what happened in the Soviet Union—a country without private property rights. The farmers in the Soviet Union worked on collective farms. But as part of that, they were given a home with a small piece of property around it. In many cases, it was a lot, 100 feet by 100 feet. The Soviet Union produced more food on those small, individual lots than it did on the tens of thousands of acres of communal farming. Why? Because whatever the farmer grew on that lot was his. Whatever he grew on the communal farm was everybody's. That little piece of private property was the incentive for him to go out and produce.

Once we've lost that in this country, we've lost the backbone of our entire political system, the backbone of our entire economic system. It is critical to the survival of our country and to the kind of country we're going to leave to our kids and our grandkids. That's what the fight is all about. That's why it's so important. I think that each and every one of us has to look at this as a fight for the survival of our country.