The Heritage Foundation
LEADERSHIP FOR AMERICA

Government Claims on Private Property

The Honorable Kenneth T. Cuccinelli II

The government must protect the people's Fifth Amendment right to property. The Founders believed that protecting private property as an extension of man's self was of the highest public interest because it was essential to free government. They prescribed that the legislative branch could use the "despotic power" of eminent domain to acquire private property only for public use and with just compensation. Kelo v. City of New London *redefined constitutional terms, inspiring states like Virginia to adopt legislation to prevent similar abuses of power. Regulatory takings have long since been an indirect taking of property by rezoning and devaluing of private property. Such indirect seizure has become increasingly pervasive and expensive under the Endangered Species Act, the Clean Air Act, and the Clean Water Act. Because the courts have failed to protect Americans' fundamental right to property, federal and state legislation is needed to restore private property and ultimately protect our resources more effectively.*

At every level of government, public officials are proclaiming that private property ownership is, and ought to be, subservient to the needs of the state. These officials behave as though landowners are tenants at will, capable of remaining on their lands until bureaucrats, in their infinite wisdom, can find better uses for it. In so doing, governments—local, state, and federal—are ignoring the principle that made America great: that property is a fundamental ingredient of any comprehensive social system that prizes individual liberty as the source of national greatness. Indeed, that is this volume's Principle I, and it should drive America's environmental policy.

America was founded on the principle that the purpose of government was to protect the property of a citizen. Indeed, property's indelible importance is made evident by its inclusion in the Bill of Rights along with Americans' sacred rights to freedom of speech, assembly, and religion. Found in the Fifth Amendment to the United States Constitution, the operative provision states: "[N]or shall private property be taken for public use, without just compensation." The Constitution's Framers intended the pithy words in the Fifth Amendment to implement the central insights of the great English philosopher John Locke: "[E]very man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his."[1]

From this first premise, Locke defended the moral rightness of private ownership of land as the product of the ownership of his own body and his labor. For in a state of nature, "[a]s much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it from the common."[2] It was to secure these rights, Locke reasoned, that persons first established government "for the mutual preservation of their lives, liberties and estates."[3]

1 John Locke, *Second Treatise of Government*, Sec. 32, 1689, http://www.constitution.org/jl/2ndtr05.htm (accessed April 13, 2012).
2 Ibid.
3 Ibid.

Locke's exposition of property rights principles was transmitted to early American institutions directly through his writings, which were read by the Founding generation, and indirectly through the influence of Sir William Blackstone. Blackstone's *Commentaries on the Laws of England*, written in the decade prior to the American War for Independence, exercised enormous influence over the American colonies.[4] His four-volume exposition remained the major legal textbook on English law well into the 19th century.

Distilling the judgment of his era, Blackstone wrote that securing property was a matter of the highest public interest and was accorded the greatest legal protections such that "the law of the land postpone[s] even public necessity to the sacred and inviolable rights of private property." From this premise, the principles of the Takings Clause follow: that land could be taken for public use, but only on payment of just compensation. Even in cases of necessity, the government should, in justice, pay for private property that is turned by state action to the use of the public as a whole.

For the Founding generation, as much as for Locke and Blackstone, the securing of private property was a preeminent duty of government. This understanding informed the national debate regarding the shape of the United States Constitution and the formation of a new American government. The Founding generation agreed that a strong respect for the rights of property was no mere duty of government; this principle was, rather, *essential* to a free government. Indeed, shortly after the ratification of the federal Constitution, John Adams wrote, "The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. Property must be sacred or liberty cannot exist."[5]

Accordingly, the 1776 Virginia Declaration of Rights, penned by George Mason and a model for the Declaration of Independence, opens:

> *That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*[6]

In sum, it was almost uniformly held at the Founding that persons enjoyed an unalienable right to acquire, possess, and use property and that the security of those property rights guaranteed the independence of mind and deed that made political freedom a reality. After surviving the Atlantic passage and having flowered in American soil, that keen regard for property would find its expression in the words of the Fifth Amendment.

With those words, the Framers sought to circumscribe the exercise of the power of eminent domain: "the despotic power," as it was termed. This power—the power to take private property when state necessity requires—was deemed a power of both the federal and state governments, lodged in the legislative branch. Given to both levels of government, such power was considered necessary to facilitate government's operation. That power was granted to the legislature exclusively because that branch was seen as the most accountable to the people and, thus, the least likely to abuse it. Yet, by the same token, the Constitution charges the judiciary to see that just compensation is awarded to those whose property is taken for the public good.

Abuse of Eminent Domain

Recognition of the strengths and weaknesses of the legislative process did not blind the Framers to the need for limited judicial oversight. In fact, the great

4 See Sir William Blackstone, *Commentaries on the Laws of England*, Vols. 1–4, http://avalon.law.yale.edu/subject_menus/blackstone.asp (accessed April 13, 2012).

5 *Defence of the Constitutions of Government of the United States* in 6 The Works of John Adams 8–9 (Charles Francis Adams, ed., 1850–56), available at http://press-pubs.uchicago.edu/founders/documents/v1ch16s15.html.

6 The Virginia Declaration of Rights, 1776, http://www.constitution.org/bcp/virg_dor.htm (accessed April 13, 2012).

compromise that is embodied in the Fifth Amendment authorizes governmental takings of private property. Yet this compromise circumscribes both the reach and exercise of such takings. As the Supreme Court has recognized, it does this by "impos[ing] two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner."[7] Thus, if the use is private, the government may not take the property even if just compensation is paid.[8] And even if the use is public, the legislature must be willing to pay the price of the property it takes. The compensation aspect of this guarantee is honored for physical invasions of real property. The Supreme Court, however, has turned the law on the public-use component on its head.

In 2005, in the case of *Kelo v. City of New London*,[9] the Supreme Court upheld a Connecticut city's taking of private property from one private party and giving that property to another private party who had announced plans to use the land in question as part of a redevelopment plan to stimulate new jobs and increase tax revenue. While this misguided scheme resulted in neither new jobs nor increased tax revenue, it did result in Ms. Kelo's home being demolished; the site is now used as a garbage dump. At the time of the dispute, however, the Court concluded that a city's supposed program of "economic development" satisfied the Fifth Amendment's "public use" requirement, expressly rejecting "any literal requirement that condemned property be put into use for the general public."[10]

Although *Kelo* opened the door to widespread federal and state abuse of eminent domain, the decision did acknowledge that states, under their own constitutions, could place further restrictions on the exercise of their takings power. In a show of genuine political accountability, many states acted swiftly: As of the date of this writing, 44 states have enacted measures to prevent their political subdivisions from abusing their powers of eminent domain as the city of New London did in *Kelo*.

Virginia provides an example of how states have curbed the abuse of eminent domain. Signed into law in April 2007, Senate Bill 781 prevents the Commonwealth of Virginia and its localities from taking property from homeowners, farmers, and business owners and handing that property over to private entities for the purpose of development to increase tax revenues or stimulate employment.[11]

While SB 781 represents a significant step forward in protecting property rights in Virginia, future sessions of the legislature could repeal that law or any part of it without the direct involvement of the people of Virginia. Preventing future repudiation will require amending Virginia's Constitution; such an amendment has been passed a second time by the General Assembly in 2012 and will appear on the ballot as a referendum. That amendment enshrines the aforementioned protections but also guarantees that the compensation will be just by compensating for the real loss of the property owner, limiting the amount of property to be taken to the amount that is necessary for the public use, and placing on the government the burden to prove that the state's taking is for a public use.

Regulatory Takings

Although binding legal guarantees often protect real property rights, real property receives far less protection from what is commonly called "regulatory taking." It has long been accepted that governments may restrict land use in such a way as to indirectly reduce the value of property without being required to pay for that reduction in value. An example of such a regulatory taking occurs when the Environmental Protection Agency (EPA) declares private land with certain characteristics to be "wetlands" that must be preserved for certain wildlife and can no longer be used or developed in ways that are inconsistent with that objective. The loss of the opportunity to develop the land and the resulting

7 *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32 (2003).
8 *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).
9 545 U.S. 469 (2005).
10 *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, at 242.
11 "Eminent domain; definition of public uses and limitations thereon," SB 781, April 4, 2007, http://lis.virginia.gov/cgi-bin/legp604.exe?071+ful+CHAP0901 (accessed April 13, 2012).

devaluation of the property are generally not compensable to the landowner.

The Supreme Court first articulated this legal principle in 1922 in *Pennsylvania Coal Co. v. Mahon* when it 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."[12] That position has been extended to mean that without a physical invasion of land, an exercise of regulatory power creates a right to compensation only if it deprives an owner of all economically beneficial use of the property or, in the alternative, results in imposing a substantial economic impact that interferes materially with "distinct income-backed expectations" in the property.[13]

In the aftermath of the Roosevelt Revolution, the Supreme Court established the rule that no property owner has a right to be compensated for the exercise of federal regulatory authority or state police power until these extreme limits are met. Yet there is growing evidence that the Endangered Species Act, the Clean Air Act, and the Clean Water Act have been pushed well beyond the limits of diminishing returns for the economy as a whole. With regard to environmental regulation, EPA regulations were more cost-effective in the 1970s and 1980s, when initial rules were yielding bigger reductions in air, water, and land pollution than the more ambitious requirements recently introduced. Now that pollution levels have decreased, further regulation cannot achieve as large an impact as the initial round of environmental legislation, which means that citizens and industry—and the American economy—are paying higher costs for smaller environmental benefits.

The Guardian of Every Other Right

For the Framers of the Constitution, the right to property was the essential principle of free government—"the guardian of every other right." And yet, the Supreme Court's recent *Kelo* decision undermined this right, and as a result, property owners are now faced with the possibility of losing significant economic value through regulatory takings.

Despite *Kelo* opening the door to abuse of the federal eminent domain power, states can and should place restrictions on the exercise of their takings power. And the large-scale delegation from state legislatures and Congress to state and federal regulatory agencies—a system that allows politicians to vote for big, generic political goals (such as clean water, clean air, and clean land) while leaving the decisions on implementation to the bureaucrats—must be reversed.

This nation must also take bold steps to balance care for the environment with care for the economy, as both are so intertwined that one cannot flourish without the other. Those groups pushing for environmental regulations regardless of the cost have to recognize that economic growth underwrites environmental regulation. Only as societal wealth increases will a nation have the money and the will to tackle environmental concerns. In the end, therefore, only economic success can deliver environmental improvement, which follows Principle V: as we accumulate, scientific, technological, and artistic knowledge we learn how to get more from less.

No nation can enjoy the benefit of continuous growth unless its regulatory regime is sustainable. Such sustainability, in turn, cannot be achieved if courts and legislatures stress the gains from environmental regulation while ignoring its cost. That one-sided strategy does not work anywhere else in the public or private sector. It cannot work here.

12 260 U.S. 393, 413 (1922).
13 *Lingle*, at 242.

Recommendations

Even if property owners must bear the burden of regulation without compensation for the perceived "public" benefit, all citizens and public officials must ensure that overregulation does not cause serious economic dislocation for society as a whole. Indeed, now that the courts have generally failed to address regulatory abuse, legislative action at the federal and state levels is necessary, where appropriate, to begin rolling back regulation. Specifically:

Reaffirm state protections of property rights. All states should reaffirm their protections for property rights by guarding those rights from abuse by social planners, future legislatures, and local governments seeking to increase tax revenues by confiscating properties and turning them over to crony developers. Homeowners must not have their land taken as part of schemes to enrich local governments, especially when such schemes never materialize (as was the tragic case in *Kelo*).

Ensure that costs of regulations do not outweigh benefits. Principle IV states that all regulations to reduce, control, and remediate pollution should achieve real environmental benefits that outweigh the legislation's costs. Congress and the states (when the states are exercising non–federally delegated regulatory authority) should clarify that no regulation may be issued without an administrative finding that the costs do not outweigh the benefits. Regulators must be directed not only to consider the intended benefit, but also to quantify the incidental burdens of regulation to property, jobs, industry, health, and the costs of goods and services.

Require congressional approval to enact major regulations. A determination of costs and benefits is not always amenable to expert analysis. Therefore, the U.S. House and Senate should first approve all major regulations before they are enacted. Such approval would be required by the Regulations from the Executive in Need of Scrutiny (REINS) Act, proposed by U.S. Congressman Geoff Davis (R–KY).

The REINS Act would require that no regulation having an annual economic impact of $100 million or more on the American economy could take effect without congressional approval. Such approval would be granted in the form of an enactment that would, in turn, be subject to presidential presentment—like any other standard piece of legislation. This change would honor the requirements of Article I of the U.S. Constitution that Congress alone exercise legislative power subject to the President's veto. Furthermore, this approach would shift political power away from unaccountable bureaucrats and back to Congress, which is directly accountable to the American people.

Pursue state-level versions of the REINS Act. States should consider passing their own versions of the REINS Act to govern their regulatory activity, thereby giving their legislatures, after deliberation, the chance for an up-or-down vote on regulations with large and potentially negative economic effects. Such a move would enhance the political accountability so vital to America's representative system of self-government and take away the legislator's ability to blame nameless bureaucrats—the government officials to whom these same legislators have delegated such enormous power.