

BRIEF ANALYSIS

No. 152

*For immediate release:**Thursday, February 16, 1995*

Guide to Regulatory Reform: The Compensation for Takings Rule

Private property rights are crucial to the functioning of a market economy, and are enshrined in the U.S. Constitution. The "takings clause" of the Fifth Amendment is unequivocal: "...nor shall private property be taken for public use without just compensation." Unfortunately, this component of our Bill of Rights is regularly ignored by government — especially by environmental regulators who effectively condemn and take private property without paying for it.

The Supreme Court has stated 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." This sound principle helps form the foundation of any legitimate government action. Yet because the federal courts have not diligently protected people's rights under the takings clause, the Republicans' Contract With America seeks to restore these rights through legislative action. Let's take a closer look.

Takings and Compensation. Consider a few examples of regulatory decisions under the Endangered Species Act, wetlands rules and other environmental laws.

- Brandt Child of Moab, Utah, hoped to develop campgrounds and a golf course on his property. The federal government used the Endangered Species Act to block his plans because the rare Kanab ambersnail resided in some of the springs on his land.

- A Baptist congregation in Florida was prohibited from building a new church and adjacent parking lot because federal officials determined the site was more important as a "wetland."
- Retiree Margaret Rector of Austin, Texas, was blocked from selling 15 acres of land because it was potential habitat for the black-capped vireo and the golden-cheeked warbler.

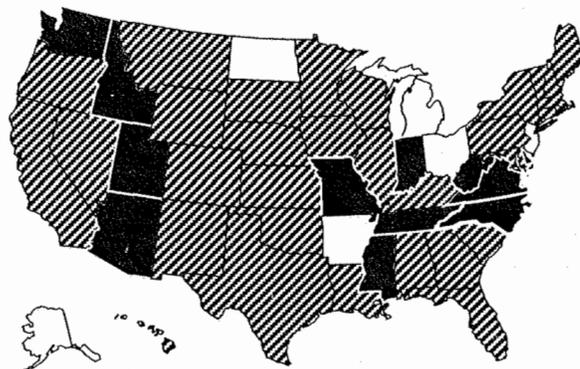
These people were not offered compensation by the government. They were simply ordered to leave their property in its original condition and thereby provide ecological benefits to the rest of us.

No matter how vital or important the activity, it is improper to impose the costs of providing a public amenity or service on a single individual. Although everyone must eat, we do not allow the federal government to confiscate foodstuffs from the shelves in grocery stores. Even though food is much more vital

than habitat for endangered species, the government must pay for the food that it distributes to the poor. The same is true of military weapons. Without them, we would all be defenseless against foreign aggressors. Yet the Department of Defense must pay for every bullet and bombshell produced by the private-sector defense contractors.

Criminalizing Federal Regulations. Some private property owners have had more than their land rights taken away. They have been sent to prison or threatened with prison for technical violations of environmental regulations, particularly federal rules dealing with wetlands. For example:

Status of Property Rights Legislation



▨ Property rights bill introduced

■ Property rights bill passed

Source: Defenders of Property Rights, 6235 33rd Street, N.W., Washington, D.C. 20015.

- In Maryland, Bill Ellen spent six months in jail for minor violations of wetlands permit requirements; although he had secured 38 separate permits to construct waterfowl habitat on his employer's land, the bureaucrats considered him a willful violator of the law.
- A Missouri family farmer was tried but not convicted for repairing a broken levee on his farm; in the process of moving dirt to rebuild the levee, he was accused of destroying wetlands.
- Twelve oil companies recently filed suit seeking the return of \$570 million paid for offshore oil leases. After granting the leases, the federal government imposed a ban on drilling — and kept the money.

Recent Court Decisions. There are indications that the tide may be turning in this struggle to enforce the Constitution.

In the 1987 case *First English Evangelical Lutheran Church v. County of Los Angeles*, the Supreme Court established that takings may be temporary as well as permanent. Often, regulators will deny a construction permit to a property owner who must then go to court. At the last minute, the regulators will change their minds, hoping to avoid embarrassment in court. This temporary denial of a property right is properly seen as a temporary taking. The government must pay compensation to the property owner, just as would a private lessee of the property who only occupied the site for a temporary period.

In another 1987 case, *Nollan v. California Coastal Commission*, and the more recent 1994 case, *Dolan v. City of Tigard*, the Supreme Court held that applications for building permits cannot be held ransom to other state goals. In these cases, property owners were being coerced to give land to the government for public pathways before they could build elsewhere on their land.

Chief Justice Rehnquist declared in his majority opinion in *Dolan*, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment...should be relegated to the status of a poor relation..."

In a 1992 Supreme Court case, *Lucas v. South Carolina Coastal Council*, a developer who owned two expensive beachfront lots was awarded compensation when the state prevented him from building on the site. This case was significant because the state had relied on a host of safety and environmental justifications to support its position that compensation was not required. The court was able to see through this smoke screen.

Most of these cases involved a relatively small amount of compensation, at least by federal standards. Yet takings claims are not always for small dollar amounts.

- In one case, the U.S. Court of Claims awarded \$60 million plus interest to a private firm that had been prevented from developing its mining lands.
- The spotted owl regulatory decisions have blocked the sale of millions of dollars worth of timber in the Pacific Northwest — for which there has been no takings award.

Executive and Legislative Reforms. In response to the spate of takings claims being filed in federal courts in the early 1980s, President Reagan issued Executive Order 12630. This proclamation directed all federal agencies to conduct a "takings impact analysis" just as they are required to perform an "environmental impact analysis." The purpose was to anticipate any likely violations of private property rights and carefully consider alternatives. Congress failed to join Reagan in this effort, and takings under Presidents Bush and Clinton have steadily increased. The House of Representatives will soon consider legislation contained in the Contract With America that would require compensation whenever a federal action "results in a reduction in the value of the property equal to 10 percent or more." Most important, the legislation would require the payment to come directly from the budget of the offending agency. This creates an internal incentive to obey the Constitution or pay the consequences.

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