104TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 104–46

PRIVATE PROPERTY PROTECTION ACT OF 1995

FEBRUARY 23, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CANADY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 925]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 925) to compensate owners of private property for the effect of certain regulatory restrictions, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

99–006

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Property Protection Act of 1995".

SEC. 2. RIGHT TO COMPENSATION.

(a) IN GENERAL.—The Federal Government shall compensate an owner of property whose use of that property has been limited by an agency action that diminishes the fair market value of that property by 10 percent or more. The amount of the compensation shall equal the diminution in value of the property that resulted from the agency action.

(b) DURATION OF LIMITATION ON USE.—Property with respect to which compensation has been paid under this Act shall not thereafter be used contrary to the limitation imposed by the agency action, even if that action is later rescinded or otherwise vitiated. However, if that action is later rescinded or otherwise vitiated, and the owner elects to refund the amount of the compensation, adjusted for inflation, to the Treasury of the United States, the property may be so used.

SEC. 3. EFFECT OF STATE LAW.

No compensation shall be made under this Act if the use limited by Federal agency action is proscribed under the law of the State in which the property is located (other than a proscription required by a Federal law, either directly or as a condition for assistance). If a use is a nuisance as defined by the law of a State or is prohibited under a local zoning ordinance, that use is proscribed for the purposes of this subsection.

SEC. 4. EXCEPTIONS.

(a) PREVENTION OF HAZARD TO HEALTH AND SAFETY OR DAMAGE TO SPECIFIC PROPERTY.—No compensation shall be made under this Act with respect to an agency action the purpose of which is to prevent an identifiable—

(1) hazard to public health or safety; or

(2) damage to specific property other than the property whose use is limited.

(b) NAVIGATIONAL SERVITUDE.—No compensation shall be made under this Act with respect to an agency action pursuant to the Federal navigational servitude.

SEC. 5. PROCEDURE.

(a) REQUEST OF OWNER.—An owner seeking compensation under this Act shall make a written request for compensation to the agency whose agency action resulted in the limitation. No such request may be made later than 180 days after the owner receives actual notice of that agency action.

(b) NEGOTIATIONS.—The agency may bargain with that owner to establish the amount of the compensation. If the agency and the owner agree to such an amount, the agency shall promptly pay the owner the amount agreed upon.

(c) CHOICE OF REMEDIES.—If, not later than 180 days after the written request is made, the parties do not come to an agreement, the owner may choose to take the issue to binding arbitration or seek compensation in a civil action.

(d) ARBITRATION.—The procedures that govern the arbitration shall, as nearly as practicable, be those established under title 9, United States Code, for arbitration proceedings to which that title applies. An award made in such arbitration shall include a reasonable attorney's fee and appraisal fees. The agency shall promptly pay any award made to the owner.

(e) CIVIL ACTION.—An owner who does not choose arbitration, or who does not receive prompt payment when required by this section, may obtain appropriate relief in a civil action against the agency. An owner who prevails in a civil action under this section shall be entitled to, and the agency shall be liable for, a reasonable attorney's fee and appraisal fees. The court shall award interest on the amount of any compensation from the time of the limitation.

(f) SOURCE OF PAYMENTS.—Any payment made under this section to an owner, and any judgment obtained by an owner in a civil action under this section shall, notwithstanding any other provision of law, be made from the annual appropriation of the agency whose action occasioned the payment or judgment. If the agency action resulted from a requirement imposed by another agency, then the agency making the payment or satisfying the judgment may seek partial or complete reimbursement from the appropriated funds of the other agency. For this purpose the head of the agency concerned may transfer or reprogram any appropriated funds available to the agency. If insufficient funds exist for the payment or to satisfy the judgment, it shall be the duty of the head of the agency to seek the appropriation of such funds for the next fiscal year.

SEC. 6. DEFINITIONS.

For the purposes of this Act—

(1) the term "property" means land and includes the right to use or receive water;

(2) a use of property is limited by an agency action if a particular legal right to use that property no longer exists because of the action;

(3) the term "agency action" has the meaning given that term in section 551 of title 5, United States Code, but also includes the making of a grant to a public authority conditioned upon an action by the recipient that would constitute a limitation if done directly by the agency;

(4) the term "agency" has the meaning given that term in section 551 of title 5, United States Code;

(5) the term "State" includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States; and

(6) the term "law of the State" includes the law of a political subdivision of a State.

PURPOSE AND SUMMARY

The purpose of H.R. 925, the "Private Property Rights Protection Act of 1995," is to ensure that private property owners are compensated when the use of their property is limited by overreaching Federal regulations. H.R. 925 requires the Federal government to compensate an owner of property when a limitation placed on the use of that owner's property by a Federal agency action causes the fair market value of the property to be reduced by ten percent or more.

The Act expressly prohibits compensation for any agency action that limits the use of an owner's property if the action is undertaken to prevent an identifiable hazard to public health or safety or to prevent identifiable damage to any other specific property. No compensation is allowed under the Act if the use which has been limited by Federal agency action is also prohibited under the law of the State where the property is located or would be considered a nuisance under State law. However, the Federal government is required to compensate an owner of property for State action if the State action is required by Federal law or is imposed as a condition for Federal assistance.

H.R. 925 establishes a procedural mechanism for compensation. If the owner and the agency are unable to come to an agreement regarding compensation for the diminution in the value of the property, the owner may seek compensation through binding arbitration or a civil action and can obtain reasonable attorney's fees and appraisal fees.

BACKGROUND AND NEED FOR LEGISLATION

The concept of private property is generally recognized as a "bundle" of rights including the right to possess property and exclude others from that property, the right to freely use property in one's possession unless that use will cause harm to others or constitute a public nuisance, and the right to transfer the property. *Presbytery of Seattle* v. *King County*, 114 Wash. 2d 320, 787 P. 2d 907, 1990.

The Takings Clause in the Bill of Rights limits government encroachment on private property rights. The clause is included in the Fifth Amendment to the United States Constitution and states, "* * * [N]or shall private property be taken for public use, without just compensation." The Takings Clause prohibits the government from taking private property, unless the property is taken for pub-

lic use, and the owner receives compensation equal to the value of the property.

In *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415 (1922), the Supreme Court recognized that regulation of property could be considered a taking if it "goes too far." Unfortunately, there are no bright lines to guide the courts in determining whether a government regulation "goes too far." Courts must engage in ad hoc factual inquiry on a case-by-case basis to determine whether a compensable taking has occurred as a result of regulation.

Both proponents and opponents of property rights legislation seem to agree that Takings Clause jurisprudence is complicated and unclear. During the February 10, 1995 hearing before the Subcommittee on the Constitution, J. Peter Byrne, a Georgetown Law School professor who opposes property rights legislation, testified that current takings law is "confused" and called the regulatory takings doctrine "nuanced and fact-specific."

This "nuanced and fact-specific" doctrine leaves both government officials and property owners confused and uncertain regarding the extent to which regulations can limit the use of private property without compensation being required. In fact, Chief Judge Loren Smith of the Court of Federal Claims recently voiced his concern over the inadequacy of the law of takings in addressing the impact of regulations on private property rights. In *Bowles* v. *United States,* 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. 31 Fed.Cl. 37 (1994).

The burden of the uncertainty of takings law falls most heavily on small property owners who are intimidated by the power of bureaucrats. Takings litigation is a long and expensive process which only the most well-financed and dedicated property owner can endure. Small property owners do not have the time or money to bring a lawsuit against the Federal government.

H.R. 925 establishes clear guidance for property owners and government officials as to when agency actions go too far and infringe on property rights. The Act will force agencies to recognize that when they limit the use of an owner's property, there are costs im-

posed on that owner. Agencies will 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. Agencies will also be more accountable to Congress, and therefore, be more likely 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." "Commentaries on the Constitution of the United States," 2nd ed., vol. II (Boston, 1851), 534–535. H.R. 925 will help to ensure that property is not subjected "to the will or caprice of" Federal agencies.

HEARINGS

The Committee's Subcommittee on the Constitution held one day of hearings on the need to protect private property rights from regulatory takings on February 10, 1995. Testimony was received from eleven witnesses: The Honorable John Schmidt, Associate Attorney General, U.S. Department of Justice; James Ely, Jr., Professor of Law and History, Vanderbilt University School of Law; Peter Byrne, Associate Professor, Georgetown Law School; Nancy Cline, a property owner from Sonoma, California; Reverend Joan Campbell, General Secretary, National Council of Churches of Christ; Roger Pilon, Director of the Center for Constitutional Studies, the CATO Institute; Roger Marzulla, Chairman, Defenders of Property Rights; Honorable Alletta Belin, Assistant Attorney General of New Mexico, on behalf of the Honorable Tom Udall, Attorney General of New Mexico; Jim Miller, Counselor, Citizens For A Sound Economy; the Honorable Richard L. Russman, Chairman, New Hampshire Senate Environment Committee; Jonathan H. Adler, Associate Director of Environmental Studies, Competitive Enterprise Institute; with additional material submitted by seven individuals and organizations: Representative Karen McCarthy; R. Bruce Josten, Senior Vice President of the Membership Policy Group, Chamber of Commerce of the United States of America; Dr. Thom White Wolf Fassett, on behalf of the General Board of Church and Society of the United Methodist Church; Reverend Elenora Giddings Ivory, Director of the Washington Office, on behalf of the Presbyterian Church (USA); Dr. Patrick W. Grace Cooper, Policy Advocate, on behalf of the Office For Church in Society, United Church of Christ; Evangelical Lutheran Church in America; and the Mennonite Central Committee U.S.

COMMITTEE CONSIDERATION

On February 16, 1995, the Committee met in open session and ordered reported the bill H.R. 925 with amendments by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

The Committee then considered the following with recorded votes:

1. Mr. Frank made a motion to postpone Committee consideration of H.R. 925 until Wednesday, February 22, 1995. Mr. Frank's motion was defeated by a 12–19 rollcall vote.

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mrs. Schroeder	Mr. Moorhead
Mr. Frank	Mr. Sensenbrenner
Mr. Boucher	Mr. McCollum
Mry Bryant (TX)	Mr. Gekas
Mr. Reed	Mr. Coble
Mr. Nadler	Mr. Smith (TX)
Mr. Scott	Mr. Schiff
Mr. Watt	Mr. Gallegly
Mr. Serrano	Mr. Canady
Ms. Lofgren	Mr. Inglis
Ms. Jackson-Lee	Mr. Goodlatte
	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

2. Mrs. Schroeder offered an amendment to decrease the amount of compensation paid to an owner under the Act by an amount equal to any increase in the value of the owner's property that resulted from an agency action other than the action that caused the limitation for which the owner was compensated. The Schroeder amendment was defeated by a rollcall vote of 10–12.

AYES	NAYS
Mrs. Schroeder	Mr. Hyde
Mr. Frank	Mr. Sensenbrenner
Mr. Boucher	Mr. Gekas
Mr. Bryant (TX)	Mr. Coble
Mr. Reed	Mr. Smith (TX)
Mr. Nadler	Mr. Canady
Mr. Scott	Mr. Inglis
Mr. Watt	Mr. Heineman
Ms. Jackson-Lee	Mr. Bryant (TN)
Mr. Goodlatte	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

3. Mr. Frank offered an amendment to bar an owner from receiving any compensation under the Act if at the time he acquired the property he knew or should have known that the property was or would be limited by an agency action. The Frank amendment was defeated by a rollcall vote of 8–16.

AYES	NAYS
Mrs. Schroeder	Mr. Hyde
Mr. Frank	Mr. Sensenbrenner
Mr. Boucher	Mr. McCollum
Mr. Bryant (TX)	Mr. Gekas
Mr. Reed	Mr. Coble
Mr. Nadler	Mr. Smith (TX)
Mr. Watt	Mr. Schiff
Ms. Jackson-Lee	Mr. Canady
	Mr. Inglis
	Mr. Goodlatte
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

4. Mr. Watt offered an amendment to bar compensation under the Act unless the agency action that imposed the limitation on the use of property is not reasonably related to or in furtherance of the purposes of the statute under which the action is taken. The amendment also would eliminate the requirement that compensation be paid from the appropriated funds of the agency. The Watt amendment was defeated by a roll call vote of 6–16.

AYES	NAYS
Mr. Schroder	Mr. Hyde
Mr. Frank	Mr. Sensenbrenner
Mr. Boucher	Mr. McCollum
Mr. Reed	Mr. Gekas
Mr. Watt	Mr. Coble
Ms. Jackson-Lee	Mr. Smith (TX)
	Mr. Schiff
	Mr. Canady
	Mr. Goodlatte
	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 925, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 22, 1995.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 925, the Private Property Protection Act of 1995, as ordered reported by the House Committee on the Judiciary on February 16, 1995. Based on our analysis of the language of the bill and the legal practice governing payments for takings of private property, CBO estimates that enactment of the bill would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply. We have not yet completed our analysis of the costs of this legislation, which could be significant but would depend on the appropriation of the necessary amounts.

H.R. 925 would address the protection of private property rights that may be affected by federal or federally mandated regulatory activities. In general, the legislation would require the federal government to compensate a private property owner whose use of his or her land (or water rights) has been limited by an agency's action in a manner that diminishes the property's fair market value by 10 percent or more. The amount of the compensation owed to the owner would equal the loss of market value resulting from the agency's action.

The bill would provide an alternative to litigation over takings by allowing disputes to be resolved through settlement or arbitration. Property owners who choose to do so may seek compensation, including interest, legal, and other costs, in a civil action against the agency. Finally, the bill would specify that any compensation, whether awarded by court judgment, settlement, or arbitration, must be paid from appropriated funds by the agency that caused the taking. The agency would be permitted to reprogram or transfer funds from any appropriated source available to it and to seek reimbursements from other agencies where appropriate.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis.

Sincerely,

JAMES L. BLUM
(For Robert D. Reischauer, Director).

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 925 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short title

This section states the short title of the bill as the "Private Property Rights Protection Act of 1995."

Section 2. Right to compensation

This section requires the Federal government to compensate an owner of property when a limitation placed on the use of that owner's property by a Federal agency action causes the fair market value of the property to be reduced by ten percent or more. When determining whether a diminution in value has occurred, the interested parties should look to that portion of the property which is affected by the agency action. Ownership of adjacent unaffected lands is inconsequential for determining the diminution in the value of the portion of the property affected. This measurement of diminution in value is consistent with the court's analysis of whether there had been a denial of economically viable use of property in the case of *Loveladies* v. *United States,* 28 F.3d 1171 (Fed. Cir. 1994).

The diminution in value of property is measured by subtracting the fair market value of the property after the agency action from the fair market value of the property before the agency action. The situation where an agency action both benefits and burdens a parcel of property is clearly taken into account in the fair market value of the property after the agency action because the fair market value measures the net affect of the agency action on the parcel of property.

Section 2 also prohibits a compensated owner from engaging in the use for which he has been compensated, even if the agency action that limited the use is later rescinded or vitiated, unless the owner elects to refund the compensation to the Federal government.

Section 3. Effect of State law

This section bars compensation under the Act if the use which has been limited by Federal agency action is also prohibited by a local zoning ordinance or any other law of the State where the property is located or if the use would be considered a nuisance under State law. There is no provision in the Act requiring a State to compensate a property owner for State action. However, the Federal government is required to compensate a property owner for

State action where the State action is directly required by Federal law or is a condition of Federal assistance.

Section 4. Exceptions

This section bars compensation under the Act with respect to agency action which is undertaken to prevent an identifiable hazard to public health or safety or to prevent identifiable damage to specific property other than the property whose use is limited. In addition, no compensation is permitted with respect to an agency action pursuant to the Federal navigational servitude.

The Federal navigational servitude allows the Federal government to protect the navigable capacity of rivers and lakes open to navigation.

Section 5. Procedure

This section establishes a procedure by which an owner may obtain compensation. An owner seeking compensation under the Act is required to make a written request for compensation to the agency whose action resulted in the limitation within 180 days of receiving actual notice of the agency action.

The section allows the agency to bargain with the owner to establish the amount of compensation. If they agree on an amount of compensation, the agency is required to promptly pay the owner the amount agreed upon. If the agency and the owner cannot come to an agreement within 180 days after the written request is made, the owner may seek compensation through binding arbitration or a civil action and can obtain reasonable attorney fees and appraisal fees.

The section requires any compensation to an owner to be paid from the annual appropriation of the agency whose action resulted in the limitation on the use of the property. If the agency action was required by another agency, the acting agency may seek reimbursement from the other agency. If an agency does not have sufficient funds to compensate an owner, the agency head is required to seek the appropriation of such funds in the next fiscal year.

DISSENTING VIEWS

We are strongly opposed to H.R. 925, the Private Property Protection Act, which advocates an extremist view of compensating private property owners under the Constitution's "takings" clause when government regulations result in reducing the fair market value of private property by more than 10 percent. This is a radical departure from long-settled Supreme Court doctrine in an effort to undermine the Government's ability to promote the common good by providing for "clean skies, fresh water [and] safe and fair workplaces that [the American people] have come to expect." [1]

The result will be, as a Justice Department official testified, "hardworking American taxpayers * * * 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." [2]

At a time when government downsizing is a rallying cry, H.R. 925 senselessly creates a vast new bureaucracy and a new entitlement program with so much uncertainty that endless litigation is a distinct likelihood.

There is another motivation for "takings" legislation: to undermine enforcement on the nation's civil rights laws, such as the Americans with Disabilities Act.

I. H.R. 925 radically expands settled Supreme Court law, leading to absurd results and windfalls to investors

For two centuries the courts have grappled with essential questions arising from the few words in the 5th Amendment which drive takings law: what uses are "public," how much compensation is "just," what is "property," and what amounts to a "taking." In the seminal case of *Armstrong* v. *United States*, the Court described the "takings" clause's underlying purposes:

> The 5th Amendment's guarantee that private property shall not be taken * * * without just compensation was designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.[3]

In several subsequent cases, the Court has further defined how to determine whether a "taking" has occurred:

> Elimination of the most profitable use of the property is not a taking; [4]

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[1] Statement of John R. Schmidt, Associate Attorney General, House Judiciary Committee's Subcommittee on the Constitution, at page 3 (February 10, 1995).
[2] Id.
[3] 364 U.S. 40, 49 (1960).
[4] *Andrus* v. *Allard*, 444 U.S.C. 51 (1979).

> A reduction of property value occasioned by government regulation must generally be severe or total for there to be a taking;[5]
>
> A "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."[6]

In the landmark *Penn Central Transportation Co.* v. *New York City* case affirming that communities have the authority to adopt laws and regulations designed to protect and enhance the quality of life of its citizens,[7] the Court established that regulation of private property is not a taking if:

> (i) the regulation advances a legitimate governmental interest,
>
> (ii) the property owner retains some viable use of the property (as measured by the owner's reasonable investment backed expectations).

The Court in *Penn Central* also held that property owners may not establish a taking "by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development," and that a reviewing court must examine the effect of the regulation on the entire property, and not focus on any one specific segment or interest.

Proponents of H.R. 925 have replaced this entire body of law with wholly new doctrines, and they have done so with a revolutionary fervor. The Cato Institute's Roger Pilon, a strong supporter of H.R. 925, bluntly described his views:

> 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.[8]

A. Absurd results

Because the "takings" clause is triggered by any broadly defined "agency action," which includes "a rule, order, license, sanction * * * or the failure to act," private property owners in a variety of absurd situations may be emboldened to claim compensation from the government.

The threshold of 10 percent loss of property value is an invitation to every property owner in the country to at least try to make a "takings" claim which only requires submitting a written request to the agency which took some action, such as issue a regulation, directive or license.

The legislation invites property owners and land speculators to submit claims to agencies based not on the existence of a limitation on an owners' actual intended use of that property, rather an alleged denial of the most speculatively profitable use of that property.

Assume a farmer, profitably farming her land, wants to build condominiums. It is a wetland, and the Corps permits only single family homes. Under H.R. 925 the owner would be compensated for

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[5] *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 131 (1978).
[6] *Concrete Pipe and Products* v. *Construction Laborers Pension Trust*, 113 S.Ct. 2264 (1993).
[7] 438 U.S. 104 (1978).
[8] Transcript of hearing, Subcommittee on the Constitution, February 10, 1995, at page 53.

the difference in value of the projected use and the permitted use even though both uses are profitable. This is an absurd result.

Assume an isolated, inaccessible property worth $1,000 until a major federal highway and interchange was built nearby, thereby increasing the value to $200,000. An agency regulation that has the effect of limiting the property's value by an additional 10% would entitle the owner to takings compensation. Even though the net increase in value resulting from government action far exceeds the amount of the limitation, the agency would have to pay.

B. Windfalls

H.R. 925 also invites compensation of windfalls to speculating landowners who purchase property even with notice of pending or actual Federal regulations. The Committee majority rejected an amendment offered by Representative Frank (D.–MA), Ranking Member of the Subcommittee on the Constitution, which would have prevented fraudulent claims from speculating developers.

The proposed amendment provides that "no compensation shall be made under this Act to an owner who acquired property that owner knew or should have known is or would be limited by the agency action." The amendment would have denied property owners the right to purchase property with knowledge of an existing or proposed limitation on use, and then claim compensation for denial of the right to so use the property.

Under H.R. 925 a mining company could buy property in an area knowing that mining is prohibited on the land by Federal regulation. The Constitution would not permit a claim for compensation, because the company was on notice of the restriction. If the law reduced the value of the property, the company presumably paid "fair market value", i.e., the value with the restriction intact.

In rejecting the foreseeability amendment offered by Representative Frank, the Committee majority permits the mining company to seek a claim for compensation equal to the difference in value of the land with and without the restriction. Not only would the compensation be a pure windfall, it would be a sham.

The majority also defeated an amendment offered by Representative Schroeder (D.–CO) which would have prevented agricultural property owners from double dipping by receiving crop subsidies which increase the value of their land, and then under H.R. 925 claiming compensation for the inability to cultivate that same land because it is a wetland, or for some other limitation.

II. H.R. 925 creates a new bureaucracy

H.R. 925 would create a new, unnecessary level of bureaucracy to establish and administer mechanisms to review claims against each federal agency and to arbitrate disputes which arise. The administrative costs alone would be staggering.

For instance, because there are few regulatory activities involving restrictions on land use that could be undertaken without potential requests for compensation, new bureaucracies would have to be created to assess the expected requests for compensation.

As Tom Udall, Attorney General of New Mexico, testified:

> [The bill] would require 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 workforce of government lawyers would have to be hired just to defend all the claims filed under the provision.[9]

The result, as a Justice Department witness testified, "may well be more government, not less."[10]

A 1992 assessment by the Congressional Budget Office of a related bill, H.R. 1330, which would have required compensation by the U.S. Army Corps of Engineers for actions affecting wetlands, estimated these costs at between $10 and $15 billion.

The bill does not limit the amount of any one required payment. The bill does not limit the total amount of all payments. The bill is a blank check binding taxpayers that could bankrupt the Government.

III. H.R. 925's proponents aim to utilize "takings" to undermine civil rights laws

Testifying on behalf of the National Council of the Churches of Christ in the USA, the Rev. Dr. Joan Brown Campbell, General Secretary, remarked that:

> [t]hirty years ago, the churches became engaged in an earlier debate over the 'takings' provisions * * * At that time, it was a ruse used 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 debates I am not surprised to see the issue raised again as a way to avoid the claims of the common good.[11]

Actions taken under the Fair Housing Act and the Americans with Disabilities Act, to cite two examples, could result in compensation entitlement because compliance might reduce the value of property. An owner could show that a Federal prohibition on a restrictive covenant which the owner wishes to enforce lowers the value of her land.

Richard Pilon of the Cato Institute revealed in his testimony to the Subcommittee on the Constitution one strong motivation of the legislation: a takings bill in this form is a first step toward repealing the Americans with Disabilities Act. (Transcript at pp. 63–5.)

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[9] Transcript of hearing of House Judiciary Committee's Subcommittee on the Constitution, at page 4, (February 10, 1995).

[10] Statement of John R. Schmidt, at page 10.

[11] Statement of Dr. Joan Brown Campbell, House Judiciary Subcommittee on the Constitution, at page 4 (February 10, 1995).

CONCLUSION

We dissent because H.R. 925 is a poorly drafted bill which promotes an extremist view of compensation and is little more than a vehicle to shut down important functions of government. As the Administration testified at the one subcommittee hearing on this issue, "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."

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