

Takings Legislation: Where It Stands and What Is Next*

*Joseph L. Sax***

With the time that we have today, I shall spin out for you the story of what is going on with the Takings Bill.¹ I'll start by giving you a little bit of background on events in the 104th Congress beginning in January of 1995. On September 27, 1994, accurately anticipating the results of the then-forthcoming November congressional elections, the House Republican Conference issued a document entitled "Contract with America" enumerating ten bills to be considered during the first 100 days of the new Republican-led Congress.²

Among those bills—which included a Fiscal Responsibility Act,³ a Senior Citizens' Equity Act,⁴ a Taking Back Our Streets Act,⁵ and so forth—there was tucked away in just about one and a half pages of an eighty-two page bill entitled the "Job Creation and Wage Enhancement Act of 1995,"⁶ a provision called Title IX.⁷ Title IX is entitled "Private Property Rights Protections and Compensation." Its essence was set out in a single sentence. That sentence read: "A private property owner is entitled to receive compensation . . . for any . . . limita-

Copyright © 1996 by ECOLOGY LAW QUARTERLY

* From a talk given at the University of California, Boalt Hall School of Law, in November 1995.

** Presently serving as Counselor to Bruce Babbitt, Secretary of the Interior. James H. House and Hiram H. Hurd Professor of Environmental Regulation, University of California, Boalt Hall School of Law.

1. Private Property Protection Act of 1995, H.R. 925, 104th Cong., 1st Sess. (1995).

2. These bills would become the Fiscal Responsibility Act, H.R. 2, 104th Cong., 1st Sess. (1995); the Taking Back Our Streets Act of 1995, H.R. 3, 104th Cong., 1st Sess. (1995); the Personal Responsibility Act of 1995, H.R. 4, 104th Cong., 1st Sess. (1995); the Unfunded Mandate Reform Act of 1995, H.R. 5, 104th Cong., 1st Sess. (1995); the American Dream Restoration Act, H.R. 6, 104th Cong., 1st Sess. (1995); the National Security Revitalization Act of 1995, H.R. 7, 104th Cong., 1st Sess. (1995); the Senior Citizens' Equity Act, H.R. 8, 104th Cong., 1st Sess. (1995); the Job Creation and Wage Enhancement Act of 1995, H.R. 9, 104th Cong., 1st Sess. (1995); the Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong., 1st Sess. (1995); the Family Reinforcement Act, H.R. 11, 104th Cong., 1st Sess. (1995).

3. H.R. 2.

4. H.R. 8.

5. H.R. 3.

6. H.R. 9.

7. *Id.* §§ 9001-9004. By March, the bill was in its fourth version and the language had been reworked and given new section numbers. H.R. 9, 104th Cong., 1st Sess. §§ 201-210 (Mar. 8, 1995).

tion or condition that is imposed by a final agency action on a use of property that would be lawful but for the agency action" and is not negligible.⁸ The bill defined "not negligible" as "any reduction in the value of the property equal to ten percent or more."⁹

This rather obscure provision was the starting point for a legislative dispute over property rights that had been brewing for quite some time. Probably the relevant starting point was an Executive Order issued by President Reagan in 1988, which required all federal agencies to conduct detailed reviews of all actions that might affect the use of private property, for the purpose of avoiding actions that might result in a constitutional taking.¹⁰ This approach, which is known as a "Takings Impact Analysis," was modelled after NEPA¹¹ (by people who hate NEPA) and has itself been the subject of some controversy.

When President Clinton was elected, he was urged to rescind the Reagan executive order, principally on the ground that some of its language and implementing guidelines incorporated an interpretation of property rights that went beyond the Supreme Court's interpretation of the Fifth Amendment. The President decided not to rescind the Executive Order, which is still in effect. Legislation was introduced last year that would have codified into law that Executive Order.¹² The principal advocate for takings impact analysis legislation—which in retrospect seems quite a moderate approach—was Senator Robert Dole.¹³ Subsequently, however, Senator Dole hardened his position and became the principal sponsor of the most far-reaching property rights legislation of any that has been introduced in the Congress,¹⁴ and that's saying something.

The direct precursor of the property rights bills that have been on the active agenda this year was introduced in February 1994 by Billy Tauzin,¹⁵ then a Democrat from Louisiana who has since switched parties. The Tauzin bill set the diminution of value approach to com-

8. H.R. 9, 104th Cong., 1st Sess. § 9002(a) (Jan. 8, 1995). This language is from the first version of the bill.

9. *Id.* § 9002(a)(2)(B). This standard was changed in the fourth version of the bill to be any reduction of twenty percent or more, with an option for the property owner to require government purchase on any reduction of fifty percent or more. H.R. 9, 104th Cong., 1st Sess. § 203(a) (Mar. 8, 1995).

10. Exec. Order No. 12,630, 3 C.F.R. § 554 (1988), *reprinted in* 5 U.S.C. § 601 (1994).

11. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994).

12. 103 CONG. REC. S5,921-22 (daily ed. May 18, 1994) (amendment 1735, as modified, to the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-11 (1994)); Private Property Rights Act of 1995, S. 22, 104th Cong., 1st Sess. (1995).

13. *See* 103 CONG. REC. S5,921-22 (daily ed. May 18, 1994); S. 22, 104th Cong., 1st Sess. (1995).

14. *See* Omnibus Property Rights Act of 1995, S. 605, 104th Cong., 1st Sess. (1995).

15. Private Property Owners Bill of Rights, H.R. 3875, 103d Cong., 2d Sess. (1994). *See also* H.R. 1388, 103d Cong., 1st Sess. (1993) (the Just Compensation Act was introduced to reduce the risk of undue or inadvertent burdens on the public resulting from

pensation that has since governed the debate. In effect, his bill provided a right to compensation for property owners, the affected portion of whose property is deprived of fifty percent or more of its fair market value by agency action¹⁶ under the Endangered Species Act¹⁷ or the section 404 wetlands program of the Federal Water Pollution Control Act.¹⁸ The bill was limited to those two laws.¹⁹ I think it's fair to say that the Tauzin bill was not viewed at the time—in early 1994—as having any prospect of serious action in the Congress. But even then it was clear that property rights would be an issue to be reckoned with in the Congress.

Let me now turn to 1995 and Title IX of the Job Creation and Wage Enhancement Act of 1995. The language quoted earlier from the Contract bill²⁰ was no doubt seen as being too stark for a bill that would be taken seriously. A law requiring compensation for any agency action that results in a reduction of ten percent or more by limiting *any* lawful use of property, could require the public to pay pornographers, slum landlords, and owners of leaking toxic dumps to cease their activities, so long as no previous law prohibited that same conduct.

The bills in the Congress are somewhat more measured. One bill has passed the House. It is similar to the Tauzin bill that I have just described.²¹ The other bill has been introduced in the Senate, and it has—as of this writing—been reported out of the Senate Judiciary Committee, and is awaiting action by the full Senate.²² Neither bill is likely to pass both Houses and be sent to the President this Congress. In any event, the President has said he would veto the bills.²³

Let me try to identify the essential issues presented by the bills. I've reduced them to four: simplicity, defenses, cost, and coverage. I would like to trace the progress of these bills in the context of these four issues, recognizing that this is somewhat of a simplification.

As to simplicity, the proponents of these diminution of value bills usually urge that their goal is essentially a procedural one. They claim to want a bright-line standard that will allow property owners, and especially small property owners with limited resources, to avoid the

certain lawful governmental actions by compensating for diminution in value of property rights).

16. H.R. 3875 § 8(a).

17. 16 U.S.C. §§ 1531-1544 (1994).

18. 33 U.S.C. § 1344 (1994).

19. *See id.* §§ 8(a), 9(6).

20. *See supra* text accompanying notes 8-9.

21. *See* H.R. 925, 104th Cong., 2d Sess. (1995).

22. That bill is S. 605, 104th Cong., 2d Sess. (1995) (as amended Dec. 1995).

23. Ron Galperin, *Property Values: A Weekly Column by Ron Galperin: Owners Stand to Gain From Property-Use Bills*, L.A. TIMES, Jan. 16, 1996, at A7.

costly and protracted effort required to win takings cases in the courts, where the standard admittedly is neither simple nor clear. To define the goal in this procedural way has a real tactical benefit for the proponents of this legislation. It deflects a question that the opponents repeatedly put forward: "Why are you departing from the substantive standard for compensating property owners that has uniformly commended itself to the Supreme Court for the entirety of our national history, and why are you substituting for that standard a standard that the Court has explicitly and uniformly rejected—that is, 'mere measure of diminution of value?'"²⁴ No satisfactory answer to that question has ever been forthcoming. The answer usually comes in indirect form, and returns to the procedural argument's simplicity. If we're changing the standard, proponents of these bills argue, it is in order to provide an effective remedy to property owners, a straight-forward, bright-line standard.

That brings me to the defenses, the second issue. The difficulty for the proponents here is that they have been unable to provide a formula that is both bright-line and workable. For example, must the public pay for every diminution in value that results from regulation, regardless of circumstances? Opponents of the bill make a point of saying that such bills would require the public to pay polluters not to pollute—a statement that just drives the proponents of the bill crazy. The standard in the Contract bill—a defense against compensation only for property uses that are already unlawful²⁵—is plainly insufficient, since a great deal of pollution activity was not illegal prior to the time it was addressed by federal law. Indeed, as the legislative histories of laws like the Clean Air Act²⁶ and Clean Water Act²⁷ make clear, the inadequacy of state law, the failure to cover many of these activities, particularly through the state nuisance law, is precisely why federal law was enacted in the first place.²⁸

The Dole bill²⁹ seeks to get around this problem with a different formulation. It relieves the public of the obligation to pay if the proposed use of the property is a nuisance under state law, as a nuisance is understood within the state in which the property is situated.³⁰ The difficulty here is that many polluting activities are not nuisances under

24. See, e.g., *Concrete Pipe and Products of Cal. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993).

25. See H.R. 925, 104th Cong., 2d Sess. § 4 (1995).

26. 42 U.S.C. §§ 7401-7671q (1994).

27. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994).

28. E.g., *Hazardous and Toxic Waste Disposal, Hearings Before the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 693 (1979); S. Doc. No. 63, 91st Cong., 2d Sess. 1679 (1970).

29. S. 605, 104th Cong., 2nd Sess. (1995).

30. *Id.* § 204(d)(1).

state law. We've written a long memorandum to demonstrate that point, and I won't bore you with all the details of it, but let me give you a couple of examples that may seem surprising to you.³¹ In Maine, flooding caused by filling of adjacent property may not be a nuisance.³² In Oregon, groundwater contamination has been held not to be a nuisance.³³ In Massachusetts, hazardous waste contamination of property has been held not to be a nuisance.³⁴ The same has been held in Pennsylvania as to contamination of a creek by a leaking landfill.³⁵ Although some of these examples might constitute nuisances in some jurisdictions, or in a different factual setting, cases like these—and there are dozens and dozens of them—demonstrate that state nuisance law does not provide anything like comprehensive protection even from conventional pollution. Thus, the statement “we're going to be paying polluters not to pollute.”

Indeed, California presents a particularly interesting and striking example of the limitations of nuisance law. I'm sure most of you know about the Kesterson case. At the Kesterson Reservoir in the Central Valley, irrigation runoff from a federal irrigation project was drained into a wildlife refuge, where as a result of high levels of selenium concentration, the runoff severely affected migratory birds.³⁶ If the Bureau of Reclamation reduces deliveries of irrigation water to farmers in order to reduce the amount of drainage and thus of pollution in the reservoir, which is a wildlife refuge, a claim could be made under the bills before Congress that a right to receive water had been “taken” by federal action, and that the water right was diminished in value to the extent that the deliveries had been reduced. I might add that under these bills, if such a claim were to prevail, the recipients of this water, which they get at highly subsidized prices, would claim compensation not at the price that they paid for the water, which might be as low as \$3.50 per acre-foot, but the market value of the water, which might be \$250 per acre-foot.³⁷ The reason I gave this

31. U.S. Dep't of the Interior, Memo on the Nuisance Exceptions in H.R. 925 and S. 605 (May 25, 1995) (on file with author).

32. Johnson v. Whitten, 384 A.2d 698, 701-02 (Me. 1978).

33. Cereghino v. Boeing Co., 826 F. Supp. 1243, 1247-48 (D. Or. 1993).

34. American Glue & Resin, Inc. v. Air Products & Chemicals, Inc., 835 F. Supp. 36, 42-43 (D. Mass. 1993).

35. O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 657-58 (E.D. Pa. 1981).

36. See generally Richard Rapaport, *Crisis at Kesterson: A Review of San Joaquin Valley Agricultural Drainage Problems and Possible Solutions*, 5 UCLA J. ENVTL. L. & POL'Y 187 (1986); Laura H. Kosloff, *Tragedy at Kesterson Reservoir: Death of a Wildlife Refuge Illustrates Failings of Water Law*, 15 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,386 (Dec. 1985).

37. See, e.g., H.R. 925, 104th Cong., 1st Sess. § 3(a) (1995) (using fair market value as compensation measure); S. 605, 104th Cong., 1st Sess. §§ 203(3)(a), 204(a) (1995) (defining “just compensation” as market value). For a discussion of water subsidies and the market rate of water, see GENERAL ACCOUNTING OFFICE, *WATER SUBSIDIES—IMPACT OF HIGHER IRRIGATION RATES ON ENERGY AND NATURAL RESOURCES*, GAO/RCED-94-8

example is that while the pollution at Kesterson is what most people think of as a nuisance, California has a statute providing that no generally accepted agricultural activity conducted or maintained for commercial purposes shall be or become a nuisance, public or private, after it has been in operation for more than three years.³⁸ These right to farm laws exist in a number of states, removing agricultural activities from the coverage of nuisance.³⁹ My point here is simply to illustrate the difficulty of capturing in any bright-line fashion a standard that will sort out those situations in which compensation at least arguably ought to be paid, from those where compensation would certainly be inappropriate.

The authors of the property rights bills have twisted and turned in a variety of ways to try to get around this problem, but, I think it's fair to say, without success. There is no simple, workable solution to the problem.

The House bill, presumably recognizing the futility of the approach taken in the Senate bill, goes in a different direction. After eliminating both nuisances and activities prohibited under local zoning law from compensation,⁴⁰ it adds the following provision: "No compensation shall be made under this Act with respect to an agency action the primary purpose of which is to prevent an identifiable hazard to public health or safety or damage to specific property other than the property whose use is limited."⁴¹ The difficulty here is that as the legislation attempts to specify more particularly the standards for compensation, it opens the way to ever more dispute over meaning. What is the primary purpose of an agency action? What is an identifiable hazard, as opposed to an unidentifiable hazard? What is the scope of public health or safety? For example, would it include protecting the birds in a case like the Kesterson case? When does one have identifiable damage to specific property? These are only a few of the bill's ambiguous terms. No law with such language is going to be fast, or cheap to implement, or avoid being litigation-ridden, which are central problems the bills are supposed to avoid.

(1994); David Frum, *Up From Subsidy*, AM. SPECTATOR, June 1995, at 42; Mark Grossi, *Cheap Water to End, Valley Farmers Told*, THE FRESNO BEE, Mar. 25, 1995, at A1; Jack Innis, *Why Our Water Supply Gets the Squeeze*, SAN DIEGO UNION-TRIB., Apr. 25, 1996, at B13; Jonathan Marshall, *Water Subsidies' Repeal on Hold: Clinton Backs Off Plan to Halt Payments to Some Farmers*, S.F. CHRON., Feb. 21, 1996, at A1.

38. CAL. CIV. CODE § 3482.5(a)(1) (Deering 1995).

39. *E.g.*, FLA. STAT. ch. 823.14 (1995); GA. CODE ANN. § 41-1-7 (1995); MISS. CODE ANN. § 95-3-29 (1995); MO. REV. STAT. § 537.295 (1995); MONT. CODE ANN. § 76-2-901 (1995); N.C. GEN. STAT. § 106-701 (1995); R.I. GEN. LAWS § 2-23-5 (1995).

40. H.R. 925, 104th Cong., 1st Sess. § 4 (1995).

41. *Id.* § 5(a).

I point to these difficulties in order to raise a fundamental question to which no answer has yet been forthcoming from advocates for compensation legislation. Why do proponents of these bills believe that Congress is likely to do a better job in articulating the standard for fairness to property owners in these bills than the courts have done in nearly 150 years of struggling with the question? This is, I think, the central dilemma on which they are caught. They are unprepared to say that they think the Supreme Court is all mixed up and does not know what it's doing. And so they say, "we want to avoid the problems of litigation," but once pressed on that point they don't seem to be able to show a way to avoid the problems of litigation. They face the same problems of definition with which the Supreme Court has struggled, and they are caught up in the same inability to come up with a simple one-dimensional answer. Indeed, as I said a little earlier, the standard that they are advocating—a specified diminution of value as the sole test of compensation—is one that every justice of the Supreme Court, conservative and liberal alike, over more than a century has rejected as a standard. The only exception the Court has recognized is the rare case where the property is left without any economically beneficial use.⁴² The point that diminution in value is not the appropriate test is one the Supreme Court unanimously reaffirmed in 1993.⁴³ The inability of compensation proponents to explain why they are departing from many decades of Supreme Court precedent is, in my opinion, one major reason the bills have not been moving forward, as some would have thought they were going to do at the beginning of the year.⁴⁴

Let me turn now to costs. It should hardly come as a surprise that in a time when balancing the budget and reducing the deficit are prime objectives of both parties, a law calling for compensation out of the public treasury for a wide range of governmental activities that have never before been compensable, is, to put it mildly, controversial. The Office of Management and Budget has estimated the cost of the compensation bill passed by the House as in the neighborhood of \$28 billion over seven years, and of the Senate bill as several times that figure.⁴⁵ These are, of course, necessarily estimates, and pretty rough ones. But even if they're significantly discounted, the amounts in question are very substantial. If I had to identify the single factor

42. See, e.g., *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992).

43. *Concrete Pipe and Products of Cal. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993).

44. The fullest statement of the bill's proponents on this point can be found in S. REP. No. 239, 104th Cong., 2d Sess. 15-20 (1996).

45. *Id.* at 28-29. The Congressional Budget Office assumes costs will be less because agencies would change their regulatory practices, "reversing or modifying permit decisions or enforcement actions." See *id.* at 42.

that has most diminished the prospects of property rights bills, it would be the prospect of stunning fiscal obligations. Budget-busting is a nonpartisan issue. You've undoubtedly read recently of the Washington state referendum⁴⁶ in which the public overturned a similar bill⁴⁷ by a sixty to forty margin, largely because of local government concerns that a diminution of value compensation requirement would virtually bankrupt cities which regulate land and resource use.⁴⁸

You may ask why the bills in Congress did not directly run up against budgetary limitations. Why, in the technical jargon of the federal budget process, were they not "scored" as creating billions of dollars in entitlements? The answer is that the bills were crafted to make the obligation to pay claims come out of monies already appropriated to the relevant departments and agencies.⁴⁹ Where those monies might be inadequate, compensation claims obligations would be made subject to further appropriations.⁵⁰ In other words, there's no money appropriated to pay claims, and no promise to pay, a point that has not been widely advertised by proponents of the bills.

As anyone who has followed the progress of this legislation knows, advocates for the legislation say—trying to get around this cost problem—that their principal purpose is not to generate substantial claims, but rather to create an incentive on the part of regulatory agencies to cut back on regulation, an incentive that is presumably sharpened by making the compensation obligation payable from the agency's budget. One difficulty with the notion that agencies will simply reduce regulation, rather than regulate and pay, is that much regulation is not discretionary but is mandated by statute or by court order. This is particularly true in the case of the Endangered Species Act, which has been a principal target of this legislation.⁵¹ That law allows little discretionary regulation. For example, listing of endangered species must be done "solely on the basis of the best scientific and commercial data."⁵² Once listed, agencies are obliged to "insure" that listed species' existence is not jeopardized.⁵³

Thus, compensation bills are likely to generate very substantial costs, despite the hopes of their proponents. Alternatively, they are likely to operate as de facto repeals of some existing laws, a prospect

46. Washington Referendum 48 (1995).

47. Washington Initiative 164 (1995).

48. See David Postman, *Legislators to Submit Revision of Ref. 48—Republicans Rework Property-Rights Bill*, SEATTLE TIMES, Jan. 4, 1996, at B3.

49. H.R. 925, 104th Cong., 1st Sess. § 6(f) (1995); S. 605, 104th Cong., 1st Sess. § 204(f) (1995).

50. H.R. 925 § 6(f); S. 605 § 204(f).

51. See H.R. 925 §§ 3(a), 10(5)(B); S. 605 § 501(a)(1).

52. 16 U.S.C. 1533(b)(1)(A) (1994).

53. *Id.* § 1536(a)(2).

that has generated criticism that the bills—particularly those like the House bill that expressly target the Endangered Species Act and the wetlands program⁵⁴—are effectively disguised sneak attacks on environmental laws, attacks that those who want to weaken or repeal the laws are reluctant to make directly. That fact has also weakened support for the bills. These factors—budget, and concern about back-door repeal—have been central in retarding the movement of compensation bills in the Congress.

That brings me to the last of the four elements: the question of what scope of governmental action they should cover. I've already noted that the Tauzin bill of 1994, which is the principal model for the property rights compensation bills, is limited to endangered species and the section 404 wetlands program.⁵⁵ The bill that passed the House is essentially the same, although it adds a couple of other programs that are impacted by wetlands and endangered species regulation, most notably the Federal Reclamation Law.⁵⁶ The Contract provision cited earlier contains no such limitation of coverage; it covers everything.⁵⁷ Even more significantly, so does the bill in the Senate, S. 605.⁵⁸ Coverage is the principal difference between the Tauzin and Senate bills.

The provision for unlimited coverage has significantly slowed the progress of the Senate. To many in Washington, the unlimited coverage of the takings bills make them hardly seem serious legislation at all. As an example, I want to take a couple of minutes to quote from testimony of Associate Attorney General John Schmidt, who provided the administration's first major statement in opposition to the Senate bill. In speaking before the Judiciary Committee in April of this year, he said the following:

“Because S. 605 goes beyond mere land use regulations and applies to all matter of agency actions, it is likely to have many unintended consequences that we cannot even begin to anticipate. The bill's various and confusing terms and conditions make it difficult to predict how the courts will apply it, but we can rest assured that plaintiffs' lawyers will seek the broadest possible application: compensation for businesses that must comply with access requirements under the Americans with Disabilities Act; compensation for a bank where federal regulators determine that the bank is no longer solvent and appoints a

54. H.R. 925, 104th Cong., 1st Sess. § 10(5)(A), (B) (1995).

55. *See id.* §§ 8(a), 9(6).

56. H.R. 925, 104th Cong., 1st Sess. § 10(5)(D)(ii) (1995). Other statutes included in the scope of H.R. 925 are Title XII of the Food Security Act of 1985, 16 U.S.C. §§ 3801-3862 (1994); the Federal Land Policy Management Act, 43 U.S.C. § 1701-1784 (1994); and section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. § 1604 (1994). H.R. 925 § 10(5)(C), (D)(ii), (D)(iii).

57. H.R. 9, 104th Cong., 1st Sess. § 9002(a)(1) (1994).

58. *See* S. 605, 104th Cong., 1st Sess. § 204(a) (1995).

receiver; compensation for corporations across the country when the Congress suggests federal legislation designed to stabilize and protect pension plans; compensation for virtually any federal action that might affect the complex water rights controversies in the West; compensation for agricultural interests that must comply with changing phytosanitary restrictions; compensation where food safety rules or product labeling requirements diminish the value of factories producing unsafe products; and so forth. The examples are virtually endless."⁵⁹

I suppose it's obvious that a more narrowly focused bill, and especially one that targeted only such controversial laws as the Endangered Species Act, would have a broader appeal, at least in some quarters. So one may wonder why the most prominent property rights bill of this Congress, which boasts both the Senate Majority Leader and the Chair of the Senate Judiciary Committee as its sponsors, exposes itself to criticism as cutting, and I think, as telling as John Schmidt's, which I just read to you. Only those who drafted the bill can answer this question authoritatively; only they know what they really have in mind.⁶⁰ But I would venture this speculation: the constituency for compensation legislation has two main branches. One, represented by people like Billy Tauzin, is primarily concerned about what they perceive as excessive regulation under the wetlands and endangered species laws (Tauzin is from Louisiana, a state with very extensive wetlands). For that constituency, property rights serves as a tool to cut back on regulation in those areas. The other group consists of those with an ideological concern about property rights, who are no more troubled by uncompensated wetlands regulation than they are about uncompensated local zoning laws, or laws that protect Americans with disabilities, laws that promote worker safety, or regulate pension plans. My impression is that the legislative proponents of property rights bills are reluctant or politically unable to abandon this broader constituency.

Unfortunately for the proponents of compensation legislation, this broader ideological constituency brings with it a vastly bigger stone to roll up the legislative hill. Are we really going to compensate every urban landowner who's subject to height limitations? Imagine the claims this would generate in Washington D.C., where every building that stands in the shadow of the Washington Monument is by law

59. *Statement of John R. Schmidt, Associate Attorney General, Before the Committee on the Judiciary, United States Senate*, 104th Cong., 1st Sess. 10 (1995).

60. On July 16, 1996, Senator Hatch introduced a revised compensation bill, the coverage of which is limited to real property. 142 CONG. REC. S7,887-02 (daily ed. July 16, 1996); S. 1954, 104th Cong., 2d Sess. (1996).

limited.⁶¹ Is every historic preservation ordinance going to have to go? Will prosperous banks no longer be required to contribute to insurance funds to protect the public against the risk of failing banks? Will we have to pay to keep adult bookstores out of the neighborhood? These are the questions that have been bubbling up as the Senate has considered the Dole bill, and they are questions that have arisen in hearings on the bill. As one watches the efforts to enact such laws in the states, it is clear that what happens in Congress will ultimately affect not just federal regulation, but state and local regulation, including local land use laws.

For all these reasons, I feel pretty sure that we're not going to see a property rights compensation bill sent to the President this year. And although this is perhaps rash prophecy, I doubt that we'll see such legislation enacted soon, if ever, whoever prevails in the 1996 presidential and congressional elections. The reason, I believe, is that Congress will come to see that the restrained view of the Fifth Amendment taken by the U.S. Supreme Court over many, many decades⁶² is in fact the course of wisdom and prudence. Or, at the least, it's the best legal solution to a very knotty problem.

I would like to end by saying something about a practical solution. The question that then arises, if one agrees that enactment of pending property rights legislation is unwise, is: "Aren't there real problems out there, and what should we do about those problems?" The answer is that there *are* real problems out there, as the proponents of these bills have said. They are probably primarily problems of "little people"—small landowners who find it difficult to deal with the regulatory and judicial systems. The best way to deal with these problems is to look at issues programmatically: let's take a look at the issues that actually arise in the Endangered Species Act, let's take a look at the problems that actually arise in the administration of the wetlands program, and where there are legitimate problems, let's target the specifics with a focused solution. For example, the best way to solve the problems of small owners is not to give them more opportunities to go to some complex administrative or judicial process, but to try to find ways to lift undue regulatory burdens from these people.

For example, we can provide, as they've done now under the wetlands program, what's called a general permit, which is a kind of exemption, for owners of small wetlands—a half-acre of wetland—

61. While no zoning limits building height in relation to the Washington Monument specifically, the Building Height Act of 1910, 36 Stat. 452 (1910), limited the height of buildings in the national capitol to the width of the street onto which the building faces. This law has been incorporated into local zoning. See D.C. Mun. Regs., tit. XI, § 2510 (1995) (adopting the stricter of local regulations or the Building Height Act).

62. See *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1014-32 (1992).

which covers the great majority of homesites in the United States.⁶³ What we've proposed in the Endangered Species Act is to provide a presumptive exemption for up to five acres in single ownership, which would exempt essentially all small tracts and virtually all homesites in the United States.⁶⁴ The idea is that many small tracts have very small impacts, and that small tract owners find it more difficult to adapt to regulation. We have also initiated a series of other reforms designed to ease the burdens of regulation. For example, we are instituting a policy to provide affirmative assistance for people when endangered species are identified on their land. We have implemented a "no surprises" policy, for people who participate in voluntary habitat conservation agreements, to give them assurance that once they've made a deal and agreed to do certain things, they won't be called on to come back later and bear additional costs.⁶⁵ We have put in place a "safe harbor" program, which is an affirmative incentive program, to address one of the claims that was made about the Endangered Species Act—that people who are afraid that there might be endangered species on their property have incentives to go and get rid of all their habitat.⁶⁶ The safe harbor program permits people who have existing habitat to go forward, to develop, to allow their habitat to become more valuable for species, and then, if at some later point in time they need to cut back, they can cut back to a baseline without any additional liability under the Endangered Species Act.⁶⁷ We are also in the process of exploring with the Treasury Department some incentives to tax laws, so that people who contribute to habitat land can get benefits such as estate taxation deferrals.

My point is simply that we are trying to be responsive to real problems that people have raised by putting forward specific, targeted program-oriented reforms. I believe these reforms will be effective, and that their successful implementation will prove a far better solution to the real problems of regulatory ineptitude than ill-advised and radical proposals that go under the name of property rights reform.

63. 60 Fed. Reg. 38,650 (1995).

64. 50 C.F.R. §§ 17.01-.108 (1995)

65. U.S. ENVIRONMENTAL PROTECTION AGENCY, NO SURPRISES; ASSURING CERTAINTY FOR PRIVATE LANDOWNERS IN ENDANGERED SPECIES ACT HABITAT CONSERVATION PLANNING (1994).

66. 60 Fed. Reg. 10,400 (1995).

67. *Id.*