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PRIVATE PROPERTY BILL MORE DEMANDING THAN CONSTITUTION: REQUIRES COMPENSATION FOR FEDERAL ENVIRONMENTAL REGULATION

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On March 3, 1995, the U.S. House of Representatives, by a vote of 277 to 148, passed H.R. 925, the proposed "Private Property Protection Act of 1995." H.R. 925 would require the federal government to compensate owners of private property for the effect of certain regulatory restrictions, most notably wetlands and endangered species protection which results in a loss of property value. In its consideration of H.R. 925, the House adopted an amendment, by a vote of 338 to 83, which increased "the minimum threshold for payment of compensation for loss in property value of any portion of the property from 10 percent to 20 percent." In addition, the House adopted an amendment which defines the term "fair market value" in H.R. 925 as follows:

[T]he most probable price at which property would change hands, in a competitive and open market under all conditions requisite to a fair sale, between a willing buyer and a willing seller, neither being under the compulsion to buy or sell and both having knowledge of relevant facts, at the time the agency action occurs.

Further, the House approved an amendment which "requires agencies to inform affected property owners of their rights under the bill and the procedures necessary to obtain compensation.

The U.S. Senate will now consider the proposed "Private Property Protection Act." The Senate can be expected to conduct a more probing review of the direct and indirect fiscal and environmental costs associated with H.R. 925 or similar legislative initiatives. Under the rubric of private property rights, H.R. 925 would undoubtedly make federal environmental regulation prohibitively expensive. In so doing, H.R. 925 would frustrate the legislative objectives of federal environmental laws, such as the Clean Water Act, Endangered Species Act, and Clean Air Act.

What Cost for Who's Benefit?

According to the House Committee on the Judiciary, in its report on H.R. 925 (Report 104-46) the purpose of the proposed "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."

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. The burden of the

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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.

In response, the Committee report noted that "H.R. 925 require 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." (As cited above, the full House raised this minimum threshold to 20 percent.)

As described in the House report, H.R. 925 would establish the following "procedural mechanism for 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.

Once compensated, however, H.R. 925 would prohibit the 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."

H.R. 925 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. Further, H.R. 925 would also require the Federal Government "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."

The House committee noted that H.R. 925 "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." Specifically, H.R. 925 would bar compensation "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."

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On the other hand, H.R. 925 does not require a State to "compensate a property owner for State action." Rather, the Federal government would be required under the proposed legislation "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."

As characterized in the House report, 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 imposed 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.

In so doing, the House report found that "H.R. 925 will help to ensure that property is not subjected 'to the will or caprice of Federal agencies.'

ABSURD WINDFALL FOR LAND SPECULATORS?

Democrats on the House Judiciary Committee strongly opposed to H.R. 925. In their view, the proposed Private Property Protection Act "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 20 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 work-places that the American people have come to expect.

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."

According to the dissenting Democrats, "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."

Unlike H.R. 925, the minority Democrats found that recent U.S. Supreme Court decisions have held that elimination of the most profitable use of the property is not a "taking" requiring compensation.

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

In particular, the dissenting Democrats found H.R. 925 "radically expands settled Supreme Court law, leading to absurd results and windfalls to investors."

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.

H.R. 925 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.... H.R. 925 also invites compensation of windfalls to speculating landowners who purchase property even with notice of pending or actual Federal regulations.

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 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

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resulting from government action far exceeds the amount of the limitation, the agency would have to pay.

Further, the Democratic minority noted that the Republican majority on the House Judiciary Committee majority rejected the amendments "which would have prevented fraudulent claims from speculating developers."

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.

In the opinion of the dissenting Democrats, 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...

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.

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

Accordingly, the Democrats concluded that 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 work-places 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.