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Prodding the Court to Protect Property Rights

by Roger Pilon

When Sen. Robert Dole (R-Kans.) and Rep. Gary Condit (D-Calif.) introduced their private property protection bills in the 103rd Congress, the reaction of the environmental community was as predictable as it was appalling. Aimed at codifying Executive Order no. 12630, which President Reagan signed in 1988, the bills create no new property rights. In fact, they take as given the diminished property rights we have today, then simply call upon federal agencies to assess the takings implications of any proposed regulations before those regulations go into effect—to better protect private property rights and avoid compensation drains on the federal treasury. Unfortunately, that deference to the Constitution appears to be more than many can abide.

Roger Pilon is director of the Cato Institute's Center for Constitutional Studies. This is a revised version of testimony he delivered on November 3, 1993, before the House Committee on Agriculture, Subcommittee on Department Operations and Nutrition, which held hearings to review H.R. 561, the Private Property Protection Act of 1993. For a fuller discussion of these issues, see Roger Pilon, "Property Rights, Takings, and a Free Society," ***Harvard Journal of Law and Public Policy*** **6 (1983): 165-95.**

Commenting for the Senate Committee on Governmental Affairs, the Congressional Research Service noted that the executive order had been "controversial": "Environmental, historic preservation, and labor groups have asserted that the order was designed implicitly to further a conservative, antiregulatory agenda, while developers, farmers and property rights organizations applaud it as sensitizing federal agencies to the property rights consequences of their actions." Indeed, when the Dole bill was introduced, 45 environmental groups rose to oppose it. Vice President Al Gore wrote the Senate to say that he felt "strongly" that the legislation should not be adopted. And Attorney General Janet Reno objected that "the legislation would create a private right of action [a right to sue to make sure that the attorney general abided by the statute] that would extend beyond that now available under the Fifth Amendment." It is a fitting commentary on the state of constitutional respect in this country that so many should stand opposed to a measure that asks simply that federal agencies examine the constitutional implications of their actions before they act.

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After Cato's conference "The Politics and Law of Term Limits," held on December 1 in the F. A. Hayek Auditorium, David Boaz interviews George Will for Cato's new weekly TV show "Cato Forum " on National Empowerment Television.

Strictly speaking, of course, legislation of this kind should be unnecessary in our system since the rights of property owners are guaranteed not simply by statute but by the Constitution itself. Over the course of this century, however, those rights have been increasingly compromised by a growing body of federal, state, and local regulations and by a series of Supreme Court opinions that Justice John Paul Stevens once labeled "open-ended and standardless," reflecting reasoning that Justice Antonin Scalia more recently called "essentially ad hoc." Although the Court has lately begun to rethink its takings jurisprudence, that rethinking has a way to go before it can be called principled.

In the meantime, this private property legislation is a step in the right direction—one step in an evolutionary process, the end of which should be the full restoration of our constitutional guarantees regarding property. If that process

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Property Rights (Cont. from p. 1)

does in fact continue, we will be joining the movement that is taking hold around the world today toward recognizing the fundamental place and importance of property rights in any society that calls itself free. If Boris Yeltsin can at last take the first steps toward securing property rights in Russia, as he did in late October, should the United States Congress, which itself emerged from a struggle to secure our rights to property, be any less concerned to return us to our own roots as a nation?

The Rise and Fall of Property Rights

To appreciate the significance of this legislation, it may be useful to review very briefly some of the historical and theoretical issues that surround it. The legislation has been introduced, of course, because property owners across this land are increasingly dismayed over restrictions that governments are placing on their ability to use and enjoy their property—seemingly in violation of the plain words of the Constitution. Yet this state of affairs did not arise out of nothing. It has a history and a rationale that deserve our scrutiny.

Perhaps no one has put the right to property more succinctly than the principal author of our Constitution, James Madison, who wrote in 1792 that "as a man is said to have a right to his property, he may be equally said to have a property in his rights." Pointing clearly to the intimate connection between rights and property, Madison was simply reflecting the common understanding of his time, which found its own roots in Roman law, in the Magna Carta, in English common law, and in the works of writers ranging from Bracton to Coke, Blackstone, Locke, and many others. Because of his profound influence on our founding generation, in fact, John Locke can be said to have been the philosophical father of the American Revolution, and of the Declaration of Independence in particular. Indeed, it was Locke who showed that all rights could usefully be reduced to property: "Lives, Liberties and Estates, which I call by the general Name, *Property*." Thus, if rights are property, violations of rights are takings of that property—whether lives, liberties, or estates.

Over time, those fundamental insights, derived from the theory of natural rights, found their way into the basic law of our land—the Constitution and the Bill of Rights. The Fifth and Fourteenth Amendments, for example, prohibit government from depriving individuals of life, liberty, or property without due process of law. And the Fifth Amendment, later applied against the states through the Fourteenth Amendment, prohibits government from taking private property for public use without just compensation. The Constitution, then, does not prohibit government from taking private property: the power of eminent domain is what the Fifth Amendment's takings clause implicitly authorizes. What it prohibits is taking property without compensating the owner for the property taken, without making the owner whole.

> **"The Court's understanding of 'property' in takings law is inconsistent with the definition of 'property' that every first-year law student learns."**

Known in the 17th and 18th centuries as "the despotic power," eminent domain was so called because no individual, whether in a state of nature or in civil society, could ever legitimately exercise such a power, however noble his motives. Nevertheless, when we constituted ourselves we gave government that power, not because it was inherently legitimate but because without it certain public ends might be difficult to achieve efficiently because of high transaction costs. As a mark of the inherent illegitimacy of the power, however, and as a brake on its excessive use and on the expansion of government generally, we insisted that those whose property would be taken under the power be justly compensated. After all, no individual should be made to bear a disproportionate share of the cost of the public's appetite, especially when his involvement in the transaction is involuntary to begin with. Moreover, the public's appetite would be boundless if its indulgence cost the public nothing.

When the power of eminent domain has been used to condemn outright a piece of property—to build a road or a public school, for example—courts have had little difficulty applying the Fifth Amendment's takings clause to award compensation to the owner. With the rise of the regulatory state over the course of this century, however, courts have been presented with so-called regulatory takings—cases in which governments have taken the uses that go with a piece of property, leaving the underlying estate in the hands of the owner. Sometimes the regulations are so restrictive that the estate that remains is worthless, yet the property "itself" has not been taken, it is argued, and so no compensation is owing under the Fifth Amendment's compensation requirement.

From Ad Hoc to Principled Jurisprudence

Faced with such cases, the Supreme Court has fashioned a takings jurisprudence that simply will not withstand serious scrutiny, yet it is the jurisprudence with which we try to live today. In a nutshell, recognizing that regulatory takings can be every bit as destructive to the interests of an owner as outright condemnations, the Court has said, in effect, that if a regulation takes the entire value of a holding—as in the recent case of *Lucas v. South Carolina Coastal Council*—the government entity responsible for the regulation must compensate the owner just as if the underlying estate had been condemned. It is appalling that there are those who believe that the Court's holding on this is "too deferential" to the individual. Yet the Court has captured not even the letter, much less the spirit, of the takings clause.

Indeed, in *Lucas* the Court itself recognized that with regulatory takings the situations in which "government has deprived a landowner of all economical-

ly beneficial uses" are "relatively rare." Far more often a regulation will have taken 25, 50, 75, even 95 percent of the value of a holding. Yet under the Supreme Court's current jurisprudence, the owner may get nothing—to which the Court has said, in shocking indifference to the plain meaning of the Constitution, "Takings law is full of these 'all-or-nothing' situations."

Plainly, where the Court has gone wrong is in its implicit definition of "property." Equating "property" with the underlying estate alone—absent its uses—the Court has said in essence that only when regulation reduces the value of that estate to zero does a taking occur. That definition, however, is inconsistent with the Court's understanding of "property" in other contexts, with private divisions of property through contracts, wills, trusts, and other legal instruments—indeed, with the definition of "property" that every first-year law student learns, virtually from the first day. "Property," as Madison, Locke, and almost every other commentator on the subject has seen, includes not simply the underlying estate but all the uses that go with it, all the uses that give that estate value. Take one of those "sticks" in that "bundle of sticks" and you have taken something that *belongs* to the owner of the estate. That is what Madison meant when he spoke of our having a property in our rights.

But the Court has gone wrong in another way as well. For to understand the takings clause it is not enough simply to clarify the definition of "property." In addition, the eminent domain power, which is what the clause is about, must be related to the police power—that cardinal mark of sovereignty. Acting under the police power—to secure rights—governments may legitimately condemn uses—may even condemn the underlying estate—and no compensation is due the owner. Plainly, if the police power is construed broadly, it can swallow the compensation requirement of the takings clause. That is precisely what has happened over the course of this century.

To properly apply the takings clause, therefore, the police power and the eminent domain power must be related in a principled and consistent way. To do that, however, we must go to the roots of the police power, which Locke—and reason—tells us are in the executive power that each of us has in the state of nature, the power to enforce our own rights. That is the *ground* of the power. But that ground also sets the *bounds* of the power, for no one may enforce rights he does not have—or yield up to the state any such power to be exercised on his behalf.

When properly derived and drawn, then, the relation between the police power and the power of eminent domain is simple and straightforward. Government, as the Declaration of Independence tells us, is instituted to secure our rights: that much it may do under the police power. Acting under that power, government may condemn or take a use that is inconsistent with the rights of others—as when it orders the abatement of a nuisance—and no compensation is owing to the individual whose use is taken, for he had no right to engage in that activity in the first place. Thus, a significant range of environmental and safety regulations can be justified under the police power, simply from a consideration for the rights of others.

"When government seeks to secure various 'public goods' by condemning otherwise legitimate uses of property, it must pay for those goods, just like any private citizen."

But when government goes further, when it seeks to secure various "public goods"—from lovely views, to below-market rents, to the preservation of everything from historic sites to countless flora and fauna—and to do so by condemning otherwise *legitimate* uses, it must act under the power of eminent domain. It must *pay* for those goods, just as any private citizen would have to pay for them. Unlike private citizens, government under our Constitution can get what it wants through condemnation. Given that "despotic power," for government to condemn the legitimately held property of its citizens and then *not* pay for what it has taken simply adds insult to injury. It is the very mark of illegitimate government.

Unfortunately, all too much of that illegitimacy is with us today. And it will not disappear until the Court comes to grips with its 70-odd years of "essentially ad hoc" regulatory takings jurisprudence. What this private property legislation can do, then, is prod the Court in the right direction by bringing to the surface—for all to see, including potential plaintiffs—at least some of the costs of the all-but-endless federal regulations that restrict property owners over the length and breadth of this land. Today, those costs fall silently on the backs of individual owners, who too often are in no position to litigate to recover them. But that silence is coming to an end. As the regulatory burden in this country continues to grow—as it must, given that most regulations today are "free" to those who benefit from them—owners will become ever more vocal. They will increase their volume until the Court finally gets it right, until the Court returns us to the true foundations of our Republic. If legislation will hasten that process by focusing light on the problem, it is to be welcomed. ■

Roger Pilon testifies on property rights before a House Agriculture subcommittee in November.