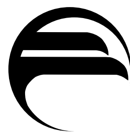

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WORKING PAPER NO. 98-24

DISCOURAGING FEDERAL ACTIONS THAT REDUCE
THE VALUE OF PRIVATE PROPERTY:
EVALUATING PROCEDURAL AND FINANCIAL APPROACHES

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ABSTRACT

A regulatory taking occurs when a court concludes that a government action has taken private property for a public use without paying just compensation to the owner - a violation of the Fifth Amendment. Often, the remedy is a monetary award whose value is determined by the court.

In recent years there has been considerable interest in creating a statutory complement to the constitutional law of takings. Some believe that a statutory scheme, utilizing procedural and financial approaches, would discourage federal regulatory activities that reduce the value of privately owned property. The procedural approach would require federal agencies to evaluate the property value effects of proposed actions before undertaking them. The financial approach would require that federal agencies pay from their own budgets for any compensation awards that result from their decisions.

This paper compares the existing procedural and financial approaches to the ones proposed. It describes the model of agency incentives and the regulatory environment implicitly assumed by these proposals and compares them to the literature on regulatory decision making and administrative law. Finally, the paper discusses some of the institutional factors that are likely to affect the outcome of the proposed reforms. These include the role of the courts in enforcing analysis requirements, the extent of agency discretion, and the federal budget process.

I. Introduction

The Fifth Amendment to the U.S. Constitution prohibits the taking of private property for public use without paying just compensation. Occasionally, a court will conclude that a government regulation has caused a taking of private property. Such cases are often called regulatory takings. In successful takings cases the court may award compensation that reflects the reduction in property value caused by the government action. In practice, takings claims against the federal government are rare and usually unsuccessful. One reason for this is that claimants must satisfy significant procedural requirements before the court is willing to decide the merits of their claims. Another is that takings claims are evaluated according to a body of case law that tends to favor the government's regulatory powers over any burdens imposed on property owners. It would appear that regulatory takings claims are not a promising way to protect citizens from property value losses caused by federal regulations.

The process in which takings claims are decided and the criteria used to evaluate them are a creation of the courts, based primarily on their interpretation of the Constitution. Some people argue there should be a dramatic change in the way these cases are decided. If left to the courts, such changes would result from individual decisions that establish new precedents to be used in future cases. That process could take a very long time and the result might not be a consistent takings doctrine whose application leads to predictable results. One alternative to that approach is to adopt a statutory complement to the constitutional law of takings. Congress cannot enact legislation that would provide less protection than that implied by the Fifth Amendment, but it is free to enact

legislation providing greater protection so long as doing so does not infringe upon others' constitutional rights.

Many legislative proposals of this sort were introduced in Congress during the 1990s. Most of them were not seriously considered. But the elections of 1994 significantly changed the balance of power within Congress. Since then, two bills were passed in the House of Representatives and two others reached the floor of the Senate, but were withdrawn under the threat of a filibuster.[1] The movement has not been limited to the federal level. Dozens of states have considered similar legislation and a few states have enacted one or more bills (Emerson and Wise 1997).

These bills attempt to address two alleged failures in government decision making. First, some argue that government restrictions are imposed without regard to the distribution of their costs, in some cases resulting in very large burdens imposed on relatively few property owners. Second, they argue that the government tends to overregulate—imposing restrictions beyond the point where the additional benefits of more regulation are at least as great as the additional costs. Both of these alleged failures might be explained by the fact that the government bears only a small share of the total costs it is imposing (Adler 1996, Ceplo 1995). Two remedies are usually proposed: (1) improving the quality and visibility of information about the burdens being imposed and (2) forcing

[1] In the 104th Congress, the House of Representatives passed the Private Property Protection Act of 1995 (H.R. 925, 104th Cong., 1st. Sess.) while the Senate Judiciary Committee reported a much broader bill, the Omnibus Property Rights Act of 1995 (S. Rpt. 239, 104th Cong., 2nd Sess.). The 105th Congress considered a number of procedural bills. The House passed the Private Property Rights Implementation Act of 1997 (H.R. 1534, 105th Cong., 1st Sess.). That bill was referred to the Senate Judiciary Committee, which reported its own version, the Citizens Access to Justice Act of 1998 (S. Rpt. 242, 105th Cong., 2nd Sess.).

the government to bear a larger share of those costs, especially if they would otherwise be concentrated among a few property owners.

The first remedy would be implemented by imposing new procedural requirements on regulatory agencies. Some bills would create an enforceable duty that agencies evaluate the effects of a proposed action on property values before taking action. By enforceable duty we mean that interested parties could use the courts to enforce the pre-decisional analysis requirement. The second remedy would be implemented by creating a statutory right to compensation for certain losses in property value caused by federal regulation. Any compensation awarded by the courts would be paid from the budget of the agency found responsible for causing the loss. In a sense, such legislation would create a special form of tort law for regulatory-induced losses in property value.

A great deal has been written on the takings issue. For example, one can argue about the nature and extent of the government failures just described—a major focal point of the debate over the bills.[2] Another focal point was the likely cost of implementing such legislation. Supporters argued the costs would be minimal, because the government would respond by reducing the activities likely to trigger compensation awards (Adler 1996). But others have computed estimates ranging in the many billions of dollars (Goldstein and Watson 1997, Heimlich and others 1997). Meanwhile, the academic literature has explored the theoretical characteristics of efficient compensation mechanisms

[2] The opposing views were very well articulated in the majority and minority opinions contained in the committee report for S. 625 (S. Rpt. 239 above).

(Blume, Rubinfeld and Shapiro 1984, Blume and Rubinfeld 1987, Fischel and Shapiro 1988, Miceli and Segerson 1996).

Surprisingly, very little has been written about how the kinds of remedies that have been proposed would operate in practice. This paper offers some preliminary answers to that question. The following sections provide background about the takings debate and describe the regulatory problem envisioned by supporters of the legislative proposals. The paper then compares the existing procedural and financial incentives to the ones proposed. In the process, a number of questions about the feasibility of the proposals are explored.

While any discussion of the effects of proposed legislation is obviously speculative, there are good reasons to be skeptical about the prospects of these proposals. Their adoption would certainly discourage regulatory activity, but not necessarily in a constructive way. There is no doubt that more rigorous analytical requirements would increase the quality of information available to regulators. But too much can be asked of this kind of analysis. At the same time, it is difficult to impose binding analytical requirements that do not invite litigation and delay. Paying compensation from agency budgets is more problematic. There is little reason to believe that the budgets of most regulatory agencies reasonably correspond to the regulatory costs they impose. Consequently, agencies that administer regulatory programs that involve large, concentrated costs may not be able to afford to implement those programs. And yet, in some cases, the law may leave them no choice. In the end, by bringing a larger share of the costs of regulation into the federal budget, Congress would be forced to allocate limited resources between these programs and the many other competing demands in the

budget. This is precisely the kind of tradeoff that supporters of the proposals want to see. But the federal budget process is an unwieldy thing. If Congress must choose between scaling back popular environmental programs or diverting significant funds into compensation payments, it is likely to choose a third course—setting caps on the amount of compensation it will pay. But that would essentially short circuit the incentives the proposals are designed to create.

II. Regulatory Takings in the Present System

The purpose of many federal regulations is to protect or enhance the well being of people and the environment. But regulations impose costs on the private sector by prohibiting certain activities and changing how others are conducted. When the benefits and costs of a regulation are distributed unevenly, basic questions of fairness arise: When should a small part of society bear the cost of a regulation whose benefits are enjoyed by society as a whole?

The government does not have complete discretion in deciding how the costs of regulation are to be distributed. In the early part of this century, the Supreme Court held that if a government regulation goes "too far" it will violate the Fifth Amendment's prohibition against taking private property for public use without just compensation. When this happens the government must compensate the property owner for what is called a "regulatory taking."

Some argue that federal regulatory programs impose heavy burdens on property owners, particularly owners of undeveloped land. They argue that restrictions imposed under those programs are, in effect, taking private property in violation of the Fifth Amendment. But regulatory takings

claims are not common. And it is even less common for a court to find that a federal action has caused a taking of private property. There are many explanations for this. For one, the courts evaluate takings claims according to a body of case law that is generally tolerant of government actions that address legitimate public objectives. The stringency of the courts' criteria, together with uncertainty about its application, significant procedural impediments, and the cost of litigation, probably deters property owners from filing takings claims.

A. What Is a Regulatory Taking?

The Constitution does not prohibit the taking of private property. It only requires that when the government takes private property, it must pay the owner just compensation. When the government needs private property for a public use, for example, to build or expand a road, it publicly declares its intent, condemns the specific property, and compensates its owner. Thus in cases of eminent domain there is no question that compensation is required; the primary question is about what constitutes just compensation.

Some government actions can severely limit the use of private property, leaving the owner in much the same position as if it had formally condemned the property. In certain circumstances, a court will find that such a restriction is a "regulatory taking" and award compensation to the owner for the resulting loss in the value of the property. A property owner who believes the government has taken his or her property can file a claim against the government. In such cases, the burden of proof lies with the property owner.

1. When Is a Taking Claim Ready to Be Decided? The Problem of Ripeness

Courts are generally reluctant to decide a case when the available information is insufficient to undertake a reasoned balancing of individual rights and government interests; that is, when a case is not yet ripe. In the takings context, the requirement of ripeness usually implies that a court will not consider a claim until after there has been a final agency decision that directly affects the property owner.[3] In the words of the Supreme Court:

> "It follows from the nature of a regulatory taking claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes."[4]

Most regulatory agencies are not in the business of defining the permissible uses of a property. More typically, they decide whether to accept an owner's application to use his or her property in a particular way. When a permit is rejected, the owner is often invited to reapply with a modified proposal. Thus several applications may be necessary to determine what uses of the property the agency will permit (Meltz 1998). In addition, if the permitting system has an administrative appeals process, courts typically require property owners to go through that process before filing a taking

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[3] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

[4] *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340 (1986).

claim.[5] Establishing ripeness is particularly difficult for takings claims that arise from land use restrictions imposed at the state or local level (Roddewig and Duerkson 1989). The problem appears to be less severe for claims arising from federal land use restrictions, where takings claims based on the denial of a single permit have reached some form of decision.

There are rare instances in which a court is willing to consider a taking claim before a law or regulation has been applied to any specific property. Such cases are very difficult to win because the property owner must establish that the law or regulation is, on its face, a taking of private property.[6] Under that standard, few laws and regulations are likely to qualify as a taking.

2. How Do Courts Evaluate Taking Claims?

In a 1922 case, *Pennsylvania Coal Co. v. Mahon*, the Supreme Court decided for the first time that a land use regulation could violate the Fifth Amendment.[7] In that decision, Justice Holmes wrote, "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." But he also wrote, "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it

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[5] Examples of these kinds of procedural requirements appear in several Supreme Court decisions during the 1980s: *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas and Electric v. City of San Diego*, 450 U.S. 621 (1981), and *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340 (1986). Each of these cases involves a local zoning restriction.

[6] *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264 (1981).

[7] 260 U.S. 393 (1922).

will be recognized as a taking."[8] Since this decision, most of the debate over regulatory takings has surrounded what constitutes "too far."

But the Supreme Court has never developed a comprehensive test that separates government actions that are takings and those that are not. The Supreme Court itself has stated:

> "...this Court, quite simply has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."[9]

In most takings cases, the courts resort to an ad hoc analysis that involves many factors, including the following: (1) the character of the government action; (2) the extent of interference with reasonable, investment-backed expectations; and (3) the economic impact of the action. At different times, and in different settings, the courts have defined or used these factors differently. Practitioners

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[8] *Pennsylvania Coal Co. v. Mahon,* pp. 413 and 415.

[9] *Penn Central Transportation. Co. v. New York City*, 438 U.S. 104, 123 (1978), citations omitted. The Court is quoting from its decisions in *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960) and *U.S. v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1952).

and scholars frequently complain that it is difficult to predict which of these factors a court will emphasize or how they will be applied to the facts of a given case (Peterson 1989).

a. The Character of the Government Action.

This factor evaluates the nature of the government action. For example, if the government action interferes with certain fundamental attributes of property ownership, a court is likely to find it is a taking. One of those fundamental attributes is the right to exclude others from one's property. Thus, a permanent physical occupation of land is almost always found to be a taking of private property.[10]

An investigation into the character of a government action may also explore the purpose of the action. If a government action does not substantially advance a legitimate public purpose, a court is more likely to find a taking.[11] But if the purpose of the action is to protect public health and safety or to prevent a public nuisance or a noxious use of property, a court is less likely to find a taking.[12] Courts also examine whether the government action is closely related to the harm it is trying to control. If that relationship is tenuous, or there appears to be a gross imbalance between the harm caused and the remedy imposed, a court may find there has been a taking.[13]

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[10] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *United States v. Cress*, 243 U.S. 316 (1917); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); and *Hendler v. United States*, 19 Cl. Ct. 27, (1989). Another fundamental aspect of property is the ability to pass it on to one's heirs. See *Hodel v. Irving*, 481 U.S. 704 (1987).

[11] *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

[12] *Keystone Bituminous Coal Association. v. DeBenedictis*, 480 U.S. 470 (1987).

[13] *Nollan v. California Coastal Commission*, 483 U.S. 625, 836 (1987) and *Dolan v. City of Tigard*, 114 S. Ct. 2481 (1994).

b. The Extent of Interference with Reasonable, Investment-Backed Expectations

The courts often investigate what the property owner could reasonably have expected to do with his or her property at the time it was purchased.[14] If the property owner could have reasonably expected the government action, a court is less likely to find that a taking has occurred. This is especially true if such expectations were reflected in the purchase price of the property (Oswald 1995).

Consider the example of a property owner who bought wetlands in the mid 1950s with another who bought wetlands in the mid 1990s. (Roughly speaking, a wetland is land that is covered by water or that has waterlogged soil for long periods of the growing season.)[15] During the 1950s there were few restrictions that prevented the draining or filling in of wetlands, and few were expected. Consequently, a mid 1950s buyer would likely have paid a price that reflected the land's agricultural or development potential. By the mid 1990s, many federal and state restrictions on the use of wetlands were in place. A buyer of such land in the 1990s could reasonably expect that it was subject to restrictions on its use. A well-informed buyer would consider this fact when deciding what the land was worth. An uninformed buyer might not, but it is less likely that a court would consider his or her expectations to be reasonable.

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[14] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

[15] The exact definition of wetlands is more complicated, nor are wetlands immediately identifiable. For a scientific definition of wetlands, see National Research Council (1995). One regulatory definition of wetlands is found in Army Corps of Engineers (1987).

c. The Economic Impact of the Government Action

Courts also investigate how a government action has affected the value of the property. In general they seek to answer the question, What proportion of the total value of the property was eliminated by the government action? Barring certain exceptions, a government action that eliminates all property value will be a taking.[16] But other than this extreme case, no specific loss-in-value threshold has ever been articulated. In the past, there have been cases involving severe reductions in value, sometimes greater than 80 percent, where no taking was found (Walter 1995).

At times, the courts evaluate the economic impact of a government restriction by examining what uses of the property remain. A court is more likely to find a taking when a government restriction eliminates all "economically viable uses" of the land.[17] For example, a building setback requirement that largely prohibited the development of a property was found to be a taking because it left the owner with no economically viable use.[18] But since few government actions eliminate all economic uses of a property, it is rare that takings cases are decided on the issue of loss in value alone.

B. The Volume and Results of Takings Litigation in the Status Quo

To examine the frequency and outcome of federal takings claims in the status quo, we present data from two sources. The first is the number of outstanding takings cases (178) at the end of the

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[16] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[17] *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

[18] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

1997 fiscal year in which the U.S. was represented by the Justice Department's Environment and Natural Resources Division (details are provided in Table 1). That number should account for most of the takings cases arising from disputes over federal environmental and land use regulations over the last several years.

The second source of data is the records of the Clerk of the U.S. Court of Federal Claims. That is the court that hears virtually all takings claims against the U.S. in which the property owners are seeking monetary compensation. Takings claims represent a very small part of the court's docket. In the six year period of fiscal years 1992 to 1997, the number of pending claims rose significantly. But they never exceeded 300 at the end of a fiscal year (see Figure 1). The highest number of new takings claims filed in that period was 101.

1. Federal Activities That Lead to Takings Claims

Fully a quarter of the pending cases arise from the Army Corps of Engineers' Section 404 wetlands permitting program. Section 404 refers to the section of the Clean Water Act that is the basis of the Corps' authority to regulate the dredging and filling of certain wetlands.[19] Although this regulatory program is the most significant source of takings claims, their number is tiny relative to the hundreds of thousands of permit decisions processed in recent years.

[19] The Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344, 86 Stat. 884) authorize the regulation of pollutant discharges into the waters of the United States. The term pollutant is defined broadly and includes dredge and fill material, such as soil. While the act does not use the term wetlands, courts have interpreted the waters of the United States broadly to include tidal and nontidal wetlands. See *NRDC v. Calaway*, 392 F. Supp. 685 (1975) and *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

Another federal agency that comes under frequent criticism is the U.S. Fish and Wildlife Service, which is responsible for implementing the Endangered Species Act.[20] That law provides the basis for restricting the use or development of privately owned land that contains critical habitat of an endangered species. So it is curious that only a handful of takings claims involving the Endangered Species Act appears on the Justice Department's docket. One explanation for this is that it can take a long time for the Fish and Wildlife Service to reach a final decision about the permissible uses of a property. Until that happens, a property owner's taking claim is not ripe (Thompson 1997, Meltz 1993).

The remaining takings claims stem from a surprising variety of federal activities. Superfund is responsible for a number of takings claims. Other claims involve disputes over oil, gas, and mineral interests on federal lands. A few claims involve mining regulations. Other claims arise from disputes over the federal rails-to-trails program, protection of wild horses and wildlife, and land use restrictions imposed in the vicinity of military installations and the Columbia River basin gorge.

2. The Outcome of Takings Litigation

The records of the Clerk of the U.S. Court of Federal Claims demonstrate that takings litigation in the present system rarely leads to a compensation award (see Figure 2).[21] Over the fiscal years 1992 to 1997, 60 percent of takings claims disposed by the court (223 claims) were dismissed.

[20] 16 U.S.C. 1531, 87 Stat, 884.

[21] In a few instances, the court records include more than one reference to what is probably a single claim. In the data presented here, we treat each of these references as a case. While there may be some resulting duplication, this does not affect the overall pattern of outcomes.

Another 20 percent of claims disposed (76 claims) were withdrawn by the property owner. About 8 percent of the claims disposed (28 cases) resulted in a judgment against the United States. Another 9 percent of claims disposed (34 cases) involved a settlement that may have included some form of payment by the government.

Even though successful takings claims have been rare, the amount of compensation awarded has been substantial (see Table 2). In the 1992 to 1997 period, fewer than 400 cases were disposed of by the court. Less than 20 percent of those cases involved any kind of award or settlement, yet nearly $350 million was awarded.[22] The distribution of awards was highly skewed—just 10 cases account for three quarters of the total. The single largest amount, $200 million, resulted from the settlement of a case involving mining restrictions imposed under the Surface Mining Reclamation Control Act of 1977.

It should be noted that an award of compensation does not necessarily mean the property owner was actually paid. Some of these decisions have been appealed, and a few may have been reversed by a higher court. In addition, there can be a significant delay between the time that compensation is awarded and when it is actually paid by the federal government.

[22] To put this amount in perspective, information provided by the Clerk of the U.S. Court of Federal Claims shows that during this same period, the federal government lost contract cases that resulted in several billion dollars in damage awards.

III. Proposals for Change

While literally dozens of takings bills have been introduced in recent Congresses, most would do one or more of the following:

- Increase analysis and reporting requirements that federal agencies must satisfy before imposing restrictions on the use of privately owned property;
- Relax procedural requirements that must be satisfied before a federal court will decide the merits of a compensation claim;
- Create a new statutory right to compensation for property value losses caused by federal regulations if the statutory eligibility criteria are satisfied; and
- Make regulatory agencies responsible for paying any compensation awards that result from their actions.

Some legislative proposals would modify the process of agency decision making by requiring agencies to prepare a "taking impact analysis" of any action that might affect private property rights or significantly reduce property values. The resulting written reports would be made available to the public. In addition, interested parties could go to court to force agencies to comply with the analysis requirement.

Other proposals are designed to increase property owners' access to compensation. Procedural barriers that may deter property owners from filing takings claims would be reduced. In addition, a new cause of action would be made available to property owners. It would use legislatively designed eligibility criteria that are significantly easier to satisfy than those implied by the current takings doctrine. The proposed criteria are based primarily on a reduction-in-value test: if a government action reduces a property's value, in percentage terms, by more than a specified threshold, the owner would be reimbursed for the loss in value.[23] Different bills specify different loss-in-value thresholds, some as low as 10 percent of a property's initial value. Finally, some proposals would create an explicit financial tradeoff between an agency's regulatory decisions and the resources it has available after paying compensation awards resulting from its decisions.

IV. The Implicit Model of Regulation

The argument for creating incentives for regulatory agencies suggests that those agencies are making inappropriate decisions. This can be a subjective assumption and is fiercely debated by those who benefit or suffer from regulation. But there is evidence that agencies do not always issue rules that satisfy one test of economic efficiency: that the marginal benefit of making a rule more strict just equals the marginal cost of doing so (Hahn 1996). There is also evidence that government resources are not systematically allocated toward reducing the greatest risks of morbidity and mortality before regulating lesser risks (Tengs and Graham 1996). Others point to the inflexibility and complexity of

[23] Many proposals would make this calculation on the basis of the 'affected portion' of the property, i.e. that part of the property that was directly affected by the government restriction. The current approach typically computes these losses on the basis of an entire property. The percent reduction in value calculated for a portion of a property could be significantly higher than if it is calculated on the basis of the property as a whole. There are methodological problems with either approach. Defining the affected portion can be subjective. But there have been cases in which defining the property as a whole was also unclear.

existing regulations and the reluctance of agencies to employ more market-oriented approaches (Tietenberg 1986). Finally, even if federal agencies regulate efficiently, some feel that too often those agencies impose unfair burdens on property owners.

Many different explanations for the behavior of regulatory agencies have been suggested. For example, it could be that government agencies wish to maximize their prestige and power by regulating according to the broadest possible interpretation of the law. Or it could be that agencies are vulnerable to the influence of certain interest groups that use legal and other pressures to encourage more aggressive implementation and enforcement of the law (Mueller 1989, Ceplo 1995). Or it might be that as specialized organizations established to pursue a narrow set of goals, agencies try to maximize social welfare but are limited in their ability to do so by the constraints imposed by Congress, which writes the laws they enforce and determines their budgets.

A. The Rationale for Creating New Incentives for Regulatory Agencies

The argument for adopting new incentives to influence agency decisions presupposes that Congress and the President do not exercise sufficient control over those decisions with the tools currently available. Some of those tools include the appointment of agency directors, review of proposed regulations by the Office of Management and Budget (OMB), oversight and reauthorization activities by congressional committees, clearance of agency appropriation requests by the OMB, and the annual congressional appropriations process.

The level of congressional and presidential control over agency decisions is the subject of a vast literature in political science and other fields. Among scholars, there is a division between those who believe agencies operate somewhat independently of Congress and the President and those who strongly disagree. It has proven difficult to rigorously test the claims of either side of this debate (Calvert and others 1987, Kerwin 1994). The courts also exercise control over regulatory agencies through their review of agency decisions. But the effect of judicial review is also the subject of vigorous debate in academic circles (Schuck and Elliott 1991).

Among the most powerful tools the Congress and the President have available to influence the decision making of regulatory agencies is the threat of reducing their annual appropriations. But, in practice, this can be a difficult threat to carry out. This is true in part because the appropriations process is divided among many actors who may disagree about the extent of problems and the appropriate solutions. And while the appropriations process is sometimes used to make policy decisions, this practice can cause conflicts between authorizing and appropriations committees in Congress.

B. The Regulatory Process and Agency Discretion

If agencies are to respond to the proposed financial incentives, they must have sufficient flexibility to change their regulatory behavior. If agencies are largely free to choose among a variety of options in the implementation of regulatory legislation, new procedural or financial incentives could significantly affect their decisions. But if those decisions are largely beyond their control—perhaps because they are dictated by Congress or the courts —even strong incentives

cannot be expected to have much effect. In general, regulatory agencies enjoy significant, but not unlimited discretion to interpret, implement, and enforce the laws entrusted to them. So it is reasonable to expect they would adapt to powerful new incentives placed on them. But it would be unreasonable to assume that agencies enjoy sufficient foresight or discretion to avoid all actions that might trigger compensation awards.

Congress often legislates in broad terms, leaving the details of implementation to an agency with expertise in the field. Agencies flesh out the statutory frameworks laid out by Congress by promulgating rules and regulations. Depending on how a law is written, agencies may enjoy broad discretion to develop the regulatory program, or none at all. A law may precisely define the duties of the responsible agency, or it may allow them considerable latitude to define their responsibilities. In the latter case, an agency will enjoy more flexibility in the drafting of regulations and enforcement of the law. Consequently, the level of discretion available to agencies should be evaluated on a case by case basis.

C. Judicial Review of Agency Decisions

When Congress enacts regulatory legislation, it usually delegates to one or more agencies the authority to write and enforce regulations that will carry out the purposes of the law. The process of writing those regulations may be stipulated by the law itself, but it is also governed by more general procedural requirements established by the Administrative Procedure Act.[24] That law defines the role of the federal courts in reviewing decisions made by regulatory agencies.

[24] 5 U.S.C. 551-559, 701-706, 60 Stat. 237.

When technical issues are involved, the courts usually defer to the expertise of the agency, unless the agency clearly ignored or misinterpreted information contained in the rule-making record. Courts are reluctant to substitute their interpretation of a law for that of the agency, unless the agency's interpretation is clearly unreasonable. In general, an agency decision is unlikely to be overturned unless the court finds it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The limited statistical data available suggest that agencies prevail in the vast majority of cases.[25]

Despite significant judicial deference, there are still instances in which courts overturn the actions of regulatory agencies. There are also instances where an interested party has sued the government for the purpose of at least delaying an agency action, even if the suit had little prospect of succeeding (Schuck and Elliott 1991). Two factors contribute to the chances of litigation. The first is the inclusion of citizen suit provisions in regulatory legislation. Many environmental laws, including the Clean Air and Water Acts and the Endangered Species Act, contain such provisions, and they have often been used successfully to force changes in regulatory programs. The second is the inclusion of statutory deadlines in regulatory legislation. Those deadlines give courts something concrete to enforce and can strengthen the bargaining position of organizations willing to sue to enforce them (Kerwin 1994).

[25] Schuck and Elliott (1991) attempted to examine judicial outcomes over a 20 year span. They report that during the 1980s, only about 12 percent of cases resulted in a significant change of an agency's position. Schuck and Elliott were acutely aware of the limitations of their data. The figure cited above is the result of a complicated process and is not a random sample of disputes between agencies and interested parties. In addition, many cases are disposed of without a written opinion, and it is unclear what should be inferred from those cases.

Legal challenges have successfully overturned some major regulations and other agency decisions. In some cases, those challenges significantly altered the development of a regulatory program (Melnick 1983, Rosenbaum 1991, and Wenner 1994). In addition, concern over potential litigation tends to make regulatory agencies cautious in the rule making process (Wald 1994). Thus judicial review of agency decisions does appear to limit the discretion of regulatory agencies, even if the extent of those limits is hard to define.

V. Strengthening Analysis Requirements

The idea of a formal takings analysis requirement is an extension of similar analytical requirements developed over the last 30 years. This "look before you leap" principle is embodied in statutes that require federal agencies to evaluate how a proposed action might affect the environment or small businesses.[26] Other analysis requirements have been imposed by executive order. For example, since the mid 1970s, a number of executive orders have required executive branch agencies to evaluate the costs and benefits of major regulations before they are promulgated.[27] And for a decade now, an executive order has required that executive branch agencies also consider the potential effects of their proposed actions on private property rights. The proposed takings analysis process builds upon the current one but differs from it in several important respects.

A. Takings Analysis in the Present System

[26] The National Environmental Policy Act, 42 U.S.C. 4321, 83 Stat. 852; The Regulatory Flexibility Act, 5 U.S.C. 601, 94 Stat. 1165..

[27] The most recent of those is Executive Order 12866, *Regulatory Planning and Review*, 58 F.R. 51735.

If the government must compensate property owners for taking their property, it is reasonable that agencies consider, before they act, the possibility that their decisions may cause a taking. Executive Order 12630, promulgated in 1998, requires executive branch agencies to prepare a formal analysis of the takings implications of certain actions and to report any significant findings to the Office of Management and Budget.[28] Those reports are called "Taking Implication Assessments" or TIAs. The executive order instructs the Attorney General to develop guidelines that agencies will use in conducting those analyses.

The content of the written TIAs must include: (1) an assessment of the likelihood the proposed action could cause a taking of private property; (2) a discussion of alternative actions that are less likely to cause a taking, but would still satisfy the agency's obligations under law; and (3) an estimate of the government's liability for compensation should a court find the proposed action is a taking (U.S. Attorney General 1988).

There are several important points about the executive order. First, the analyses are conducted using the current definition of regulatory takings developed by the courts. Second, agencies are not expected to develop precise estimates of the liability that might arise in a particular case (U.S. Attorney General 1988). Third, the written assessments are prepared solely for internal use and are protected from public disclosure.[29] Finally, the analysis can be enforced only within the

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[28] Executive Order 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*, 3 C.F.R. 554 (1988).

[29] The confidentiality of takings assessments was upheld in the case *CIT Group/Equipment Financing, Inc. v. U.S.* 24 Cl. Ct. 540 (1991).

executive branch, presumably through the Office of Management and Budget and the Office of the Attorney General.

The unobtrusive nature of the executive order makes it hard to determine whether it is accomplishing its stated objectives. Many critics have assumed the requirements have been ignored by most federal agencies. This in fact is not true. Interviews of agency officials and an examination of written assessments at a number of federal agencies reveal that TIAs are regularly conducted but not many are currently required. And consistent with the current definition of regulatory takings, only rarely do the reports identify any significant chance of a potential taking.

1. Actions That Require a Takings Analysis

Each year federal agencies undertake thousands of actions that could affect property rights or property values. Out of this vast number of actions, only a small number are selected for a takings analysis. This economy is achieved in two ways. First, agencies may prepare a "generic" takings impact assessment for activities they engage in repeatedly but which are unlikely to result in takings. That is possible because the vast majority of government actions do not regulate the use of private property in ways that would qualify as a taking, as that term is currently defined by the courts. Second, some agencies have worked with the Attorney General to develop supplemental guidelines that exempt many of their activities from the analysis requirement. For example, the Army Corps of Engineers does not prepare a taking assessment for every application to dredge and fill wetlands. Instead, it prepares an assessment only when it plans to deny a permit or if the property owner rejects

the terms of a proposed permit. Since the Corps rejects relatively few permits annually, few takings assessments are required (U.S. Attorney General 1989).

2. Conclusions Reached in Takings Analyses

Takings assessments are relatively short and tend to focus on legal questions. Most analyses rely on qualitative evaluations to reach their conclusions. Since takings are almost never found, estimates of potential liability or consideration of alternative actions are seldom documented. A number of legal arguments appear in many of the analyses. The first is that the proposed action does not fall under one of the categories of behavior where courts are most likely to find a taking. For example, agencies will argue the proposed actions do not correspond to a physical invasion of private property and do not eliminate all economically viable uses of an entire property. The second is often used when an agency is evaluating a proposed regulation. In that case agencies argue that, in itself, the regulation does not impose restrictions on the use of a specific property. In other words, until an agency is reaching a decision about the uses of a particular property, takings implications do not arise. This reasoning is based on the courts' typical refusal to evaluate a taking claim until after a regulation has been applied to a specific property.

B. Proposed Changes to the Takings Analysis Process

The current takings analysis requirement has several strengths. It replaced an ad hoc approach that agencies would otherwise use with a more systematic and documented one. At the same time supplemental guidelines provide agencies with discretion to concentrate their analytical resources on the activities most likely to generate takings challenges. Keeping the written reports

confidential encourages candor within the agency. Finally, enforcement of the requirement is kept out of the courts, where litigation over the minimum acceptable quality of the analyses might become protracted.

At the same time, however, the current approach to takings analyses can be criticized as too modest. Those who believe the current definition of takings is excessively narrow would prefer that agencies consider, and where possible avoid, a broader set of impacts on private property. Protecting the analyses from outside review reinforces the impression that agencies do not comply with the executive order, or perhaps have something to hide from those who bear the costs of regulation. Finally, some critics are not convinced that the executive branch enforces the analysis requirement or has the proper incentives to do so.

Three significant changes to the takings analysis process have been proposed. The first is that agencies would use the proposed statutory eligibility criteria for compensation in their analyses. Not all proposals would do this, however. The second would make the written assessments available to the public and to those directly affected by an agency's decision. And the third would make the analysis requirement a legally enforceable duty, so that interested parties could use the courts to compel agencies to prepare an adequate analysis before choosing among actions that could affect the uses and value of private property.

1. Takings Analyses Based on the Proposed Eligibility Criteria.

New takings analysis requirements are often included in proposals that would also create a statutory compensation system. In such a system, regulatory agencies would evaluate the proposed actions in light of statutory eligibility criteria and not the regulatory takings doctrine of the courts. Any takings analysis requirement must address at least two questions. First, what actions must be evaluated and when? Second, how should agencies estimate the property value losses or compensation that might occur if a proposed action is implemented?

a. What Actions to Evaluate and When?

Three factors contribute to the relatively small number of analyses prepared in the status quo: (1) the relatively narrow definition of takings developed by the courts; (2) the courts' reluctance to decide takings cases until a regulation is applied to a specific property; and (3) adoption of guidelines that allow agencies to prepare generic analyses for frequently repeated actions that are unlikely to cause takings. Given these factors, agencies have a legitimate basis for concentrating their analytical efforts on the few actions that pose significant takings implications.

Under many versions of the proposed analysis requirements, each of these factors would become less important. For analysis requirements that are coupled with a statutory compensation system, the broader eligibility criteria could increase the number of proposed agency actions that might lead to compensation awards. This reduces the efficacy of guidelines that permit generic analyses for actions that pose relatively low risks. Nor is it clear that the proposals would allow agencies to defer their analyses until new regulations are applied to specific properties. In addition,

some proposals would allow the analysis requirement to be enforced in court. This means that an agency's conclusion that an analysis was not required could be challenged by an interested party. Depending on the specific legislative language adopted, the potential for litigation might encourage agencies to prepare analyses when they otherwise would not.

b. Estimating Property Value Losses

At present, changes in property values receive little attention in most takings cases. Under the current takings doctrine, such losses are decisive only when a government action eliminates nearly the entire value of a property. This is also reflected in the approach agencies now use when conducting their takings impact assessments; property value losses play a minor role. Further, the Attorney General's guidelines stress that any estimates of potential liability are not expected to be precise. This approach would not be sufficient if eligibility criteria based on estimates of property value losses are adopted. Consequently, agencies can be expected to devote more time and more resources estimating possible losses in property value caused by their proposed actions. But how might such losses be estimated? How accurate would those estimates be?

If agencies can wait until a regulation is applied to a specific property, they could use essentially the same techniques that would be used in the trial of an actual compensation claim. Typically, this involves gathering expert appraisals of the change in property value caused by the government- imposed restriction. There are advantages and disadvantages to this approach. Appraisals can provide an objective basis for estimating losses borne by property owners. But when applied to the kinds of property often affected by federal restrictions — undeveloped land — they can

also be expensive, sensitive to critical assumptions, and subject to vociferous criticism by opposing parties (VandenBerg and Hunt, 1998).

For analyses of proposed regulations, which must be done before they are applied to any particular property, different techniques are required. One approach is to leverage the information generated by the agency's investigation into the costs and benefits of the proposed regulation. For example, an agency might insert an estimate of the regulation's cost into an economic model that predicts changes in the prices of different kinds of property. But estimates of regulatory costs have been criticized for their limited methodologies and inaccuracies (Hahn 1996, Jaffe et al 1995, McGarity 1987). In addition, economists often disagree about how to appropriately model the short run incidence of regulatory costs (Arnold 1995, Hopkins 1996). Even where the choice of modeling is uncontroversial, the necessary information about supply and demand relationships may not exist. In many instances this approach might generate illustrative estimates. But those estimates may be highly sensitive to the assumptions of the economic modeling.

Another approach is to apply statistical techniques to data on the physical and economic characteristics of a set of properties. These techniques have been used to measure the effects of regulatory actions after the fact.[30] That is, they measure how an action changed property values after both the action and the adjustment in prices occurred. To do so, the estimation technique must isolate the effect of the specific regulation from the many other factors that also affect property

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[30] A few examples include Beaton (1991), Beaton and Pollock (1992), Katz and Rosen (1987), and Parsons (1992).

values. The quality of the resulting estimates depends on the strength of the models used and the quality of the data available to the researchers. These studies usually require large amounts of data, which tends to make them expensive.

Given the cost and delay associated with this approach, an agency may not conduct a new study for each proposed regulation. More often, an agency may try to infer the property value effects of a proposed action based on relationships identified in previous studies. This is essentially estimation by analogy and its reliability depends upon the similarity between the proposed action and the ones that were studied. It also depends on the quality of the initial study and whether the two actions involve essentially the same kinds of property. A limitation of most studies of this sort is that they evaluate the effects of an action on property values in a relatively small area. It may simply be inappropriate to generalize those estimates to a larger geographic scale.

There is no doubt that with greater effort and additional resources, regulatory agencies can generate better estimates of the changes in property value induced by their actions. But they are unlikely to have the precision to tell agencies whether their actions will result in compensation payments. It is more likely, then, that agencies will use these studies to reach qualitative conclusions about the risk and magnitude of compensation awards resulting from their actions.

2. Publishing Written Takings Analyses

Proposals to strengthen existing takings analysis requirements have two general objectives: to improve decision making and to provide public notice of government actions that would limit the

uses of privately owned property. But while a takings assessment requirement can serve both these purposes, it may not serve them equally well. On the one hand, to be effective as a management tool, the assessments must be thorough and candid. Such candor is more likely if the process is kept confidential. On the other hand, confidentiality implies that less information about the likely burdens of a proposed regulation is available to the public. It also makes it more difficult for Congress to scrutinize agency decisions. Publication of the written analyses would draw greater attention to agency decision making and might even increase the chances of a lawsuit. Consequently, regulatory agencies might be tempted to skew their analyses in such ways that takings implications are rarely, if ever, found.

3. Enforcing a Takings Analysis Requirement

A judicially enforced analysis requirement could accomplish two things. First, it might ensure that agencies comply with the analysis requirement. Second, judicial review of the content of takings analyses might counterbalance any incentive for agencies to misrepresent the implications of their proposed actions in reports made available to the public. In the present system, courts do not play a role in the enforcement of the takings analysis requirement. The executive order and subsequent guidelines explicitly state that the analysis requirement can be enforced only within the executive branch. And while the written analyses are not currently published, federal agencies argue that the takings implications of proposed actions have been adequately considered.

There is more than one way to define the role of the courts in enforcing an analysis requirement. For example, the courts' role could be limited to ensuring that a written report was

completed at the appropriate time. Alternatively, the courts may be directed to ensure that the analyses satisfy certain minimal requirements. In addition, the courts might review the reasonableness of an agency's conclusions. Finally, some proposals would require that agencies adopt the regulatory approach that imposes the least burdens on property owners while still complying with the law. In that case, the courts may be responsible for verifying that agencies have indeed selected the least burdensome approach.

If courts are asked to evaluate the adequacy of an assessment or its conclusions, the outcome will depend significantly on the level of scrutiny employed. Federal courts usually defer to agencies in the exercise of their professional judgment. While other requirements may also apply, the process of promulgating regulations is governed according to standards set in the Administrative Procedure Act. Under that law, agency decisions can be set aside if they are found to be arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. Given that courts often have considerable difficulty deciding takings cases, they may not hold agencies to a very stringent standard when making similar determinations before the fact. But the determination of takings has always been a constitutional question decided by the courts. Given that history, courts might actually be more willing to second guess the conclusions reached in an agency's written takings analysis.

While it is relatively rare, agency decisions are sometimes set aside when they are based upon an analysis a court thought was inadequate. This has been the experience with the National Environmental Policy Act, which requires government agencies to prepare environmental impact

statements before making decisions that could significantly harm the environment.[31] Twenty-eight years after this law was enacted, its requirements and the adequacy of individual environmental impact statements are still regularly contested in the courts (Rosenbaum 1991). It is possible that something similar might occur for a takings analysis requirement that can be enforced in court. Opponents of a proposed action might be able to delay its adoption, or prevent it entirely, by challenging the adequacy of the takings analysis.

VI. Paying Compensation From Agency Budgets

In the current system, compensation awards or settlements resulting from regulatory takings cases are usually paid from a special account, called the Claims and Judgments Fund. This fund was created by Congress to pay claims and judgments against the United States *not otherwise authorized by law*.[32] This means that if the payment of compensation is authorized by some other law, the terms of that law determine how and when the compensation is paid, *even if the funds appropriated for that purpose are inadequate to pay the award*. In those cases, the Claims and Judgments Fund is unavailable. But when no existing law has authorized the payment of a compensation award, it may be paid from the Claims and Judgments Fund. This account is funded through a permanent, indefinite appropriation, which means that no additional congressional action is necessary for the award to be paid.[33]

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[31] 42 U.S.C. 4321; 83 Stat. 852. See also Rosenbaum (1991), p. 282.

[32] Automatic Payment of Judgments Act, 31 U.S.C. § 1304. 70 Stat 678, 694.

[33] For years, the U.S. General Accounting Office was responsible for determining whether this fund could be used to pay a given award. That responsibility was transferred to the executive branch in 1996 and is currently exercised by the Treasury Department.

Payments from the Claims and Judgments Fund stem from a variety of government actions, including awards arising from certain breach-of-contract suits. Payments from the fund fluctuate significantly from year to year, but they have averaged about $600 million per year in recent years. With a few exceptions in recent years, compensation awards resulting from regulatory takings cases have accounted for only a small portion of payments from the fund.

Payments made from the Claims and Judgments Fund affect total government spending, but they have little other effect on the federal budget process. Expenditures from this account represent mandatory spending, so they do not count against the discretionary spending caps set in the Balanced Budget and Emergency Deficit Control Act. Consequently, they do not compete directly with regulatory programs, which are primarily funded in the discretionary part of the budget. While this approach helps to ensure that compensation awards are paid more quickly, it does not provide an explicit financial incentive for federal agencies or Congress to avoid activities that result in compensation awards. Even without an explicit financial incentive, federal agencies and Congress care about such awards—at least because they are embarrassing. But some feel that more powerful incentives are required to offset what they see as a tendency to regulate in ways that are inefficient or unfair.

Some legislative proposals would pay compensation awards with funds contained in the annual appropriation of the federal agency whose action triggered the award. This would force the

agency to divert funds to pay those awards, request additional funds from Congress, or both. Supporters of this approach argue that it would force regulatory agencies to consider more carefully the property value effects of their proposed actions. Agencies would likely change the mix and level of their regulatory activities to reduce the expected volume of compensation payments.[34] As a result, property owners would bear fewer costs than they do now. But critics point out that agencies enjoy at most a small part of the benefits of the regulations they develop and enforce. Thus if agencies are made financially responsible for a disproportionate share of the costs of those regulations, they may have too little incentive to enforce them, even if the social benefits of doing so exceed the costs.

A. Congress Would Control Payments but Not Compensation Awards

The volume of compensation awards in a statutory compensation system is a function of many variables including: (1) the eligibility criteria chosen, (2) the willingness of property owners to seek compensation, (3) the response of regulatory agencies to the new financial incentives they face, and (4) the language of the laws that agencies are obligated to implement and enforce. In such a system, Congress would not control the volume of compensation awards. But it can control the amount of payments made in any year because it determines the dollar amounts and language contained in agency appropriations. Thus while the process that generates compensation awards is in many ways automatic, the process that liquidates them requires congressional action.

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[34] This response is confirmed in the only close empirical example of this kind of experiment the authors could find. Cordes and Weisbrod (1979) examined changes in the allocation of federal highway spending that occurred after compensation was made available to those displaced by federally supported highway construction projects in the late 1960s. After controlling for other factors, they found both a reduction in aggregate spending on highways and a reallocation of highway spending toward states with relatively lower relocation costs. Thus, the data demonstrate both income and substitution effects.

The size of compensation awards relative to agency budgets will significantly affect how regulatory agencies and Congress would adapt to such a system. If compensation awards are small, they could be absorbed by the regulatory agencies with little or no effect on the overall budget. But if compensation awards turn out to be large, agencies would be forced to reduce their activities, request additional funding, or both. Still, even if aggregate compensation awards were large, Congress always retains its discretion to limit the appropriations available to pay those claims. But it would be politically difficult for Congress to deny the funding required to pay compensation awards after property owners have established their legal eligibility for compensation. It is more likely that Congress would find some way to pay the outstanding awards while adopting measures to reduce the governments' exposure to new awards. That might be achieved by legislating changes in the regulatory programs generating the awards or by setting explicit caps on the volume of awards that can be made. Congress has attempted the former numerous times in recent years but has had little success. Adopting the latter would cripple the incentive system that supporters of these bills hope to create.

B. The Appropriations Process

The budgets of most federal regulatory agencies are specified in various appropriations acts passed by Congress and signed by the President each year. Appropriations acts, of course, have the force of law. Thus, the effect of legislation specifying that compensation awards are to be paid from agency appropriations depends in part on the language of those appropriations.

Agencies enjoy some discretion in deciding how limited appropriations should be spent, so long as those decisions are consistent with the applicable statutes. In making those decisions, agencies typically look to the language of their appropriations, the laws that authorize their activities, committee reports and hearings, the laws governing the use of congressionally appropriated funds, and previous decisions of the comptroller (GAO 1991). Occasionally a dispute over the use of an appropriation will reach a federal court. But the federal courts typically grant agencies considerable latitude in performing their duties, including their administration of limited appropriations.

1. What Appropriations Would Be Available to Pay Compensation Awards?

Suppose that compensation awards are to be paid from the budget of the agency whose action triggered the award. What do we mean by agency budget? There are two general possibilities. The first is to target the appropriations that fund the specific regulatory program that caused a compensation award. The second is to include the appropriations of the agency as a whole.

In some cases either approach would lead to the same outcome. This would be true for an agency with only a few missions, all of them closely related to a regulatory program that generates compensation awards. But in other cases, the situation is more complicated. Consider the annual budget of the U.S. Army Corps of Engineers. Its regulatory program, which includes the Section 404 permit program that regulates activities on certain wetlands, has a budget of about $100 million per year. But the Corps is a much larger organization that serves many interests. The annual appropriation for all civilian programs at the Corps exceeds $3 billion. Most of those funds are used to maintain or improve waterways and shorelines. Many of those projects are politically popular.

The targeted approach would make the regulatory program entirely responsible for the possible financial implications of its decisions. But limiting the appropriations available to pay compensation increases the chances there won't be enough funds available to pay all the compensation awards a program like this might generate. Returning to our example, the federal government is currently defending itself in wetlands-related takings litigation involving an estimated $300 million in damages alleged by property owners (GAO 1993b). Of course, the damages sought by property owners typically far exceed the amounts actually awarded by the courts. But if courts regularly awarded even a significant fraction of that amount, most or all of the budget of the Corps' regulatory program would be diverted to the payment of outstanding awards. If the Corps were unable to find ways of reducing the frequency of such claims, it would regularly be forced to request increased funding or a supplemental appropriation from Congress.

Adopting the more general approach increases the appropriations available to pay compensation awards so it is more likely that agencies would be able to pay them. But the disadvantage of this approach is that many unrelated programs could be affected by the diversion of funds to pay outstanding awards. In that case, the program generating compensation awards would not bear the full financial cost of its decisions. Congress may not wish to penalize the many other activities of a large and diverse agency for the decisions of a single program office.

2. Limitations on the Use of Agency Appropriations.

The more general the language of an appropriation, the more likely those funds could be used to pay outstanding awards. Some appropriations language is quite general, for example, when a lump

sum is appropriated for general program administration. These are the most likely sources of funds for compensation payments. But other appropriations are highly restrictive, for example, when a specific sum is appropriated to engage in a specific activity or to acquire specific items within a certain time period. Those funds would probably not be available to pay compensation awards.

One factor that will affect an agency's ability to pay compensation awards is their ability to shift funds within an appropriation. This is called reprogramming authority (GAO 1993a). Agencies are free to reprogram unobligated funds as long as the expenditures are within the general purpose of the appropriation and do not violate any specific limitation (GAO 1991). Whether the payment of compensation is within the general purpose of an appropriation depends on its specific language.

If compensation awards exceed the resources available from the annual appropriation that funds a program, agencies may wish to use funds from another appropriation to pay the awards. Shifting budget authority from one appropriation to another is known as a transfer and must be authorized by Congress.[35] Some proposals would grant agencies the authority to transfer funds between appropriations to pay outstanding compensation awards. The authority to transfer funds would make it easier to pay outstanding awards, but it also means that programs completely unrelated to the activities causing the compensation awards would be affected.

3. What Happens if Outstanding Awards Exceed the Available Funds?

[35] 31 U.S.C. § 1532 codifies this prohibition. See GAO (1993a).

Paying compensation from limited agency appropriations would raise difficult questions for agencies in the event some compensation awards are unavoidable. In those situations, agencies might face conflicting congressional directives. On one hand, appropriations language may direct them to use funds to carry out specific statutory responsibilities, such as regulation. On the other, they may also be directed to pay outstanding compensation awards. What is an agency legally required to do when faced with competing statutory obligations and insufficient funds to meet both simultaneously? It depends.

A review of appropriations law is beyond the scope of this paper, but some general points can be made. First, agency expenditures must be consistent with authorizing legislation and the language of the agency's appropriation. Sometimes authorizing and appropriations language will conflict. Second, Congress can always repeal prior legislation, but courts prefer that it be done explicitly rather than implicitly. When faced with two laws that conflict, wherever possible the courts will attempt to interpret them harmoniously. But when two statutes are in irreconcilable conflict, the more recent statute, as the latest expression of Congress, generally governs (GAO 1991).

When faced with a compensation award, the agency might first exhaust the appropriation Congress explicitly specifies as a source of compensation payments. Next, the agency must determine if any other funds are available to pay the remaining awards. How far the agency looks for other sources of compensation payments would depend on the exact language of the statutory compensation system and any guidance received from the appropriation committees. After identifying any additional sources of funds, the agency must allocate them between compensation payments and

the original purposes of those appropriations. If outstanding awards remain, the agency must then decide how to divide the available funds among the remaining awards and request additional funds from Congress. Claimants who receive partial or no compensation would maintain their rights to their compensation award and would earn interest on their outstanding awards.

C. The Role of Congress

If compensation awards are large relative to an agency's funding, the agency is likely to turn to Congress for additional appropriations. It might request a supplemental appropriation or an increase in its appropriation for the following year. Congress would then have to decide whether to divert funds from other spending priorities or to insist that awards be paid from the agency's existing resources. In the latter case, the payment of some compensation awards could be delayed. Those outstanding awards would grow as they accrue interest.

While Congress might have few immediate options available, it could take steps to avoid difficult decisions in later years. For example, it could limit the funds available in future years to pay new compensation awards. While this might deter litigation by property owners and reduce the volume of awards in the future, it would also undermine the purposes of a statutory compensation system. Alternatively, Congress could instruct agencies to change their regulatory practices to reduce the likelihood of large compensation awards. But this would require a consensus about how those programs should be changed, a consensus that may be difficult to find.

It has already been noted that when two statutes are in irreconcilable conflict the more recent statute governs. This rule has important consequences for the operation of an incentive system based on the annual appropriation process. In a statutory compensation system, an agency's appropriation will usually be the most recent law. An appropriation, and any restrictions on its use, would likely prevail over the legislation establishing the compensation system. Hence, if an appropriation is written to preclude the payment of compensation awards, then those funds would not be available to pay awards. Thus the continued operation of such a system depends significantly on the willingness of appropriations committees to leave agency budgets available for compensation payments.

VII. Conclusions

As with many proposals for regulatory reform, the takings legislation of the 1990s begins with sensible notions. More information should improve regulatory decision making. Requiring the government to present an honest assessment of the magnitude and concentration of regulatory costs should discourage regulatory initiatives where the benefits are less than the costs and promote a discussion about who should bear the costs and in what shares. If we believe that government might be suffering from a dose of "fiscal illusion," i.e., discounting costs that do not appear on the government's accounts because they are borne by the private sector, we may want to incorporate some measure of those costs in the government's books. Like any other institution, government responds to price changes, so we should expect at least a little change in the pattern of regulatory decisions. And if we are especially concerned about concentrated costs, we may want the government to share in them by specifying a system for compensating property owners for significant

reductions in value caused by government actions. But the devil is in the details, and this is where some significant problems are likely to emerge.

For example, there is a tendency to ask too much of a takings analysis requirement. The expenditure of more effort and more money should result in better analyses. But except for the most obvious cases, the techniques and data available are not going to yield precise quantitative information about the incidence of regulatory costs. More often, the results would be qualitative and agencies can be expected to develop rules of thumb to predict the likelihood that certain decisions will lead to a significant number of compensation claims. Publishing the written assessments should increase public awareness of the burdens agencies are imposing. It would also put agencies in the position of justifying those burdens to the public. At the same time, it creates a potential incentive for agencies to bias the analysis so that the publicly announced conclusions are favorable to the agency. Agencies have little incentive to create a road map for possible litigation directed at them. Of course the courts might be used to counteract such an incentive, but at the cost of additional litigation and delay.

It is difficult to conceive of a more powerful way to discourage regulatory agencies from decisions that significantly reduce property values than to make them pay for those losses. In the simple model, regulatory agencies seem a lot like consumers making consumption decisions subject to a resource constraint whose shape is affected by the relative prices of different goods. In such an environment, we expect that changes in the relative costs of imposing certain kinds of restrictions will lead to substitution away from practices that have become more costly. But this does not mean

agencies would always choose to avoid compensation. There may be circumstances where an agency feels the benefits are worth the additional expense. Still if compensation costs turn out to be significant, we should expect an overall decline in regulatory activity.

But the model is complicated by the nature of regulatory legislation and the many players that influence how it is implemented and enforced. Agencies do not have unlimited discretion to adjust their regulatory practices. The extent of their discretion varies with the legislation they are entrusted with implementing and enforcing. In addition, agencies may not be very good at predicting which decisions pose the greatest risks of a compensation award. In the more complicated model, we still expect agencies to adjust, but not so much as before. Once consequence is that compensation costs would be higher. Unless regulatory budgets are adjusted accordingly, the amount of regulatory activity may decline significantly. Congress would of course be responsible for reallocating funds from other areas of the budget. One question is whether it would truly be willing to do so, or would instead opt to reduce or eliminate any future government liabilities—essentially unwinding the incentive system that has been proposed.

TABLE 1. TAKINGS CLAIMS PENDING AGAINST THE UNITED STATES BY REGULATORY PROGRAM, 1997

Regulatory Program or Type of Regulation	Number of Cases
Section 404 wetlands permit program	46
Cases involving denial of access to land, for example, if the government disputes the validity of a property owner's mineral interest on federal land	34
Superfund, for example, the placement of monitoring wells on private property	22
Oil, gas, and mineral interests, including claims arising from the Outer Continental Shelf Lands Act	15
Breach of contract involving real property	12
Surface mining regulations	5
Taking of reversionary interests in rights of way under the Rails to Trails Act	4
Endangered Species Act	2
Land use restrictions imposed near military air bases	2
Other	36
Total	178

SOURCE: The Regulatory Takings Docket of the Justice Department's Environment and Natural Resources Division, End of Fiscal Year 1997, mimeo, Department of Justice, Environment and Natural Resources Division, Policy Legislation and Special Litigation Section, October 1997.

NOTE: These cases are not the entire universe of takings claims against the United States.

TABLE 2. TAKINGS CLAIMS DISPOSED AND JUDGMENTS AWARDED BY THE U.S. COURT OF FEDERAL CLAIMS, FISCAL YEARS 1992 TO 1997

Department or Agency	Cases Disposed[a]	Judgments[b] Number	Judgments[b] Percent of Cases	Judgments[b] Thousands of Dollars[c]
Agriculture	25	5	20	203
Air Force	8	1	13	425
Army	74	19	26	12,984
Energy	6	1	17	187
EPA	21	8	38	9,630
Interior	52	14	27	322,678
Justice	33	1	3	6
Navy	14	5	36	512
Treasury	26	2	8	340
Other Agencies	42	4	10	1,176
Other				850
	71	2	3	
Total	372	62	17	348,989

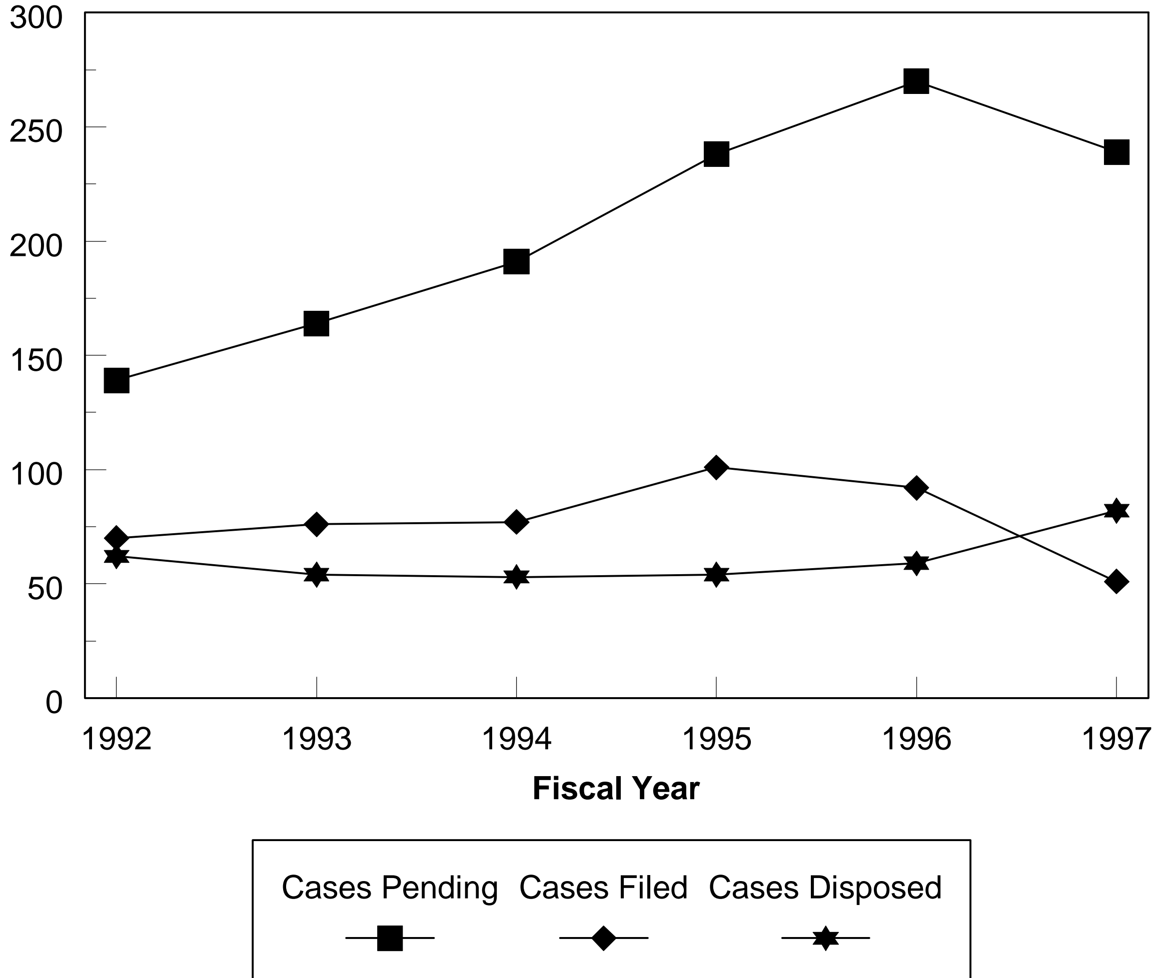
SOURCE: The authors, based on data provided by the Clerk of the U.S. Court of Federal Claims.

a. In a few instances, the data contain multiple entries for what may be single cases.

b. These are cases resulting in an award of compensation by the court or a settlement reached by the parties.

c. The dollar value of all compensation awards is not always reported. Not all compensation awards are necessarily paid. Some cases may pending an appeal. Others may have been overturned on appeal. In addition, the amounts listed above do not include $1.2 million in expenses awarded in 15 cases.

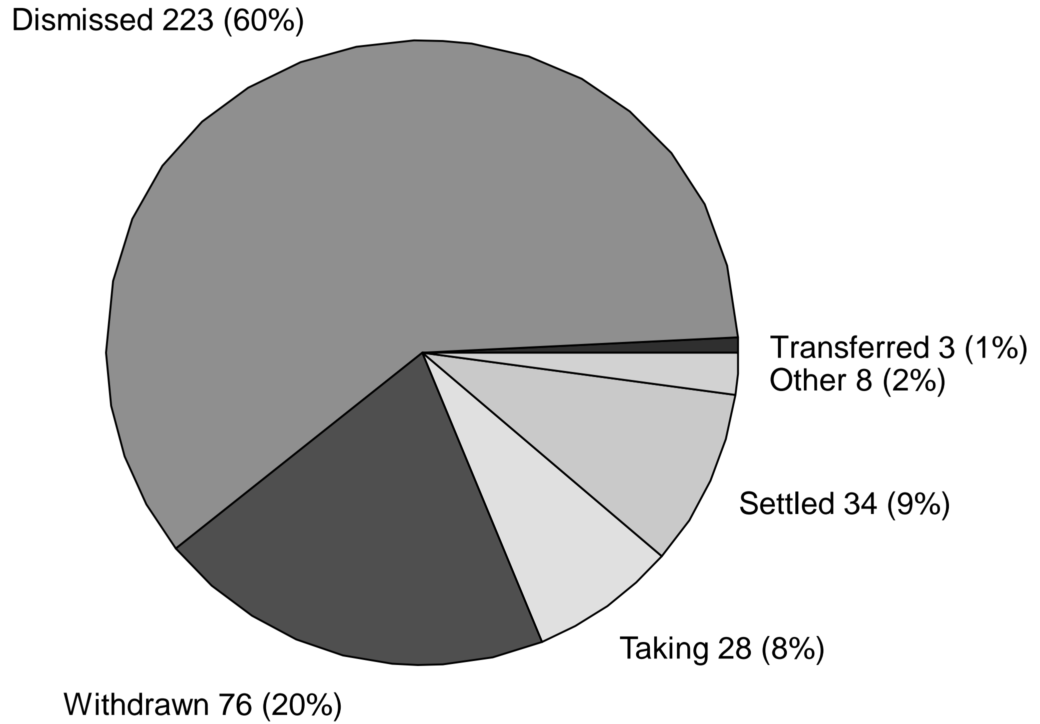
FIGURE 1. TAKINGS CASES IN THE U.S. COURT OF FEDERAL CLAIMS



SOURCE: The authors, based on data provided by the Clerk of the U.S. Court of Federal Claims

NOTES: In some years, the number of cases pending did not reconcile with the number of cases filed and disposed.

FIGURE 2. THE OUTCOME OF TAKINGS CASES DISPOSED OF BY THE U.S. COURT OF FEDERAL CLAIMS (Cases disposed in fiscal years 1992 to 1997)



SOURCE: The authors, based on data provided by the Clerk of the U.S. Court of Federal Claims

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