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# A REPLY TO MESSRS. BERGER AND KANNER

Lois J. Schiffer\*

Upon review of a draft of the response by Messrs. Berger and Kanner<sup>1</sup> to my essay, *Taking Stock of the Takings Debate*,<sup>2</sup> I have concluded that any reply should appear in the same issue as the response. Often the best antidote for error is immediate correction. In order to ensure publication in the same issue as the response, a rapid reply was required. Thus, I am limited to preliminary reactions based on a first reading of a draft. Fortunately, a brief reply is all that is warranted.

In June 1997, I delivered a thirty-minute luncheon address at a conference sponsored by the American Association of Law Schools. Shortly after I finished my remarks, a friend of mine, who teaches at Santa Clara Law School, asked if I would consent to having my remarks published. I was delighted and agreed immediately. I was not asked to provide a more comprehensive analysis, nor did I have the time to do so.<sup>3</sup>

My address and essay described the U.S. Department of Justice's takings docket, as well as efforts by the Clinton Administration to provide regulatory relief to property owners. I also summarized the Administration's opposition to takings compensation legislation introduced in the 104th Congress. My purpose was to stimulate further discussion. I certainly have done that.

I am curious, however, why the co-authors of the re-

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1. Michael M. Berger & Gideon Kanner, Essay, *The Need for Takings Law Reform: A View from the Trenches—A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837 (1998) [hereinafter *Berger-Kanner Response*].

2. Lois J. Schiffer, Essay, *Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 153 (1997).

3. The origins of my essay are made clear in the essay itself. Schiffer, *supra* note 2, at 153 n.(unnumbered).

sponse chose an eleven page republication of an informal luncheon address—five pages of which are devoted to takings compensation bills<sup>4</sup>—as a point of departure for a forty-eight page, 174-footnote defense of these bills. My brief address and essay necessarily sketched only a broad outline of the argument against compensation bills. The literature on takings generally, and on takings compensation bills in particular, is voluminous. It contains much in the way of comprehensive, scholarly articles by giants in the takings debate who oppose compensation bills. Any of these articles would have provided a more comparable springboard from which to launch a detailed defense of the bills. More to the point, the Berger-Kanner *Response* would have benefited from a review of the existing academic literature in opposition. I am flattered they view my modest, informal contribution as a worthy foil. For the sake of balance, however, I invite interested readers to benefit from the full debate by reviewing the more comprehensive analyses.<sup>5</sup>

The Berger-Kanner *Response* contains many errors, but at least three points require immediate attention. First, the response mistakenly asserts that it is unfair to express concern that takings compensation bills, as a class, would undermine federal protections designed to prevent pollution or protect human health and public safety.<sup>6</sup> It is, perhaps, understandable that the co-authors would fall into this error, since these bills are difficult to defend in the face of the

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4. Schiffer, *supra* note 2, at 159-64.

5. For articles opposing takings compensation bills, *see, e.g.*, Joseph L. Sax, *Using Property Rights to Attack Environmental Protection*, 15 PACE ENVTL. L. REV. 1 (1996); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996); Frank I. Michelman, *A Skeptical View of "Property Rights" Legislation*, 6 FORDHAM ENVTL. L.J. 409 (1995). For articles discussing the issue of regulatory takings generally, *see, e.g.*, John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of Doctrinal Confusion*, 17 VT. L. REV. 695 (1993). I cite these works not because I agree with everything in them (I do not), but because they are scholarly, professional, and balanced discussions of these important issues.

6. *See* Berger-Kanner *Response*, *supra* note 1, at 861-65.

overwhelming public support for environmental protections.<sup>7</sup> The bills themselves, however, make clear that their compensation mandates would apply to these protections.

For example, the leading Senate takings bill in the 104th Congress, Senate Bill 605, applies to virtually all federal agency actions, and many state agency actions, including pollution controls and safety measures.<sup>8</sup> Although Senate Bill 605 would not require compensation for agency actions taken to abate a nuisance,<sup>9</sup> our basic federal pollution control laws do far more than abate nuisances. As noted in my original essay<sup>10</sup>, the Congress enacted and has expanded federal environmental laws precisely because state nuisance law is inadequate to control smokestack pollution, sewer system overflows, emissions of chemicals that deplete stratospheric ozone, and many other forms of pollution. Senate Bill 605 would greatly impair efforts to implement federal pollution control laws by exposing the U.S. Environmental Protection Agency and other agencies to compensation claims by polluters when these agencies seek to impose many, if not most, pollution control requirements.<sup>11</sup> The hearing record on Senate Bill 605 contains many other examples of threats to human health and public safety that would not be covered by the bill's nuisance exception and thus would be undermined by the bill's sweeping compensation mandates.<sup>12</sup>

The Berger-Kanner *Response* notes that a single takings bill eventually was amended to exclude from its compensation mandate any federal action the "primary purpose" of

7. See *Study Shows 2 in 3 Americans Are "Environmentalists,"* DENVER POST, Oct. 19, 1997, at B6 (reporting that sixty-eight percent of Americans consider themselves environmentalists). Only four percent said they were unsympathetic to environmental concerns; citing a nationwide study by former Reagan pollster Richard Wirthlin. *Id.*

8. S. 605, 104th Cong. §§ 203(1), 203(2), 203(6), 204(a) (1995) (applying the bill's various compensation mandates to actions of any agency of the United States, as well as actions of any State agency administering a federal program or receiving federal funds in connection with a state regulatory program).

9. *Id.* § 204(d)(1).

10. Schiffer, *supra* note 2, at 162.

11. See, e.g., *The Right to Own Property: Hearings on S. 605 Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 368 (1995) [hereinafter *Hearings on S. 605*] (statement of Gary S. Guzy, Deputy General Counsel, U.S. Environmental Protection Agency).

12. See, e.g., *Hearings on S. 605, supra* note 11, at 191-202 ("Memo on the Nuisance Exceptions in H.R. 925 and S. 605," attached to the statement of Joseph L. Sax, Counselor to the Secretary, Department of the Interior).

which is to prevent an "identifiable hazard to public health or safety" or "identifiable . . . damage to specific property."<sup>13</sup> The absence of a comparable provision in the other compensation bills in the 104th Congress, including the leading Senate bill, is sufficient to justify concern about the effect of these bills as a class on public health and safety.<sup>14</sup> Moreover, the "identifiable hazard" exception itself is problematic, for it would generate compensation claims whenever the specific property at risk is not identifiable. Suppose the federal government protects wetlands to reduce flood risks, but is unable to identify specific homes and businesses that would be damaged by a flood if the wetlands are filled.<sup>15</sup> The owner of the wetlands could claim compensation by arguing that the prospective damage to "specific property" is not "identifiable" and that the exception does not apply.<sup>16</sup> Because flood risks often are raised by the *cumulative* impact of wetlands destruction over time, the exclusion provides little comfort.

Second, the Berger-Kanner *Response* discusses a non-compensation takings bill introduced in the 105th Congress, House Bill 1534, the Private Property Rights Implementation Act of 1997. This bill would amend our nation's landmark

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13. Berger-Kanner *Response*, *supra* note 1, at 863 n. 106.

14. None of the following takings compensation bills contains an "identifiable hazard" exclusion: Omnibus Property Rights Act of 1996, S. 605, 104th Cong. (1996); Private Property Owners Bill of Rights, S. 239, 104th Cong. (1995); Private Property Rights Restoration Act, S. 145, 104th Cong. (1995); Property Rights Litigation Relief Act of 1995, S. 135, 104th Cong. (1995); Private Property Owners Bill of Rights of 1995, H.R. 790, 104th Cong. (1995); Property Rights Litigation Relief Act of 1995, H.R. 489, 104th Cong. (1995).

15. The Berger-Kanner *Response*, *supra* note 1, could be read to suggest that the only advantage of wetlands is that they provide wildlife habitat. In fact, wetlands provide other critical benefits. They play a crucial role in the reduction of flood risks, acting like huge natural sponges to absorb excess water. See Lois J. Schiffer & Jeremy D. Heep, *Forests, Wetlands and the Superfund: Three Examples of Environmental Protection Promoting Jobs*, 22 J. CORP. L. 571, 590-91 (1997). Wetlands also purify lakes and streams by filtering out pollution from runoff, saving cities millions of dollars each year in wastewater treatment costs. *Id.* at 591. One study estimates that, excluding Hawaii and Alaska, wetlands save \$30.9 billion annually by preventing flood damage, \$1.6 billion annually in water quality improvement, and \$4 million annually in protecting shoreline property from ocean storms. *Id.* at 590. Wetlands also are vital to the jobs of commercial fishers, those in the tourism industry, and many others, generating \$72 billion in revenue and providing one million jobs in 1991 alone. *Id.* at 589 (citing studies). In California, the remaining wetlands have an estimated economic value of \$10 billion annually. *Id.* (citing studies).

16. It is unclear why takings bill supporters were unwilling to support a straightforward health and safety exception without undefined qualifiers.

civil rights laws to revise established ripeness principles in order to allow claimants to sue local officials in federal court far earlier in the land use planning process.<sup>17</sup> It also would abolish decades of carefully crafted abstention doctrine that allows federal courts to defer to state courts on issues of state law where such deference is necessary to respect the legitimate role of state courts in our federal system.<sup>18</sup> Messrs. Berger and Kanner suggest that House Bill 1534, while not "a finely tuned precision tool,"<sup>19</sup> is a step in the right direction. Space limitations preclude an extensive analysis of the bill's many problems.<sup>20</sup> Perhaps the best indicator of its relative merits is the overwhelming, bipartisan opposition it has generated. At the Senate Judiciary Committee markup of the bill, Chairman Orrin Hatch, a staunch proponent of takings legislation, acknowledged that House Bill 1534 raises serious concerns and needs major restructuring before he would consider bringing it to the floor.<sup>21</sup> Three other Republican Committee Members, Senators Fred Thompson, Michael DeWine, and Arlen Specter, said they would vote against the bill on the floor in its current form.<sup>22</sup> All eight Committee Democrats voted against the bill.<sup>23</sup> In a letter signed by Ohio Republican Governor George Voinovich, the National Governors' Association strongly opposes the bill.<sup>24</sup> More than forty state Attorneys General, including many Republicans, strongly oppose the bill.<sup>25</sup> A sampling of the many other organizations that oppose the bill is set forth in the margin.<sup>26</sup> The bill has generated such overwhelming, bi-

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17. H.R. 1534, 105th Cong. § 2 (1997) (amending 28 U.S.C. § 1343 (1994)).

18. *Id.* (adding new subsection (c) that prohibits abstention in specified cases that concern the use of real property).

19. Berger-Kanner *Response*, *supra* note 1, at 884.

20. For arguments for and against House Bill 1534, see H.R. REP. NO. 323, 105th Cong., 1st Sess. (1997).

21. Colleen Schu, *Senators to Wrestle over Property Rights Bill Before Floor Vote*, ENV'T & ENERGY WKLY., Mar. 2, 1998, at 10.

22. *Id.*

23. *Id.*

24. Letter from National Governors' Association, National League of Cities, and U.S. Conference of Mayors to "Member of Congress" (Oct. 21, 1997) (on file with the *Santa Clara Law Review*).

25. Letter from Forty State and Territorial Attorneys General to Henry J. Hyde, Chairman, House Judiciary Committee (Sept. 24, 1997) (on file with the *Santa Clara Law Review*).

26. Groups opposing House Bill 1534 and similar bills on behalf of state and local officials include the National Governors' Association, the National League

partisan opposition not because it needs a tune up, but because it is fundamentally flawed.

Third, the response suggests that Department of Justice officials "bitterly resist" every legislative proposal to assist property owners.<sup>27</sup> In fact, the Department of Justice was instrumental in developing a compromise measure offered as a substitute amendment to one of the primary takings bills being considered by the 105th Congress, House Bill 992, the Tucker Act Shuffle Relief Act of 1997.<sup>28</sup> This bill is intended to allow property owners to consolidate a takings challenge with other challenges to federal agency action in a single forum.<sup>29</sup> Although House Bill 992 raises serious constitutional and policy concerns, the Department of Justice supports an appropriate compromise that would expand the jurisdiction of federal district courts to achieve the same goal. The compromise has received broad support.<sup>30</sup>

Moreover, the Administration has supported amendments to the Endangered Species Act that would codify many of the landowner protections that the Department of the Interior has implemented administratively.<sup>31</sup> We have pro-

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of Cities, the U.S. Conference of Mayors, the International Municipal Lawyers Association, the National Conference of State Legislatures, and the Conference of Chief Justices of the state Supreme Courts. Many other organizations also oppose House Bill 1534 and similar bills, including the Judicial Conference of the United States, the Administrative Office of the U.S. Courts, the American Planning Association, the U.S. Catholic Conference, the Coalition on the Environment and Jewish Life, the National Council of Churches of Christ, the Chesapeake Bay Foundation, many national environmental organizations, Scenic America, Great Lakes United, and the National Trust for Historic Preservation. Letters reflecting this opposition are on file with the *Santa Clara Law Review*.

27. Berger-Kanner *Response*, *supra* note 1, at 838.

28. 144 CONG. REC. H1085-1140 (daily ed. Mar. 11, 1998).

29. The jurisdiction of federal district courts over monetary claims against the United States, including takings claims, generally is limited to claims up to \$10,000. See 28 U.S.C. § 1346(a)(2) (1994). As a result, claims for more than \$10,000 generally must be brought in the U.S. Court of Federal Claims. See 28 U.S.C. § 1491 (1994). But challenges to the *validity* of federal agency action generally must be brought in federal district or appellate courts. Thus, current law may preclude a property owner from bringing all relevant challenges to a federal action in one court. See *generally* 144 CONG. REC. H1085-1140 (daily ed. Mar. 11, 1998).

30. The House vote on the compromise alternative was 206-206. See 144 CONG. REC. at H1138. Because the compromise was offered as an amendment to the underlying bill, it was defeated by the tie vote. It is unclear whether the Senate will take up this legislation in the remaining months of the 105th Congress.

31. Endangered Species Recovery Act, S. 1180, 105th Cong. (1997).

vided additional administrative relief to property owners in the federal wetlands protection program, and general regulatory relief in environmental programs across the board.<sup>32</sup> At the Department of Justice, we have aggressively promoted Alternative Dispute Resolution ("ADR") and other initiatives to streamline takings litigation so that property owners and the government can get these claims resolved in a timely fashion. As recently as November 1997, the Chief Judge of the U.S. Court of Federal Claims, the tribunal that hears almost all takings claims against the United States, "expressed his appreciation for the Department's efforts to promote the use of ADR."<sup>33</sup> While others have devised ill-considered proposals that have little chance of success, the Administration is providing real relief to property owners.

Finally, I would like to express some concern about the tone of the Berger-Kanner *Response*. It contains considerable vitriol, much of it directed at me personally.<sup>34</sup> Nevertheless,

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32. See Executive Office of the President, *Reinventing Environmental Regulation: Progress Report* (1996); Executive Office of the President, *Reinventing Environmental Regulation* (1995).

33. Letter from Chief Judge Loren A. Smith to Lois J. Schiffer (Nov. 12, 1997) (on file with the *Santa Clara Law Review*).

34. The Berger-Kanner *Response* accuses me, by name, of: "bureaucratic hubris," Berger-Kanner *Response*, *supra* note 1, at 859 n.95; making arguments that "simply cannot be serious," *id.*; "tak[ing] liberties" with the facts, *id.* at 862; using terminology that "resonates the subtext of anti-property rights ideologues," *id.* at 863 n.103; disregarding the inscription on the Department of Justice walls regarding the need to seek justice in every case, *id.* at 870 n.131; using the "technique of omitting what does not fit a polemical author's thesis," *id.*, at 864 n.107; being "less than ingenuous," *id.* at 865; echoing "the deplorable fare" of "unscrupulous partisan polemicists," *id.* at 866; being "disingenuous," *id.* at 871; being among the "bogus defenders of stare decisis," *id.* at 874; and so on.

The coauthors seem to have a particular fondness for the word "functionary;" while it is a perfectly good word, a more generous response might have acknowledged the role of Department of Justice attorneys as public servants, which is how the Attorney General rightly insists we view ourselves and our mission. It is, in fact, an honor for us to serve the American people as Department of Justice attorneys.

Messrs. Berger and Kanner also suggest that members of the environmental movement "are overwhelmingly affluent upper, and upper-middle class persons who have got theirs . . . but expect would-be competing seekers of the good life to lower *their* expectations . . ." *Id.* at 846. Suffice it to say that nearly seventy percent of the American people view themselves as environmentalists. See *supra* note 7. Unless the American people (like the children in Garrison Keillor's fictional Lake Wobegon) are all above average, this statistic easily defeats the accusation of elitism. The growing Environmental Justice movement, whose members seek to protect low-income and minority communi-

I take some comfort in knowing that by being subjected to invective by these authors, I am in good company.<sup>35</sup> Unfortunately, this style of argument all too frequently attends the takings debate, even in academic journals. Individuals on both sides are guilty.

There is a growing dialogue about civility in the courtroom,<sup>36</sup> but just as important is civility in academia and in legal journals, many of which, like this one, are edited by the future leaders of our profession. These students will learn from our example, and if we want our profession to remain noble, we owe it to them to avoid ad hominem attacks, to embrace courtesy, and to articulate our strongly held views with decorum.

What we seek at the Department of Justice is balance: balance in discourse, balance in society, balance between the property rights of individuals and those of their neighbors, and balance between the needs of landowners and the community at large.

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ties from disproportionate environmental harm, also is difficult to reconcile with the elitism thesis. The charge of elitism reflects the misguided notion that environmental protections inevitably conflict with economic growth. In fact, the two generally go hand in hand. See generally Schiffer & Heep, *supra* note 15, at 571-73.

35. Among other things, the coauthors accuse a panel of the Court of Appeals for the Eleventh Circuit of a "morally scandalous performance," Berger-Kanner *Response*, *supra* note 1, at 875 n.145, and the entire judiciary (presumably both federal and state) of "callous insensitivity to constitutional rights," *id.* at 881, and "years of quite *deliberate* judicial obfuscation of takings law," *id.* at 882 (emphasis added).

Some time ago, Messrs. Berger and Kanner coauthored a response to another takings article by five highly respected land use scholars and lawyers, to whom Messrs. Berger and Kanner referred as the "Gang of Five." That Berger and Kanner response, accurately self-described a "polemic," contains so much rhetorical flourish at the expense of the original authors that it is possible to give only a sampling: "anti-intellectual tour de force;" "astonishing display of intellectual parochialism;" "either grossly misinformed or a dubious attempt at humor;" "sophistry" (repeatedly); "Orwellian interpretation;" "gaffes;" "advocating nonsense;" "ethical, legal and economic hogwash;" "the absolutist dogma embraced and huckstered by the Gang of Five;" "the Brave New World of the Gang of Five;" "bile and diatribe;" and so on. See Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685 (1986).

36. See, e.g., Judge Paul L. Friedman, *Fostering Civility: A Professional Obligation*, Remarks at a Meeting of the American Bar Association Section of Public Contract Law, Annapolis, Maryland (Mar. 13, 1998) (unpublished manuscript, on file with the *Santa Clara Law Review*); Elliott B. Glicksman, *Civility: A Return to Normalcy*, 74 MICH. B.J. 894 (1995); Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441 (1992).