

CHAPTER 3

THE ORIGINS OF THE TAKINGS PROJECT

MEESE JUSTICE AND THE "RADICAL PROJECT" TO THWART ENVIRONMENTAL LAWS

Extreme theories on Constitutional law are routinely expounded by law professors and, just as routinely, remain where they are formed: in the relative obscurity of academic law journals. In normal times, Epstein's theory would have met the same demise. But these were not normal times. Epstein's book was published in 1985, shortly after the reelection of Ronald Reagan to a second term in office: A heady time for conservatives and libertarians, particularly those interested in the development of constitutional law.

By 1985 a dramatic shift in the ideology of the federal judiciary was already well underway. In the Supreme Court, for example, Presidents Nixon, Ford and Reagan (in his first term) had named six of the nine then-sitting justices and the most liberal remaining justices (Blackmun, Brennan and Marshall) were aging, each approaching his 80's. With Reagan reelected and Republicans in control of the Senate, the writing was on the wall: conservatives would be able to complete a fundamental shift in the composition and ideology of the federal judiciary.

1985 thus represented a time of opportunity for conservative legal scholars and political operatives. It was a time not only to envision the end of a period of liberal judicial activism, but also a time to construct the blueprint for a new era of using the court system to further their political agenda. In the minds of many of the conservatives and libertarians that congregated in Washington at the beginning of President Reagan's second term in office, Professor Epstein's theory became that blueprint. Epstein became the "most requested speaker" at Federalist Society meetings throughout the country,¹ the choice of the Heritage Foundation to be a Supreme Court justice, and among the most influential intellectual leaders of the Reagan Revolution.² As one administration official commented in early 1985: "Epstein's ideas have begun to gain currency. . . a movement is forming around. . . a lot of the thoughts he's been in the forefront in promoting."³

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At the center of this movement within the Reagan administration was second term Attorney General Edwin Meese III. To Meese, one of Reagan’s closest and most trusted advisers,⁴ the Reagan Revolution meant “[t]aking the Constitution, taking principals of free markets, taking the ideals of individual liberty, and translating them into action.”⁵ At a conference on economic liberties that he convened at the Justice Department in 1986, he called on conservatives throughout the country to “join us in what we would describe as a little constitutional calisthenics.”⁶ Within the Takings Clause, he argued, “a revolution in, or perhaps more accurately, a revisiting and restoration of economic liberty is a prospect.”⁷

As Charles Fried, the Solicitor General at the Justice Department during Meese’s tenure wrote in a now-famous passage:

Attorney General Meese and his young advisors—many drawn from the ranks of the then-fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein—had a specific, aggressive, and it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property.

As Fried makes clear, the Takings Project had little to do with protecting individual landowners; the objective from the start was to further the Reagan Administration’s attack on health and safety regulations. In Fried’s words:

The grand plan was to make government pay compensation as for a taking of property every time its regulation impinged too severely on a property right—limiting the possible uses for a parcel of land or restricting or tying up a business in regulatory red tape. If the government labored under so severe an obligation, there would be, to say the least, much less regulation.⁸

Meese and his advisors laid the groundwork for the current Takings Project through a number of important measures. They convened conferences on “economic liberties” to discuss the strategies for reinvigorating the Takings Clause.⁹ They argued for developers and against the government position in Supreme Court cases including *Nollan v. California Coastal Commission*.¹⁰ And they issued the takings Executive Order (E.O. 12630), which required that “government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights.”¹¹

RESHAPING THE FEDERAL JUDICIARY

The most important legacy of Meese’s radical project, however, stems from the effort, started in earnest during Meese’s term as attorney general and continued during the Bush presidency, to

appoint conservative activist judges to spots on the three federal courts—the U.S. Supreme Court, the Federal Circuit Court of Appeals, and the U.S. Claims Court—that control the direction of federal takings law. To read Professor Epstein’s theory on the Takings Clause into the U.S. Constitution, the promoters of the Takings Project needed judges on these courts that were willing to join in Meese’s “constitutional calisthenics”—i.e., conservative judges that, like Epstein, did “not believe in judicial restraint.”¹²

The Reagan and Bush administrations accomplished this transformation in the federal judiciary largely by delegating the responsibility for screening and choosing judges to members of the Federalist Society. As the New York Times reported:

President Ronald Reagan and President George Bush essentially turned over the privilege of selecting judges to lawyers in the conservative wing of the Republican party, who embarked on a crusade to remake the federal courts¹³

During Reagan’s second term in office, Assistant Attorney General Stephen Markman, who chaired the Washington Chapter of the Federalist Society, oversaw Meese’s judicial appointment process, with assistance from Society co-founders Liberman and Calabresi.¹⁴ Under Meese’s guidance, Markman and his assistants applied what one commentator termed “. . . the most systematic ideological or judicial philosophical screening of judicial candidates since the first Roosevelt administration. . . .”¹⁵ Similarly, President Bush delegated primary control over judicial selection primarily to the White House Counsel’s office, which, in the words of the Wall Street Journal was “an all-star team of the Federalists Society.”¹⁶ C. Boyden Gray, the White House Counsel and a Federalist Society member,¹⁷ delegated primary responsibility for selecting judges to Society co-founder, Lee Liberman,¹⁸ who evaluated the “ideological purity” all of Bush’s candidates for federal judgeship.¹⁹

The Rise of the Federalists

The Federalist Society was formed in 1982 by four law students—David McIntosh, Lee Liberman, Steve Calabresi and Spencer Abraham—at three top law schools, Harvard, Yale and the University of Chicago, with the immodest mission to “reorder priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law.”²⁰ Like Epstein, the Society’s principal target is federal regulation adopted during and since the New Deal. Indeed, the Society’s disdain for FDR’s New Deal is such that Society members routinely hiss whenever President Roosevelt’s name is mentioned.²¹

The Federalist Society was supported by conservative foundations as part of a much larger effort to develop a network of faculty, students and alumni at universities around the country to oppose and reverse progressive curricula and political

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thought at the nation's campuses. The Institute for Education Affairs and the Olin Foundation funded the Federalist Society's first symposium at Yale Law School. During the same few years, IEA and Olin also helped establish conservative newspapers, such as the Dartmouth Review, at universities across the country and IEA bankrolled Professor Epstein in publishing *Takings*.²²

Less than four years after its inception, the Federalist Society had chapters across the country, thousands of members and a \$400,000 annual budget. By the end of Reagan's second term, Steve Calabresi, one of the groups founders, was able to claim that "more than half of the 153 Reagan-appointed Justice Department employees and all 12 assistant attorney generals are members or have spoken at Federalist Society events."²³

The Federal Circuit and the Court of Federal Claims

The Federal Circuit Court of Appeals and the Court of Federal Claims were both created in 1982 and vested with the exclusive jurisdiction to hear takings claims against the federal government seeking over \$10,000 in money damages.²⁴ This jurisdictional grant gives these courts a singular ability to shape the development of takings law. In particular, subject only to the discretionary review of the Supreme Court, these courts have the power to determine the viability of critical environmental laws including the wetlands provision of the Clean Water Act, the habitat protection provisions of the Endangered Species Act, and the rail banking provision of the Rails-to-Trails Act. The Takings Project's most important victories stem from the Reagan and Bush Administrations' careful shaping of the ideological composition of these two critical courts.

The Federal Courts Improvement Act

Early in his first term, while Republicans controlled the Senate, President Reagan ushered through Congress the Federal Courts Improvement Act of 1982 (FCIA).²⁵ The Act replaced the former Court of Claims and Court of Custom and Patent Appeals with a new U.S. Claims Court (now known as the Court of Federal Claims) and established the Federal Circuit Court of Appeals to hear appeals from the Claims Court.

While promoted as a procedural reform to improve the handling of claims against the United States, the FCIA gave the Reagan and Bush Administrations a remarkable opportunity to construct these two critical courts. While the active commissioners on the former Claims Court automatically became judges on the new court, the statute provided that their terms would all expire, at the latest, on October 1, 1986.²⁶ Thus, by the middle of his second term, Reagan was able to appoint every judge on the Court of Federal Claims, including the Chief Judge. Similarly, while appellate judges from the former Court of Claims and Court of Customs and Patent Appeals initially filled the 12 judgeships on the Federal Circuit, the majority of these judges retired or took senior status rather than presiding over

a dramatically expanded roster of cases. As a result, Presidents Reagan and Bush had the opportunity to make 11 appointments to the Federal Circuit and to name 8 of the 11 judges currently serving on the court.²⁷

The Federal Circuit Court of Appeals

Presidents Reagan and Bush used their 11 appointments to the Federal Circuit to create the nation's most activist conservative court on takings issues. They accomplished this by appointing judges who were well trained as political operatives. For example, Judge Randall Rader was appointed to the Federal Circuit after serving for nearly eight years as Judiciary Committee counsel to Senator Orrin Hatch (R-Utah). Judge Robert Michel, similarly, was appointed to the bench after serving as a top aide and counsel for Senator Arlen Specter (R.-Penn.). Judge Robert Mayer served as deputy to the current Ninth Circuit Court of Appeals judge Alex Kozinski during Kozinski's controversial stint as director the Special Counsel's office at the Merit Systems Protection Board.²⁸

The most activist and influential Reagan/Bush appointee has been S. Jay Plager. Plager, who lists Federalist Society membership on an official biography,²⁹ was appointed to the bench by President Bush in 1989, after several years at the forefront of President Reagan's attack on federal environmental, health, and safety regulations. At the end of Reagan's second term, Plager simultaneously served as Administrator of the OMB's Office of Information and Regulatory Affairs,³⁰ and as Executive Director of Reagan's Vice-Presidential Task Force on Regulatory Relief.³¹

At OMB, Plager headed a staff of 60 employees who were responsible for ensuring that the benefits of regulations promulgated by federal agencies outweighed the costs of the regulation to industry.³² With the advent of Reagan's Executive Order on takings, Plager's office at OMB was also given a central role in assessing the takings implications of new federal regulations.³³ As Executive Director of the of the Vice President's Task Force on Regulatory Relief, Plager served as the conduit between industries seeking relief from regulatory burdens and the administration officials empowered to grant such relief.³⁴

The Court of Federal Claims

Presidents Reagan and Bush followed a similar pattern in filling slots on the Court of Federal Claims. As Clint Bolick, the Litigation Director for the Institute for Justice, has noted:

The Claims Court is a place where the Reagan and Bush Administrations have been able to place top-notch conservative judges without getting much attention. That is the result of liberals being somewhat asleep at the switch and the Administrations' being extremely sophisticated in their selection and placement of judges.³⁵

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Most notably, Reagan appointed Loren Smith, a member of President Nixon's Watergate defense team and general counsel to Reagan's 1976 and 1980 presidential campaigns, as Chief Judge of the Court of Federal Claims.

Judge Smith, who calls Professor Epstein one of his intellectual heroes,³⁶ is the judiciary's most vocal cheerleader for the Takings Project.³⁷ The "darling of conservative members of Congress,"³⁸ Judge Smith has regularly accepted invitations to testify on behalf of property rights legislation. In the 104th Congress, for example, Judge Smith testified in favor of the provisions of Senator Dole's Omnibus Property Rights Bill of 1995, arguing that the bill was necessary to "correct[] procedural and structural problems faced by [takings] litigants." While disclaiming any opinion on the substantive provisions in the bill, Judge Smith asserted that Congressional action was needed to protect "some of the most vital interests of any free society" and to free himself and his colleagues from the burden of "the appearance of anti-democratic law-making in order to honor their oath and decide a takings claim."³⁹ This term, Judge Smith has testified in favor of procedural reform bills that would expand his court's jurisdiction to hear takings cases.⁴⁰

Judge Smith has also championed property rights on the lecture circuit.⁴¹ Between 1995 and 1996, for example, Judge Smith was reimbursed by the Federalist Society for speeches to at least six Society chapters.⁴² The year before, the same year Judge Smith awarded a coal company \$300 million in a takings case because the government would not allow strip mining of an environmentally sensitive property,⁴³ Judge Smith was flown to Tucson, Arizona to give a speech to the National Coal Lawyers Association.⁴⁴ His introduction to a symposium conducted by the National Legal Center for the Public Interest, an umbrella group for conservative legal foundations, is characteristic of Judge Smith's clarion calls for judicial activism in favor of property owners:

[t]he reason takings jurisprudence is such a challenge for the judiciary and the legal system, however, is that the other protections for our economic liberty have vanished; thus, takings law has become the only area where citizens can seek any redress from the legal system for government intrusion. . . . This puts enormous strain on takings doctrine and the courts. The cases are asked to do the work the Framers assigned to all three branches, and perhaps most importantly to the States and their tripartite governments. . . . But for good or ill, this task has devolved on the courts, and they must do their job to make the Fifth Amendment's takings guarantee as real as other constitutional protections we hold so dear.⁴⁵

Judge Smith's most lasting accomplishment may well stem from his intense lobbying of behalf of himself and President Reagan's other appointees to the Claims Court. Under the FCIA, Claims Court judges were appointed to 15-year terms. This provision created both the opportunity for Reagan to appoint every judge on the Claims

Court and the downside that a successor with very different views on the constitutionality of efforts to protect the environment could similarly remake the court and reverse the direction of its jurisprudence.

Because of Judge Smith's lobbying effort, however, President Clinton's opportunity to remake the Claims Court never really materialized. Shortly after being named Chief Judge, Judge Smith lobbied and ultimately convinced the federal judiciary's Administrative office, headed by Chief Justice Rehnquist, to recommend significant changes to the tenure system for Claims Court judges.⁴⁶ As a consequence of these reforms, Claims Court judges that request, but do not receive reappointment automatically receive "senior status" and can continue to hear cases. This tenure system makes it difficult for the Clinton Administration and future presidents to significantly alter the Court's ideology.⁴⁷

The Supreme Court

Presidents Reagan and Bush were also very successful in appointing justices to the Supreme Court that are sympathetic to the Takings Project. Takings cases in the Supreme Court in recent years have been very contentious and very close. In each case, Reagan and Bush appointees, typically led by Justice Antonin Scalia, have formed the block necessary for a property-owner victory.⁴⁸ For example, in the Court's 1994 decision in *Dolan v. Tigard*, Chief Justice Rehnquist (Reagan's choice to be Chief Justice) was joined by four Reagan and Bush appointees (O'Connor, Scalia, Thomas and Kennedy) in siding with the landowner. Similarly in *Lucas v. South Carolina Coastal Council*, the same five justices constituted five of the six votes received by *Lucas*. As a result of these appointments to the high court, when President Bush left office in 1993, six of the nine then-sitting justices were very sympathetic to arguments made by property owners.⁴⁹

Not surprisingly, the justice leading the Supreme Court in revising takings doctrine has been Antonin Scalia. Scalia, a colleague of Professor Epstein's at the University of Chicago Law School, had served as the faculty advisor to Lee Liberman and David McIntosh in founding the Federalist Society.⁵⁰ Liberman, then at the Justice Department, helped prepare Scalia for Senate confirmation hearings. During his first term on the bench (the term he authored the Court's opinion in *Nollan*), Scalia hired Liberman and Gary Lawson, two of the five co-founders of the Federalist Society, to be his law clerks.⁵¹ Calabresi, a third Society founder, clerked for Scalia the following year.⁵²

At the end of President Bush's term in office, therefore, judges sympathetic to the Takings Project dominated the Federal Circuit and the Court of Federal Claims, and held a solid majority on the Supreme Court. The stage was set for success in the litigation campaign to use those judges to advance the Takings Project.

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Endnotes

- ¹ Grey, *supra* Ch.1, note 8, at 23.
- ² Graham, *supra* Ch.2, note 43 at 1 (“Epstein, 42, is among those academicians mentioned most frequently as having the potential to be a major influence in Reagan’s second term, influence that might land him a judicial appointment. In fact, Epstein — along with Bork and Scalia — was mentioned as a possible Supreme Court appointee in a recent poll of leading conservatives.”).
- ³ *Id.*
- ⁴ See HERMAN SCHWARTZ, PACKING THE COURTS, THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 31 (1988).
- ⁵ See Major Policy Statements of the Attorney General, Edwin Meese III, 1985—1988 at 183 (address to the Conservative Political Action Committee Conference, 2/19/87).
- ⁶ See *id.* at 142 (address to the First Annual Department of Justice Conference on the Constitution, Economic Liberties, and the Extended Commercial Republic, June 14, 1986).
- ⁷ *Id.* at 141.
- ⁸ ORDER AND LAW, *supra* Ch.1, note 1 at 183 Meese himself does not dispute the existence of the grand plan. Confronted with Fried’s account of his “quite radical project,” Meese bristled and commented defensively: “maybe it is a radical departure from the regulatory mess we are in right now, but it’s not a radical departure from the constitution.” Tom Castleton, *Claims Court Crusader: Chief Judge Puts Property Rights Up Front*, LEGAL TIMES, Aug. 17, 1992, at 1.
- ⁹ See Major Policy Statement of the Attorney General, *supra* Ch. 3, note 5, at 142.
- ¹⁰ See Brief for the United States as Amicus Curiae Supporting Reversal, 86—133, at 22- 23; DOUGLAS KMIEC, THE ATTORNEY GENERALS LAWYER at 125 (1992).
- ¹¹ See Executive Order 12630 (March 15, 1988) at 1(b) President Reagan promoted his Executive Order as necessary to ensure federal agency compliance with *Nollan* and *First English*, but, as many commentators have noted, the Order goes far beyond the mandates of those cases. See Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENV’T L.J. 439, 442—447 (1993) (collecting authorities). Ultimately, E.O. 12630 was used as the framework for the property rights legislation that came close to becoming law during the 104th Congress. See *id.*
- ¹² Graham, *supra* Ch.2, note 43 at 1.
- ¹³ Neil A. Lewis, *A Republican Senator Forces the Administration to Rethink Strategy on Judicial Appointments*, N.Y.TIMES, Dec. 9, 1994, at 1986. see also Roger J. Miner, Remark, *Advice & Consent in the Theory and Practice*, 41 AM. U. L. REV. 1075, 1080—81 (1992) Roger Miner, a Judge on the Second Circuit Court of Appeals describes the remarkable rise of the Federalist Society from obscurity to prominence as follows:

The force of history and attachment to the coattails of political

winner have catapulted [Federalist Society members] to positions of power, first as law clerks, then as movers and shakers in the office of the Attorney General and now in the office of the President. This has been accomplished not by acquiring political power, but by co-opting it.

Id. at 1081.

¹⁴ See Crocker Coulson, *Federalist Papers*, NEW REPUBLIC, Dec 1, 1986, at 23.

¹⁵ Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 326 (1987); see also, DAVID G SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 422—23 (1993).

¹⁶ Paul A. Gigot, *Supreme Court: An Emerging Case of Poetic Justice*, WALL ST. J., Jan. 27, 1989.

¹⁷ See Al Kamen & Ruth Marcus, *A Chance to Deepen Stamp on Courts*, WASH POST, Jan. 29, 1989, at A1. Gray is now on the Society's Board of Trustees. See FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES, 1996 ANNUAL REPORT (1997).

¹⁸ See Miner, *supra* Ch. 3, note 13, at 1081—82 (Murray Dickman was the Attorney General's point man on judicial nominations Obviously he deferred to Ms. Liberman. The present Attorney General [(Thornburgh)] seems to be little more than a conservative adjunct of the White House Counsel's office." (citations omitted)).

¹⁹ See Miner, *supra* Ch. 3, note 13, at 1080—81 ("Lee Liberman . . . examines all candidates for ideological purity. It is well known that no federal judicial appointment is made without her imprimatur."); see also Amy Singer, *A Federalist in the White House*, Am. Law., Oct. 1991, at 87.

²⁰ Federalist Society 1997—1998 Pamphlet on Student Division Membership and Benefits.

²¹ See Neil A. Lewis, *Conservative Outsiders Now at the Hub of Power*, N.Y. TIMES, Mar. 29, 1991, at B16; Peter Swire & Simon Lazarus, *Reactionary Activism: Conservatives and the Constitution*, New Republic, Feb. 22, 1988, p.17 (discussing an October 1987 Federalist Society conference on "Constitutional Protections of Economic Activity" where Professor Epstein served as the Keynote Speakers and argued that the Takings Clause "invalidates much of the 20th Century legislation" including "modern zoning, landmark preservation, and rent control statutes. . .").

²² See, JEAN STEFANIC & RICHARD DELGADO, NO MERCY, HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 109 (1996).

²³ Neil A. Lewis, *Conservative Outsiders Now at the Hub of Power*, N.Y. TIMES, Mar. 29, 1991, B16.

²⁴ See 28 U.S.C. §1346, 1491 (1994).

²⁵ Federal Courts Improvement Act of 1982, Pub L. No. 97—164 (1982).

²⁶ 28 U.S.C. §171 (1994). Unlike most federal judges, who receive lifetime appointments, Court of Federal Claims judges are appointed for terms of 15 years. See 28 U.S.C. §172 (1994).

²⁷ See Huffman, *supra* Ch.2, note 41, at 599 n14 ("because the Federal Circuit was a new court in 1983, most of its members were appointed

during the Reagan and Bush Administrations, thus creating somewhat more philosophical agreement among its members than exists on other courts of appeals”).

²⁸ Terence Moran, *Nominee’s Pentagon Speech Questioned*, LEGAL TIMES, May 18, 1987 at 6.

²⁹ See 1996 Judicial Staff Biography 851-852.

³⁰ See generally SUSAN J. TOLCHIN & MARTIN TOLCHIN, *DISMANTLING AMERICA—THE RUSH TO DEREGULATE* (1983).

³¹ *Former Hoosier Dean to be Nominated to Court*, UPI, Oct 2, 1989, available in LEXIS, UPI File; see also Steven Waldman, *Watching the Watchdogs*, NEWSWEEK, Feb. 20, 1989.

³² See Robin E. Folsom, *Executive Order 12630: A President’s Manipulation of the Fifth Amendment’s Just Compensation Clause to Achieve Control over Executive Agency Regulatory Decision Making*, 20 B.C. ENVTL. AFF. L. REV. 639, 650—659 (1993) (discussing the Role OMB’s Office of Information and Regulatory Affairs (OIRA) played in implementing Reagan’s Executive Orders on cost/benefit analysis (E.O. 12,291) and takings (E.O. 12,630)).

³³ E.O. 12,630 at Section 5(b), 53 Fed. Reg. 8859 (1988), reprinted in 5 U.S.C. §601 (1988) (requiring that agencies identify and address takings implications in submissions to OMB); Folsom, *supra* Ch. 3, note 32, at 687 (“the [Takings] Order adds weight to the cost-side of proposed regulations that have takings implications. This allows an opportunity for OMB to prevent agencies from implementing any regulations with takings implications”).

³⁴ Folsom, *supra* Ch. 3, note 32, at 649 (“[t]he Task Force worked together with American industries to determine which regulations were overly burdensome to those industries and needed to be relaxed”).

³⁵ W. John Moore, *Just Compensation*, 1992 NAT’L J. 1404, 1406.

³⁶ David Helvarg, *Legal Assault On the Environment*, THE NATION, Jan 30, 1995, at 126.

³⁷ With his handlebar mustache and affinity for performing magic tricks, Judge Smith has shown what one reporter called a “clear penchant for the limelight” Tom Castleton, *Claims Court Crusader: Chief Judge Puts Property Rights Up Front*, LEGAL TIMES, Aug. 17, 1992, at 16. See also Loren Smith, *Introduction to National Legal Center for the Public Interest’s Seminar on Regulatory Takings*, 46 S.C. L. REV. 525, 525 (1995) (“[t]he National Legal Center for the Public Interest asked me to write this introduction to this symposium on regulatory takings. Why should I have been asked? Maybe because they knew I would accept? Possibly. Or perhaps it was because the court upon which I serve hears all money claims. . . against the federal government? Likely reason. Or perhaps because I have been associated with the Center in the past as an author and speaker? That’s it!”).

³⁸ Terry Carter, *The Court Conjurer*, AM BAR. ASS’N. J. at 73 (1997).

³⁹ Statement of Loren Smith on The Omnibus Property Rights Act of 1995 (S 605) before the Senate Committee on the Judiciary, April 6, 1995 at 2—4.

- ⁴⁰ Statement of Loren A. Smith on H.R. 992, The Tucker Act Shuffle Relief Act of 1997, Sept. 10, 1997.
- ⁴¹ In addition to the speeches discussed above, see *Lawyers Chapters Focus Attention on Judicial Activism, Local Self-Government*, THE FEDERALIST PAPER, (The Federalist Society for Law and Public Policy Studies) May 1997, at 3 (reporting on a speech Judge Smith gave to the Society's Sacramento chapter entitled "Life, Liberty and Whose Property" in which Judge Smith "touched upon the Takings Clause as well as the importance of property rights in preserving democracy and free expression").
- ⁴² See Loren A. Smith, 1995 Financial Disclosure Report (filed June 14, 1996).
- ⁴³ *Whitney Benefits v. U.S.*, 30 Fed. Cl. 411, 416 (1994) (ruling that Whitney Benefits was entitled to compound interest on an early judgment by Judge Smith awarding Whitney \$60 million for the taking of the right to strip mine coal. See 18 Cl. Ct 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd* 926 F.2d 1169, *cert. denied*, 502 U.S. 952 (1991), raising the governments liability to over \$300 million.
- ⁴⁴ See Loren A. Smith, 1994 Financial Disclosure Report (filed July 17, 1995).
- ⁴⁵ Smith, *supra* Ch. 3, note 37, at 525; see also, *Claims Court Crusader*, *supra* Ch. 3, note 37, at 1 (quoting Judge Smith:"to the extent that New Deal jurisprudence became identified with basically saying economic rights don't exist . . . then its contrary to the Constitution and has to be ignored.").
- ⁴⁶ See 28 U.S.C. 178 (b) (1995). Terry Carter, *U.S.. Claims Court Anxious To Secure Further Respect*, L.A. DAILY JOURNAL, Jan. 3, 1992, at 1.
- ⁴⁷ While President Clinton can, if he chooses, appoint judges to take the positions of the Reagan appointed judges whose terms are expiring, he cannot remove the Reagan-era judges (including Judge Smith) from the bench or prevent these judges from hearing cases and drawing a federal salary equal to that of a judge in active service. see 28 U.S.C. §178(e).
- ⁴⁸ See Robert Meltz, *The Property Rights Issue*, Cong Res. Service, No. 95—200A (Jan. 20, 1995)("votes in several of the Court's recent land use/taking cases make unequivocally plain that where a justice stands on the taking question may depend largely on his or her political philosophy."); Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 Will.& Mary L. Rev. 1099 (1997).
- ⁴⁹ President Clinton may have succeeded in shifting the balance in takings cases to 5 to 4 by replacing Justice White, who typically sided with property-owners, with Justice Ginsberg, who, at least in *Dolan*, sided with the City of Tigard It is too early to tell whether President Clinton's appointment of Justice Breyer to replace Justice Blackmun—an impassioned supporter of land use regulation—will have any impact on the Court's Takings Clause jurisprudence.
- ⁵⁰ See Al Kamen, *Scalia's Federalists From Justice*, WASH POST, Dec. 12, 1986, at A23.
- ⁵¹ See *id*; W. John Moore, *Right For Now*, NAT'L J., at 594.
- ⁵² See Kamen, *supra* Ch. 3, note 50, at A23.