

CHAPTER 4

THE TAKINGS PROJECT

With supportive judges sitting in critical places in the federal judiciary, a large and still-growing collection of corporations, non-profit law firms and think tanks has assembled to assist developers in bringing takings cases through the court system and to these judges.

THE COURTHOUSE LAWYERS

At the center of the Takings Project is a nationwide network of non-profit legal foundations that bring takings cases free-of-charge to their clients. At least 12 active organizations—the Pacific Legal Foundation, the Mountain States Legal Foundation, the Institute for Justice, the New England Legal Foundation, the Defenders of Property Rights, the Southeastern Legal Foundation, The Northwestern Legal Foundation, the Oregonian's in Action Legal Center, the Texas Justice Foundation, the Stewards of the Range, the Landmark Legal Foundation and the Washington Legal Foundation—with a combined budget in excess of \$15 million, litigate takings cases on behalf of property owners.¹

These non-profits act as the highest profile courthouse lawyers in the Takings Project. Dubbing property rights the “civil rights issue of the 90’s,”² they have adopted what Charles Fried termed an “ACLU-type constitutional litigation strategy” for turning Professor Epstein’s flawed theory on takings law into the law of the land.³ As one participant declared: “I look upon us as the bearers of the torch of the civil rights movement. . . . I see us as successors to Martin Luther King and Thurgood Marshall.”⁴ This labeling is particularly ironic because many of the same groups leading the Takings Project—most prominently the Pacific Legal Foundation and the Institute for Justice—are simultaneously fighting to limit or dismantle the civil rights laws and Supreme Court opinions that represent an important part of Marshall and King’s life work.⁵

The leading force in this litigation campaign is the Pacific Legal Foundation (PLF). Formed in Sacramento in the early 1970’s by aides to Governor Ronald Reagan, PLF has spent, in their words “a quarter of a century devoted to defending property rights, the free

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enterprise system, and the concept of limited government.”⁶ PLF’s goal, like Epstein’s, is to use the Takings Project as a way to “get rid of the regulatory state established under F.D.R.’s New Deal.”⁷

Begun with a single office and a \$100,000 budget, PLF has grown with the Takings Project. It is now a national organization with offices in 5 states, a budget of over \$4 million and a litigation docket consisting of 60 of the most important takings cases from around the country.⁸ PLF only represents a small number of plaintiffs in the time-consuming and expensive early stages of litigation.⁹ Typically, PLF will monitor cases from around the country, weigh in with an amicus brief as a case reaches a federal appellate court or a state supreme court, and then, if the case has a sympathetic plaintiff and presents an important issue upon which PLF desires Supreme Court review, PLF will assist the landowner in petitioning the Supreme Court to review the case.¹⁰

The campaign has been a remarkable success for PLF. PLF has either represented the plaintiff or assisted the plaintiff in obtaining Supreme Court review in each of the last four important regulatory takings cases heard by the Supreme Court,¹¹ and the property owner has prevailed in each of the cases. These cases, in turn, have set the stage for even more dramatic victories in the Federal Circuit and other federal courts. As PLF Founder and past-President Ronald Zumbrun has boasted “[w]e see the 90s as our decade. . . . We have the weapons—court precedent, experienced personnel, and credibility.”¹²

The Institute for Justice has also been playing an increasingly large role in takings litigation. The Institute was founded in early 1991 by William Mellor, a Reagan Administration official and a former litigator for the Mountain States Legal Foundation,¹³ and Clint Bolick, a veteran of the Meese Justice Department and a former assistant to Supreme Court Justice Clarence Thomas when Thomas chaired the EEOC. The Institute spends its more than \$2 million annual budget to convince conservatives that “‘conservative judicial activism’ is neither an oxymoron nor a bad idea.”¹⁴

The Institute’s Center for Private Property Rights both litigates cases on behalf of property owners and supports property owners in cases brought by other groups.¹⁵ The Institute distinguishes itself from other legal foundations by being able to claim that it is not just inspired by Professor Epstein, Epstein is a regular contributor. In three recent Supreme Court takings cases, *Lucas*, *Dolan* and *Suitum*, Professor Epstein has co-authored an amicus brief on the Institute’s behalf.¹⁶

A third organization, the Defenders of Property Rights (DOPR), distinguishes itself as “[t]he nation’s only legal defense foundation dedicated exclusively to the protection of property rights.”¹⁷ Founded by the husband and wife team of Roger and Nancie Marzulla, two veterans of both Mountain States Legal Foundation and the Meese Justice Department,¹⁸ DOPR boasts that it has won

13 of the 15 property rights cases in which it has acted as lead counsel and has assisted property owners in 61 other cases.¹⁹

The non-profit law firms that are working takings cases through the courts coordinate with each other through regular meetings in Washington DC hosted by the Heritage Foundation. Edwin Meese, who started the Takings Project more than a decade ago, continues to play an important role in overseeing its progress. According to three published reports, Meese, now a Ronald Reagan fellow at the Heritage Foundation, Co-Chair of the Board of Trustees of the Federalist Society and a Board Member of the Defenders of Property Rights, oversees regular meetings at the Heritage Foundation that coordinate the participants in the Takings Project.²⁰

The legal foundations are assisted in litigating takings cases by an army of pro bono lawyers from private law firms. This pro bono network amplifies the forces marshaled by the legal foundations.²¹ For example, in 1993, Washington Legal Foundation reported that forty-eight law firms, including top Washington DC law firms such as Arnold & Porter and Covington & Burling, donated pro bono services to WLF.²²

The largest player in organizing this effort is the Federalist Society. The Society has expanded its efforts to attract practicing lawyers in recent years and now has a lawyers' division with 59 chapters and 18,000 members.²³ A central focus of this expansion has been the establishment of a pro bono resources network that links conservative lawyers who wish to litigate on behalf of conservative and libertarian causes with legal foundations such as PLF, which conduct such litigation.²⁴ The Society reports that over 1,000 members have joined this network.²⁵

The Institute for Justice runs a similar network dubbed the Human Action Network or HAN. HAN is comprised of over 300 lawyers that have participated in the Institute's lawyer and law student training programs. HAN seeks to "broaden our movement's impact exponentially" by enlisting lawyers and law students trained by the Institute to bring cases that further the Institute's ideological agenda.²⁶

A final important player in guiding takings cases through the courts are the associations representing developers. The largest player in this industry-based effort is the National Association of Home Builders (NAHB). With 190,000 members, a \$48 million budget,²⁷ a staff in excess of 350, and 850 affiliated state and local associations nationwide,²⁸ the NAHB is one of the nation's best organized and most powerful lobbying organizations. The NAHB has always filed amicus briefs in support of property owners in important takings cases and supported local associations in litigating cases.²⁹ In several recent high-profile cases, however, the NAHB has delved more directly into the fray by bringing a series of cases as plaintiffs on behalf of its members.³⁰

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TRAINING LAWYERS AND JUDGES

The non-profit organizations leading the Takings Project also devote considerable resources to training the pro bono counsel, counsel for developers and private practitioners that assist them in litigating takings cases, and to training and rewarding the judges that provide them with critical victories in takings cases.

Lawyer Training

The most important actor in the lawyer training effort is again the Federalist Society. The Society's Lawyer's Division operates a practice group on "Environmental Law and Property Rights" to discuss topics such as "the 'takings' implications of zoning and major federal pollution laws," and conducts workshops training lawyers on bringing takings cases.³¹ The tenor of these workshops can be gleaned from the report filed by the Chicago Daily Law Bulletin on a 1992 Federalist Society conference entitled "Takings and the Environment: The Constitutional Implications of Environmental Regulations."³² The Bulletin described the seminar as "a national revival meeting for takings lawyers" and went on to report:

Environmental takings are hot and the specialty bar knows it. They've tasted blood, and they want flesh. Throw them a bone and they'll bite off your arm. They're bigger now and, thanks to recent court rulings, they've got teeth.³³

The Bulletin explained this fervor as follows: "[i]ts like they've been a suppressed religious cult for years and suddenly gained legitimacy and mainstream currency."³⁴

The PLF also conducts takings training seminars in venues across the country discussing topics such "Getting Into State Court," "Trying a \$200 Million Dollar Regulatory Taking Case," and "Proving Denial of All Economically Viable Use." While billed as non-partisan events and often co-sponsored by prominent legal organizations such as the American Law Institute and the American Bar Association, these seminars have a decided ideological slant. Several participants in an October 1996 PLF training seminar in Washington DC event described the seminar as a "property rights rally" where opposing views were repeatedly deemed "bullshit" by the conference chair.³⁵

Finally, the Institute for Justice plays an important supporting role. The Institute hosts "Policy Activist Seminars" each year for practicing lawyers intended to "develop a whole new network of conservative legal crusaders across the country."³⁶ These seminars seem to be having the intended impact: Edwin Meese, a speaker at the Institute's 1995 seminar declared the seminar to be "one of the more important events in the conservative movement."³⁷ A recent attendee reported leaving the seminar "considerably energized and looking eagerly for someone to sue."³⁸

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Training Judges

Conservative and libertarian non-profits are also devoting significant resources to keeping conservative activist judges in the fold. A number of non-profit organizations, including the Manhattan Institute's Center for Judicial Studies, the Liberty Fund and George Mason University's Law and Economics Center, host all-expense paid judicial seminars that discuss libertarian views on topics including property rights.³⁹

The most significant judicial training program, both in its popularity among judges and in its focus on property rights, are the programs for federal judges run by the Foundation for Research on Economics and the Environment (FREE).⁴⁰ FREE is a Montana-based non-profit that promotes "free market environmentalism," a doctrine that relies on free market and private property rights as the best protectors of the environment. Perhaps the leading legal academic proponent of free market environmentalism is FREE trustee James Huffman. Huffman, in turn, is Professor Epstein's most consistent proponent and one of the few academics to vocally promote judicial activism on behalf of property owners.⁴¹

Since 1992, FREE has offered summer seminars for federal judges. The seminars provide judges with free travel and accommodations at a ranch resort near Bozeman, Montana to obtain their presence at lectures that, in their words, "emphasiz[e] property rights, market processes and responsible liberty."⁴² As FREE explains:

Our seminars in environmental economics and policy provide federal judges economic, scientific and ethical insights when they hear environmental cases. We explain how secure property rights, entrepreneurial innovations and the market process can improve environmental policy.⁴³

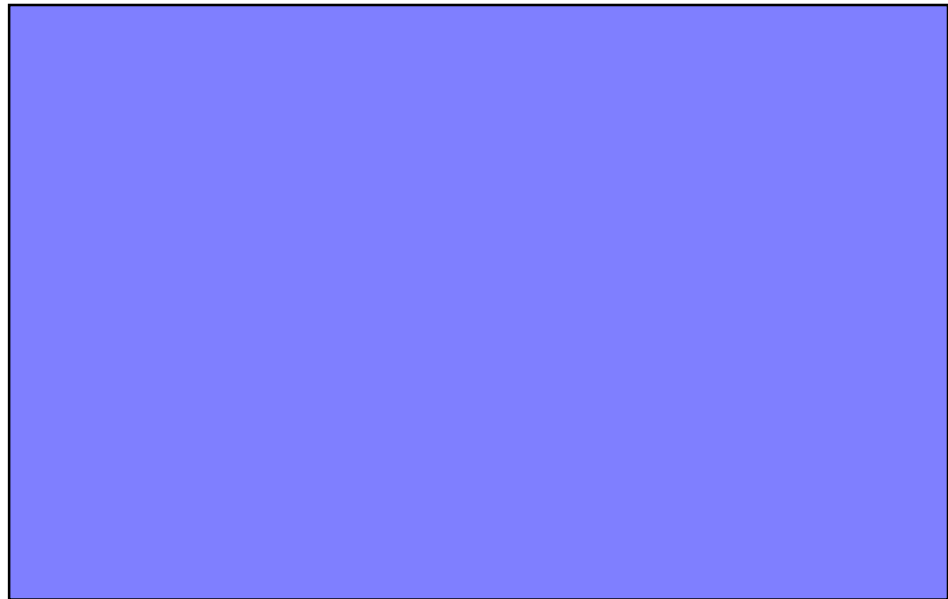
The seminars also provide time for "cycling, fishing, golfing, hiking and horseback riding."⁴⁴

FREE boasts that nearly one-third of the federal judiciary has either attended or asked to enroll in a future FREE seminar and that, in 1996, nearly 150 federal judges applied for 54 seminar openings. FREE's seminars have been particularly popular with the judges appointed to the bench by Presidents Reagan and Bush. Seventy-eight of the 109 federal judges (72%) attending FREE's seminars, and 27 of 36 appellate court judges (75%) were appointed by Presidents Reagan and Bush (see graph, page 36).

The seminars have also been very popular with the judges on the Federal Circuit and the Court of Federal Claims that are revolutionizing federal takings law. Judges Michel, Mayer, Newman, Rader and Plager of the Federal Circuit, and Chief Judge Smith, and Judges Futey, Robinson, Turner, Yock from the Court of Federal Claims have all attended FREE Seminars; Judges Plager and Michel have each attended two FREE seminars since 1992.⁴⁵

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SOURCE: FREE invitation to federal judges (on file with Community Rights Counsel)

FREE's judicial seminars are funded by the same foundations — the Olin Foundation, the Carthage Foundation, the Sarah Scaife Foundation and the M.J. Murdoch Foundation — that are funding groups such as the Pacific Legal Foundation, the Defenders of Property Rights and the New England Legal Foundation to litigate takings cases in courts such as the Federal Circuit. So, for example, the Olin Foundation simultaneously funded the New England Legal Foundation to litigate on behalf of the property owners in the landmark Federal Circuit case, *Preseault v. United States*,⁴⁶ and FREE to provide judicial seminars for several of the Federal Circuit judges that decided to hear the *Preseault* case "en banc" and ruled in favor of the NELF.⁴⁷ Similarly, the M.J. Murdoch Foundation has been both a large contributor to FREE⁴⁸ and the Pacific Legal Foundation,⁴⁹ which has appeared before the Federal Circuit as an amici in the seminal *Florida Rock* and *Loveladies Harbor* cases.⁵⁰ Finally, through the Carthage Foundation, Richard Mellon Scaife is the largest single contributor to FREE⁵¹ and PLF,⁵² and one of the largest supporters of the Defenders of Property Rights, "[t]he nation's only legal defense foundation dedicated exclusively to the protection of property rights."⁵³ Through the other foundation Scaife heads, the Sarah Scaife Foundation, Scaife is also one of the largest contributors to NELF.⁵⁴

PROCEDURAL REFORM LEGISLATION

This term in Congress, proponents of the Takings Project, most notably the National Association of Homebuilders, have turned to the Project's congressional supporters for legislation designed to grease the wheels of the Takings Project.⁵⁵ In particular, the NAHB drafted⁵⁶ and turned the full force of its lobbying capability behind the Private Property Implementation Act of 1997 (H.R. 1534).⁵⁷ H.R. 1534 (and its Senate companion bill, S. 1204) would expand the

jurisdiction of the federal courts over takings claims, eliminate procedural requirements that encourage judicial restraint (such as the requirement that potential litigants “exhaust” non-judicial relief before bringing suit), and require the government to pay the legal fees of developers who win in court. Despite the strong opposition of the Judicial Conference of the United States, 37 state Attorneys General, the American Planning Association, the National Governors Association, the National Conference of State Legislatures, the National League of Cities and the U.S. Conference of Mayors, H.R. 1534 passed the House of representatives on October 22nd by a 248 to 178 vote. The Senate equivalent, S. 1204, has now garnered 31 co-sponsors.

Equally notable simply for its audacity is Sen. Orrin Hatch’s (R-Utah) Citizens Access to Justice Act of 1997 (S. 1256) and its companion bill in the House, H.R. 992. Hatch’s takings bill would add to S. 1204 provisions that would significantly expand the jurisdiction of the Court of Federal Claims and other federal district courts to hear takings cases against the federal government, giving takings plaintiffs the opportunity to forum shop between their local federal district court and the Court of Federal Claims.⁵⁸ Moreover, to “assure uniformity in property rights law,” Hatch’s bill would vest in the Federal Circuit exclusive appellate jurisdiction to hear takings cases against the federal government from every district court in the nation. While declaring, in other words, that “a judicial activist on the left or the right, is not, in my view, qualified to sit on the federal bench,”⁵⁹ Hatch’s legislation would reward the nation’s most activist court on property rights with significant new powers to shape the direction of takings law in this country. (As this Report was going to print, the Senate Judiciary Committee voted Senator Hatch’s proposed takings legislation out of committee on a 10-8 party line vote and the House of Representatives passed H.R. 992.)

BANKROLLING THE TAKINGS PROJECT: THE FUNDING VISION OF WILLIAM SIMON AND RICHARD MELLON SCAIFE

Finally, a word about the sponsors. While the Takings Project has received funding from every major conservative foundation and a wide variety of corporations, developers and individuals, the campaign is, to a remarkable extent, the funding vision of two prominent conservatives philanthropists: William Simon, now president of the Olin Foundation, and Richard Mellon Scaife, chair of the board of both the Carthage and the Sarah Scaife Foundations. These two funders have helped start or maintain virtually every non-profit organization playing an important role in the Takings Project. In many, if not most cases, these foundations are the organizations’ largest single contributors.

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**1993-95 Grants by Olin, Scaife and Carthage
Foundations to Principal Takings Project Participants**

Grantee	Olin	Scaife	Carthage	Totals
Defenders of P. Rights			\$250,000	\$250,000
Federalist Society	\$470,000	\$350,000	\$50,000	\$870,000
FREE	\$25,000		\$200,000	\$225,000
Institute for Justice	\$125,000	\$195,000		\$320,000
New England Lgl Fndn	\$35,200	\$100,000		\$135,200
Pacific Lgl Fndn	\$50,000	\$375,000		\$425,000
Washington Lgl Fndn	\$275,000		\$1,600,000	\$1,875,000
Totals	\$980,200	\$1,020,000	\$2,100,000	\$4,100,200

SOURCE: FoundationAnnual Reports, 1994-97 Foundation Grant Indices.

Simon, the Secretary of Treasury under Presidents Nixon and Ford, wrote a blueprint for organizing the conservative agenda in his 1978 book "Time for Truth." In it, Simon argues that "[f]unds generated by business (by which I mean profits, funds in business foundations and contributions from individual businessmen) must rush by multimillions to the aid of liberty. . . to funnel desperately needed funds to scholars, social scientists, writers and journalists who understand the relationship between political and economic liberty."⁶⁰ Since then Simon, first at the Institute for Educational Affairs (IEA) (which Simon helped found in 1978 with Irving Kristol)⁶¹ and now as the President of the Olin Foundation, has worked to transform that vision into reality. At IEA, Simon simultaneously granted money to Epstein to help publish Takings and helped start the Federalist Society. The foundation he now runs, the John M. Olin Foundation, grants over \$20 million to conservative causes each year. Among Simon's regular grantees are: the Cato Institute's Center for Constitutional Studies, the Federalist Society, FREE, George Mason's Center for Law and Economics, the Institute for Justice, the Landmark Legal Foundation, the Pacific Legal Foundation and the Washington Legal Foundation.⁶²

Richard Mellon Scaife's support for the Takings Project has been even more extensive both in length and breadth. The Wall Street Journal has called Scaife "the financial archangel for the [conservative] movement's intellectual underpinnings"⁶³ and this title fits the role he has played in the Takings Project. In the 1980's, the Sarah Scaife Foundation was among the largest foundation funders of the Federalist Society, the Institute for Educational Affairs and many of then-fledgling conservative legal foundations. For example, in 1987, the Foundation awarded \$60,000 to both the Federalist Society and the Institute for Education Affairs, \$110,000 to the Pacific Legal Foundation and the Washington Legal Foundation and \$25,000 to the Southeast Legal Foundation.⁶⁴

In the 1990s, Carthage has been the single largest contributor to FREE, the Defenders of Property Rights, and the Washington Legal Foundation, and a generous contributor to the Landmark Legal Foundation⁶⁵ and the Pacific Legal Foundation.⁶⁶ The Sarah Scaife Foundation regularly funds the Cato Institute's Center for Constitu-

tional Studies, PLF, NELF, Southeastern Legal Foundation, Landmark Legal Foundation, the Federalist Society, the Institute for Justice, and George Mason’s Law and Economics Center.⁶⁷

Endnotes

- ¹ See NATIONAL DIRECTORY OF NON-PROFIT ORGANIZATIONS (1997-98 ed); THE RIGHT GUIDE, A GUIDE TO CONSERVATIVE AND RIGHT-OF-CENTER ORGANIZATIONS (1997) [hereinafter THE RIGHT GUIDE]; see also Roger K. Newman, *Public-Interest Firms Crop Up on the Right, Suits with Agendas*, NAT'L L.J. Aug. 26, 1996, at 22 ("funding from upwards of 500 corporations and foundations provides a \$3.5 million annual budget [for the Washington Legal Foundation], matched only by that of the Pacific Legal Foundation"); Institute for Justice webpage <<http://www.instituteforjustice.org>> (Institute's FY 1996 budget exceeds \$2 million); see also DAVID HELVARG, THE WAR AGAINST THE GREENS, at 21—22 ("[t]he Defenders [of Property Rights] works closely with the Federalist Society, the Competitive Enterprise Institute, and the Washington Legal Foundation, three members of a nationwide network of twenty-two pro-business, public interest law firms that do anti-environmental lawsuits and litigation on a pro bono basis, providing the anti-green movement with tens of millions of dollars in free legal services.").
- ² See Nancie G. Marzulla, *The Property Rights Movement: How it Began and Where It is Headed*, in LAND RIGHTS: THE 1990'S PROPERTY RIGHTS REBELLION (Bruce Yandle ed., 1995).
- ³ See Charles Fried, *Protecting Property—Law and Politics*, 13 HARV J. L. & PUB. POL'Y 44, 48—49 (1990).
- ⁴ Richard Perez-Pena, *A Rights Movement that Emerges From the Right*, NY. TIMES, Dec. 30, 1994, at B6 (quoting Richard Samp of the Washington Legal Foundation).
- ⁵ See The Right Can't Have It Both Ways, *supra* Ch. 1, note 7.
- ⁶ PACIFIC LEGAL FOUNDATION, 1996 Annual Report.
- ⁷ David Helvarg, *Legal Assault on the Environment*, THE NATION, Jan 30, 1995, at 126 (quoting Jim Burling, PLF's Litigation Director).
- ⁸ See PACIFIC LEGAL FOUNDATION, 1996 ANNUAL REPORT (1997).
- ⁹ See Jack Woodward, *David v. Goliath: Pacific Legal Foundation is Changing Regulatory Law in the United States*, Undated PLF Pamphlet; Robert P. King, *Property Rights Crusaders Move in on Florida Growth Laws*, THE PALM BEACH POST, May 29, 1997, at 1A "We only take precedent-setting cases. . . [o]ur effort is to change the law." *Id.* (quoting Richard R. Bradley, PLF's Director of Strategy and Development).
- ¹⁰ Maura Dolan, *Giving the Right Their Day in Court*, L.A. TIMES, Feb. 8, 1996, at A1 ("Foundation lawyers comb newspapers looking for cases that have a chance of going to the U.S. Supreme Court and in which they can offer friend-of-the-court arguments. Like-minded conservatives also refer cases, and the group occasionally represents people who call with problems").
- ¹¹ The four cases are *Nollan v. California Coastal Comm'n*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 293 (1997).
- ¹² H. Jane Lehman, *Owners Aren't Giving Ground in Property Battles*, CHICAGO TRIBUNE, Feb. 9, 1992, at 1.

- ¹³ Institute for Justice web site, visited Feb 6, 1998, <http://www.instituteforjustice.org>. (staff biography).
- ¹⁴ See Institute for Justice, *supra* Ch.4, note 13, The Court of Public Opinion (quoting George F. Will Mar. 7, 1993). see also William H. Mellor, III, *Can Washington Change?*, REASON, August 18, 1996, at 26 (“the more propitious focus for libertarians should be away from issues defined by Washington politics and on such matters as establishing a rule of law conducive to a society of free and responsible individuals. Whether the issue is economic liberty, property rights, or the First Amendment, the Constitution provides a means to check Washington’s real-world impact”).
- ¹⁵ See Institute for Justice, *supra* Ch.4, note 13, Electronic Brochure, Institute for Justice Approach: Private Property Rights.
- ¹⁶ See, *Suitum v. Tahoe Regional Planning Agency*, No 96-243, Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner (Nov. 29, 1996); *Dolan v. Tigard*, No 93-518 (Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner (Jan. 13, 1994); *Lucas v. South Carolina Coastal Council*, 91-453 Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner (Jan. 2, 1992).
- ¹⁷ THE RIGHT GUIDE, *supra* Ch.4, note 1 AT 122.
- ¹⁸ Margaret Kriz, *Taking Roots in Property Rights*, Nat’l J at 2133 (October 6, 1996).
- ¹⁹ THE RIGHT GUIDE, *supra* Ch.4, note 1 AT 122.
- ²⁰ See James Andrews, *Conservative Law Groups Adopt the Liberal Model*, CHRISTIAN SCIENCE MONITOR, Oct 3, 1994 (Meese conducts monthly meetings of “the growing field of conservative and libertarian lawyers who battle for property rights and against the regulation they consider harmful to economic growth”); Roger K. Newman, *Public Interest Law Firms Crop up on the Right*, NAT’L L J., Aug. 26, 1996, at A22 (“One of the behind-the-scenes forces in coordinating such legal campaigns has been Edwin Meese III. . . . He chairs a monthly meeting in Washington of representatives of upwards of a dozen groups that network, exchange ideas and discuss what each is doing.”); see also HELVARG, *supra* Ch.4, note 1, at 21—22 (“[A] nationwide network of twenty-two probusiness ‘public interest’ law firms . . . coordinate through an annual meeting sponsored by the Heritage Foundation”).
- ²¹ See Newman, *supra* Ch.4, note 20, at A22 (“Conservative law firms. . . tak[e] advantage of millions of dollars of pro bono time offered by law firms.”); FEDERALIST SOCIETY 1996 ANNUAL REPORT 8 (1997).
- ²² See William G. Castagnoli, *What is the WLF and Why Is It Challenging the FDA?*, MED. MARKETING & MEDIA, Apr. 1995 at 27, 28, 32.
- ²³ See FEDERALIST SOCIETY, 1996 ANNUAL REPORT 4, 10 (1997).
- ²⁴ See *id.* at 8 (listing the Institute for Justice, the Pacific Legal Foundation and the Washington Legal Foundation as among the organizations that have taken advantage of the Society’s “pro bono apparatus”).
- ²⁵ See *id.*
- ²⁶ As takings challenges have become more viable, there has developed an increasingly lucrative for-profit practice in representing property owners, encouraging the founders of the more prominent legal foundations to

establish for-profit affiliates to litigate takings cases on behalf of fee-paying developers, *see Love Your Work?*, LEGAL TIMES, Nov. 24, 1997, at 3 (“Noted environmental and property rights lawyer Roger Marzulla has left the D.C. office of Akin, Gump, Strauss, Hauer & Feld to open shop with his wife Nancie Marzulla. Marzulla & Marzulla, launched [early this month,] is sharing space with the nonprofit Defenders of Property Rights, where Nancie Marzulla doubles as President. The new firm is primarily representing smaller clients in litigation against the government.”); THE RIGHT GUIDE, *supra* Ch.4, note 1, at 253 (PLF also contracted the Sacramento firm of Zumbrun, Best & Findley for management and legal services. The firm was paid \$212,661. The firm is affiliated with PLF president, Ronald Zumbrun, who is paid as an independent contractor through the firm.).

²⁷ NATIONAL DIRECTORY OF NON-PROFIT ORGANIZATIONS (1997—1998 Ed.).

²⁸ DIRECTORY OF ASSOCIATIONS AT 100 (1997 Ed.).

²⁹ *See* Brief Amici Curiae of the National Association of Home Builders and the Building Industry Legal Defense Foundation in Support of Petitioner, at 1 *Suitum v. Tahoe Regional Planning Agency*, No. 96—243, 1997 U.S. LEXIS 3233 (listing “myriad” of Supreme Court cases in which the NAHB has appeared as an amicus on behalf of developers); Steve Ketch, *Builders Seek Protection of Property Rights*, CHIC. TRIB., Jan. 25, 1987 (“[t]he [NAHB] has a litigation program that aids local associations in certain cases where suits to protect property rights are involved.”).

³⁰ *See* National Ass’n of Home Builders v. City of Los Angeles, No. 96—55274, 1997 U.S. App. LEXIS 13877 (9th Cir. June 9, 1997); National Ass’n of Home Builders v. Chesterfield County, No. 95—3213, 1996 U.S.App. LEXIS 18838 (4th Cir. June 30, 1996); *see also* National Ass’n of Home Builders v. Babbitt, 949 F.Supp. 1 (DC Cir. 1996).

³¹ THE FEDERALIST SOCIETY, MEMBERSHIP & BENEFITS (nd.).

³² Terry Carter, *A National Revival Meeting for Takings Lawyers*, CHICAGO DAILY LAW BULLETIN, Apr 2, 1992 at 2.

³³ *See id.*

³⁴ *Id.*

³⁵ Letter from Julia Levin, *National Heritage Institute*, and Enrico Nardone, *National Audubon Society*, to Charles Alan Wright, President, *The American Law Institute* (Oct 24, 1996) (on file with CRC).

³⁶ Institute for Justice, *supra* Ch.4, note 13.

³⁷ *Id.*

³⁸ *Id.* (quoting J. Stanley Marshall, Chairman, THE JAMES MADISON INSTITUTE).

³⁹ *See* Alliance For Justice, *Justice For Sale* 70—82 (1993).

⁴⁰ FREE was founded and is directed by John Baden a “free market environmentalist,” who along with Richard Epstein serves as an adjunct scholar at the libertarian Cato Institute *See* *Cato Institute* webpage (<http://www.cato.org/>). Baden is a vocal proponent of strong constitutional protection of property rights. According to Baden “property rights are under siege” from environmental regulations such as the Endangered Species Act, *see* John Baden, *Property Protection and Property Rights in Harmony*, SEATTLE TIMES, Mar. 30, 1993, at A7 and “[t]he Constitution requires due compensation when government takes or restricts private owners’ property.” John A. Baden, *A Green Campaign Speech For A*

Better Environment, SEATTLE TIMES, Nov. 13, 1996, at B5. Baden's other credentials include editing *Environmental Gore*, see ENVIRONMENTAL GORE (John A. Baden ed., 1994), a collection of essays critiquing Vice President Gore's EARTH IN THE BALANCE which includes an essay by Nancy Marzulla arguing that property rights are the "underpinning" of all the rights protected by the constitution and that private property rights should be society's "central organizing principle." See *id.* at 219—21 (quoting Gore's EARTH IN THE BALANCE).

- ⁴¹ See James L. Huffman, *A Coherent Takings Theory At Last: Comments on Richard Epstein's Private Property and the Power of Eminent Domain*, 17 ENVTL. L. 153, 177 (1986) ("Epstein is on the right track in urging judicial activism . . ."); James L. Huffman, *Judge Plager's "Sea Change" in Regulatory Takings Law*, 6 FORD. ENVT'L L.J. 597, 609 (1995) (praising Judge Plager's opinion in *Florida Rock*, but suggesting that it could have been improved by an even closer adherence to the doctrine outlined by Professor Epstein). Huffman also serves as a board member of the Oregonian's in Action Legal Center, a the non-profit property rights group with a mission to "protect Constitutional rights of landowners . . . through litigation," that litigated *Dolan v. City of Tigard* before the Supreme Court. See THE RIGHT GUIDE, *supra* Ch.4, note 1 at 251—52.
- ⁴² FREE invitation to federal judge dated Jan 7, 1996 (on file with CRC)("Conference and travel expenses are paid and time is provided for cycling, fishing, golfing, hiking, and horseback riding"). See also FREE webpage<<http://www.free-eco.org/free>>.
- ⁴³ See FREE, *supra* Ch.4, note 42 (web page).
- ⁴⁴ FREE invitation to federal judge dated Jan 7, 1996 (on file with CRC).
- ⁴⁵ *Id.*; Judges Financial Disclosure forms (copies on file with CRC).
- ⁴⁶ In 1994, the Olin Foundation gave \$50,000 to the New England Legal Foundation, the Plaintiff's counsel in *Preseault*, for "property rights litigation" JOHN M. OLIN FOUND. INC., 1994 ANNUAL REPORT (1994).
- ⁴⁷ In 1995, the Olin Foundation gave \$25,000 to FREE to support their judicial seminars, see JOHN M. OLIN FOUND. INC., 1995 ANNUAL REPORT (1995). FREE attendees, Judges Plager, Mayer, Newman and Rader provided four of the six votes for *Preseault*. *Preseault* 100 F.3d 1525 (Fed. Cir. 1996); Judges Financial Disclosure Forms (copies on file with CRC).
- ⁴⁸ M.J. Murdoch Charitable Trust, 1993 Grants Approved by Classification (\$78,000 grant to FREE); 1995 Annual Report (\$150,000 grant to FREE in 1995).
- ⁴⁹ 1994 Foundation Grant Index at 330 (\$200,000 grant from Murdoch to PLF in 1992); 1994 Annual Report (\$200,000 to PLF in 1994); 1996 Annual Report (\$200,000 to PLF in 1996).
- ⁵⁰ See SARAH SCAIFE FOUNDATION, 1995 ANNUAL REPORTS 9 (1995) (reporting grants to PLF of \$200,000 and \$175,000, respectively). Sarah Scaife Foundation's 1995 Annual Report makes special note of PLF's work in litigating property cases: "[f]or more than twenty years, the Pacific Legal Foundation has supported the preservation of individual and economic freedoms as set forth in the Constitution. Its successes in litigating property rights cases ensure its position as a leader in strengthening these guarantees for the general public." *Id.* Scaife granted \$200,000 to PLF "to enable the Pacific Legal Foundation to continue its work." *Id.*

- ⁵¹ See *CARTHAGE FOUNDATION 1993—96 ANNUAL REPORTS* (1993, 1995 & 1996) (reporting grants to FREE of \$100,000 in 1993, 1995 & 1996, 1993 Foundation Grants Index at 655 (\$100,000 grant to FREE in 1990).
- ⁵² 1994 FOUNDATION GRANTS INDEX at 327 (in 1991, Carthage granted \$75,000 to PLF); 1993 FOUNDATION GRANT INDEX at 307 (in 1990, Carthage granted \$275,000 to PLF).
- ⁵³ See *THE RIGHT GUIDE*, *supra* Ch.4, note 1 at 122.
- ⁵⁴ The question of whether Federal Circuit judges, by attending these seminars, actually violate the ethical restrictions imposed by the Ethics Reform Act of 1989 appears to be an open one. See 5 U.S.C. §7353 (a)(2)-(b)(1). The law provides that judges, shall not “accept anything of value from a person . . . whose interests may be substantially affected by the performance or nonperformance of the individual’s official duties” unless the gift is permitted under “reasonable exceptions” established by the Court’s ethics office. See *id.* The Court’s ethic’s office, the Administrative Office of the United States Courts, in turn, has approved judges attending educational seminars unless “the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics covered in the seminar are likely to be in some matter related to the subject matter of such litigation.” Advisory Committee on Codes of Conduct, Advisory Opinion No. 67. The questions of whether the required inquiry into the “source of funding” for the seminars reaches to the foundations funding FREE, and whether the foundations that simultaneously fund FREE and litigation in the Federal Circuit are “involved” in litigation within the meaning of the ethics rule have not, to date, been addressed by the Administrative Office.
- ⁵⁵ The proponents of the Project turned to procedural reform after spending much of the 104th Congress trying, unsuccessfully, to pass legislation changing the substantive standards applicable to takings cases. See Allan Freedman, *Property Rights Advocates Climb the Hill to Success*, CONGRESSIONAL QUARTERLY, Oct. 25, 1997.
- ⁵⁶ See John Brinkley, *Lobby Gave Landowner Property Rights Measure*, VENTURA COUNTY STAR, Nov 5, 1997, at A1 (“Rep. Elton Gallegly said his bill to give landowners expedited access to federal courts was written for the benefit of ‘ordinary landowners,’ but, in fact, its author was an attorney for the National Association of Home Builders.”); see also Jim Vande Hei, *Home Builders, Pressured By GOP, Stay Out of N.Y.*, ROLL CALL, Oct 23, 1997 at 1 (“According to documents obtained by Roll Call, officials of the Home Builders wrote Rep. Elton Gallegly’s (R-Calif.) private property bill, a top issue for the association that hit the House floor yesterday”).
- ⁵⁷ See Freedman, *supra* Ch.4, note 55, at 2591 “It is a classic tale of Washington influence and how a single association responsible for \$295,250 in campaign contributions in the first six months of 1997 and \$57,500 in soft money contributions to both parties mobilized support with a small army of lobbyists . . .” *Id.*
- ⁵⁸ See *The Citizens Access to Justice Act of 1997*, S 1256, §5 (1997).
- ⁵⁹ Anthony Lewis, *The War on the Courts*, NY TIMES, Oct. 27, 1997 at A23. Even though President Clinton has generally appointed more moderate, older, more experienced jurists to the bench than his predecessors, the Senate confirmed just 17 judges in 1996—the lowest election-year total in over 40 years—and 36 judges in 1997. Lewis calls “the campaign by

the far right to block President Clinton's appointments to the Federal Courts" "as important as any political effort in this country today." *Id.*

- ⁶⁰ STEFANIC & DELGADO, *supra* Ch. 3, note 22, at 90 (quoting WILLIAM E SIMON, A TIME FOR TRUTH (1978)).
- ⁶¹ *See* STEFANIC & DELGADO, *supra* Ch. 3, note 22, at 110. According to Stefanic and Delgado, the IEA was formed by the John M. Olin, Sarah Scaife, JM, and Smith Richardson foundations to serve as a clearinghouse for corporate philanthropy, linking conservative scholars and thinkers seeking funding with corporations and foundations wishing to further a conservative public policy agenda. *See id.* at 109—110. In 1990, the IEA merged with the Madison Center and became the Madison Center for Educational Affairs. *Id.*
- ⁶² *See* JOHN M. OLIN FOUND., INC. 1996 ANNUAL REPORT.
- ⁶³ PHIL KUNTZ, CITIZEN SCAIFE, WALL STREET JOURNAL, OCT 25, 1995.
- ⁶⁴ FOUNDATION GRANT INDEX, 18TH EDITION, (1989) AT 651-52.
- ⁶⁵ *See* CARTHAGE FOUNDATION, ANNUAL REPORT 1993-1996.
- ⁶⁶ *See* 1993 FOUNDATION GRANTS INDEX AT 307 (\$275,000 in grants in 1990).
- ⁶⁷ *See* SARAH SCAIFE FOUNDATION, INC., ANNUAL REPORTS 1994-1996.