six of its satellites to a private company, and Inmarsat has agreed to privatize all but its public-safety services.

Several members of Congress, believing that privatization cannot be achieved unless mandated by the U.S., have introduced legislation intended to force the ISOs to privatize. H.R. 1872 would close the U.S. market to INTELSAT and Inmarsat, their privatized spin-offs and successors, and all U.S. entities that use their facilities, unless the ISOs meet the bill's rigid criteria, and do so by dates certain. H.R. 1872 has been criticized by some for hamstringing the government's ability to negotiate with other countries, and for adopting—allegedly for the purpose of enhancing competition—a protectionist strategy that benefits certain U.S. satellite companies by excluding their most likely international rivals from the market. What has received less attention is that H.R. 1872 would effect the largest confiscation of private property in recent times, exposing the U.S. to billions of dollars in claims for compensation.

The problem is this: The United States actually does not hold any investment in the ISOs. Private investors have committed massive amounts of capital to fund the ISOs, and they have done so at the behest of the U.S. government, in furtherance of declared national policy. When Congress passed the Communications Satellite Act of 1962, 47 U.S.C. §§701 *et seq.*, it determined that ''United States participation in the global system shall be in the form of a private corporation, subject to appropriate regulation.'' 47 U.S.C. §701(c). Congress therefore authorized the creation of a new company, COMSAT, to be the sole operating entity in INTELSAT. In 1978, Congress also made COMSAT the sole U.S. participant in Inmarsat.

By statute, COMSAT is a ''corporation for profit'' and not ''an agency or establishment of the United States government.'' 47 U.S.C. §731. It has never been funded or otherwise subsidized by the United States. Rather, Congress authorized and expected COMSAT to raise capital by selling shares of voting capital stock ''in a manner to encourage the widest possible distribution to the American public,'' 47 U.S.C. §634(a), and by selling its securities to private investors. See 47 U.S.C. §§721(c)(8), 734(c). COMSAT's stock trades on the New York Stock Exchange, and its current market capitalization is over $2 billion.

The INTELSAT and Inmarsat Operating Agreements (which COMSAT was directed by the U.S. government to sign) obligate COMSAT to meet periodic capital calls. At the end of 1997, COMSAT owned roughly 18% of INTELSAT, with a carrying value of approximately $402 million, and roughly 23% of Inmarsat, with a carrying value of approximately $223 million. COMSAT is pledged to invest another $332 million in INTELSAT. In addition, it has invested hundreds of millions in shareholder capital outside the ISOs in order to provide INTELSAT and Inmarsat services to the U.S. public.

H.R. 1872 could substantially impair, or perhaps destroy, that investment. The bill sets conditions for privatization that the State Department concedes are too onerous for other countries to accept. The entity that INTELSAT recently agreed to privatize would not qualify, nor would the privatized Inmarsat. Some have argued that the bar has intentionally been set too high, at the request of U.S. companies seeking protection for competition, so that the market-closing sanctions that accompany a failure to meet the criteria will be triggered.

During the transition to privatization, H.R. 1872 would effectively bar the ISOs from deploying satellites to new orbital locations or replacing obsolete satellites at the end of their lives. Moreover, H.R. 1872 declares that if ''substantial and material progress'' is not made, year by year, toward meeting the bill's conditions, COMSAT will be barred from providing high-speed data, Internet, and land mobile service—even though it relies on such services now for significant portions of its revenue. In addition, COMSAT would be frozen in time while the rest of the marketplace moved forward; it could not provide additional services, or additional applications of existing services.

If privatization is not achieved in exactly the time and manner specified, the bill would limit COMSAT to the provision of so-called ''core'' services, defined as force telphony and occasional use services for INTELSAT, and emergency services (now provided at no charge) for Inmarsat. But the refuge of these ''core'' services may well be illusory, because changes in technology are causing these markets to disappear. Voice traffic, for example, is migrating rapidly from satellites to fiber-optic cables, and a voice-only provider likely would see its market slip away in a world of converging voice and data services.

Moreover, H.R. 1872 imposes further sanctions that could cripple COMSAT *whether or not the ISOs privatize.* Most significantly, the bill would give *every one* of COMSAT's customers the unilateral right to abrogate its contracts with the company. Such sweeping Congressional abrogation of the private contract rights of a single company—without any judicial determination of wrongdoing—may be unprecedented in U.S. history .

Constitutional Analysis. WLF has concluded that, if adopted, H.R. 1872 would effect a substantial compensable taking of private property. The bill would impair COMSAT's substantial investments in and for INTELSAT and Inmarsat, thus imposing on COMSAT's shareholders virtually the entire cost of a congressional policy change. The Takings Clause of the Fifth Amendment is ''designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'' Armstrong v. United States, 364 U.S. 40, 49 (1960). Congress may not induce a company to invest its private capital, and then turn around and declare that policy changes have made the investment unnecessary, without compensating that company for the assets dedicated to public use.

WLF has concluded that if H.R. 1872 passes, COMSAT may have legitimate claims for compensation for its taken investments. Government's regulation of the uses to which private property may be put can ''take'' that property, just as if the government had seized the property. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017–18 (1992); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163–64 (1980). The Supreme Court has articulated three factors that determine whether usage regulation goes so far as to constitute a taking: ''the economic impact of the regulation on the claimant,'' the ''extent to which the regulation has interfered with distance investment-backed expectations,'' and ''the character of the governmental action.'' Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

H.R. 1872 bears all the indicia of a regulation that, in Justice Holmes's words, goes ''too far.'' Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922). Based on WLF's understanding of the situation, the bill would have a devastating economic impact on COMSAT, immediately stranding hundreds of millions of dollars of investments made to provide (and useful solely for providing) banned services, and ultimately relegating the company to providing an ever-shrinking core of services with ever-more-obsolete technologies. Moreover, H.R. 1872 appears to interfere with COMSAT's investment-backed expectations. If COMSAT had not legitimately expected that it would be allowed to pursue a profit on its INTELSAT and Inmarsat investments, it would have been irrational for COMSAT to have made them, and for its shareholders to have contributed capital to the company.

Nor does H.R. 1872 merely ''adjust the benefits and burdens of economic life to promote the common good,'' with only an incidental effect on COMSAT. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225 (1986). It is true that COMSAT's actions have always been subject to regulation, cf. id. at 226–227. But H.R. 1872 goes well beyond the ordinary regulatory adjustment that such an actor must expect. It rejects the most basic premise of COMSAT's existence: that a global ''commercial communications satellite system,'' built ''in conjunction and cooperation with other countries,'' will best ''serve the communications needs of the United States and other countries.'' 47 U.S.C. §701(a). In light of this language, the backers of H.R. 1872 cannot reasonably maintain that COMSAT should have expected that the U.S. would seek to exclude INTELSAT and Inmarsat from the market altogether. See Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1010–11 (1984) (where company submits trade secrets to EPA upon statutory assurance that EPA will not disclose them, later amendment of statute to permit disclosure works a taking); United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990) (where mining company invested $5 million to explore for uranium on tribal lands in reliance on Interior Department approval, company could not be expected to foresee Interior's decision six years later to allow tribe to cancel the land claims, and decision worked a compensable taking).

Finally, H.R. 1872 does not ''substantially advance'' its stated regulatory goal: securing the privatization of INTELSAT and Inmarsat. See Lucas, 505 U.S. at 1016. To the contrary, by setting the bar as high as it does, the bill guarantees that privatization will fail and that COMSAT will be expelled from the U.S. market. Congress may legitimately decide that it no longer wants COMSAT to serve its historic role. But if it does so, it is required by the Fifth Amendment to compensate COMSAT's shareholders for the capital they have put in public service at the government's request.

Please let us know if you seek further legal counsel from WLF on this issue.

Sincerely,

DANIEL J. POPEO,
General Counsel.

[From the Washington Times, Apr. 27, 1998]

DEREGULATION OR PLAIN OLD THEFT?

(By Nancie G. Marzulla)

More than 30 years ago, hundreds of Americans invested in an idea: that communications satellites could benefit their nation and the world. The result was COMSAT, a Maryland-based shareholder-owned company that successfully launched the United States to the apex of the satellite industry.

Today, however, if a bill now being considered in Congress passes, these investments will be in jeopardy. Some in Congress and elsewhere seem to have forgotten the Constitution's Fifth Amendment prohibition against uncompensated ''takings.'' In their quest for deregulation, they've proposed federal legislation that could end up costing the U.S. Treasury hundreds of millions, if not billions, of dollars to cover COMSAT's takings claims.

In the process, these ''takers'' would be sending a clear message to current and future investors: Risk your money, but don't