

Mr. DINGELL. Mr. Chairman, I move to strike the requisite number of words.

(Mr. DINGELL asked and was given permission to revise and extend his remarks.)

Mr. DINGELL. Mr. Chairman, the amendment gets to the nub of the question. It says this, and I can understand why the opponents of the amendment are so distressed about it, because it says,

In implementing the provisions of this section, the Commission shall not restrict the activities of COMSAT in a manner which would create a liability for the United States under the Fifth Amendment to the Constitution.

What is wrong with that amendment? All it says is that the Commission has to respect the Constitution and cannot create a liability on the taxpayers because we have engaged in an unconstitutional taking or because we have violated the provisions of the Tucker Act.

I want my colleagues to listen to what the Washington Legal Foundation said. By the way, the gentleman from Virginia (Mr. BLILEY) is a major contributor to that agency and has sent them a wonderful letter in which he told them how he wanted to support the good work of that foundation. Here it is. This is what they had to say:

In response to your written request for counsel, the Washington Legal Foundation has undertaken a legal analysis of H.R. 1872. After the consideration of H.R. 1872, WLF has concluded that H.R. 1872 would indeed effect a compensable taking of private property belonging to COMSAT, as well as a material breach of the terms of the compact between the United States and COMSAT. WLF's conclusion should not be construed as endorsement or opposition to H.R. 1872.

They are giving you a clear warning. The amendment says that the Commission cannot subject your constituents and mine to that kind of liability. I would want to observe something else. What this bill does is to impair contract rights of COMSAT and to impair the value, the good will and the corporate assets of that corporation.

The Supreme Court has been very clear on this point. They have said that the most significant factor in determining whether economic regulation constitutes a taking is the extent to which, and I quote now from the Supreme Court, "the regulation has interfered with the owner's reasonable investment-backed expectations." That is from the Penn Central case, *Penn Central Transportation Company v. The City of New York*, 438 U.S. 104, 124, dated 1978.

They went on to say some other things which I think are important. They went on to say, "The simple words," and I am now interpolating, the Supreme Court said "that Congress may at any time alter, amend and repeal this act * * * cannot be used to take away property already acquired * * * or to deprive" a private "corporation of the fruits already reduced to possession of contracts lawfully made."

We are here with considerable diligence in this legislation interfering in

the contract rights of COMSAT. COMSAT's officers are, at the proper responsibility and under the insistence of their shareholders, most assuredly going to file suit under the Tucker Act. I can offer my colleagues firm assurances that the judgment that will be awarded to COMSAT will be most generous and it will be done at the expense of your constituents unless this body has the wisdom to adopt the amendment offered by the gentlewoman from Maryland.

It should be observed, this does not do anything, the amendment, except to assure that there will be no liability imposed on our constituents because of an unconstitutional taking by this body. I urge my colleagues to keep that thought in mind. You have a responsibility to pass legislation in this body which observes the Constitution, but which also does not subject our taxpayers to a liability for wrongful acts taken by this Congress.

I would urge my colleagues to keep carefully in mind that the sums here are not piddling. They amount to billions of dollars. My question to my colleagues, Mr. Chairman, is, do you want the responsibility on your soul and on your conscience of having dissipated this enormous sum of money and subjected your taxpayers to that kind of liability?

Mr. COX of California. Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, I think we have just heard from the ranking member on the Committee on Commerce that he is prepared to accept as a norm for debate and decision in the House in futuro the decisions of the Washington Legal Foundation. I think that will actually help us a great deal here in our deliberations in the House. I think he is quite right, the Washington Legal Foundation is a fine outfit. I will look forward to holding the ranking member to his new principle.

But the Washington Legal Foundation, which he sings the praises of, has written us a letter subsequent to the one that he is describing that says, "I want to make it very clear, the Washington Legal Foundation does not in any way oppose this bill or in any manner support amendments to this bill." Specifically, the letter was written so that we would all know that they oppose this amendment. That is the position of the Washington Legal Foundation.

Furthermore, the Congressional Research Service has written us on the same point telling us that it is their legal analysis that the impacts described in the gentleman's presentation are not likely to support successful takings claims. That is the view of the Congressional Research Service.

So the question is not whether we are going to expose taxpayers to spending huge amounts of money because Congress did something wrong. This amendment would expose taxpayers to huge expenditures of their hard-earned

money because Congress did something right, which is to take away the monopoly powers that this bill in fact takes away from COMSAT. This is not a Fifth Amendment taking.

Private actors can be disadvantaged in any number of ways by governmental action. A private landowner can discover that the value of her real estate is reduced to zero because of the land being declared essential habitat. That is an example of governmental action that ought to be considered a taking and the landowner in that case ought to be fairly compensated. But here our private actor is not some innocent landowner trying to recover from government regulation. This is a private company seeking to compel continued government protection for the unique monopoly powers, the privileges and benefits that flow from those monopoly powers that it enjoys. This is an anticompetitive policy that is in fact hostile to true property rights. In fact, current law unfairly restricts the ability of private companies to compete. Instead it guarantees to COMSAT's investors monopoly-sized returns on their investments.

What property does COMSAT have that it alleges is being taken? It suggests that takings claims are raised by the "fresh look" provisions of this bill. That is the language that enables the FCC beginning in 2000 to permit users or providers of telecommunications services to renegotiate contracts they signed with COMSAT prior to the repeal of its statutory monopoly as the only U.S. company authorized to sell INTELSAT services. In other words, COMSAT wants to retain its monopoly powers and anything less would be considered a taking.

The United States Supreme Court has repeatedly ruled that persons doing business in a regulated marketplace should expect the legislative scheme to change from time to time, even in ways that might be unfavorable to their interests. This principle was most recently reiterated by the Supreme Court in its unanimous 1993 decision in *Concrete Pipe*, which quoted from the Court's 1958 decision in *FHA v. The Darlington*. Here is what the Court said. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."

Even if COMSAT were to pretend that it is not a participant in a heavily regulated marketplace, and, that would be a tough argument for COMSAT to make because they testified before Congress just last year that their company is hamstrung by a burdensome regulatory regime, Congress took special care when it created COMSAT in 1962 to let investors know that there would be no guaranteed return on their investment. These days COMSAT gets an 18 percent guaranteed rate of return. These days INTELSAT gets immunity from antitrust lawsuits. There is no doubt that H.R. 1872 will impair