



2019 Property Rights Policy Priorities

The past two years have seen real progress on several fronts, bolstering private property rights in America. At the same time, much more needs to be done to secure the blessings of liberty to both the American people and the U.S. private enterprises they build with their property rights.

Unfortunately, ideologues and extremists have not stopped pressing an antiproperty rights agenda locally, nationally, and internationally. Rather, they are on the rise. In short, private property in all its forms remains under serious threat.

We must hold fast to the gains made by the 115th Congress and by the Trump administration, as we redouble our efforts to promote private property rights. Our country cannot afford backsliding on property rights, for they are both inherently ours and fundamental to individual flourishing and national prosperity. The adverse consequences of lost ground would harm private citizens, land owners, business owners, individual and corporate innovators and creators, as well as America's economic prosperity, industrial competitiveness, and national security.

Therefore, Conservatives for Property Rights renews its commitment to the cornerstone principles of property rights. CPR reiterates its focus on eminent domain, death tax, patents, copyright, regulatory reform, federal land holdings and use, U.S. industrial competitiveness, and civil asset forfeiture reform.

Eminent Domain

The Constitution secures Americans' private rights to life, liberty, and property. The Fifth Amendment constrains the ability to take away private property by requiring due process, compensation at what the property is worth, and limiting the power to taking property for a legitimate public use. However, judicial activism has eased the ability to abuse eminent domain powers and unjustly take away private property. CPR considers restoring Fifth Amendment rights and protections a high priority.

- **Private Property Rights Protection Act**

Last year, the U.S. House passed the Private Property Rights Protection Act, H.R. 1689, by voice vote. However, the U.S. Senate never took up the bill. The measure, which was sponsored by Rep. James Sensenbrenner (R-Wis.) and strongly supported by CPR, would bar federal usage of eminent domain for purposes of economic development, as well as block federal funds from any state that uses eminent domain

to take away land from a private owner to transfer it to another private entity. This was a lost opportunity for finally remedying the *Kelo* decision.

CPR will advocate for this legislation in the 116th Congress. Although the House is now held by a Democratic majority, this bill should enjoy strong bipartisan support. No House Democrats went on record against the measure last year, and “opposition to the [*Kelo*] decision cut across racial, ethnic, partisan, and gender lines.”¹

Death Tax

The estate tax aims at the heart of the rights of property ownership, which naturally includes the right to dispose of that property by leaving it to one’s heirs. Such family assets have already been taxed and represent a benefit of the fruits of one’s labor. Passing one’s estate to one’s heirs after death, whether land, farms, family businesses, liquid assets, or other forms of property, must be preserved as a property right. CPR supports repeal of the “death tax” and opposes any attempt to institute, retain, increase, or otherwise expropriate anyone’s assets at death.

- **IRS estate tax rule changes**

We filed comment in 2017 on a proposed IRS rule to change the valuation of family businesses under federal estate tax, raising the tax liability for certain family businesses and disregarding estate tax planning done more than three years before death. The proposal was withdrawn. That was a victory. CPR will remain vigilant regarding renewed attempts to use the death tax as a pay-for of government spending. We will continue to advocate death tax repeal, though the prospects have diminished.

- **Estate tax increase plans**

Democratic presidential hopefuls, including Sens. Cory Booker, Bernie Sanders, and Elizabeth Warren, have developed plans for increasing the death tax. Their bills would expose more of an estate’s assets to the death tax, raise the tax rate, and add surtaxes to certain amounts of estates’ value. They would raise the top rate to as high as 75% from the current 40%. CPR opposes such antiproperty-rights legislation.

Patent Rights

The U.S. Constitution provides for exclusive rights to the fruits of one’s intellectual labor, including to discoveries and inventions. Patents are like deeds securing one’s rights in intangible property. CPR brings a unified voice of Movement Conservatives emphasizing vital, inherent rights in private property in all its forms — physical, personal, and intellectual.

¹ Ilya Somin, “The Limits of Backlash: Assessing the Political Response to *Kelo*,” 93 Minn. L. Rev. 2100, 2101, 2108-2109 (June 2009).

- **Strengthening Patents and Patent Rights**

The U.S. patent system has steadily slipped in such measures as the U.S. Chamber of Commerce's IP Index² and the Bloomberg Innovation Index, while patent cancellations have devalued patent assets by 60%. Bad U.S. Supreme Court rulings and harmful legislation such as the America Invents Act and even the proposed "Innovation" Act have weakened our patent system. Bipartisan efforts to reverse the damage to inventors' rights and property are finally taking shape. CPR stands firmly for bolstering our patent system, patent rights, and quiet title to intellectual property.

Legislative: CPR has endorsed and promoted legislation including the STRONGER Patents Act, the Restoring America's Leadership in Innovation Act, the Inventor Protection Act, and the TROL Act. We anticipate these bills' reintroduction in the 116th Congress. These bills would strengthen private property rights in inventions, repair or repeal PTAB, restore patentability of scientific discoveries and software, restore injunctive relief, repeal the most harmful parts of the AIA, end patent fee diversion, strengthen the presumption of patent validity, and require reasonable disclosures in demand letters. CPR will advocate for such badly needed reforms.

Consensus is growing for restoring the meaning of section 101 of the patent law, regarding patentable subject matter, to what the statute actually says. Bipartisan work to address the judicial damage to patentability is under way. This could restore certainty and patentability in important areas, namely software and life sciences. CPR strongly supports such remediation and looks forward to advocating for 101 legislation.

Regulatory: Under new Patent & Trademark Office Director Andrei Iancu's welcome leadership, regulatory actions to strengthen patent property rights have occurred. CPR supported a rulemaking last year that has changed the patent claim construction standard used in Patent Trial & Appeal Board proceeds to the one used by federal courts and the International Trade Commission. Mr. Iancu's PTO has issued new guidance to patent examiners clarifying the current thinking on patentable subject matter, while a proposed rule would allow patent owners to amend patent claims during patent challenges at PTAB. CPR supports regulatory measures boosting strong, certain patent rights and looks forward to backing more positive administrative steps.

Also, the National Institute on Standards and Technology has sought to improve the deriving of practical benefits from federally funded research discoveries out of federal labs and research agencies, which dramatically lags university tech transfer performance. CPR commented in response to NIST's request for information as part of the agency's ROI Initiative. We plan to comment on the plan NIST develops, as well as advocate for robust federal agency tech transfer, based on transferring private IP rights in resulting discoveries to promote their commercialization.

² The Chamber's 2019 International IP Index ranks the U.S. in a 10-way tie for 2nd place, up from 12th place in 2018, based on "modest course correction" at the USPTO. Weakness remains in the U.S. concerning patentability and patent validity challenges.

- **Damaging proposals aimed at curbing patents and IP rights**

Patents and patent rights stand to suffer from a range of proposals. Recent bad ideas include restricting access to courts for asserting one's patent rights. The Innovation Act and the PATENT Act would have shifted the procedural playing field in patent litigation alone — decidedly tilted against the patent owner — such as with heightened pleading standards, disclosure requirements that expose sensitive competitive information, radically loosening the patent claim construction standard, one-sided fee-shifting, broad joinder, and overreaching customer stay. Compulsory patent licensing, a favorite tactic in the Third World for stealing innovations and expropriating IP, is the latest go-to for many who don't respect IP rights. CPR opposes attempts to deprive patent owners of the ability to exercise exclusivity and enforce their rights under law.

Legislative: While antipatent property rights bills such as the so-called Innovation Act and PATENT Act may get reintroduced, more immediate threats to these property rights arise in the context of drug pricing. The legislation includes the Prescription Drug Price Relief Act (S. 102/H.R. 465), sponsored by Sen. Bernie Sanders and Rep. Ro Khanna. The Sanders-Khanna bill would require HHS to identify “excessively priced” brand medicines, those with average manufacturer price in the U.S. above the median price in certain countries with socialized medical systems, and require breaking the innovators' patents of such pharmaceuticals through compulsory licensing by copycat drug makers. CPR vigorously opposes compulsory licensing and related tactics for stealing inventions and discoveries from innovators.

Similarly antiproperty rights legislation, introduced in the 115th Congress by Rep. Lloyd Doggett, is the Medicare Negotiation and Competitive Licensing Act. This bill directs HHS to “negotiate” Medicare Parts C and D drug prices. A price unacceptable to the government leads to a compulsory license. Doggett garnered more than 100 cosponsors last Congress. CPR opposes this legislation.

Regulatory: Regulatory agencies have contributed to weakened patents, lost patent rights, and an increasingly uncertain patent system — that is, they have harmed property rights. While the Justice Department Antitrust Division has staked out a framework that respects the contribution intellectual property makes to sparking “dynamic competition,” the Federal Trade Commission has yet to shake off the severe antitrust policies and practices of the Obama administration. In particular, the FTC seems to view patent owners exercising the right to exclude as monopolists acting unfairly to crush competition. CPR's comment letter on IP's role in promoting competition told the FTC how new inventions create new markets and new industry sectors that exist only because of the rights patent owners have to exclusively form the initial market and to benefit economically from that limited duration of exclusive rights.

- **Losing fundamental property rights in inventions**

In its 2018 ruling in *Oil States Energy Services v. Greene's Energy Group*, the U.S. Supreme Court undercut the private property rights a patent secures — the clear understanding and jurisprudence for two centuries. Disturbingly, the U.S. government in several cases has asserted the erroneous claim that patents confer so-called “public

rights.” To be blunt, public rights is anathema to private property rights an inventor inherently has in his or her invention or discovery. CPR Executive Director James Edwards signed an amicus brief in *Oil States* with other conservative leaders. Their brief rebutted the nefarious, dangerous public-rights theory. This is a fight worth fighting, because regarding patent rights as public rights deprives patent owners and inventors of basic property rights. CPR will press this matter at every opportunity.

Copyright

Copyright is the engine of the creative economy, allowing creators to express and support themselves free from interference by government or powerful patrons. Grounded in Article I, Section 8 of the Constitution, strong copyright protections incentivize creativity, innovation, investment and jobs, which – coupled with strong free speech protections – have helped the U.S. cultural industries become the envy of the world. CPR advocates for strong copyright protections that continue to support creators and storytellers in the digital age.

- **Bringing the DMCA into the 21st Century**

The Digital Millennium Copyright Act, enacted in 1998, is overdue for an update. This law gives Internet platforms immunity from liability for infringing content carried on their services if they meet limited obligations to remove the infringing content once notified. In practice, this system requires creators to play an endless game of “whack-a-mole,” futilely sending millions of notices to online service providers only to see their works reappear virtually immediately.

CPR supports updating and strengthening DMCA’s “notice and takedown” process in order to provide better protection to online creative works, and clarification that eligibility for copyright “safe harbors” should be limited to passive, neutral providers. Internet platforms should be required to keep infringing content from reappearing, take responsibility as merchants, and collaborate with copyright owners to minimize massive online IP infringement. CPR will continue to call for modernizing online copyright protection and enforcement of exclusive property rights.

- **Ensuring Justice for Small Creators**

Piracy hurts all creators, and combatting piracy is particularly hard for small creators. Most creators are individuals, independent operators, entrepreneurs and small businesses, including songwriters, authors, indie bands, photographers, painters, videographers and graphic artists. Many of them pursue their creative endeavors on the side, with many creators such as photographers producing high volumes of new works, while much of this work remains of modest economic value. When these works are infringed, it’s an uphill battle to enforce copyrights.

The Copyright Alternative in Small-Claims Enforcement (CASE) Act (H.R. 3945) was introduced in the 115th Congress, and the House Judiciary Committee held a hearing on the CASE Act. Among its cosponsors are the 116th’s chairman and ranking minority member of the Judiciary Committee. The CASE Act would create a voluntary,

streamlined arbitration process for resolving small-claims copyright infringement. CPR endorsed this measure and looks forward to backing it again.

- **Addressing the Proliferation of Streaming Piracy Devices, Apps and Websites**

Despite an explosion of innovative, legal streaming services and the creation of compelling new content to populate them, streaming-based piracy is growing at an alarming rate. Online analytics firm Sandvine concluded that in 2017, 6.5% of North American households – 7 million homes – had a device configured for piracy.

Creators and innovators should not have to compete against illegal services, which threaten creativity, innovation, investment and jobs in the creative economy. Moreover, consumers are put at risk by stream-ripping and other forms of streaming piracy; one report found that fully one-third of piracy sites infect visitors with malware leading to identity theft, fraud and more. CPR urges Congress and law enforcement to consider ways to stop this threat in its tracks to protect legal streaming innovation and the creativity it supports.

Regulatory Reform to Restore Private Property Rights

Government regulation can be used and abused to the point of effectively taking away someone's property. Such regulatory takings assault private property rights. This ramped up federally under the Obama administration's Environmental Protection Agency, Army Corps of Engineers, the Center for Medicare & Medicaid Innovation, and other bureaus. Federal regulators have abused their power by making de facto policy changes through regulatory overreach.

CPR supports Trump administration initiatives for deregulation. Deregulatory efforts to roll back the red tape that enables unelected bureaucrats to deprive property rights remain a high CPR priority. CPR will oppose illegitimate regulatory moves, as well as radical legislation such as the socialistic Green New Deal, that would take away or weaken property rights and devalue private property and the fruits of one's labor.

- **Waters of the United States Rule**

CPR strongly favors the repeal of the Waters of the United States rule's overly broad Obama-era definition of "navigable waters" in the Clean Water Act. The 115th Congress U.S. House twice passed WOTUS repeal. Language was adopted on H.R. 2, the Farm Bill, and included in H.R. 6147, the FY 2019 Interior Appropriations Bill. The U.S. Senate missed an opportunity to support private property rights, stripping WOTUS language from both bills in conference committee. CPR will continue to call for legislative repeal of this vehicle for regulatory takings of private property where puddles sometimes form, but chances of success have faded. The Trump administration's EPA has proposed regulatory action to fix WOTUS's twisted definition. CPR strongly supports this common-sense move. But regulatory changes are more easily reversed than legislation is repealed, so we will keep pressing for legislation.

- **Policymaking Through Regulatory Abuse — CMS’s International Pricing Index**
Purportedly as a way of reducing U.S. prescription drug prices and stopping foreign freeloading off U.S. innovation, the Center for Medicare & Medicaid Innovation has proposed a “pilot” program using an international pricing index. This would set Medicare Part B drug prices based on the rates under 14 nations’ price controls in government-run health systems.

CMMI designed the “pilot” using tactics of the Obama administration: mandatory participation, covering half the country. This cynical approach, affecting millions of Medicare providers and beneficiaries, practically constitutes policy change by bureaucratic diktat. This artificially reduces reimbursement rates by importing foreign price controls, devaluing the ability of doctors to enjoy the fruits of their labor. And the IPI robs pharmaceutical innovators of fair rates for products still afforded exclusivity. CPR opposes government price controls and abuse of regulatory mechanisms to diminish property rights. CPR will continue to advocate against such tactics in 2019.

- **Abuse of Regulatory Power Under the Protecting Access to Medicare Act**
Health and Human Services deliberately misread a provision of the Protecting Access to Medicare Act to dramatically reduce Medicare reimbursement rates for laboratory tests and diagnostics. The manner in which HHS designed the new process amounts to a regulatory taking — the PAMA lab test reimbursement change intentionally devalues all lab tests, based on cherry-picked data from less than 1% of labs. CPR joined a coalition effort expressing concern on this regulatory abuse and stands ready to push back on other such attempts to misuse regulatory powers.

Federal Land Holdings and Use

The federal government holds vast amounts of “public” lands — 27% of the U.S. — much of which lies in the Western states. The holding and use of these lands has become a political football — as well as the playground of property rights-unfriendly environmental extremists. CPR believes that more, not fewer, lands should be transferred to private hands. This would empower citizens with assets they could improve, while overcoming the “tragedy of the commons” where “common” property actually amounts to nobody’s property and, thus, nobody’s responsibility. And lands that remain government property should be made available to private parties to extract natural resources or make other productive use of the lands (excepting certain areas where there are important historical, ecological, or other legitimate reasons not to develop that land).

- **Private commercialization of energy resources on public lands**
The Trump administration and allies such as the Congressional Western Caucus have made progress on putting public lands to responsible, practical usage. The Interior Department has put forward a carefully crafted draft proposal to open the oil-rich Arctic National Wildlife Refuge to environmentally responsible exploration. This acts on a mandate from Congress in the 2017 tax reform law, which requires the department to

allow oil and gas leases in ANWR. CPR applauds this development and will weigh in favorably on ANWR oil and gas extraction as this rule proceeds. This positive step reflects one of the recommendations in CPR's industrial competitiveness report, calling for private licensing of public land rights for commercial extraction of natural resources.

Industrial Competitiveness

President Trump has made industrial competitiveness a top priority of his administration, initiating the protection of Americans' and U.S. firms' private property rights abroad and at home from the threat of foreign actors. This has connected in the public's mind our nation's economic security with our national security. CPR's 2018 "Property Rights: The Key to National Wealth and National Security" report addresses this concept, giving new attention to the private property rights foundation on which our industrial base is built. This study revisits the important work of President Reagan's Young Commission on Industrial Competitiveness.

The Trump administration's aggressive efforts toward foreign competitors, particularly China, relates to trade; correctly understood, this is not primarily a trade issue. The primacy of property rights has drawn CPR into these matters. CPR will continue to demand that China and other foreign countries stop freeloading on and expropriating American businesses' IP, competitively sensitive information, technology and know-how, and instead adopt reciprocal trade and other policies that respect private property rights, the rule of law and national sovereignty. This fight will continue, and CPR will continue to advocate for property rights-based industrial competitiveness.

- **Better trade agreements – stronger IP rights**

The administration has advanced a trade agenda based on improving old trade agreements and pursuing new ones. Overall, the reformed South Korea-U.S. deal made incremental gains, while the U.S.-Mexico-Canada Agreement (new NAFTA) takes steps toward reciprocal trade. In the USMCA's intellectual property chapter, property rights gain on the patent side, while the copyright section is mixed, with positive protections combined with several concerning loopholes that should not set a precedent for future trade deals. Notably, biologics data exclusivity sets a 10-year floor, which raises Canada's and Mexico's standards. This represents progress. But on copyright, USMCA locks in the insufficient and inaccurate standards of the Digital Millennium Copyright Act, which already allows Internet piracy to flourish. CPR will push for even stronger IP protections in coming trade agreements.

- **Stopping expropriation, forced tech transfer and joint ventures**

"[T]he policies of many nations . . . are structured to acquire foreign technologies as quickly and as cheaply as possible," stated the Young Commission. China, as well as many other countries, employ an array of unfair means to achieve exactly what the Young Commission described more than 30 years ago. The U.S. Trade Representative notes, "China imposes requirements that U.S. firms develop their IP in China or transfer their IP to Chinese entities as a condition to accessing the Chinese market. China also

requires that mandatory adverse terms be applied to foreign IP licensors, and requires that U.S. firms localize research and development activities.”

CPR has voiced support for combating mandatory technology transfer, forced joint ventures with Chinese firms, and other forms of expropriation of and disregard for American firms’ IP and IP rights. We will keep pressing this issue, as well as calling for U.S. officials to intervene and sanction foreign unfair practices that subject American interests to loss of IP rights and devaluation of property value.

- **Weaponized legal procedures and official bias favoring domestic champs**

Too many foreign countries manipulate their antitrust and other laws, unequally apply rules, and otherwise use official powers as weapons against American companies. This abuse of power is employed for favoritism toward domestic champions and for harming American companies. China’s “antitrust enforcement practices are inconsistent with the rule of law,” Prof. Richard Epstein says.

South Korea, Taiwan, China, and others use their competition agencies to unfairly attack U.S. firms, denying access to evidence, failing to give advance notice of proceedings, denying cross-examination of witnesses, etc. The Chinese government owns a number of its national industrial champs, heavily subsidizes many others, and targets investigations of U.S. firms on questionable grounds. South Korea has attacked American property rights, national sovereignty and property values through extraterritorial remedies, imposing patent license rate restrictions on American companies outside its borders.

Such unjustifiable practices must finally end. CPR will continue to insist on basic fairness and equality under law for American businesses abroad. CPR will urge that U.S. officials be present at and intervene in biased proceedings, and sanction foreign countries’ failure to afford the rule of law, due process or equal treatment to U.S. firms facing such abusive, manipulative tactics. The same principles embodied in the Fifth Amendment protection of due process and property rights must apply to American interests, even in Communist China. CPR will advocate for reciprocity.

- **Progress for U.S. economic and national security**

Our property rights-based industrial competitiveness has reemerged and is again recognized as a critical asset linked to our economic and national security. The NIST Green Paper on federal tech transfer reform states this. Congress’s recent enactment of legislation strengthening the Committee on Foreign Investment in the United States acts on this. CFIUS’s and President Trump’s intervention blocking Broadcom’s attempted hostile takeover of Qualcomm was founded on this.

The U.S. government must have the back of Americans and U.S. innovators as they create, invent, pursue R&D, commercialize and exercise their private property rights to create wealth and new jobs, create new industries, create new markets and expand America’s industrial competitiveness globally — with American leadership in 5G, biotechnology, pharmaceuticals, artificial intelligence, medical devices, energy,

agriculture and more. U.S. agencies must apply proproperty rights principles in their policymaking and enforcement, and advocacy with their foreign counterparts. With the latter, American officials need to insist on rules-based conduct by foreign governments toward U.S. interests, on reciprocal treatment under law and on fair, unimpeded market access and market competition determining industrial leadership.

CPR will continue to support USTR's holding foreign competitors to account and reciprocity. We insist on the Federal Trade Commission's enforcement humility regarding American companies advancing IP-based dynamic competition. Further, CPR demands that the FTC refrain from calling foreign trade- and IP-cheating competitors/national champions as witnesses against American companies in U.S. courts of law. We continue to urge the International Trade Commission to immediately block any imported product or device that infringes a U.S. firm's IP.

Civil Asset Forfeiture

Civil asset forfeiture is prone to abuse by government officials due to the lack of due process afforded to property owners and the incentives to seize property as a means of enriching government agencies. CPR supports civil asset forfeiture reforms that would establish presumption in favor of the property owner, strong evidentiary requirements and substantial burden of proof on the government.

Such reforms could be promoted in the 116th Congress, given traditional Democratic support and concern among a growing number of Republicans. CPR will look for opportunities to add its voice to civil asset forfeiture reform.

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Admittedly, this priority list is hardly exhaustive. However, it is based on Conservatives for Property Rights' established priority issues and activities of the coalition's first year and a half, as well as considering how these issues may develop in the coming year.

CPR's guiding principles have been to focus exclusively on federal policy, on a set of identified and considered property rights issues and leverage the "sweat equity" of member organizations so as to spread the workload according to what we collectively are able to handle. Our activities to date amount to how this has shaken out.

CPR has engaged more deeply in some matters and less so in others than originally anticipated. This is due to important developments in Washington, given collective resources at a given time, and compelling reasons that called for CPR's weighing in, for instance on regulatory reform and industrial competitiveness.

Similarly, CPR may add or subtract active issues over the course of the year. Stay abreast of these developments by following CPR on Twitter at **@4Property Rights**, regularly checking www.property-rts.org/issues-projects, and following CPR's blog, "**Locke's Notebook**," at www.property-rts.org/blog.