JAMES J. KILPATRICK 10/3/02

Return of the spotted owl

Don't look now, but the northern spotted owl is back again. Yes! A case involving the wise old bird once more is pending in the Supreme Court on a petition for review. The case presents an important question under the "takings clause" of the Constitution and fully deserves a hearing.

The takings clause of the Fifth Amendment says that government may not "take" private property for public use without the payment of just compensation. In the case at hand, Marsha Seiber of Linn County, Ore., complains that the state has effectively taken 40 acres of her farm without paying a dime in compensation.

The state's purpose is to preserve appropriate habitat for a pair of owls known as Little Wiley and his mate. The happily banded couple have not been seen on Seiber land since two days in April 1994. Indeed, no spotted owls at all have been observed on the property in recent years.

Mrs. Seiber and her husband, a retired postal worker, are battling the Oregon State Board of Forestry and the Audubon Society of Portland, among other intervenors. The Seibers want to harvest mature timber from their own property, and the state won't let them.

The Board of Forestry, for its part, feels that it is bound by the federal government's declaration 12 years ago that the northern spotted owl (*Strix occidentalis caurina*) is a threatened species. In an effort to conserve the species, the state requires property owners to take certain steps whenever an adult pair of owls is reliably identified on their property. Owners must set aside 70 acres of suitable habitat encompassing a nest site, and they must explain how they would prevent disturbances during the March to October nesting season.

The Seibers ran into the maze of regulations in 1994. Because of Little Wiley, the Oregon state forester had designated 40 acres of their land and 30 acres of a neighbor's adjoining land as a protected nesting site. They sued, but last June – four years after their suit began – the Seibers lost in Oregon's Supreme Court. Now they're asking for help from the high court.

The landowners make a persuasive case. They say:

"The subject regulation goes beyond merely regulating the use of the Seibers' land; it requires that the timber on it be left standing for the sole purpose of providing spotted owl habitat. Clearly it is a use of private property by the government for a public purpose. Further, the regulation prohibits them from conducting any activity on their property that could 'cause the owls to flush from the nesting site.'

"Most importantly, petitioners cannot harvest 40 acres of trees that have taken them decades to grow and on which they depend for income during their retirement years. ... During the four years that this case has been pending, they have annually paid taxes on the subject 40 acres, while at the same time they have been barred from deriving any income from the timber crop on it."

The basic federal act makes it unlawful for any person to "take" an endangered species. In what is known as the Sweet Home case of 1995, the Supreme Court divided 6-3 in accepting the government's view that "to take" means "to harm," and "to harm" means to modify habitat "where it actually kills or injures wildlife by significantly impairing breeding or sheltering." Justice John Paul Stevens virtually invited further case-by-case litigation on the issue.

Justice Antonin Scalia, joined by Justice Clarence Thomas and the chief justice, filed a vigorous dissent in the Sweet Home case. The prohibition placed upon private land, he said, "imposes unfairness to the point of financial ruin – not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."

In the pending case, the Seibers stand to lose $300,000 in marketable timber just to preserve 40 acres of aging forest for a pair of absentee owls. The government may not give a hoot, but it strikes me as grossly wrong.

James J. Kilpatrick is a syndicated columnist.