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HOW CONGRESS CAN END THE "REGULATORY LIMBO" BLOCKING PROPERTY OWNERS' ACCESS TO JUSTICE

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We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

—Chief Justice William Rehnquist,
Dolan v. *City of Tigard,* 512 U.S. 374, 392 (1994)

Personal property rights are protected under the Fifth Amendment of the U.S. Constitution.[1] As Justice William Brennan wrote in *San Diego Gas & Electric* v. *City of San Diego:*[2] "After all, a policeman must know the Constitution, then why not a planner?" Yet, today, property owners who file claims against a state or local government over the improper taking of property receive very different treatment than other federal claimants do. Unlike those who feel their First or Fourth Amendment rights may have been violated, and can pursue a claim directly in federal court, property owners cannot. They are uniquely required to exhaust all possible state court and administrative remedies before federal courts will allow them to file a claim. No other federal claimant must clear such hurdles.

REGULATORY LIMBO

A property owner deserves the same access to federal court as any other individual who claims his constitutional rights have been violated. Under the present system, however, federal courts can avoid ruling on takings claims by concluding that the claims are premature (or not "ripe" for adjudication) because the state or local agency taking the property has not been clear in determining the

1 The Fifth Amendment states, "[N]or shall private property be taken for public use, without just compensation."
2 San Diego, 450 U.S. 621, 661 n. 26.

limits of the allowable uses of the property. In many cases, the property owner may be required to apply for and be denied a permit several times before the federal court will consider the claim "ripe."

One review of this problem[3] found that federal courts used this "ripeness" requirement between 1990 and 1997 to refuse to review cases of land-use takings over 90 percent of the time. A property owner can go through multiple attempts to get a permit without ever receiving a final answer as to what he can or cannot do on the property. Government agencies know that, so long as they do not clearly determine the limits of the allowable uses of the property, property owners are left in "regulatory limbo," forced to seek permit after permit—often for years—before the federal court will consider the claim to be ripe.

Most property owners cannot afford the long and tedious process of resolving all possible remedies before their case is ripe. This process can involve years of court battles and tens of thousands of dollars in legal fees just to win the right to have the merits of their case heard in court. Only property owners asserting Fifth Amendment claims are subject to the "ripeness" hurdles that keep them from having their cases heard. The result is that landowners are dissuaded from seeking judicial redress even though their constitutional rights may have been violated by arbitrary government conduct.

Although the federal courts should not be given expanded authority to interfere in local issues, a violation of the Fifth Amendment to the Constitution is a federal issue by nature, and makes the federal courts uniquely qualified to decide its merits. The fact that constitutional claims can arise from the actions of local governments does not make them less valid, and they should be treated with equal weight.

RELIEF FROM THE BURDENSOME JUDICIAL PROCESS

On May 6, 1997, Representative Elton Gallegly (R–CA) introduced H.R. 1534, the Private Property Rights Implementation Act of 1997. The legislation would improve access to the court system for property rights claimants by shortening the unreasonably long administrative process required before courts can consider a claim ripe for adjudication. In addition, the bill would prevent federal courts from abstaining from cases for claims that are based solely on federal constitutional questions. The purpose of H.R. 1534 is to ensure that landowners have their day in court without the oppressive delays and expenses inherent in the current system.

H.R. 1534 would not give the federal courts new authority on questions that legitimately should be answered in state courts. The bill stipulates that, if any question arises concerning whether a state or local law is fundamental to the merits of the case, the case may be certified back to the state courts before a federal court would determine the merits of the case. H.R. 1534 recognizes that federal courts should not be making decisions on issues that are legitimately the domain of state and local courts; but, when those decisions infringe upon constitutionally guaranteed rights, property owners deserve the same ability to defend their rights in federal court that other federal claimants enjoy. H.R. 1534 is designed simply to instruct federal courts to stop abstaining on Fifth Amendment claims.

H.R. 1534 would not promote premature resort to federal courts for redress. Under H.R. 1534, the landowner's claim still would have to be ripe before the federal court would hear the claim. H.R. 1534 does, however, define "ripeness" so that property owners are not left in regulatory limbo.

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3 Gregory Overstreet, "The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Court Will Go to Avoid Adjudicating Land Use Cases," *10 J.Land Use and Envt'l L.* 91, 92.

Unlike the current system that leaves the definition of ripeness open-ended, H.R. 1534 defines a claim as ripe after the property owner has obtained a final decision from the land-use agency (such as a zoning board or environmental regulator), the decision is adverse to the property owner, and the property owner has sought a waiver from that decision and/or appealed it to the appropriate administrative board.

Under H.R. 1534, then, only *after* a waiver and/or appeal has been pursued can a constitutional claim become ripe for review in federal court. The bill still requires the owner to attempt one appeal before being able to take the claim to federal court, but it makes it clear that after that appeal is denied, the property owner has the right to pursue the claim in federal court. H.R. 1534 clearly defines ripeness so that property owners, local authorities, and courts all know when a claim is ripe. H.R. 1534 does not prevent property owners from continuing to try to work out their differences with the state and local agency in question, but it does give property owners the choice of exercising their Fifth Amendment rights as guaranteed in the Constitution. Land-use agencies should be able to give property owners a clear answer as to the approved uses of their land after one appeal and/or waiver request instead of forcing landowners to play the very costly "guess-when-your-claim-is-ripe" game.

H.R. 1534 also would not change the burden of proof for property owners alleging takings under the Fifth Amendment. The affected landowners still would have to prove that they had suffered an "actual and concrete injury" directly "caused" by the land-use review body. Unlike other property rights bills that define a takings at a certain level (50 percent, 33 percent, or 20 percent), this bill would leave the current language unchanged. If property owners do not have sufficient evidence that an uncompensated taking has occurred, they will lose on the merits of the case. H.R. 1534 simply lets the merits be heard where they belong—in federal court.

H.R. 1534 already enjoys considerable bipartisan support and has more than 220 sponsors. The House Subcommittee on Courts and Intellectual Property held a hearing on H.R. 1534 on September 25, 1997.

On September 23, 1997, Senator Paul Coverdell (R–GA) introduced S. 1204, the Property Owners' Access to Justice Act. This legislation is identical to H.R. 1534. It also enjoys broad bipartisan support, and has 14 sponsors already. No hearings have been scheduled yet.

HOW THE PROPOSED PROPERTY RIGHTS BILLS DIFFER

H.R. 1534 and H.R. 992, the Tucker Act Shuffle Relief Act, address different, but related, problems that property owners face when trying to have the merits of their cases heard in federal court. H.R. 1534 addresses the property owner's *right* to have the merits of his case heard in federal court. H.R. 992 would solve the jurisdictional question of which federal court should hear the claim—the U.S. District Court or the Federal Court of Claims.

Currently, once a property owner's case finally is deemed "ripe," it is often subject to what is called the Tucker Act Shuffle.[4] While the district courts have jurisdiction over invalidating the government's taking of property, the Federal Court of Claims has jurisdiction over claims for compensation. The property owner is shuffled back and forth between the two courts, with neither claiming jurisdiction to hear the merits of the case. H.R. 992 would let property owners choose to pursue both kinds of claims in either court.

Both H.R. 1534 and H.R. 992 offer relief to property owners and hope that they will have "their day in court" to present the merits of their cases.

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4 Alex F. Annett, "How Congress Can Enhance Property Owners' Access to Justice," Heritage Foundation *Executive Memorandum* No. 492, September 12, 1997.

WHAT CONGRESS SHOULD DO

Property owners will continue to find it extremely difficult to vindicate their property rights so long as the judicial system remains hostile to hearing these cases. Property owners need more straightforward and equitable access to justice. Americans are entitled to procedural fairness that currently is absent from modern land-use litigation.

Congress needs to clarify the rules of the takings game so that citizens can pursue orderly and predictable means of redress when they suffer possible constitutional violations at the hands of their state and local governments. The result of this clarification will be savings in the time, money, and other burdens placed on claimants and on the judiciary system as a whole.