105TH CONGRESS
*1st Session*
HOUSE OF REPRESENTATIVES
REPORT
105–323

# PRIVATE PROPERTY RIGHTS IMPLEMENTATION ACT OF 1997

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OCTOBER 21, 1997.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. COBLE, from the Committee on the Judiciary, submitted the following

## R E P O R T

together with

## DISSENTING VIEWS

[To accompany H.R. 1534]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1534) to simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by the United States Constitution, have been deprived by final actions of Federal agencies, or other government officials or entities acting under color of State law; to prevent Federal courts from abstaining from exercising Federal jurisdiction in actions where no State law claim is alleged; to permit certification of unsettled State law questions that are essential to resolving Federal claims arising under the Constitution; and to clarify when government action is sufficiently final to ripen certain Federal claims arising under the Constitution, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Private Property Rights Implementation Act of 1997".

**SEC. 2. JURISDICTION IN CIVIL RIGHTS CASES.**

Section 1343 of title 28, United States Code, is amended by adding at the end the following:

"(c) Whenever a district court exercises jurisdiction under subsection (a) in an action in which the operative facts concern the uses of real property, it shall not abstain from exercising or relinquish its jurisdiction to a State court in an action where no claim of a violation of a State law, right, or privilege is alleged, and where a parallel proceeding in State court arising out of the same operative facts as the district court proceeding is not pending.

"(d) Where the district court has jurisdiction over an action under subsection (a) in which the operative facts concern the uses of real property and which cannot be decided without resolution of a significant but unsettled question of State law, the district court may certify the question of State law to the highest appellate court of that State. After the State appellate court resolves the question certified to it, the district court shall proceed with resolving the merits. The district court shall not certify a question of State law under this subsection unless the question of State law—

"(1) will significantly affect the merits of the injured party's Federal claim; and

"(2) is so unclear and obviously susceptible to a limiting construction as to render premature a decision on the merits of the constitutional or legal issue in the case.

"(e)(1) Any claim or action brought under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) to redress the deprivation of a property right or privilege secured by the Constitution shall be ripe for adjudication by the district courts upon a final decision rendered by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, that causes actual and concrete injury to the party seeking redress.

"(2) For purposes of this subsection, a final decision exists if—

"(A) any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere;

"(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one appeal or waiver, where the applicable statute, ordinance, custom, or usage provides a mechanism for appeal to or waiver by an administrative agency; and

"(C) in a case involving the uses of real property, where the applicable statute or ordinance provides for review of the case by elected officials, the party seeking redress has applied for but is denied such review.

The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if the prospects of success are reasonably unlikely and intervention by the district court is warranted to decide the merits.

"(3) For purposes of this subsection, a final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State or territory of the United States.".

**SEC. 3. UNITED STATES AS DEFENDANT.**

Section 1346 of title 28, United States Code, is amended by adding at the end the following:

"(h)(1) Any claim brought under subsection (a) that is founded upon a property right or privilege secured by the Constitution, but was allegedly infringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, that causes actual and concrete injury to the party seeking redress.

"(2) For purposes of this subsection, a final decision exists if—

"(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere; and

"(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one appeal or waiver, where the applicable law of the United States provides a mechanism for appeal to or waiver by an administrative agency.

The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if the prospects of success are reasonably unlikely and intervention by the district court or the United States Court of Federal Claims is warranted to decide the merits.".

**SEC. 4. JURISDICTION OF COURT OF FEDERAL CLAIMS.**

Section 1491(a) of title 28, United States Code, is amended by adding at the end the following:

"(3) Any claim brought under this subsection founded upon a property right or privilege secured by the Constitution, but allegedly infringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, that causes actual and concrete injury to the party seeking redress. For purposes of this paragraph, a final decision exists if—

"(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere; and

"(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one appeal or waiver, where the applicable law of the United States provides a mechanism for appeal or waiver.

The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if the prospects of success are reasonably unlikely and intervention by the United States Court of Federal Claims is warranted to decide the merits.".

**SEC. 5. EFFECTIVE DATE.**

The amendments made by this Act shall apply to actions commenced on or after the date of the enactment of this Act.

## PURPOSE AND SUMMARY

The purpose of H.R. 1534, as amended, is to provide private property owners claiming a violation of the Fifth Amendment's taking clause some certainty as to when they may file the claim in federal court by addressing the procedural hurdles of the ripeness and abstention doctrines which currently prevent them from having fair and equal access to federal court. H.R. 1534 defines when a final agency decision has occurred for purposes of meeting the ripeness requirement and prohibits a federal judge from abstaining from or relinquishing its jurisdiction when the case does not allege any vio-

lation of a state law, right, or privilege as a means of overcoming judicial reluctance to review takings claims based on the abstention doctrines.

## BACKGROUND AND THE NEED FOR LEGISLATION

Representative Gallegly introduced H.R. 1534 on May 6, 1997. Chairman Coble and Representatives Sensenbrenner, Goodlatte, Bono, Cannon, McCollum, and Canady are cosponsors of the bill.

The United States Constitution protects individuals from having their private property "taken" by the government without receiving just compensation. U.S. Const. Amend. V. From the Takings Clause a complex body of law upon which federal courts use to find a "taking" developed. In conjunction with takings law, a complex set of doctrines used by federal courts in finding that a takings claim is ready to be heard on the merits also developed. These are the doctrines of "ripeness" and "abstention."

Under current case law, a takings claim must be "ripe" to be heard in federal court. In a key decision, the Supreme Court attempted to clarify the ripeness principles. In *Williamson County Planning Comm'n* v. *Hamilton Bank of Johnson City,* 473 U.S. 172, 87 L.Ed. 2d 126, 105 S. Ct. 3108 (1985), the Court stated that a takings claimant must show: (1) that there has been issued a "final decision regarding the application of the regulations to the property at issue" from "the government entity charged with implementing the regulations," *id.,* at 186; and (2) that the claimant requested "compensation through the procedures the State has provided for doing so," *id.,* at 194. A takings plaintiff must meet both requirements before the case will be considered ripe for federal adjudication.

A federal court may also abstain from hearing a takings case under the judicially created doctrine of "abstention." This doctrine allows federal judges to exercise discretion in deciding whether or not to accept cases that are properly under the court's jurisdiction. Federal courts are reluctant to adjudicate state political and judicial controversies. When a claim presents a federal question that would not need to be resolved if an underlying challenged state action of an unsettled state law issue were determined, a federal court will likely abstain. *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941). Federal courts also abstain from hearing cases which touch on sensitive state regulatory issues which are best left to the state courts. *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943). Federal judges often use the abstention doctrines to refer takings cases back to state courts before reaching the merits of the Fifth Amendment takings claims.

Control over land use lies with local entities. Private property owners must submit a land use proposal to the local agency for approval. For many applicants, this application is the beginning of a negotiation process regarding the permitted land uses. However, this process can take years for property owners who are left in regulatory limbo due to the local entities failure to make a final decision as to what land use is permitted. As a result, property owners are not able to use or develop their land.

While this result could be construed as a Fifth Amendment taking, the applicant is, for all practical purposes, unable to file a

claim in federal court. Local land use authorities do not want to be sued in federal court and can abuse the system by purposely withholding a final agency decision. To further frustrate the problem, the federal court decisions interpreting the Supreme Courts "ripeness" definition are conflicting and confusing, providing little guidance to property owners as to when a case is "ripe" for federal adjudication.

Federal judges are often reluctant to get involved in land use issues. They can, and do, dismiss takings cases back to state court based on the abstention doctrines or the lack of ripeness. Most property owners do not have the time and money necessary to pursue their case through the state court and then re-file in federal court. The extensive use of the abstention doctrines to avoid land use cases, even ones involving only a federal claim, has become a barrier to federal court, leaving takings plaintiffs without an option. Plaintiffs alleging violations of other fundamental rights do not encounter these same barriers to having their case be heard in federal court on the merits.

H.R. 1534 seeks to address these procedural blockades and offer property owners more certainty as to the federal adjudicatory process governing takings. H.R. 1534 accomplishes this by defining when a final agency decision takes place and prohibiting federal judges from invoking the abstention doctrine to avoid cases that involve only Fifth Amendment takings claims. H.R. 1534 does not affect traditional interpretations of the abstention doctrine by injecting the federal courts into state and local issues because the legislation applies only to federal claims.

## HEARINGS

The Subcommittee on Courts and Intellectual Property held a legislative hearing on H.R.1534, the "Private Property Rights Implementation Act of 1997," on September 25, 1997. Testimony was received from five witnesses, who collectively, represented federal and state attorney's general offices, the National Association of Home Builders, and a preeminent land use professor.

## COMMITTEE CONSIDERATION

On September 30, 1997, the Subcommittee on Courts and Intellectual Property met in open session and ordered reported the bill, H.R. 1534, as amended, by voice vote, a quorum being present. On October 7, 1997, the Committee met in open session and ordered reported favorably the bill, H.R. 1534, with amendment, by a recorded vote of 18 to 10, a quorum being present.

## VOTE OF THE COMMITTEE

### ROLLCALL NO. 1

On the Amendment offered by Mr. Conyers and Ms. Jackson Lee to the Amendment in the Nature of a Substitute: The Amendment was defeated by a recorded vote of 7 to 17.

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. McCollum |

| | |
|---|---|
| Mr. Frank | Mr. Coble |
| Mr. Nadler | Mr. Smith (TX) |
| Ms. Jackson Lee | Mr. Gallegly |
| Ms. Waters | Mr. Inglis |
| Mr. Delahunt | Mr. Goodlatte |
| Mr. Rothman | Mr. Buyer |
| | Mr. Bono |
| | Mr. Chabot |
| | Mr. Jenkins |
| | Mr. Hutchinson |
| | Mr. Pease |
| | Mr. Cannon |
| | Mr. Watt |
| | Ms. Lofgren |
| | Mr. Wexler |
| | Mr. Hyde |

ROLLCALL NO. 2

On the Motion by Ms. Lofgren to Recommit the Bill: The motion was defeated by a recorded vote of 7 to 16.

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Sensenbrenner |
| Mr. Frank | Mr. McCollum |
| Mr. Watt | Mr. Coble |
| Ms. Lofgren | Mr. Smith (TX) |
| Mr. Meehan | Mr. Gallegly |
| Mr. Delahunt | Mr. Inglis |
| Mr. Wexler | Mr. Goodlatte |
| | Mr. Buyer |
| | Mr. Bono |
| | Mr. Bryant (TN) |
| | Mr. Chabot |
| | Mr. Barr |
| | Mr. Jenkins |
| | Mr. Cannon |
| | Mr. Rothman |
| | Mr. Hyde |

ROLLCALL NO. 3

On the Amendment to the Amendment in the Nature of a Substitute, as amended, offered by Mr. Watt: The Amendment was defeated by a recorded vote of 10 to 17.

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Sensenbrenner |
| Mr. Frank | Mr. McCollum |
| Mr. Berman | Mr. Coble |
| Mr. Scott | Mr. Smith (TX) |
| Mr. Watt | Mr. Gallegly |
| Ms. Lofgren | Mr. Canady |
| Ms. Waters | Mr. Inglis |

| | |
|---|---|
| Mr. Meehan | Mr. Goodlatte |
| Mr. Wexler | Mr. Buyer |
| Mr. Rothman | Mr. Bono |
| | Mr. Bryant (TN) |
| | Mr. Chabot |
| | Mr. Barr |
| | Mr. Jenkins |
| | Mr. Hutchinson |
| | Mr. Cannon |
| | Mr. Hyde |

ROLLCALL NO. 4

On the Question on reporting favorably to the House as amended: The motion to report the bill favorably to the House as amended was adopted by a recorded vote of 18 to 10.

| AYES | NAYS |
|---|---|
| Mr. Sensenbrenner | Mr. Conyers |
| Mr. McCollum | Mr. Frank |
| Mr. Gekas | Mr. Berman |
| Mr. Coble | Mr. Scott |
| Mr. Smith (TX) | Mr. Watt |
| Mr. Gallegly | Ms. Lofgren |
| Mr. Canady | Ms. Jackson Lee |
| Mr. Inglis | Ms. Waters |
| Mr. Goodlatte | Mr. Meehan |
| Mr. Buyer | Mr. Wexler |
| Mr. Bono | |
| Mr. Bryant (TN) | |
| Mr. Chabot | |
| Mr. Jenkins | |
| Mr. Hutchinson | |
| Mr. Cannon | |
| Mr. Rothman | |
| Mr. Hyde | |

## COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

## COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budget authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

"In compliance with clause 2(l)C)(3) of the rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 1534, the following estimate and comparison prepared by the Director of the Congressional budget Office under section 403 of the Congressional Budget act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, May 16, 1997.*

Hon. HENRY J. HYDE, *Chairman,*
*Committee on the Judiciary,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1534, the Private Property Rights Implementation Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Susanne S. Mehlman (for federal costs), who can be reached at 226–2860, Leo Lex (for the state and local impact), who can be reached at 225–3220, and Matt Eyles (for the private-sector impact), who can be reached at 226–2649.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

*H.R 1534—Private Property Rights Implementation Act of 1997*

Enacting H.R 1534 would give greater access to federal courts to plaintiffs making claims based on property owners' rights secured by the Constitution. As a result, the bill is likely to impost additional costs on the U.S court system. While some of the affected cases could be time-consuming and costly, CBO cannot predict the number or cost of such cases. Enactment of H.R. 1534 would not affect direct spending or receipts of the federal government, and therefore, pay-as-you-go procedures would not apply.

The Fifth Amendment prohibits the taking of private property for public use without just compensation. This restriction on government action is extended to the states through the duo process clause of the 14th Amendment. H.R. 1534 would primarily affect takings claims directed at the regulatory decisions of state and local governments. First, this bill would prohibit a federal district court from exercising its current right to abstain from hearing certain takings claims. H.R. 1534 also would define "final decision" for these properly rights claims, thereby relaxing the standards by which such claims are found ripe for adjudication in federal district courts or the U.S. Court of Federal Claims. With regard to district courts, the definition specifically removes the requirement that

plaintiffs exhaust all state remedies before proceeding to federal court.

Most takings cases affected by this bill would originate from a dispute over a state or local land use regulation. When local regulation is at issue, a number of appeals to local governing boards may occur. When those venues are exhausted and when the claim asserts a taking, federal courts often defer to state courts by refusing jurisdiction in such matters. The federal courts open argue that such cases are not ripe for federal adjudication because plaintiffs have not exhausted their opportunities to obtain compensation through the state courts. CBO expects that enacting the jurisdictional changes under H.R. 1534 would give plaintiff greater access to federal courts, thus imposing additional costs on the U.S. court system to He extent that additional takings claims are filed and heard in federal courts.

Based on information from various legal experts, CBO estimates that only a small percentage of all civil cases filed in state courts involve takings claims. Of these, CBO believes that only a small proportion would be tried in federal court as the result of H.R. 1534, in part because state and local regulators may have an incentive to settle with plaintiffs in order to avoid a trial in federal court. On the other hand, most cases that would reach trial in a federal court as a result of this bill are likely to involve relatively large claims and could be time-consuming and costly. CBO has no basis for estimating the number of cases that would be affected or the amount of court costs that would result. Any such costs would come from appropriated funds.

Section 4 of the Unfunded Mandates Reform Act of 1995 (UMRA) excludes from application of that act legislative provisions that enforce constitutional rights of individuals. Because the changes to federal jurisdiction over property rights cases could involve the enforcement of certain individual constitutional rights, H.R. 1534 may be excluded. In any event, because the changes only affect federal court procedures, the bill would not impose any enforceable duty on state, local, or tribal governments, or on the private sector.

The CBO staff contacts for this estimate are Susanne S. Mehlman (for federal costs), who can be reached at 226–2860, Leo Lax (for the state and local impact), who can be reached at 225–3220, and Matt Eyles (forge private-sector impact), who can be reached at 226–2649. This estimate was approved by Robert A. Sunshine, Assistant Deputy Director for Budget Analysis.

## CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Rule XI, clause 2(l)(4) of the Rule of the House of Representatives, the Committee finds the authority for this legislation in Article I, clause 18, section 8 of the Constitution.

## SECTION-BY-SECTION ANALYSIS

### SECTION 1.—SHORT TITLE

This section provides the short title of the bill, the "Private Property Rights Implementation Act of 1997."

SECTION 2.—JURISDICTION IN CIVIL RIGHTS CASES

Section two deals with claims brought pursuant to 42 U.S.C. § 1983. It prohibits a district court with jurisdiction over a takings case from abstaining from exercising or relinquishing its jurisdiction when the case does not allege any violation of a state law, right or privilege. It provides that when a significant question of state law must be settled in order to proceed, a certified question may be directed to the highest appellate court in the state for clarification.

This section defines a "final decision" as having been reached when, after filing a meaningful application to use the property, a definitive decision regarding the extent of the permissible uses on the property without regard to any uses that may be permitted elsewhere is made. The bill applies only to actions involving the uses of real property. If an appellate process is available, the applicant need only receive one denied appeal or request for a waiver from an administrative agency or be denied such review if the appeal is to a body of elected officials to have a final decision. If an appeal or a request for a waiver is futile, it is not required.

This section also removes the requirement that the plaintiff exhaust all State remedies before being able to proceed to federal court.

SECTION 3.—UNITED STATES AS A DEFENDANT

This section deals with claims where the United States is the defendant. It amends the statute conferring concurrent jurisdiction on the Court of Federal Claims for takings in cases of less of $10,000. A final decision is defined as having occurred when a meaningful application to use the property is filed and a definite decision regarding on-site uses is made. The applicant must receive one denied appeal or request for a waiver from an administrative agency, unless it would be futile.

SECTION 4.—JURISDICTION OF COURT OF FEDERAL CLAIMS

This section deals with the jurisdiction of the Court of Federal Claims. It amends the statute conferring exclusive jurisdiction on the Court of Federal Claims for takings in excess of $10,000. A final decision is defined as having occurred when a meaningful application to use the property is filed and a definitive decision regarding the extent of permissible uses on the property without regard to the uses that may be permitted elsewhere is made. The applicant is required to receive one denied appeal or request for a waiver from an administrative agency, unless it would be futile.

SECTION 5.—EFFECTIVE DATE

This section states that the amendments made by H.R. 1534 shall apply to actions commenced on or after the date of the enactment of this Act.

AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGISLATIVE AFFAIRS,
*Washington, DC, October 6, 1997.*

Hon. HENRY J. HYDE, *Chairman,*
*Committee on the Judiciary,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: This is to express the Department of Justice's serious concerns with H.R. 1534, the "Private Property Rights Implementation Act of 1997," which was recently the subject of a Courts and Intellectual Subcommittee markup, and which the House Judiciary Committee will consider this week. The Department continues to oppose the bill strongly, and the Attorney General would recommend that the President veto the bill if passed.

On September 25, 1997, Acting Associate Attorney General John C. Dwyer presented the Department's views on H.R. 1534 in testimony before the Subcommittee on Courts and Intellectual Property. That testimony described two principal objections to the original bill's provisions respecting the ripeness of Federal court takings claims against state and local governments: (1) policy-based objections to the proposed relaxation of existing standards for determining when a property owner has secured a final decision from state and local authorities; and (2) constitutional objections to the proposed elimination of the existing requirement that a property owner seek compensation in state court before filing a Federal court takings action. Although the Subcommittee approved amendments to the bill on September 30th, the amendments do not alleviate either of these concerns.

The recent revisions to the bill's provisions concerning when Federal courts should treat state and local land-use decisions as final determinations for purposes of takings litigation strengthen our policy objections to the bill as a severe threat to the integrity of state and local land use planning processes. The amendments clarify that developers and other claimants can sidestep local procedures after a single land use application and waiver denial, and instead sue local officials in Federal court. This circumvention would diminish the role of local elected officials and the public in the resolution of local issues. Like the bill as introduced, the bill as amended would allow claimants, who have received an initial decision from local regulators, to circumvent all local waiver, appeal, or variance procedures by showing only that they are "reasonably unlikely" to succeed in the process. Evaluation of such claims would draw Federal courts into local land use disputes far earlier. The bill would elevate the rights of developers at the expense of neighboring property owners and others who would be harmed by deleterious land use proposals. It would permit developers to threaten premature litigation, and thus give them inappropriate leverage in their dealings with local officials in a way that would injure neighboring property owners and the community as a whole.

The recent amendments to the bill also fail to correct the original bill's constitutionally problematic proposal to eliminate the requirement that property owners seek compensation through state courts before litigating a takings claim in Federal court. The Supreme

Court has held that this requirement flows from the nature of the right secured by the Just Compensation Clause. Because that Clause prohibits only *uncompensated* takings, it is only violated when a state or locality refuses to provide just compensation for property that has been taken. If the bill were interpreted to allow property owners to obtain Federal court takings judgments against states and localities without first seeking compensation in state court, the bill would effectively alter the Supreme Court's authoritative interpretation of the nature of the restriction that the Just Compensation Clause places on state and local action. Congress, however, lacks the power to alter the constitutional obligations of the states in this manner. To avoid this unconstitutional result, Federal courts could comply with the literal instruction of H.R. 1534 by treating Federal court takings actions against states and localities as ripe for adjudication, even when property owner plaintiffs had failed to seek compensation using available state court procedures, while nevertheless dismissing such actions for failure to state a viable claim for relief. This saving construction of the bill's state-compensation provision, however, would appear to deprive that provision of all practical effect.

The bill's other major provision would prohibit Federal courts from "abstaining" or deferring to state courts on certain delicate issues of state law. The Subcommittee's amendments limit the abstention ban to cases that concern real property and where there is no parallel state court proceeding. Although the amendments narrow its scope, the abstention ban is still expressly designed to prohibit Federal courts from deferring to state courts on certain delicate issues of state law, thereby undermining state sovereignty, Federalism, and the legitimate role of state courts. The Department's testimony (p. 12) discusses a case involving a real property claim, *Meredith* v. *Talbot County,* 828 F.2d 228 (4th Cir. 1987), where the Federal court properly deferred on the interpretation of a new and complex state law that had never been interpreted by the state courts, thereby avoiding an unseemly exercise in which Federal courts would have to guess at the meaning of new state laws. The bill as amended would prohibit abstention in similar cases in the future.

The Department's other concerns with the bill are set forth in our testimony. Thank you for considering our views. The Office of Management and Budget has advised this Department that there is no objection to submission of this report from the standpoint of the Administration's program.

Sincerely,

ANDREW FOIS,
*Assistant Attorney General.*

cc: Hon. John Conyers, Jr.,
Ranking Minority Member.

Hon. Elton Gallegly.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill,

as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

**TITLE 28, UNITED STATES CODE**

* * * * * * *

## PART IV—JURISDICTION AND VENUE

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### CHAPTER 85—DISTRICT COURTS; JURISDICTION

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**§ 1343. Civil rights and elective franchise**

(a) * * *

* * * * * * *

*(c) Whenever a district court exercises jurisdiction under subsection (a) in an action in which the operative facts concern the uses of real property, it shall not abstain from exercising or relinquish its jurisdiction to a State court in an action where no claim of a violation of a State law, right, or privilege is alleged, and where a parallel proceeding in State court arising out of the same operative facts as the district court proceeding is not pending.*

*(d) Where the district court has jurisdiction over an action under subsection (a) in which the operative facts concern the uses of real property and which cannot be decided without resolution of a significant but unsettled question of State law, the district court may certify the question of State law to the highest appellate court of that State. After the State appellate court resolves the question certified to it, the district court shall proceed with resolving the merits. The district court shall not certify a question of State law under this subsection unless the question of State law—*

*(1) will significantly affect the merits of the injured party's Federal claim; and*

*(2) is so unclear and obviously susceptible to a limiting construction as to render premature a decision on the merits of the constitutional or legal issue in the case.*

*(e)(1) Any claim or action brought under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) to redress the deprivation of a property right or privilege secured by the Constitution shall be ripe for adjudication by the district courts upon a final decision rendered by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, that causes actual and concrete injury to the party seeking redress.*

*(2) For purposes of this subsection, a final decision exists if—*

*(A) any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere;*

*(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one appeal or waiver, where the applicable statute, ordinance, custom, or usage provides a mechanism for appeal to or waiver by an administrative agency; and*

*(C) in a case involving the uses of real property, where the applicable statute or ordinance provides for review of the case by elected officials, the party seeking redress has applied for but is denied such review.*

*The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if the prospects of success are reasonably unlikely and intervention by the district court is warranted to decide the merits.*

*(3) For purposes of this subsection, a final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State or territory of the United States.*

* * * * * * *

**§ 1346. United States as defendant**

(a) * * *

* * * * * * *

*(h)(1) Any claim brought under subsection (a) that is founded upon a property right or privilege secured by the Constitution, but was allegedly infringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, that causes actual and concrete injury to the party seeking redress.*

*(2) For purposes of this subsection, a final decision exists if—*

*(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere; and*

*(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one appeal or waiver, where the applicable law of the United States provides a mechanism for appeal to or waiver by an administrative agency.*

*The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if the prospects of success are reasonably unlikely and intervention by the district court or the United States Court of Federal Claims is warranted to decide the merits.*

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## CHAPTER 91—UNITED STATES COURT OF FEDERAL CLAIMS

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**§ 1491. Claims against United States generally, actions involving Tennessee Valley Authority**

(a)(1) * * *

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*(3) Any claim brought under this subsection founded upon a property right or privilege secured by the Constitution, but allegedly infringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, that causes actual and concrete injury to the party seeking redress. For purposes of this paragraph, a final decision exists if—*

*(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere; and*

*(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one appeal or waiver, where the applicable law of the United States provides a mechanism for appeal or waiver.*

*The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if the prospects of success are reasonably unlikely and intervention by the United States Court of Federal Claims is warranted to decide the merits.*

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## DISSENTING VIEWS

We strongly oppose H.R. 1534, the "Private Property Rights Implementation Act of 1997."

As amended and approved in Subcommittee and by the Committee, the legislation appreciably narrows the ripeness judicial doctrine thereby forcing premature federal involvement in local land use disputes; and it significantly pares back the judicial requirement that federal courts generally abstain from resolving sensitive state political and judicial controversies. Moreover, these changes are being made for the benefit of one set of plaintiffs—real property owners alleging Fifth Amendment takings—to the exclusion of all other persons who face abrogation of their constitutional rights.

Although H.R. 1534 has been characterized as purely "procedural," it will have a significant impact on takings cases and will severely tilt the playing field in favor of developers and landowners. In addition to encouraging forum shopping between federal and state courts, the legislation tells the States and municipalities that they are not competent to adjudicate their land disputes, and that a federal court should be brought in at the earliest possible point in the litigation to save localities from their alleged biases. Significantly, this legislation represents the very first effort which specifically targets our state and local governments and forces the federal bench into their decisionmaking process.

There is no hard or quantifiable data which supports this ill-considered intrusion into the law of takings. Although the Majority frequently cites the experiences of widows facing zoning and land use difficulties, beneficiaries of the bill also include landowners and professional developers. At a relative disadvantage will be families in neighborhoods who reside near property whose development potential would be enhanced by this bill.

Because in this case changes in process do in fact greatly disturb takings law in a fashion we are not prepared to accept, and, independent of that concern, because the actual language of H.R. 1534 is so inartfully drawn and problematic, we oppose this legislation.

### BACKGROUND AND CURRENT LAW

H.R. 1534 is the most recent attempt in a multi-Congress effort to change the perceived imbalance of power between developers and governmental entities with respect to land use decisions. The 104th Congress withstood a major effort by the Majority to dramatically expand takings laws, in order to provide easier and greater compensation to denied developers and polluters, by legislative fiat.[1] In this Congress the Majority's principal effort to favor

[1] Two takings bills emerged among several proposals during the 104th Congress. The Private Property Protection Act of 1995 [H.R. 925, 104th Cong., 1st Sess. (1995)] passed the House in March of 1995 by a vote of 277 to 148. Earlier versions of that legislation were considered by the House Judiciary Committee and the Constitution Subcommittee. In the Senate, Senator Robert Dole and thirty-one co-sponsors introduced the Omnibus Property Act [S. 605, 104th Cong., 1st Sess. (1995)] in March 1995. The Senate Environment and Public Works Committee held hearings in June and July 1995, and the Senate Judiciary Committee held hearings between April and October 1995. In December 1995 the Judiciary Committee marked up the bill, and ordered it reported on the floor of the Senate with minor changes. The full Senate did not take up the bill.

such developers comes in the form of H.R. 1534 which would substantially narrow the doctrines of "Abstention" and "Ripeness."

*1. Abstention*

Abstention is a discretionary doctrine under which federal judges may decline to decide cases that are otherwise properly before the federal courts, and is based on the notion that federal courts should not intrude on sensitive state political and judicial controversies unless necessary. The two basic abstention doctrines *(Pullman and Burford)* call for either retaining jurisdiction over the case but sending the litigants to state court for a determination of the state law question *(Pullman*[2]*)* or dismissing the action in cases touching on a complex state regulatory scheme concerning matters of state policy more properly addressed by state courts *(Burford*[3]*).* The latter doctrine was recently narrowed, when the Supreme Court held that abstention does not support outright dismissal or remand in actions seeking monetary damages, as opposed to equitable or other discretionary relief.[4] Moreover, a series of rulings in the 1980s leveled the playing field as between federal and state court for takings claims, and caused federal court caseloads to increase, which in the view of legal scholars, increased the use of abstention by the District Courts.[5]

*2. Ripeness*

Ripeness is another judicial doctrine, partly rooted in Article III of the United States Constitution's "cases" and "controversies" requirement, which seeks to ensure that a matter is sufficiently mature for legal resolution. Ripeness in the takings context has several elements: finality and exhaustion of remedies, and compensation. Finality/exhaustion has come to require that before the court can reach the takings claim, the property-regulating government body must have arrived at a "final, definitive position" as to the degree of development allowed on the property.[6] Further, the landowner also must exhaust any avenues for a variance, waiver, or other exemption from the land use restriction at issue. What this means practically is that a "no" from a zoning commission or other adjudicative body may not be sufficient for a federal court to assert itself, since that simple denial may not be adequate to determine what use the developer could have made of the property, short of the denied proposal. Since the Fifth Amendment bars takings without just compensation, rather than merely "takings," compensation ripeness requires that plaintiffs first seek compensation from state/local or other fora, if that remedy is "adequate." Last, there is a "futility" exemption to ripeness: A takings case is ripe despite the owner's failure to satisfy the above prerequisites if pursuing them would, under the circumstances, be futile.[7]

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[2] *Railroad Comm'n of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941).
[3] *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943).
[4] *Quackenbush* v. *Allstate Ins. Co.,* 116 S.Ct. 1712 (1996).
[5] *See, e.g.,* Memorandum to Hon. Patrick Leahy, Issues Raised by H.R. 1534, the "Private Property Rights Implementation Act," American Law Division, Congressional Research Service (Aug. 15, 1997).
[6] *Williamson County Planning Comm'n* v. *Hamilton Bank,* 473 U.S. 172 (1985).
[7] *MacDonald, Sommer & Frates* v. *Yolo County,* 477 U.S. 340, 350 n. 7 (1986) ("property owner is of course not required to resort to . . . unfair procedures . . .").

DESCRIPTION OF LEGISLATION

For abstention, H.R. 1534 provides that a federal district court may not abstain from exercising its jurisdiction where no state law claim is alleged and no parallel proceeding in state court is pending (*e.g.,* where the property owner elects to no longer pursue its remedy through state legal proceedings).[8] Only if there exists a "significant but unsettled" question of state law, may the court certify any such legal question implicated by the takings case to the highest appellate court of the state.[9] (Even then, the District Court may not certify the question unless it will "significantly affect" the landowner's claim and the question is "so unclear" and "obviously susceptible to a limiting construction" as to make the federal court adjudication "premature.")[10]

For ripeness, H.R. 1534 declares that actions are ripe upon "a final decision rendered by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, that causes actual and concrete injury to the party seeking redress."[11] Then, "final decision" is any person's "definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere" and "one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one appeal or waiver, where the applicable statute, ordinance, custom or usage provides a mechanism for appeal to or waiver by an administrative agency."[12] Pursuant to an amendment offered by Congresswoman Lofgren and accepted at Committee, federal courts are also not permitted to intervene in cases where the "applicable statute or ordinance provides for review of the case by elected officials" until the property owner has applied for and been denied such review.[13]

With regard to ripeness, the "one appeal" requirement does not apply "if no such appeal or waiver is available, if it cannot provide the relief requested, or if the prospects of success are reasonably unlikely and intervention by the district court is warranted to decide the merits"[14] (thereby substantially expanding the "futility" exception described above). This is so broadly worded it could have the effect of obviating any resort to appeal or waiver. The legislation also eliminates the current state exhaustion requirement to the ripeness doctrine, presumably overturning *Williamson County's*[15] state compensation requirement.[16]

Finally, H.R. 1534 makes substantially identical narrowing limitations to the ripeness doctrine as it applies to takings cases brought against the U.S. government in District Court or the Court of Federal Claims.[17]

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[8] Sec. 2, proposed new 28 U.S.C. § 1343 c.
[9] Sec. 2, proposed new 28 U.S.C. § 1343(d).
[10] Sec. 2, proposed new 28 U.S.C. § 1343(d)(1)(2).
[11] Sec. 2, proposed new 28 U.S.C. § 1343(e)(1).
[12] Sec. 2, proposed new 28 U.S.C. § 1343(e)(2) (A) & (B).
[13] Sec. 2, proposed new 28 U.S.C. § 1343(e)(2)(C).
[14] Sec. 2, end paragraph to proposed new 28 U.S.C. § 1343(e)(2).
[15] Supra n. 6.
[16] Sec. 2, proposed new 28 U.S.C. § 1343(e)(3).
[17] Secs. 2 & 3.

## CONCERNS WITH LEGISLATION

*1. Failure to Maintain Local Control Concerning Land Use Disputes*

A central problem with H.R. 1534 is its attack on the primacy of local/state officials in land use matters. It threatens directly their control, and will force them into federal court as defendants long before a complete record of appropriate land use is established. In this regard, it threatens to severely diminish the negotiating posture of states and local governments relative to developers of land. For example, under the bill, a developer could threaten to bring a local government into court and incur substantial legal and other costs whenever a zoning or development dispute arises.[18] The legislation also gives the developer the option of seeking redress in their local state court or in federal court, depending upon which has more favorable legal precedents. Congress should take steps to prevent forum shopping, rather than encourage it as this bill does.

The effect of the legislation reported out of the Judiciary Committee is to greatly intrude on the proper domain of local and municipal officials to determine the best use of land within their own jurisdiction. The effect of the bill is to significantly move up the point at which the federal courts may be asked to adjudicate on that question, and they will be forced to do so on a record that will be skeletal in many cases. Because of that, several Democrats offered amendments the effect of which would have been to restore local decision making authority in the area of land use. Only one amendment was accepted.

Congressman Nadler of New York offered an amendment to H.R. 1534 which would have removed from the effect of the legislation takings done "to protect public health or safety." The intent of the amendment was to protect the superior ability of states and municipalities to determine first for themselves appropriate land use policy, including those actions taken by the municipality for the sake of health and safety. The amendment was rejected by voice vote.

Congressman Watt of North Carolina offered an amendment which would have restored the effect of the current futility doctrine. Again, that judicially established doctrine provides that appeal or waiver to municipal officials need not be entertained for purposes of establishing ripeness if such appeal or waiver would be futile. H.R. 1534 dilutes the futility doctrine (permitting more rapid review by federal courts) if "no such appeal or waiver is available, if it cannot provide the relief requested, or if the prospects of success are reasonably unlikely and intervention by the district court is warranted to decide the merits."[19]

Congressman Watt's amendment would have eliminated this statutory definition of the futility doctrine, the effect of which would have arguably been to permit existing case law defining the doctrine to remain intact. Rejected 17–10, debate over the amendment nonetheless pointed out the inexplicable standard remaining in the bill, namely, *inter alia,* "if it cannot provide the relief re-

[18] At an Oct. 9, 1997 Congressional Forum, Mr. Chuck Thompson explained that Carroll County, Maryland's outside budget to defend themselves in these cases was only $20,000 per year.
[19] Sec. 2, end paragraph to proposed new 28 U.S.C. § 1343(e)(2).

quested."[20] This is not a term of art, and could mean that no appeals or waiver requests are required because administrative agencies cannot provide the relief requested—just compensation. It would be difficult to discern how a district court, reviewing whether a particular claim is ripe under this standard, could know whether or not further available appeal at the municipal level could "provide the relief requested." In addition, we are concerned with the "reasonably unlikely" standard.[21] When is a particular outcome of litigation not "reasonably unlikely" (or likely)? An articulation as ambiguous as this invites litigation about the standard. Since a central complaint of the proponents of this legislation is that current litigation concerning land use is too onerous and lengthy, standards as ambiguous as this one cannot help alleviate that stated concern.

Congressman Watt's amendment served another important function in that it raises the point that to the extent ripeness is a constitutionally driven doctrine, defined by the courts from Article III's "cases" and "controversies" requirement, there is considerable doubt about whether Congress has the capacity to legislate in this area. That is, if ripeness is constitutionally based, or even partly so, Congress' actions to limit it will itself be futile. If this aspect of ripeness is prudential, Congress may legislate jurisdictional requirements. But, the difficulty of this constitutional question argues for more hearings and testimony, not a rapid move to the floor of the House of Representatives for insufficiently informed judgment.[22]

The one amendment accepted, agreed to by voice vote after unanimous consent to limit it, was offered by Congresswoman Lofgren, and redefines "final decision" to provide that in addition to one meaningful application and one appeal/waiver, "where the applicable statute or ordinance provides for review of the case by elected officials, the party seeking redress has applied for but is denied such review."[23] Acceptance of this amendment improves this bill, in our view. Notwithstanding, debate around this amendment highlights for us our remaining problems with the bill, which is that it essentially undermines local control of land use decisions by injecting federal courts into the decisionmaking process about land use long before the time it is necessary or appropriate for the federal judiciary to be involved. States and land use authorities are competent to determine land use and compensation for takings. Federal courts have an appropriate role in determining federal takings and reviewing state compensation awards or denials, but not acting as fact-finders of record.

In Congresswoman Lofgren's view, and the view of the Committee which adopted her amendment, at least one elected body should at the local level review a proposal before a federal court reviews it. While the adoption of this amendment does not make this bill

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[20] *Id.*

[21] *Id.*

[22] Indeed, numerous legal commentators have taken the position that ripeness is directly tied into this constitutional requirement. *See* Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts,* 48 Vand L. Rev. 1, 16 (1995) (finality ripeness is prudential; compensation ripeness is constitutional); Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases,* 10 J. Land Use & Envtl. L. 91 (1994) (both are constitutional).

[23] Sec. 2, proposed new 28 U.S.C. § 1343(e)(2)(C).

acceptable to Congresswoman Lofgren or the Minority, it is a recognition that local officials, especially elected local officials held accountable to constituents, are appropriately suited to respond to and pass on local land use decisions before a federal court should.

Still, as reported the legislation continues to represent an unwarranted incursion into state and local control of land use decisions. If the reported legislation were to become law, a developer may apply for a permit to build 800 homes on a parcel of land. A zoning official may deny that request, and a zoning board may as well. If that zoning board is elected, the matter is then ripe for federal district court. Without any determination of what would be a permissible use of that land short of the denied use, the case would be before a federal district court, if the developer believes that to be the more favorable forum. What would under current law probably be deferred—dismissed or stayed while a state administrative agency or court determines a permissible use, if any—would under this legislation be reviewed by a federal district court which may or may not have any ability to discern whether there has been a taking. That is an incursion into the traditional powers of states and localities we cannot support.

It is also important to note that H.R. 1534 does not simply alter the procedural question of where and when a land use dispute is resolved. There are concerns that the legislation could serve to substantively alter the law of takings, imposing costly new burdens on State and local governments. For example, the bill defines a "final decision" for its ripeness and abstention provisions to mean "a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken *without regard to any uses that may be permitted elsewhere."*[24] This could require that whatever property rights deprivations the bill covers, the deprivation must be judged solely with respect to the regulated portion, rather than the entire portion. This runs counter to well settled takings jurisprudence requiring courts to analyze the effect of government action on the relevant parcel as a whole.[25]

*2. Undue Imposition on the Federal Judiciary*

In addition, H.R. 1534 would force federal district court judges to decide cases before the cases are adequately fleshed out. For example, in the takings context, the ripeness doctrine assures that a court would have the critical information it needs to apply certain takings factors. In particular, if a court cannot determine whether the "economic impact" and "interference with investment-backed expectations' factors set forth in *Penn Central Transportation Co.* v. *City of New York*[26] are sufficiently severe, it will be difficult to determine whether an unconstitutional taking has occurred.

The bill's limitations on abstention also create new burdens on the federal judiciary. For example, the bill creates a procedure whereby federal courts certify "significant but unsettled" questions

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[24] Sec. 2, proposed new section 28 U.S.C. § 1343(e)(2)(A) (emphasis added).

[25] *See H.R. 1534, the "Private Property Rights Implementation Act of 1997," Hearing Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.,* 105th Cong., 1st Sess (1997) (Statement of John C. Dwyer, Acting Associate Attorney General, at 14–15, *citing Concrete Pipe and Products of California, Inc.* v. *Construction Laborers Pension Trust,* 508 U.S. 602, 644; *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104, 130–31).

[26] 438 U.S. 104 (1978).

of state law, they may certify the question to the highest appellate court of the State. But not all States have adopted such procedures and some states with procedures in place will not accept certificates from federal district courts. Therefore the bill may have the effect of blocking the federal courts from abstaining and forcing them to decide significant State law questions themselves.

In the aggregate, these changes—along with the increased absolute number of takings cases likely to end up in federal court—will result in a significant increase in the federal judicial workload, a particular problem given the high number of vacant judgeships and the increasing wholesale federalization of other traditional areas of State law (such as criminal law enforcement). According to a recent Congressional Research Service report on the legislation, "there is a sound argument that H.R. 1534 will result in a significant increase in the workload of the federal courts, particularly from takings litigation."[27] Moreover, this new burden would come at the very time that the federal bench is laboring under the weight of some 100 unfilled vacancies.[28]

The result of the bill is a scheme we would have thought untenable to conservative Republicans: the massive transfer of power over land use decisions to the federal judiciary. In the same Subcommittee of the Judiciary Committee from which H.R. 1534 was reported, the Majority has convened a hearing (and reported out a bill[29]) on Judicial Misconduct/Activism, at which federal judges who have allegedly usurped their authority, misapplied the law, and legislated from the bench, were railed against. It is curious that against this backdrop legislation such as H.R. 1534 which greatly increases the workload and authority of federal judges would become a high legislative priority of the Republican leadership.

Congressman Delahunt of Massachusetts offered an amendment which would have delayed the effective date of H.R. 1534 until the Judicial Conference of the United States had certified that less than 3 percent of all federal judgeships are vacant. The purpose of the amendment, as Congressman Delahunt explained, was "to ensure that the depleted ranks of the federal bench are restored to their full strength before the courts are asked to take on the massive new workload this bill would generate."[30] Although the amendment was not agreed to, it illustrated the continuing crisis in the federal judiciary that has been brought about by the failure of the Senate to confirm judicial nominees in a timely way. It also highlighted the irony of legislation which would transfer such substantial authority from state courts to the very federal judges so often criticized by proponents of the bill for their supposed "judicial activism."

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[27] *CRS Report for Congress, "Property Rights" Bills Take a Process Approach: H.R. 992 and H.R. 1534,* Sept. 22, 1997 (97–877A).

[28] Thirty of these vacancies have been pending for more than a year and a half. In the first four months of this year, the Senate confirmed only four judicial nominees. During the entire previous year only 17 district court judges were confirmed, and—for the first time in history—not a single appeals court judge was confirmed. This situation has resulted in an alarming backlog of over 25,000 civil cases, and over 10,000 criminal cases. This backlog would be greatly exacerbated by the avalanche of litigation that would be brought if the bill becomes law.

[29] H.R. 1252, 105th Cong., 1st Sess.

[30] Transcript at 86.

*3. Failure to Extend the Legislation to Apply to Other Civil Rights Plaintiffs*

As introduced, H.R. 1534 was drafted to apply to all property and privilege claims, including all Section 1983 actions.[31] Section 1983 was adopted as part of the Civil Rights Act of 1871 in the wake of the Reconstruction Amendments to the Constitution. Known as the "Ku Klux Klan Act," it was specifically designed to halt a wave of lynchings of African-Americans that had occurred under guise of state and local law. The Subcommittee approved an amendment offered by Mr. Gallegly which, *inter alia,* limited the application of the bill to those circumstances "in which the operative facts concern the use of real property."[32] Arguing that property claims should not be granted a docket preference vis a vis life, liberty and other civil rights claims, Representatives Conyers and Jackson Lee offered an amendment to strike the limitation adopted in Subcommittee. This amendment was defeated by a vote of 7–17.

The effect of the amendment's defeat is to report a bill which grants "affirmative action" to real property claims. Application of abstention and ripeness doctrines to dismiss or stay actions in Federal District Court is not limited to real property, but H.R. 1534 as reported would limit such application only for real property, at least for abstention. That is, police brutality claims, conditions in prisons and juvenile facilities, and any other civil rights/Section 1983 claim would continue to face application of abstention principles as a bar to immediate review by Federal District Courts, but after passage of H.R. 1534, real property claims would not. For example, abstention has been held appropriate in section 1983 actions involving the Sixth Amendment right to counsel,[33] "cruel and unusual punishment" conditions of confinement at a juvenile facility,[34] the denial of Medicaid benefits and First Amendment rights,[35] gender-based discrimination[36] and a parallel state court criminal proceeding.[37] But H.R. 1534 would not alleviate or limit the application of the abstention doctrine in these cases.

That literal and symbolic moving to the front of the line of real property claims is inappropriate as a matter of court administration and public policy. While we all believe that the protection of real property is an important part of our democracy, there is no defensible reason to place Fifth Amendment takings rights above other civil rights in line for federal court review.

## BROAD OPPOSITION TO LEGISLATION

The Attorney General would recommend a veto of H.R. 1534 if passed in its current form. The Department of Justice wrote a

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[31] 42 U.S.C. 1983. Section 1983 was adopted as part of the Civil Rights Act of 1871 in the wake of the Reconstruction Amendments to the Constitution. Known as the "Ku Klux Klan Act," it was specifically designed to halt a wave of lynchings of African-Americans that had occurred under guise of state and local law.

[32] We say "intended" because the goal of the amendment to limit the effect of the bill to property rights may or may not have been effectuated: while the abstention directive in Sec. 2, proposed new 28 U.S.C. § 1343(c) is clearly limited to real property, the ripeness portions of the bill—Sec. 2, proposed new 28 U.S.C. § 1343(e) and Secs. 2 & 3—were not so limited.

[33] *Mann* v. *Jett,* 781 F.2d 1448 (9th Cir. 1986).

[34] *Manny* v. *Cabell,* 654 F.2d 1280 (9th Cir. 1980).

[35] *Winters* v. *Lavine,* 574 F.2d 46 (2d Cir. 1978).

[36] *Tiger Inn* v. *Edwards,* 636 F. Supp. 787 (D.N.J. 1986).

[37] *Heck* v. *Humphrey,* 512 U.S. 477 (1994).

strong letter in opposition to this bill, citing particularly that the bill will 1) dramatically shift authority to decide local issues from state and local to federal courts; 2) allow developers and others to sue local officials in federal court without adequately seeking to resolve their disputes outside the courtroom, thereby reducing the role of local officials in local decision making; 3) deem "ripe" for adjudication cases in which there is an insufficient factual record for decision, raising the risk of poorly informed rulings; 4) disrupt the administration of vital federal protections; 5) complicate judicial application of longstanding precedent under the Just Compensation Clause of the Fifth Amendment regarding the relevant "parcel as a whole"; and 6) burden the already overcrowded federal docket at the expense of meritorious claims. [38]

Importantly, a bipartisan group of 40 Attorneys General (37 States and 3 Territories/Possessions) signed a letter in opposition to this legislation. They wrote, "H.R. 1534 invades the province of state and local governments and directs federal judges to intrude into matters pending before state and local officials and courts. Not only does the bill catapult many state land use decisions into federal court but it also authorizes defendants in any type of state or local case, civil or criminal, to seek the intervention of a federal judge." [39]

The Attorneys General are joined in opposition by the American Planning Association, the National League of Cities, U.S. Conference of Mayors, the National Conference of State Legislatures, the International Municipal Lawyers Association, and the Judicial Conference of the United States. The League of Cities and Conference of Mayors observed that H.R. 1534:

> [w]ould impose severe and unwarranted burdens on America's cities and towns by greatly enhancing the ability of developers and other claimants to sue cities in federal court for alleged "takings." Such a federal action would expose local governments to increased financial liability and interfere with the ability of local governments to make reasonable land use decisions. [40]

Similarly, the Judicial Conference noted:

> The bill would alter deeply ingrained federalism principles by prematurely involving the federal courts in property regulatory matters that have historically been processed at the state and local levels. The bill may also adversely affect the administration of justice and delay the resolution of property claims. [41]

Other state and local government organizations, including the California State Association of Counties and the League of California Cities also oppose this bill. In addition, a broad array of environmental groups oppose this bill, including the National Wildlife Federation, the League of Conservation Voters, the Sierra Club, the Center for Marine Conservation, the Environmental Defense

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[38] Letter to Hon. Henry Hyde (Oct. 7, 1997).
[39] Letter to Hon. Henry Hyde (Sept. 24, 1997).
[40] Letter to Hon. Henry Hyde (Sept. 24, 1997).
[41] Letter to Hon. Henry Hyde (Sept. 29, 1997).

Fund, the National Audubon Society, the National Trust for Historic Preservation, Scenic America, the Natural Resources Defense Council, and the Wilderness Society.

## CONCLUSION

H.R. 1534 represents a significant windfall to developers, and would constitute a major shift in the balance of power between municipalities and other land use authorities and developers, while significantly eroding local control over land use decisions. Although this legislation has been portrayed as changing the balance of power between developers and local governments, the real shift would be from local neighborhoods and homeowners to professional developers. The real purpose of zoning regulations is to protect the interest of the individual landowner and they would be disadvantaged by this bill. At the Committee markup, it became clear that the purpose and rationale for the legislation was muddled. Significant opposition and major policy issues were raised by Democratic and Republican Members alike and the bill was opposed on final passage by all Democrats present and voting but one. In response, Subcommittee Chairman Coble and bill cosponsor Gallegly promised to consider further changes to respond to the bill's many flaws prior to floor consideration. The time to make these changes is at the Committee level, not behind closed doors. The American people deserve a better and more even-handed approach to the takings issue, and we dissent from this legislation.

JOHN CONYERS, Jr.
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SHEILA JACKSON LEE.
WILLIAM D. DELAHUNT.
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ZOE LOFGREN.

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