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THE PRIVATE PROPERTY RIGHTS IMPLEMENTATION ACT OF 1998

JULY 8, 1998.—Ordered to be printed

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

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 1534]

The Committee on the Judiciary, to which 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 in the nature of a substitute, and recommends that the bill, as amended, do pass.

CONTENTS

		Page
I.	Purposes and summary	6
II.	Legislative history	7
III.	Background and the need for legislation	8
IV.	Critics' contentions concerning the "ripeness" sections of the bill	19
V.	Section-by-section analysis	24
VI.	Cost estimate	26

59–010

VII. Regulatory impact statement 28
VIII. Minority views of Senators Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Durbin, and Torricelli 29
IX. Changes in existing law made by the bill, as reported 59

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Citizens Access to Justice Act of 1998".

SEC. 2. FINDINGS.

Congress finds that—

(1) property rights have been abrogated by the application of laws, regulations, and other actions by all levels of government that adversely affect the value and the ability to make reasonable use of private property;

(2) certain provisions of sections 1346 and 1402 and chapter 91 of title 28, United States Code (commonly known as the Tucker Act), that delineate the jurisdiction of courts hearing property rights claims, frustrate the ability of a property owner to obtain full relief for violation founded upon the fifth and fourteenth amendments of the United States Constitution;

(3) current law—

(A) has no sound basis for splitting jurisdiction between two courts in cases where constitutionally protected property rights are at stake;

(B) adds to the complexity and cost of takings and litigation, adversely affecting taxpayers and property owners;

(C) forces a property owner, who seeks just compensation from the Federal Government, to elect between equitable relief in the district court and monetary relief (the value of the property taken) in the United States Court of Federal Claims;

(D) is used to urge dismissal in the district court in complaints against the Federal Government, on the ground that the plaintiff should seek just compensation in the Court of Federal Claims;

(E) is used to urge dismissal in the Court of Federal Claims in complaints against the Federal Government, on the ground that the plaintiff should seek equitable relief in district court; and

(F) forces a property owner to first pay to litigate an action in a State court, before a Federal judge can decide whether local government has denied property rights safeguarded by the United States Constitution;

(4) property owners cannot fully vindicate property rights in one lawsuit and their claims may be time barred in a subsequent action;

(5) property owners should be able to fully recover for a taking of their private property in one court;

(6) certain provisions of section 1346 and 1402 and chapter 91 of title 28, United States Code (commonly known as the Tucker Act) should be amended, giving both the district courts of the United States and the Court of Federal Claims jurisdiction to hear all claims relating to property rights in complaints against the Federal Government;

(7) section 1500 of title 28, United States Code, which denies the Court of Federal Claims jurisdiction to entertain a suit which is pending in another court and made by the same plaintiff, should be repealed;

(8) Federal and local authorities, through complex, costly, repetitive and unconstitutional permitting, variance, and licensing procedures, have denied property owners their fifth and fourteenth amendment rights under the United States Constitution to the use, enjoyment, and disposition of, and exclusion of others from, their property, and to safeguard those rights, there is a need to determine what constitutes a final decision of an agency in order to allow claimants the ability to protect their property rights in a court of law;

(9) a Federal judge should decide the merits of cases where a property owner seeks redress solely for infringements of rights safeguarded by the United States Constitution, and where no claim of a violation of State law is alleged; and

(10) certain provisions of sections 1343, 1346, and 1491 of title 28, United States Code, should be amended to clarify when a claim for redress of constitutionally protected property rights is sufficiently ripe so a Federal judge may decide the merits of the allegations.

SEC. 3. PURPOSES.

The purposes of this Act are to—

(1) establish a clear, uniform, and efficient judicial process whereby aggrieved property owners can obtain vindication of property rights guaranteed by the fifth and fourteenth amendments to the United States Constitution and this Act;

(2) amend the Tucker Act, including the repeal of section 1500 of title 28, United States Code;

(3) rectify the unduly onerous and expensive requirement that a property owner, seeking redress under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) for the infringement of property rights protected by the fifth and fourteenth amendments of the United States Constitution, is required to first litigate Federal constitutional issues in a State court before obtaining access to the Federal courts; and

(4) provide for uniformity in the application of the ripeness doctrine in cases where constitutionally protected property rights are allegedly infringed, by providing that a final agency decision may be adjudicated by a Federal court on the merits after—

(A) the pertinent government body denies a meaningful application to develop the land in question; and

(B)(i) the property owner seeks a waiver by or brings an appeal to an administrative agency from such denial; and

(ii) such waiver or appeal is not approved.

SEC. 4. DEFINITIONS.

In this Act, the term—

(1) "agency action" means any action, inaction, or decision taken by a Federal agency or other government agency that at the time of such action, inaction, or decision adversely affects private property rights;

(2) "district court"—

(A) means a district court of the United States with appropriate jurisdiction; and

(B) includes the United States District Court of Guam, the United States District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands;

(3) "Federal agency" means a department, agency, independent agency, or instrumentality of the United States, including any military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the United States Government;

(4) "owner" means the owner or possessor of property or rights in property at the time the taking occurs, including when—

(A) the statute, regulation, rule, order, guideline, policy, or action is passed or promulgated; or

(B) the permit, license, authorization, or governmental permission is denied or suspended;

(5) "private property" or "property" means all interests constituting property, as defined by Federal or State law, protected under the fifth and fourteenth amendments to the United States Constitution; and

(6) "taking of private property", "taking", or "take" means any action whereby restricting the ownership, alienability, possession, or use of private property is an object of that action and is taken so as to require compensation under the fifth amendment to the United States Constitution, including by physical invasion, regulation, exaction, condition, or other means.

SEC. 5. PRIVATE PROPERTY ACTIONS.

(a) IN GENERAL.—An owner may file a civil action under this section to challenge the validity of any Federal agency action as a violation of the fifth amendment to the United States Constitution in a district court or the United States Court of Federal Claims.

(b) CONCURRENT JURISDICTION.—Notwithstanding any other provision of law and notwithstanding the issues involved, the relief sought, or the amount in controversy, the district court and the United States Court of Federal Claims shall each have concurrent jurisdiction over both claims for monetary relief and claims seeking invalidation of any Act of Congress or any regulation of a Federal agency affecting private property rights.

(c) ELECTION.—The plaintiff may elect to file an action under this section in a district court or the United States Court of Federal Claims.

(d) WAIVER OF SOVEREIGN IMMUNITY.—This section constitutes express waiver of the sovereign immunity of the United States with respect to an action filed under this section.

(e) APPEALS.—The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of any action filed under this section, regardless of whether the jurisdiction of such action is based in whole or part under this section.

(f) STATUTE OF LIMITATIONS.—The statute of limitations for any action filed under this section shall be 6 years after the date of the taking of private property.

(g) ATTORNEYS' FEES AND COSTS.—The court, in issuing any final order in any action filed under this section, shall award costs of litigation (including reasonable attorneys' fees) to any prevailing plaintiff.

SEC. 6. JURISDICTION OF UNITED STATES COURT OF FEDERAL CLAIMS AND UNITED STATES DISTRICT COURTS.

(a) UNITED STATES COURT OF FEDERAL CLAIMS.—

(1) JURISDICTION.—Section 1491(a) of title 28, United States Code, is amended—

(A) in paragraph (1) by amending the first sentence to read as follows: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States for monetary relief founded either upon the Constitution or any Act of Congress or any regulation of an executive department or upon any express or implied contract with the United States, in cases not sounding in tort, or for invalidation of any Act of Congress or any regulation of an executive department under section 5 of the Citizens Access to Justice Act of 1998.";

(B) in paragraph (2) by inserting before the first sentence the following: "In any case within its jurisdiction, the Court of Federal Claims shall have the power to grant injunctive and declaratory relief when appropriate."; and

(C) by adding at the end the following new paragraphs:

"(3) In cases otherwise within its jurisdiction, the Court of Federal Claims shall also have supplemental jurisdiction, concurrent with the courts designated under section 1346(b), to render judgment upon any related tort claim authorized under section 2674.

"(4) In proceedings within the jurisdiction of the Court of Federal Claims which constitute judicial review of agency action (rather than de novo proceedings), the provisions of section 706 of title 5 shall apply.

"(5) 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; and

"(B) one meaningful application to use the property has been submitted but has not been approved, and the party seeking redress has applied for one appeal or waiver which has not been approved, 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 application or reapplication to use the property would be futile. Nothing in this paragraph alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.".

(2) PENDENCY OF CLAIMS IN OTHER COURTS.—

(A) IN GENERAL.—Section 1500 of title 28, United States Code is repealed.

(B) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 91 of title 28, United States Code, is amended by striking out the item relating to section 1500.

(b) DISTRICT COURT JURISDICTION.—

(1) CITIZEN ACCESS TO JUSTICE ACTION.—Section 1346(a) of title 28, United States Code, is amended by adding after paragraph (2) the following:

"(3) Any civil action filed under section 5 of the Citizens Access to Justice Act of 1998.".

(2) 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; and

"(B) one meaningful application to use the property has been submitted but has not been approved, and the party seeking redress has applied for one appeal or waiver which has not been approved, 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 application or reapplication to use the property would be futile.

"(3) Nothing in this subsection alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.".

(c) DISTRICT COURT CIVIL RIGHTS JURISDICTION; ABSTENTION.—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 an 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 patently unclear.

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

"(i) 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;

"(ii)(I) one meaningful application, as defined by the locality concerned within that State or territory, to use the property has been submitted but has not been approved, and the party seeking redress has applied for one appeal or waiver which has not been approved, where the applicable statute, ordinance, custom, or usage provides a mechanism for appeal to or waiver by an administrative agency; or

"(II) one meaningful application, as defined by the locality concerned within that State or territory, to use the property has been submitted but has not been approved, and the disapproval explains in writing the use, density, or intensity of development of the property that would be approved, with any conditions therefor, and the party seeking redress has resubmitted another meaningful application taking into account the terms of the disapproval, except that—

"(aa) if no such reapplication is submitted, then a final decision shall not have been reached for purposes of this subsection, except as provided in subparagraph (B); and

"(bb) if the reapplication is not approved, or if the reapplication is not required under subparagraph (B), then a final decision exists for purposes of this subsection if the party seeking redress has applied for one appeal or waiver with respect to the disapproval, which has not been approved, where the applicable statute, ordinance, custom, or usage provides a mechanism of appeal or waiver by an administrative agency; and

"(iii) 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.

"(B) The party seeking redress shall not be required to apply for an appeal or waiver described in paragraph (1)(B) if no such appeal or waiver is available, if it

cannot provide the relief requested, or if the application or reapplication would be futile.

"(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.

"(f) Nothing in subsection (c), (d), or (e) alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.".

SEC. 7. DUTY OF NOTICE TO OWNERS.

Whenever a Federal agency takes an agency action limiting the use of private property that may be affected by this Act (including the amendments made by this Act), the agency shall give notice to the owners of that property explaining their rights under this Act and the procedures for obtaining any compensation that may be due to them under this Act.

SEC. 8. RULES OF CONSTRUCTION.

Nothing in this Act shall be construed to interfere with the authority of any State to create additional property rights.

SEC. 9. EFFECTIVE DATE.

This Act shall take effect on the date of enactment of this Act and shall apply to any agency action that occurs on or after such date.

I. Purposes and Summary

H.R. 1534 primarily addresses the problem of providing property owners fair access to Federal courts to vindicate their Federal constitutional rights. The bill is thus merely procedural and does not create new substantive rights.

In situations where other than fifth amendment property rights are sought to be enforced (such as first amendment rights, for example), aggrieved parties generally may file in a single Federal forum without having to exhaust State and local procedures. This is not the case for property owners. Often they must exhaust all State remedies with the result that they may have to wait for over a decade before their rights are allowed to be vindicated in Federal court—if they get there at all. Moreover, the Federal jurisdiction over property rights claims against Federal agencies and executive branch departments is in a muddle. In these types of cases, property owners face onerous procedural hurdles unique in Federal litigation.

Consequently, H.R. 1534 has two purposes. The first 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. This is accomplished 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 jurisdiction when the case does not allege any violation of a State law, right, or privilege. Thus, H.R. 1534 serves as a vehicle for overcoming judicial reluctance to review takings claims based on the ripeness and abstention doctrines.

The second purpose of the bill is to clarify the jurisdiction between the Court of Federal Claims in Washington, DC, and the regional Federal district courts over Federal fifth amendment takings claims. The Tucker Act grants the Court of Federal Claims exclusive jurisdiction over takings claims seeking compensation. Thus, property owners seeking equitable relief must file in the appro-

priate Federal district court. This division between law and equity is archaic and results in burdensome delays as property owners who seek both types of relief are "shuffled" from one court to the other to determine which court is the proper forum for review. H.R. 1534 resolves this matter by simply giving both courts concurrent jurisdiction over takings claims, thus allowing both legal and equitable relief to be granted in a single forum.

II. Legislative History

H.R. 1534 was introduced into the 105th Congress by Representative Elton Gallegly on May 6, 1997. Two hundred and thirty-seven Congressmen joined Representative Gallegly as cosponsors, 133 of whom were former State and local officeholders. H.R. 1534 was referred to the House Committee on the Judiciary Subcommittee on Courts and Intellectual Property. The Subcommittee held a legislative hearing on H.R. 1534 on September 25, 1997. Testimony was received from five witnesses, who collectively, represented Federal and State attorneys general offices, the National Association of Home Builders, and a preeminent land-use professor. 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. On October 7, 1997, the House Committee on the Judiciary met in open session and ordered reported favorably the bill, H.R. 1534, with amendment, by a recorded vote of 18 to 10. On October 22, 1997, the House as a whole considered and accepted a manager's substitute to H.R. 1534. An additional amendment, offered by Representative Traficant, was passed by the House. The House then passed H.R. 1534 as amended by a recorded vote of 248 to 178. On October 23, 1997, the House requested the concurrence of the Senate.

Coinciding with the House's consideration of H.R. 1534, the Senate Committee on the Judiciary considered concurrent legislation introduced on September 23, 1997, by Senators Coverdell and Landrieu, S. 1204, the "Property Owners' Access to Justice Act," and related legislation introduced on October 6, 1997, by Chairman Hatch and Senator Reid, S. 1256, the "Citizen Access to Justice Act". Thirty-one Senators cosponsored S. 1204 and 11 Senators cosponsored S. 1256. On October 7, 1997, the Committee held a hearing on the property rights issues addressed by the bills and heard testimony from Congressman Lamar Smith; mayor Hal Daub, mayor of Omaha, NE; Mayor Larry Curtis, mayor of Ames, IA; Mr. Jeff Garvin, attorney and representative of Florida property owner, Mr. Richard Reahard; Mr. John Delaney, a respected Washington, DC, property rights attorney; and Mrs. Nancie Marzulla, president, Defenders of Property Rights.

H.R. 1534 was referred to the Senate Committee on the Judiciary on November 13, 1997. On February 26, 1998, a motion to favorably report a substitute for H.R. 1534, offered by Chairman Hatch, was approved 10 to 8 by the Judiciary Committee. Chairman Hatch's substitute bill included the substance of H.R. 1534, as passed by the House, and incorporated additional language which resolves a Federal court jurisdictional problem known as the "Tucker Act Shuffle."

III. Background and the Need for Legislation

A. The "Ripeness" Problem

The U.S. Constitution protects individuals from having their private property "taken" by the Government without receiving just compensation. U.S. Constitution, amendment V. A complex body of law has developed from the takings clause of the fifth amendment and is used by Federal courts to determine whether a "taking" has occurred. In conjunction with this complex body of takings law, an equally complex set of procedural doctrines has also developed for use by Federal courts to determine whether the core substantive issues involved in the takings claim are ready to be heard. These procedural doctrines are known as the doctrines of "ripeness" and "abstention."

Under current case law, a takings claim must be "ripe" in order to be heard in Federal court. In a key decision entitled *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 Supreme Court attempted to clarify the principles of the ripeness doctrine. 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; if either has not been met, then the claimant will be procedurally barred from bringing such a claim in Federal court.

Unfortunately, the lower court decisions which subsequently have attempted to apply the ripeness principles set forth in *Williamson County* have only served to create much confusion over when a claim becomes ripe. Property owners have been left with no clear understanding of how many proposals or applications must be submitted before their takings claim would be considered ripe. For example, in *Southview Assocs.* v. *Bongartz,* 980 F.2d 84, 92 (2d Cir. 1992), cert. denied, 507 U.S. 987 (1993), the court decided a takings claim was not ripe because the landowner "did not attempt to modify the location of the units or otherwise seek to revise its application." The court failed to decide how many reapplications would be necessary to reach the merits.

In *Schulze* v. *Milne,* 849 F.Supp. 708 (N.D. Cal. 1994), aff'd in part, rev'd in part on other grounds, 98 F.3d 1346 (9th Cir. 1996), property owners submitted a total of thirteen (13) revised plans over 3 years to renovate their home. Each time they submitted a plan "in compliance with all applicable zoning laws," local officials nonetheless "refused to approve the plan, and instead informed plaintiffs that there were additional requirements, not found in any zoning or other statutes, which plaintiffs had yet to meet." Id., 849 F. Supp. at 709. The Committee believes that these examples poignantly illustrate the current confusion concerning when a claim becomes ripe. The current state of disarray that Federal judges and private landowners alike find themselves in can be fixed by the establishment of a set of objective criteria so that all parties will be

able to easily discern when a Government land-use decision is final. The Committee notes that this bill will bring that confusion to an end by clearly defining when a Federal takings claim becomes ripe for adjudication and how many final decisions are required before the claim may proceed in Federal court

Additionally, much confusion has existed over the second prong of *Williamson County:* namely, the requirement that a property owner must exhaust all compensation remedies available under State law. This prong acts to prevent Federal courts from reaching a final decision until the State court definitively rules that it will not entertain a compensation remedy. This problem is exemplified in *Santa Fe Village Venture* v. *City of Albuquerque,* 914 F. Supp. 478 (D.N.M. 1995). There, the local city council established a building moratorium to preclude any development on lands near a national monument site. Plaintiff had an option to purchase land within areas subject to the moratorium, but never exercised that option because of the total land use restriction. Rather, plaintiff filed a lawsuit in Federal district court seeking just compensation from the local government for its inability to develop the property. The first suit was dismissed on ripeness grounds because the property owner never sought a compensation remedy in State court. In other words, exhausting State compensation procedures was necessary to make a Federal claim ripe for resolution. The property owner then filed a second action for inverse condemnation in State court. This case was also dismissed—this time for lack of standing. Plaintiff returned to Federal court raising only Federal claims but had its case dismissed again on ripeness grounds because the Federal claims were not raised in State court despite the State court's previous adjudications. The Committee believes that it is these type of situations that this bill will resolve by removing the confusion of the State exhaustion requirement.

The Committee takes notice of a landmark study in this area prepared by Gregory Overstreet, who concluded that federal judges had avoided reaching a determination on the merits in a takings claim for ripeness reasons in over 94 percent of all takings cases litigated between 1983–88. See 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 Decisions,* 10 J. Land Use & Envt'l. L. 91, 92, n. 3 (1994). The Committee also notes that according to a more recent study prepared by the law firm of Linowes and Blocher LLP of Silver Spring, MD, and incorporated into the Record for this bill, over 80 percent of the takings cases originating in the U.S. district courts between 1990–97 were dismissed before the merits were ever reached due to the ripeness doctrine. Many of these dismissals were tantamount to the termination of the claim because the landowner lacked adequate financial resources to fund an appeal. For those landowners who could afford the high expenses of an appeal, the survey showed that more than half of the takings claims were still dismissed. Of those appellate cases that did pass the ripeness test, 60 percent were remanded for more litigation on the merits. These results underscore the need for this legislation.

Furthermore, the Committee notes that 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, so a Federal court will usually abstain anytime that 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. *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).

Additionally, Federal judges often use the abstention doctrines to refer takings cases back to State courts before reaching the merits of the fifth amendment claims. This bill remedies the current abuse of abstention by requiring that Federal courts adjudicate the merits of an aggrieved property owner's claims where those claims are solely based on Federal law. On the contrary, if a property owner also raises claims involving State constitutional, statutory or common law claims pendent to the Federal claims, then the property owner may not use this bill and the Federal court may properly abstain in that type of situation.

The Committee emphasis that control over land use lies and will remain in the hands of local entities. Private property owners must submit a land-use proposal to the local agency for approval which, for many applicants, 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. Consequently, property owners are not able to use or develop their land and are effectively denied their fifth amendment rights.

While this result could be construed as a fifth amendment taking, the Committee recognizes that the applicant is, for all practical purposes, unable to file a claim in Federal court to enforce these constitutional guarantees because 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 Court's "ripeness" definition are conflicting and confusing, providing little guidance to property owners as to when a case is "ripe" for Federal adjudication.

Moreover, the Committee notes that Federal judges are often reluctant to get involved in land-use issues. Instead, they usually dismiss takings cases back to State court based on the abstention doctrines or the lack of ripeness. Unfortunately, the overwhelming majority of property owners do not have the time and money necessary to pursue their case through the State court and then refile it in Federal court. The extensive use of the abstention doctrines by the federal courts to avoid land-use cases, even ones involving only a Federal claim, has created a blockade denying aggrieved land owners access to the Federal court system.

This problem is exemplified by the situation presented in *Suitum* v. *Tahoe Regional Planning Agency,* 80 F.3d 359 (9th Cir. 1996), vacated and remanded, 117 S. Ct. 1659 (1997). Bernadine Suitum,

a retiree, was barred from building on her land by a regional planning agency. For 7 years, the Federal courts steadfastly refused to consider whether a taking of her property by the Government had occurred until the U.S. Supreme Court ruled in an unanimous decision that she will have the right to argue her case in Federal court. This elderly woman's plight has resulted in years of expensive litigation just to have the opportunity to present the merits of her case to a Federal judge. Unfortunately, this situation is far from rare for many takings claimants.

Another procedural tool that has been used to construct a barrier to property owners seeking remedies in Federal court has been the use of the doctrines of res judicata and collateral estoppel by Federal judges. Res judicata, also known as claim preclusion, acts as a bar to further claims brought by a party on the same claim where a final judgment on the merits has already been reached. Claim preclusion prevents parties from relitigating claims that were already raised or could have been raised in an earlier lawsuit. Similarly, collateral estoppel, also known as issue preclusion, prevents a plaintiff from relitigating issues that were already decided by a State court. Consequently, a Federal court could preclude a property owner from bringing an otherwise ripe claim in Federal court because a final determination had already been reached in a State court proceeding. That is, a strict adherence to the *Williamson County* prongs could prove tantamount to the nails in the coffin box of the property owner's ripe takings claim. However, by removing the State exhaustion requirement from the ripeness landscape, this bill effectively solves all res judicata and collateral estoppel problems.

Interestingly, claimants alleging violations of other fundamental rights do not encounter these same procedural barriers when attempting to bring meritorious actions in Federal court. In those situations, ripeness, abstention, and res judicata are often inapplicable. This places fifth amendment claimants in an inferior position to their first amendment counterparts. However, the Supreme Court has expressly stated that the fifth amendment is "as much a part of the Bill of Rights as the first amendment or the Fourth Amendment [and] should [not] be relegated to the status of a poor relation." *Dolan* v. *Tigard,* 512 U.S. __ 114 S. Ct. 2309, 2320 (1994). The Committee concurs, and believes that the rights of the fifth amendment should not be inferior to those of the first amendment or to any other fundamental guarantee contained in the Bill of Rights.

H.R. 1534 seeks to address these procedural blockades and offer property owners more certainty as to the Federal adjudicatory process governing takings claims. More specifically, 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.

Additionally, H.R. 1534 maintains the traditional interpretations of the abstention doctrine which keep the Federal courts free from being thrust into controversies surrounding State and local issues by limiting its scope only to actions involving Federal claims. As the proposed language indicates, usage of this act by a claimant is

optional. That is, H.R. 1534 allows a claimant the opportunity to bring a claim in Federal court if she so chooses, but does not mandate such an avenue of jurisdiction. H.R. 1534 simply allows every citizen her right to bring a Federal takings claim into Federal court to be decided on the merits. It is important to note that if a claimant brings a takings claim that is joined to other State claims, a Federal court would be able to abstain: for example, a takings claim accompanied by a State constitutional claim, a claim of ultra vires conduct, or abuse of discretion would not be able to reach the merits in Federal court without a State court first deciding the merits of the State claims.

The Committee believes that H.R. 1534 accomplishes its goals in a manner that will not crowd the Federal dockets. Under the provisions of this bill, a claimant is required to obtain as few as three and as many as five decisions by local entities before her claim will be ripe for review by a Federal court. Thus, the claimant must spend adequate time pleading her case before the local authorities and must obtain the necessary denials from them; until she satisfies these prerequisites, her claim will be barred from the Federal courts.

Some have argued that the second prong of *Williamson County* mandates as a matter of constitutional law that property owners exhaust State compensation remedies before seeking Federal court redress. This conclusion is buttressed by their claim that a taking does not occur on a State or local level until the State or locality has had the opportunity to afford compensation to the property owner.

The Committee disagrees with both these contentions. First, *Williamson County* was decided before the remedy for a Federal taking was clarified. It is outdated. When *Williamson County* was decided in 1985, the Court viewed the remedy for takings to be invalidation of the offending statute or rule. In other words, compensation was not considered the remedy for a taking under the U.S. Constitution. That changed in 1987, with *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles,* 482 U.S. 304 (1987), where the Supreme Court finally held that the Federal remedy for a taking is compensation. Now that this Federal remedy has been clarified, there is no reason to compel a citizen to litigate State court remedies in State court first.

Second, and consequently, the second prong of *Williamson County* is now merely prudential in nature. This conclusion is buttressed by the Supreme Court's most recent takings and ripeness decision, where the Court described *Williamson County's* requirements as "two independent prudential hurdles . . . " *Suitum* v. *Tahoe Regional Planning Agency,* 117 S. Ct. 1659, 1666 (1997). In other words, the requirement of exhaustion of State or local compensation procedures is a court-created barrier which Congress may alter. Simply put, initial State court litigation is not compelled by the Constitution.

Third, the *Williamson County* second prong is only dicta, and, therefore, not binding authority. The main issue in *Williamson County* concerned the first element of ripeness, i.e., whether the land use agency rendered a "final decision." The ensuing discussion

on compensation ripeness was neither essential nor necessary to support the decision. Thus, it was mere dicta.

Fourth, the text of the takings clause does not require that property owners must exhaust State or local compensation procedures. The drafters and ratifiers of the 5th and 14th amendments to the Federal Constitution did not intend such a result: The text of the takings clause states: "[N]or shall private property be taken for public use, without just compensation." Thus, the fifth amendment clearly creates a Federal remedy for a taking. There is no basis to believe that the drafters and ratifiers intended State court litigation as a prerequisite to vindicate that Federal remedy. State court litigation puts the cart before the horse: Compensation is simply a computation of the amount owed for a taking. It makes no sense to sue in State court first, until liability for the Federal taking has been determined.

Fifth, preclusion doctrines, as mentioned above, bar any Federal takings suit in Federal court if a plaintiff must sue in State court first. A property owner in this circumstance would never get to Federal court to vindicate the property owner's rights. It is doubtful that this was the intent of the drafters and ratifiers who promulgated and adopted Federal rights amendments and established the Federal forums to protect them. Yet being barred from the Federal court house is exactly what happened in *Dodd* v. *Hood River,* 136 F.3d 1219 (9th Cir. 1998). Because the issues in both the State and Federal proceedings were similar, collateral estoppel prevented the plaintiffs from relitigating their case in Federal court. Precisely the same situation occurred recently in *Wilkinson* v. *Pitkin County,* 1998 WL 216085 (10th Cir. May 4, 1998). The court noted:

> We do note our concern that *Williamson's* ripeness requirement may, in actuality, almost always result in preclusion of federal claims * * * It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel.

Wilkinson, at n. 4.

The Committee also notes that other constitutional rights hinge on State or local issues, but do not require initial State litigation. Many provisions in the Bill of Rights also hinge on the resolution of issues concerning State or local law. There are no similar ripeness barriers requiring citizens to go to State court first to address the constitutionality of Government actions that infringe upon the speech, religion, or privacy rights protected in the Constitution.

Furthermore, the Supreme Court in *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 437, n. 15 (1982), held that takings could occur regardless of whether the property has increased in value. In this case the Court found a taking where cable was laid pursuant to a New York statute, which undoubtedly increased the value of the building. The Supreme Court found a taking and remanded the compensation issue to the lower court.

The Committee believes that this holding is contrary to the position of the bill's critics that takings analysis require, as a matter of law, that compensation be determined before a governmental action can be considered an unconstitutional taking. Under *Loretto,* a court could find that there has been a taking—a significant inter-

ference with property rights—yet award no compensation. It is still considered an unconstitutional taking. Consequently, the compensation requirement of the takings clause is merely a remedy that may or may not be awarded in a State or Federal court, depending on the fairness of the situation.

Buttressing this conclusion is the recent Supreme Court decision in *Phillips* v. *Washington Legal Foundation,* No. 96–1578 (June 15, 1998). In *Phillips,* the Court held that interest accruing from interest bearing lawyers trust accounts (Interest On Lawyers Trust Account (IOLTA)) is property within the meaning of the fifth amendment. Although the Court left open whether the adequacy of compensation must be determined before a constitutional takings is considered to occur, *Phillips* slip op. at 7, n.4, it is interesting to note that as a practical matter the Court first determined whether there was a property interest and, thereafter, remanded the case to determine whether there was a taking, and if so, the amount of just compensation.

The Court in effect applied a three-part test: (1) whether a property interest exists; (2) whether the property interest has been significantly interfered with; and (3) if a property interest has been taken, the determination of just compensation. The Committee believes that this approach belies the argument that a Federal court cannot hear takings claims before a State determines compensation. Indeed, this was the position of the dissent, who argued that the issue of compensation is not separate and distinct from the issue of disposition and use of property. *Phillips,* slip op. at 4 (Souter, J., dissenting).

Furthermore, in *Eastern Enterprises* v. *Apfel,* No. 97–42 (U.S. June 25, 1998), decided on the next to last day of the 1997–98 Supreme Court term, the Court faced the issue of whether the Coal Industry Retiree Health Benefit Act ("Coal Act'), which established a mechanism to fund health care for retirees, could be applied retroactively to a company that no longer mined coal and had withdrawn from the Coal Act funding scheme pursuant to terms of a prior negotiated agreement. Four Justices held that the application of the Coal Act violated the takings clause of the fifth amendment. *Eastern Enterprises,* slip op. at 1–37 (plurality opinion of O'Connor, Rehnquist, Scalia, and Thomas, J.J.). One Justice held that retroactive application of the act violated the due process clause. *Eastern Enterprises,* slip op. at 1–7 (Kennedy, J., concurring and dissenting in part).

In reaching its conclusion, the plurality grappled with the ripeness issue of whether a litigant, such as the petitioner in the case, is barred from seeking equitable relief in Federal district courts. The Tucker Act confers exclusive jurisdiction on the Court of Federal Claims to hear claims for compensation under the takings clause of the fifth amendment, and it was argued, much like critics of this bill, that a claim for equitable or other relief under the takings clause is hypothetical until compensation is first determined by a court. The Supreme Court noted that the court of appeals were divided on the issue and that the Supreme Court's precedents were seemingly contradictory. *Eastern Enterprises,* slip op. at 19 (plurality opinion of O'Connor, J.).

For instance, the Supreme Court in *First Evangelical Lutheran Church of Glendale* v. *County of Los Angeles,* 482 U.S. 304, 314 (1987), observed that "the fifth amendment does not prohibit the taking of private property, but instead places a condition [just compensation] on the exercise of that power." Yet in *Duke Power Company* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 70 n. 15 (1978), the Supreme Court held that a district court may exercise jurisdiction over declaratory judgment actions pursuant to a takings clause claim, even when no attempt to seek compensatory relief has been made in the Court of Federal Claims. Significantly, the *Eastern Enterprises* plurality noted that the Supreme Court had granted equitable relief without discussing the applicability of the Tucker Act, and, thus, decided the issue sub silento that an unconstitutional taking could occur without a determination of compensation. *Eastern Enterprises,* slip op. at 19–20 (plurality opinion of O'Connor, J.), citing *Babbitt* v. *Youpee,* 519 U.S. 234, 243–245 (1997); *Concrete Pipe & Products of Cal.* v. *Construction Laborers Pension Trust for Southern Cal.,* 508 U.S. 602, 641–647 (1993); *Hodel* v. *Irving,* 481 U.S. 704, 716–718 (1987).

Based on the above, the Committee believes that a Federal court may decide takings issues before compensation is ascertained. Indeed, the Court of Appeals for the Second Circuit characterized the contrary language in *First Evangelical Lutheran Church,* quoted above, as obiter dicta. See *In re Chateaugay Corp.,* 53 F. 3d 478, 492 (2d Cir. 1995).

Finally, the Committee notes that Federal courts have more than adequate experience in the appraisal of value as the many takings and inverse condemnation claims heard by these courts demonstrate. Consequently, Federal courts, as well as State courts, are appropriate forums to determine compensation. Indeed, this was the intent of the framers and ratifiers of the 5th and 14th amendments.

B. THE "TUCKER ACT SHUFFLE" PROBLEM

Under current law, property owners may not seek to invalidate Federal Government action without first seeking compensation in the U.S. Court of Federal Claims. If the property owner chooses to file in the Court of Federal Claims, the property owner will first have to defeat the Government's usual proffered motion: that the landowner's claim is really for invalidation, not compensation, and, therefore, should be dismissed as outside the Court of Federal Claims' jurisdiction. If the property owner attempts to avoid this problem by filing a claim for invalidation in the district court and a compensation claim in the Court of Federal Claims, both suits are subject to dismissal—the first as "premature" or "unripe" and the second because the Court of Federal Claims, under 28 U.S.C. 1500, "shall not have jurisdiction over a claim, for or in respect to which the plaintiff has [a suit or process] pending in any other court." *Keene Corporation* v. *United States,* 500 U.S. 200, 207 (1993) (U.S. Court of Federal Claims lacks jurisdiction to hear any case which has been filed in another court).

The Committee notes that nothing like this procedural nightmare exists for claimants seeking to enforce any other type of constitutional right. When the claim is for property rights, however,

courts too often turn a deaf ear. This unequal access to justice for fifth amendment claimants ignores the Supreme Court's admonition in *Dolan* v. *City of Tigard:*

> 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.

Dolan, 512 U.S. 374, 392 (1993).

Simply put, the scales of justice are unfairly tipped in favor of the Government when citizens are faced with the threat of losing their property rights due to Federal Government infringement. Not only are the laws drafted to ease the litigation burden of the Government, but the costs of takings litigation can range in the hundreds of thousands or even millions of dollars, too high for the average citizen to bear. Consequently, the Committee believes that many citizens faced with a property rights claim cannot pursue a legal remedy under the fifth amendment. The Government, on the other hand, does not face a similar impediments, and generally is able to pursue a vigorous defense of the case without constraint. Adding to the hardship for the individual, procedural hurdles often bar litigation on the merits of a property rights claim for anywhere from 10 years or longer. Justice delayed is justice denied.

The "Tucker Act Shuffle" is one of those hurdles. Simply put, this hurdle shuffles property owners back and forth between different Federal courts until their resources are completely exhausted. The "Tucker Act Shuffle" is possible because of the split powers of the Federal courts in property rights cases. If a property owner seeks injunctive relief, or a court order declaring the Government's action invalid, the property owner must file suit in the local U.S. district court. If the property owner merely seeks compensation as guaranteed by the fifth amendment, he must file in the U.S. Court of Federal Claims, located in Washington, DC. If the property owner wishes both injunctive or compensation relief, the property owner would have to file two separate lawsuits in two separate courts, being careful to avoid the pitfalls of 28 U.S.C. 1500, which prevents the property owner from pursuing both suits at the same time.

The provisions of this bill granting concurrent jurisdiction between the Federal district courts and the Court of Federal Claims resolves this matter. The fifth amendment of the Constitution guarantees property owners the right to be paid for their land if the Government takes it from them. In 1922, the Supreme Court held that, in addition to eminent domain, takings occur when the Government regulation "goes too far." This "regulatory" taking is no different from a situation where Government takes land outright. Thus, the property owner suffering from onerous regulation must be compensated. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922). Government agencies, however, rarely volunteer to pay for taken land. The property owner almost always must go to court to vindicate the owner's property rights.

The U.S. Court of Federal Claims has jurisdiction to hear cases involving "claims against the United States founded * * * upon the U.S. Constitution," as provided in the Tucker Act, 28 U.S.C.

1491. The district courts have jurisdiction over actions "to compel an officer or employee of the United States or any agency thereof to perform any duty owed the plaintiff" as provided in 28 U.S.C. 1367. The Court of Federal Claims does not have jurisdiction to issue injunctive relief or to invalidate actions of Congress or executive agencies, while the district court lacks the jurisdiction to award just compensation due under the fifth amendment. Finally, the Court of Federal Claims lacks jurisdiction over any case which is pending in the district court, pursuant to 28 U.S.C. 1500.

The Committee finds that regardless of which claim a property owner pursues, and no matter in which type of court the property owner pursues that claim, the Government's general practice is to defend itself by arguing that the petitioner should instead be in a different court. If the case is dismissed and refiled in any other court, the Government's defense will be that the original court had the proper jurisdiction. This creates a vicious cycle that effectively prevents property owners from vindicating their rights. The Committee notes the late Justice Brennan's observation and warning that the procedural difficulty in vindicating constitutional rights "exacts a severe penalty from citizens for their attempt to exercise rights of access to the Federal courts granted them by Congress to deny them that promptness of decision which in all judicial actions is one of the elements of justice." *County of Allegheny* v. *Frank Mashuda Co.,* 360 U.S. 185 (1959). The Committee believes that Congress should not tolerate any longer this denial of justice wrought by the confusion in our courts.

Moreover, the Committee believes that section 1500 should be repealed. The Court of Federal Claims lacks jurisdiction to hear any case which is pending in another court at the same time under 28 U.S.C. 1500, irrespective to the relief sought.

Thus, because the property owner cannot receive injunctive relief in the Court of Federal Claims, the property owner effectively must choose between pursuing a compensation claim in that court or a claim for injunctive relief in the district court. The property owner cannot pursue both, even though both claims might be viable either together or in the alternative. The Committee finds that this arbitrarily forced choice effectively places the property owner between a rock and a hardplace when seeking to uphold the owner's constitutional rights.

Section 1500 when first adopted in 1887 served a legitimate and necessary purpose—to prevent "double-dipping" by plaintiffs seeking duplicative relief in differing courts. Nevertheless, the Committee notes that over the last century the courts have adopted procedural rules and doctrines, such as res judicata, and rules for consolidation which render section 1500 obsolete. Since it has outlived its usefulness, and serves primarily as an obstacle to property rights claimants, the Committee believes that section 1500 should be repealed.

The Committee would like to address the contention made by the Department of Justice that granting an article I court—such as the Court of Federal Claims—authority to declare acts unconstitutional is itself unconstitutional. The conclusion that the U.S. Court of Federal Claims, an article I court, can decide the constitutionality of Government acts is based on sound jurisprudence, decades of

historical usage, and Supreme Court precedents. First and foremost, all Federal officers take an oath to support and defend the Constitution of the United States. Within the power and responsibility of any Federal officer is the duty to uphold the Constitution. In terms of the role of a judge of any court—be it an Article I or an article III court—a judge must always determine the constitutionality of the case brought before him. Indeed, no judge can, within the dictates of his oath of office, knowingly enforce or uphold an unconstitutional statute.

Several recent decisions of the U.S. Supreme Court uphold the broad authority of article I courts. For example, in *Freytag* v. *Commissioner of Internal Revenue,* 501 U.S. 868 (1991), the U.S. Supreme Court carefully examined the authority of the U.S. Tax Court, established under article I of the Constitution, with authority similar to that which would be conferred on the Court of Federal Claims by this bill:

> Our cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States. In both *Canter* and *Williams,* this Court rejected arguments similar to the literalistic one now advanced by petitioners, that only Article III courts could exercise judicial power because the term "judicial power" appears only in Article III. In *Williams,* this Court explained that the power exercised by some non-Article III tribunals is judicial power: "The Court of Claims * * * undoubtedly * * * exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Article III of the Constitution."

Freytag at 889, *quoting Williams* v. *United States,* 289 U.S. 553, 565–566 (1933); see also *American Insurance Co.* v. *Canter,* 1 Pet. 511 (1828).

Two years ago in *United States* v. *International Business Machines Corp,* 116 S.Ct. 1793 (1996), the Supreme Court upheld the ruling of the Court of Federal Claims that section 4371 of the Internal Revenue Code was unconstitutional under the export clause. The Committee notes that it is significant that the Justice Department did not challenge the jurisdiction of the Court of Federal Claims in either the Court of Appeals or the Supreme Court. This demonstrates the weakness of their present argument. Indeed, both the Justice Department and private litigants recognized as recently as last year that the Court of Federal Claims has the power to hear and rule on the constitutionality of acts of Congress and regulations that fall within its jurisdiction.

Some critics have suggested that the Supreme Court's earlier decision on bankruptcy courts (which adjudicate private rights rather than public rights, such as the Court of Federal Claims does) calls into question this bill. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50 (1982). In *Northern Pipeline,* the Supreme Court found unconstitutional that part of the Bankruptcy Act of 1978 that established a "United States bankruptcy court in each judicial district as an adjunct to the district court for such district." (Id. at 50). Nonetheless, the Court further held that Congress can, consistent with article III of the Constitution, create a

legislative court when to do so would fall within "historically recognized" situations that:

> * * * represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III [458 U.S. 50, 64] courts * * * [Previous Court rulings] [recognize] a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers.

Id. at 64.

Specifically, the *Northern Pipeline* Court explained that there is a historical adjudicate role of article I courts involving "public rights":

> At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the court of the United States, as it may deem proper.

Id. at 67 quoting *Murray's Lessee* v. *Hoboken Land & Improvement Col,* 18 How. 272 (1856) at 284.

Needless to say, all claims for just compensation under the fifth amendment before the Court of Federal Claims involve "public rights"—because they are exclusively cases in which citizens sue the Government. Thus, legislation designed to allow the U.S. Court of Federal Claims to grant full remedial relief for fifth amendment claimants, including invalidation of unconstitutional government actions, is well within the ambit of authority of an article I court as recognized in *Northern Pipeline.*

IV. Critics' Contentions Concerning the "Ripeness" Sections of the Bill

The Committee is cognizant that this bill is opposed by the Department of Justice, many localities, some interstate governmental associations, and certain environmental groups. The Committee believes that their concerns that the bill would hinder local prerogatives and significantly increase the amount of Federal litigation are highly overstated. The bill is carefully drafted to ensure that aggrieved property owners must first seek solutions on the local or State level before filing a Federal claim. It just sets a limit on how many procedures localities may interpose. Moreover, the Committee doubts that there will be a rush of new litigation flooding Federal courts. As explained above, it is extremely difficult to prove a takings claim, and this bill does not in any way redefine what constitutes a taking. These claims are also expensive to bring. Paradoxically, localities' defense of Federal actions may be lessened by the bill because localities already must litigate property rights claims on Federal ripeness grounds, which take years to resolve.

The Committee notes that once many State officials, localities, and State and trade organizations really examine the measure, many become the bill's supporters. Those supporting the bill or increased vigilance in the property rights arena include the Governors of Tennessee, Wisconsin, Virginia, New Mexico, North Dakota, and South Carolina. They also include the American Legislative Exchange Council, which represents over 3,000 State legislators, and trade groups such as America's Community Bankers, the National Mortgage Association of America, the National Association of Home Builders, the National Association of Realtors, and the National Federation of Independent Businesses, the organ of small business in the United States. They also include agricultural interests such as the American Farm Bureau, the American Forest and Paper Association, the National Cattlemen's Beef Association, and the National Grange. Just as important, the Committee notes that 133 House sponsors of the House-passed bill were former State and local officeholders. The Committee believes that they would not have voted for the bill if the bill would conflict with local sovereignty.

To clarify how the bill would operate and to ameliorate concerns arising out of the debate over this legislation, the Committee believes it would be useful to address various contentions made by critics of the bill:

Critics" contention No. 1: Property rights litigation ordinarily involves substantial questions of State law and the bill would circumvent the filing of suits in State courts in the first instance

The fifth amendment is a Federal right granted by the Constitution and is as important as any other Federal right—including the first and fourth amendments. Individuals who feel that their fifth amendment rights have been violated deserve the same protection in Federal court that any other Federal litigant would have. H.R. 1534 applies only to Federal claims filed in Federal court. Federal courts would still retain all authority to abstain in situations in which State or local claims are alleged in Federal court or where there are ongoing, parallel State court proceedings on the same set of facts. Furthermore, if there is a substantial and unsettled question of State law that is essential to the facts of the Federal claim, H.R. 1534 allows that question to be certified to the highest appellate court in the State—under whatever certification procedures exist in that State.

Federal litigation based on other constitutional rights can also involve substantial questions of State law. For example, the first amendment does not protect all speech—obscene material is not protected. Obscenity is determined not by Federal statute, but by "contemporary community standards" and definitions under "applicable State law." *Miller* v. *California* (1973). Federal courts do not require individuals with first amendment claims to litigate questions of obscenity in State court as a condition of hearing their case in Federal court.

Critics' contention No. 2: Because plaintiffs can circumvent State courts and go directly to Federal court, the bill will force States and cities to settle with plaintiffs because of the cost of going to trial in Federal court

It is highly unlikely that H.R. 1534 will result in frivolous suits filed by property owners simply to force a settlement, for several reasons. Most property owners want to use their land, not get compensated for having it taken from them. As the question implies, filing a suit in federal court is still an expensive proposition—for the property owner as well as the defending agency, even with the passage of H.R. 1534. Lawsuits in Federal court will continue to be the option of last resort.

Further, H.R. 1534 does nothing to help property owners on the merits of their case. It is a procedural bill that simply clarifies what conditions must be met for Federal court adjudication—it does not affect substantive takings law. The burden of proof that a property owner must meet to demonstrate a constitutional taking is still extraordinarily high, essentially the loss of all economically viable use of the property in question. Getting more expedient resolution of a frivolous case would not benefit an unscrupulous property owner in the least—that property owner would simply lose faster on the merits of their claim. In Federal court, defending cities can, and often do, request that their legal fees be paid for by the losing property owner. Thus, a property owner, even under H.R. 1534 takes an enormous risk in bringing a Federal claim in Federal court in property cases.

Critics' contention No. 3: Courts do not have the time and expertise to resolve a potentially large number of suits involving complex issues of local policy and State law

The question of whether there will be a large number of suits has been answered. Complex issues of local policy and State law, as described earlier, can be addressed by having the state court certify those questions if necessary. Nonetheless, Federal courts frequently exercise their jurisdiction over other cases involving questions of State or local law—such as cases between citizens of different states. The fundamental role of the Federal courts in these issues is not to make zoning decisions, but to determine whether individual rights under the Constitution have been violated by Government decisions. Federal courts are extremely well qualified to resolve questions of constitutionality.

Denying someone their day in court because of a busy court schedule, whether that concern is legitimate or not, is unfair. Other Federal rights are not excluded from Federal court because of a burdened docket—why the fifth amendment?

Critics' contention No. 4: The bill would dramatically shift authority to decide local issues from State and local courts to Federal courts

H.R. 1534 would apply only to Federal claims filed in Federal court. The Department of Justice is correct in stating that local land use decisions should be made locally, not at the Federal level. H.R. 1534, however, does not give Federal courts any expanded authority to interfere in local land-use decisions. Violations of the

fifth amendment are Federal issues by nature—in the same way that a Federal court would have jurisdiction over a case in which a local police force was accused of an illegal search and seizure under the fourth amendment. As Supreme Court Justice William Brennan wrote in the *San Diego Gas & Electric* v. *City of San Diego:* "After all, a policeman must know the Constitution, then why not a planner?"

The fact that constitutional claims can arise from the actions of local governments does not make them less valid. Federal courts are uniquely qualified to rule on Federal claims—even those stemming from the fifth amendment.

State and local claims should be, and will continue to be under H.R. 1534, handled in State, rather than Federal court. Federal courts should not, however, force property owners to resubmit their claims to State court when no State or local question is alleged. Only fifth amendment claims are subject to such treatment. H.R. 1534 simply puts property owners on a level playing field with other Federal litigants.

Critics' contention No. 5: The bill attempts to reduce the adverse effects of its abstention ban by allowing for certification of issues to State courts under narrowly defined circumstances

To protect State sovereignty, H.R. 1534 ensures that any question of State or local law that is both patently unclear and fundamental to the merits of the case is to be remanded back to the State courts before the Federal court can continue. Currently twelve States (Arkansas, California, Illinois, Missouri, Nevada, New Jersey, North Carolina, Pennsylvania, Tennessee, Utah, Vermont, and Virginia) do not have certification procedures in place. The bill does not require any State to change its current procedures for certifying State or local questions for the Federal courts.

H.R. 1534 is simply designed to instruct Federal courts to stop abstaining on fifth amendment claims and sending property owners back to State court when no State or local claim is alleged.

Critics' contention No. 6: The bill would allow developers and others to sue local officials in Federal court without adequately seeking to resolve their disputes with local officials through local procedures

Local land-use decisions should be made locally. But when those decisions infringe upon constitutionally guaranteed rights, property owners deserve the same ability to defend their rights in court that anyone else has—even if they are "developers."

The argument that a locality's denial of a single land-use proposal would tell the court very little about the kind of land use the locality would allow is misleading. The problem is, it does not tell the property owner much either. Currently, a property owner can go through multiple attempts to get a permit without ever getting a definite answer as to what the property owner can or cannot do on the property owner's property. Current law requires that a property owner get a definitive answer as to the allowed uses of the property before the owner can file a takings claim in Federal court. The Committee observes that Government agencies know well that as long as they do not give a final answer (instead, delaying prop-

erty owner's vindication of their rights for years) they are practically immune.

H.R. 1534 does not change the requirement that a final decision be reached before the Federal court hears a takings claim. It simply defines what a "final decision" is. The bill states that a property owner must get an answer from the agency and be rejected on an appeal or waiver attempt. This will not prevent a land-use dispute from being "worked out" at the local level. The Committee believes that initially it is essential for these disputes to be "worked out" at the local level. The problem is that often Government agencies misuse their authority to determine both how owner's can use their property and when the agency has made a "final decision," H.R. 1534 does not force property owners to go to court; it simply gives them that choice—to exercise their fifth amendment rights, as guaranteed in the Constitution.

Critics' contention No. 7: The bill would deem "ripe" for adjudication cases in which there is an insufficient factual record for decision, thereby raising the risk of poorly informed rulings

It is difficult to understand how this lack of information could occur. If a property owner does not have sufficient evidence that an uncompensated taking has occurred, the property owner will lose on the merits of the case. Nothing in the bill changes the current burden of proof.

Critics' contention No. 8: A Federal court will not know whether the State has engaged in an uncompensated taking unless the claimant seeks compensation from the State

This argument is erroneous. Federal courts are just as proficient in determining just compensation as their State counterparts in eminent domain, inverse condemnation, and other proceedings. Moreover, the fact that a State constitution also requires compensation for a Government taking does not supersede rights guaranteed under the Federal Constitution. It could not be argued, for example, that someone attempting to sue in Federal court on the grounds that the right to free speech had been violated should be required to first exhaust any remedy they might have under the State constitution before going to Federal court.

Critics' contention No. 9: The bill would disrupt the administration of Federal protections

Here, critics are trying to have things both ways. On the one hand, they assert that H.R. 1534 would undermine the principle that local land-use decisions should be made locally. On the other hand, they claim that Federal laws protecting the environment through control of local land use would be disrupted. Many critics seem to want Federal involvement in local land-use decisions if it is to "prevent environmental degradation," but not to protect the constitutionally protected rights of individuals.

The Committee notes that H.R. 1534 amends no environmental law or any Federal statute protecting human health and safety. The only way "federal protections" may be disrupted is that Federal agencies will have to think about the impact of their decisions on private property owners before acting. That is precisely the kind

of "disruption" the authors of the Bill of Rights intended when they imposed limits on the power of the Federal Government by guaranteeing the rights of individuals.

Critics' contention No. 10: The bill would burden the already overcrowded Federal docket at the expense of meritorious claims by allowing unripe and unwarranted claims to proceed in Federal court

By simply calling claims unripe and unwarranted makes them so. There is no basis given whatsoever for this charge. Seeking relief in Federal court is still expensive, even if the bill allows better access. Combined with the significant burden of proof required for a property owner to win compensation, it seems unlikely that very many property owners without a clear-cut case will pursue this route. But property owners should at least have the option, like any other individual claiming constitutional rights have been violated.

In fact, passing H.R. 1534, the Committee believes, could help clear the court dockets. Currently, these cases are frequently bumped back and forth between a variety of State and Federal courts, all ruling as to whether or not the owner has standing to sue. With H.R. 1534, the issue is resolved and the courts can move ahead with deciding the merits of the case instead of wasting time on whether the property owner has the right to sue.

Regardless, a crowded docket, the Committee, is no excuse for not protecting individual rights.

Critics' contention No. 11: Ultimately, the bill will result in an additional centralization of power in an unelected Federal judiciary

H.R. 1534 does not give the Federal judiciary any more or less power than it currently has. The Federal court now has, and has always had, the responsibility to review the constitutionality of actions taken by all levels of government. Property owners do not want centralized authority over land-use decisions—indeed that is more often the position of those opposed to property rights legislation, like the environmental organizations. The role of the Federal judiciary is the same under H.R. 1534 as it is now—to interpret the Constitution and determine whether individual rights have been infringed by Government actions.

The courts play the same role in fourth amendment suits, alleging an illegal search and seizure. The Federal courts do not routinely abstain their jurisdiction over such questions, as they do in property cases, depending on whether it was a local police force or the FBI that is accused.

V. Section-by-Section Analysis

Section 1. Short Title

This section entitles the bill the "Private Property Rights Implementation Act of 1998."

Section 2. Findings

This section makes a series of congressional findings with respect to abrogation of property rights.

Section 3. Purposes

This section states that the purpose of this act is to establish a clear, uniform, and efficient judicial process for claims based on the 5th and 14th amendment to the Constitution by amending the Tucker Act and the judicial ripeness and abstention doctrines.

Section 4. Definitions

This section defines pertinent terms used in the bill.

Section 5. Private property actions

This section grants concurrent jurisdiction to the U.S. Court of Federal Claims and U.S. district courts over civil actions challenging the validity of any Federal agency action as a violation of the fifth amendment, whether the claimant seeks monetary relief or invalidation of the action. The U.S. Court of Appeals for the Federal Circuit shall have exclusive appellate jurisdiction for claims filed under this section. This section includes an express waiver of sovereign immunity, a 6-year statute of limitations, and a provision requiring an award of attorneys' fees and costs to any prevailing plaintiff.

Section 6. Jurisdiction of U.S. Court of Federal Claims and U.S. district courts

The jurisdiction of the Court of Federal Claims is amended so that in claims that are otherwise within its jurisdiction, the Court of Federal Claims may grant injunctive and declaratory relief. The Court of Federal Claims shall also have supplemental jurisdiction, in cases otherwise within its jurisdiction, over tort claims against the United States.

Claims brought in the Court of Federal Claims or the U.S. district courts, arising under property rights or privileges secured by the Constitution, are ripe for adjudication upon a final decision by the United States or other State or local governmental entity. A final decision is made when one meaningful application to use the property has been submitted and not approved and one application for waiver or appeal has not been approved. In the event a State or local governmental entity does not approve a meaningful application to use the property, and the disapproval explains in writing the use, density, or intensity of development that would be approved, a second application must be submitted that takes into account the terms of the disapproval. A second application after an explained disapproval, or an application for appeal or waiver, is not required if a process for reapplication or appeal or waiver does not exist, the relief requested cannot be provided, or such application would be futile. In the event a State or local statute or ordinance provides for review of the case by elected officials, such review must be requested. A final decision under this section does not require exhaustion of State judicial remedies.

A U.S. district court shall not abstain from exercising jurisdiction over a claim concerning the use of real property if such action does

not include a claimed violation of a State law, right or privilege and a parallel proceeding in State court is not pending. If said claim cannot be decided without resolution of an unsettled question of State law, the district may certify the question to the State's highest appellate court. The district court shall maintain jurisdiction over the merits of the case.

Section 7. Duty of notice to owners

This section provides that any Federal agency that takes action limiting the use of private property must give notice to the affected private property owner. The notice must include an explanation of rights and procedures set forth in this act.

Section 8. Rules of construction

This act does not preempt States from creating additional property rights.

Section 9. Effective date

This act shall apply to agency actions commenced on or after the date of enactment.

VI. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, March 11, 1998.

Hon. Orrin G. Hatch,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1534, the Citizens Access to Justice Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Susanne S. Mehlman and Deborah Reis (for Federal costs), Leo Lex (for the State and local impact), and Matt Eyles (for the private-sector impact).

Sincerely,

James L. Blum
(For June E. O'Neill, Director).

Enclosure.

Congressional Budget Office Cost Estimate

H.R. 1534—Citizens Access to Justice Act of 1998

Summary: 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 impose 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 govern-

ment action is extended to the states through the due process clause of the 14th Amendment. H.R. 1534 would primarily affect takings claims directed at the regulatory decisions of state and local government. 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 property 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 judicial remedies before proceeding to Federal court. The bill also would give the U.S. Court of Federal Claims and the U.S. district courts the authority to adjudicate all claims—whether for monetary or for injunctive and declaratory relief—against the Federal Government arising from actions of Federal agencies that are alleged to take private property in violation of the U.S. Constitution. Plaintiffs would choose which court would hear their claim.

Estimated cost to the Federal Government: 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 often 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 plaintiffs greater access to Federal courts, thus imposing additional costs on the U.S. court system to the 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 that would result. Any such costs would come from appropriated funds.

CBO does not expect that granting jurisdiction over certain claims against the United States to both the U.S. Court of Federal Appeals and U.S. district courts would have any significant effect on the budget because this provision would not affect the outcome of complaints or cause any material change in the caseload of the Federal court system. This bill could result in earlier decisions in some proceedings, which may change the timing of Federal court and agency costs, but we expect that such effects would be minimal.

H.R. 1534 also would require the courts to award attorneys fees and other litigation costs to any prevailing plaintiff. Because litigation costs are already often awarded at the discretion of the courts, CBO does not expect that enacting H.R. 1534 would significantly change payments for such costs. Attorney's fees, however, are not routinely awarded; therefore, enacting H.R. 1534 could increase costs to Federal agencies. To the extent that enacting this bill results in additional cases involving larger claims, this provision could increase both litigation costs and attorney's fees paid by agencies. Such costs would likely come from funds subject to appropriation, but CBO has no basis for estimating the magnitude of any such new discretionary spending.

Pay-as-you-go consideration: None.

Intergovernmental and private-sector impact: 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.

Estimate prepared by: Federal costs: Susanne S. Mehlman and Deborah Reis; impact on State, local, and tribal governments: Leo Lex; impact on the private sector: Matt Eyles.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

VII. Regulatory Impact Statement

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that H.R. 1534 will impose some additional costs on the U.S. court system. While some cases may be time consuming and costly, one cannot predict the number or cost of such cases. Passage of H.R. 1534, however, will not significantly increase litigation.

VIII. MINORITY VIEWS

MINORITY VIEWS OF SENATORS LEAHY, KENNEDY, BIDEN, KOHL, FEINSTEIN, FEINGOLD, DURBIN, AND TORRICELLI

We respectfully but strenuously oppose the "Private Property Rights Implementation Act of 1998," ress. H.R. 1534, 105th Cong. We have three basic objections to this proposed legislation.

First, the proponents of H.R. 1534 have failed to identify any significant "problem" to which this sweeping legislation would provide a solution. The U.S. Supreme Court has carefully developed a set of procedural standards governing takings actions against local governments. These standards are reasonable and appropriate, provide clear guidance to litigants, enforce the mandate of the fifth amendment to the U.S. Constitution that private property not be taken for public use without just compensation, and recognize the legitimate interests of State and local governments and State courts in the administration of zoning and other local land use regulations in our Federal system. We believe these standards, which the Supreme Court has recently reaffirmed, are sound and the Congress should not attempt to change them.

No evidence has been presented to support the thinly veiled suggestions by the proponents of H.R. 1534 that local governments are either incompetent or routinely act in bad faith in their dealings with developers. Nor is there any evidence to suggest state courts lack the competence to fairly and efficiently address takings claims in accordance with the Constitution. We categorically reject these suggestions as a justification for this proposed legislation.

Likewise, the proponents of H.R. 1534 have failed to demonstrate a need for the major restructuring of Federal court jurisdiction over takings claims against the United States proposed in this bill. Legislation to address the so-called Tucker Act "shuffle" was developed several years ago to address a problem that formerly existed: namely that a litigant pursuing a takings claim against the United States in the Court of Federal Claims could be forever barred from pursuing a claim based on the same agency action under the Administrative Procedure Act in Federal district court, or, conversely, a litigant pursuing an APA claim in district court could be forever barred from pursuing his takings claim in the Court of Federal Claims.

Subsequent to the development of this legislative proposal, this problem was eliminated by the decision of the U.S. Court of Appeals for the Federal Circuit in *Loveladies Harbor, Inc.* v. *United States,* 27 F.3d 1545 (Fed. Cir. 1994) (en banc). Thus, while this proposal was developed to address a legitimate issue, the issue has been resolved and legislation to address it is no longer needed.

We recognize that there remains a separate, relatively narrow issue arising from the fact that an owner seeking to challenge Fed-

eral agency action must pursue a takings claim and an APA claim in separate courts. However, this issue can be addressed in a straightforward way without, like the majority's proposed "solution," creating numerous other problems. Specifically, the problem of bifurcated jurisdiction can be addressed by granting the article III district courts jurisdiction to address takings claims against the United States without regard to the amount of the claim, along with other claims arising from the same agency action. An amendment offering this solution as a substitute for H.R. 992 was defeated in the U.S. House of Representatives by a tie vote of 206 to 206.

Second, we oppose this legislation because it represents bad public policy. In particular, the legislation would short-circuit local administrative processes for resolving local land use issues by encouraging litigation at an earlier point in the process than permitted under existing law. Instead of trusting mayors, town councils, planning and zoning commissions, and other local officials to determine what is best for their communities, this bill trumps the local process and turns local land use issues into Federal cases. The legislation would increase the overall volume of litigation against local governments, most of which have small populations and few financial resources; encourage wasteful forum shopping between Federal and State courts; and transfer a significant volume of local land use litigation from State to Federal courts, increasing the workload of the federal courts and undermining the role of the federal courts, in Chief Justice Rehnquist's words, as a "distinctive judicial forum of limited jurisdiction in our system of federalism."

The bill would impose significant new financial burdens on local governments, undermine local government's ability to enforce zoning and other local land-use regulations that protect the property values of tens of millions of American families, and contradict our Nation's traditional commitment to States and localities as the primary laboratories of our democracy.

The predictable effects of the provisions concerning takings claims against the United States are different but equally harmful. The bill would dilute if not flatly violate article III of the Constitution, a bulwark of our system of separation of powers, by vesting broad new powers in an article I court, the Court of Federal Claims. These provisions would encourage forum shopping between Federal district courts and the Court of Federal Claims, as well as between the regional courts of appeal and the U.S. Court of Appeals for the Federal circuit. In addition, they would, at the expense of all other lower Federal courts, enhance the judicial authority of a few Federal courts on which judges appointed by the party of the majority predominate and who, according to some critics, do not reflect a balanced cross-section of judicial philosophy.

H.R. 1534 also grants the Court of Federal Claims and the Federal circuit sweeping new power to invalidate nationwide a wide range of environmental, health, safety, consumer, labor and other safeguards that have been upheld by Federal district and appellate courts. Finally, by granting broad new powers to the U.S. Court of Appeals for the Federal circuit, which has nationwide appellate jurisdiction, to address a whole new range of administrative law issues on which the Federal circuit has no established precedent,

the bill threatens to create new legal uncertainties about the standards governing numerous Federal actions and programs, to the detriment of Federal agencies, the public, and the regulated community.

The far narrower and unsuccessful House substitute, which would have granted Federal district courts jurisdiction over takings cases, addresses the concern about bifurcated jurisdiction over claims against the United States without producing the many serious problems described above.

Third, we oppose H.R. 1534 because it is very likely to be found unconstitutional and therefore would likely be ineffective in achieving its purposes. We believe the ripeness standards governing takings actions against local governments in Federal court are beyond the power of Congress to change as proposed by this bill. While there is room for debate on this point, we think the better view, supported by a careful analysis by the Department of Justice, is that these standards are constitutionally based and therefore not subject to legislative revision. Specifically, the Department has concluded that the requirement that a takings claimant seek compensation in State court before suing in Federal court is based on the fifth amendment itself; while the Congress could declare that takings actions are ripe even though the claimant has not pursued available State remedies, the Department believes that the only constitutional course for the courts if Congress were to adopt this legislation would be to dismiss such actions on the merits.

Similarly, we believe that because the Supreme Court has said that a "final" government action is necessary to determine whether a government action has gone "too far" and compensation is due under the fifth amendment, the courts very likely could not resolve claims which are declared "ripe" by this bill but which fail to meet the constitutional standard of "finality." Insofar as the act seeks to vest broad powers in an article I court that can only be properly vested in an article III court, the provisions addressing takings claims against the United States are likely to be determined unconstitutional as well.

Why is Congress considering such plainly unnecessary, harmful, and probably useless legislation? Proponents contend that this bill represents a more "moderate" approach to the concerns ostensibly addressed by the takings provision in the Contract with America in the 104th Congress. While we agree that the Contract with America takings proposal was seriously flawed, it at least had the virtue of focusing on Federal resource management programs within the responsibility of Congress.

As the proponents of the Contract with America takings proposal constantly emphasized, that proposal would have imposed additional duties and liabilities on the Federal Government, not State or local governments. The current proposal, by contrast, directly affects local land-use regulation, a subject which the U.S. Congress has consistently believed should be left largely in the hands of State and local officials. In this important respect, this takings proposal is far more radical than the Contract with America takings proposal. Moreover, it turns the "devolution" philosophy so vigorously advanced by many members of the majority completely on its head. In fact, it runs counter to many of the statements made in

previous Congresses by members of this Committee. During the debate on the failed takings bills of the 104th Congress, Senate supporters stated that takings legislation should only apply to the Federal Government and not impact State or local zoning laws. These Senators even stressed that a critical aspect of takings legislation in the 104th Congress was that it only imposed duties and liabilities on the Federal Government—not local governments.

This year's effort is just the opposite. This year's effort is a direct and open effort to take power away from mayors and city councils, to take power away from local planners and elected local officials, and to take power away from local zoning boards. It shifts the power to wealthy developers who can afford lawyers to get them into Federal court.

Contrary to the majority report, H.R. 1534 will have a significant impact on takings cases and will severely tilt the playing field in favor of developers. In addition to encouraging forum shopping between Federal and State courts and among the Federal district courts and the Court of Federal Claims, 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.

Developers and certain landowners, principally represented by the National Association of Home Builders, would benefit financially from this legislation. It would grant developers new and enlarged opportunities to sue local communities. Perhaps more importantly, it would provide developers significant new leverage over local communities in negotiations over proposed development. H.R. 1534 gives those who wish to make windfall profits an incentive to buy land cheaply and then take local authorities to Federal court and evade local zoning laws which "regular" citizens must follow. For example, a half acre of land zoned for suburban homes might be purchased for the cost of the home and lot by a developer. That land would be zoned for homes to protect the value of all the homes of the neighbors. But the land could be worth many times more, $2.2 million instead of just $200,000 if a gas station were there instead of a home. H.R. 1534 would allow speculators and developers to either sue for the $2 million in lost profits by alleging the taking of a property interest, or sue to evade the zoning requirements. In addition, zoning commissioners would be taking a personal risk in that the action could be filed against them in their personal capacity for acting outside the scope of their duties since "violating the Constitutional rights of others" is not an official function of town officials.

The true misfortune of H.R. 1534 is that it weakens the home owners' ability to protect their property and its value. A developer might not win in any given case, but the costs of defending lawsuits in Federal court may just be too much too bear. Just the threat of litigation to protect a "Constitutional right" might be enough to convince the zoning commission to grant a variance for the gas station. In our view, the balance of power between developers and local communities, particularly smaller cities and towns that lack even full-time legal counsel, is not unreasonably tilted in favor of the public. In any event, the proponents of this legislation

have failed to make their case otherwise. H.R. 1534 has generated strong opposition from groups representing State and local officials, religious and conservation organizations, as well as editorial boards ranging across the country from Manchester, NH, to Tuscon, AZ.

Over 10 years ago, a group of respected land use experts writing in the Vermont Law Journal said that "[a]t the present time, in many areas the cards are stacked against the neighbors and they are the ones who really need judicial help," and "any change which results in an across-the-board shift in power away from local government to landowners and developers is highly suspect." Norman Williams, Jr., R. Marlin Smith, Charles Siemon, Daniel R. Mandelker, and Richard F. Babcock, "The White River Junction Manifesto," 9 Vermont Law Review 193, 202, 244 (1984). In view of the intervening Supreme Court decisions expanding local government liability under the takings clause, in particular *First English Evangelical Lutheran Church* v. *County of Los Angeles,* 482 U.S. 304 (1987), this conclusion is even more true today than it was at the time it was written.

We pledge to work with our colleagues to ensure that this legislative proposal is defeated.

BACKGROUND AND CURRENT LAW

H.R. 1534 would radically change a set of well-established procedural standards and rules—some created by the U.S. Supreme Court, and others established by Congress—to guide the resolution of claims for "just compensation" under the takings clause of the fifth amendment against both local communities and the United States. We believe these standards and rules are clear and reasonable, and Congress should not attempt to change them. H.R. 1534 would not only discard these reasonable standards and rules, but it would introduce a whole new set of novel standards and rules, the meaning of which is obscure and which undoubtedly would require years of wasteful litigation in order to clarify. Contrary to the claims of proponents of H.R. 1534, this bill would not resolve confusion but instead is a prescription for confusion.

Ripeness

The U.S. Supreme Court has developed over the years a detailed and carefully considered body of precedent addressing the issue of "ripeness"—the question of when a controversy is sufficiently mature for Federal court adjudication. If an action is not yet "ripe," a Federal court cannot hear the case. Ripeness doctrine is rooted in part in the provision of article III of the U.S. Constitution limiting the jurisdiction of Federal courts to actual "cases" and "controversies." [1] As applied to actions seeking compensation under the takings clause, the Supreme Court has identified two essential elements for a ripe claim, "compensation" ripeness and "finality" ripeness. In our view, these ripeness standards are consistent with the Constitution, properly prevent premature Federal court involvement in poorly defined disputes, and accord appropriate deference to State and local governments which, within our Federal system,

[1] U.S. Constitution, art. III, sec. 2, cl. 1.

have long had primary responsibility over zoning and other similar local land use issues.

Turning first to "compensation" ripeness, in *Williamson County Planning Comm'n* v. *Hamilton Bank,* 473 U.S. 172 (1985), the Court explained that a takings suit against a local government is not ripe unless and until the claimant has pursued available procedures for obtaining compensation. The Court based this requirement on the text of the takings clause itself. The takings clause does not bar takings; it simply bars uncompensated takings. The Court reasoned that a Federal court cannot determine whether a local government, which is a subdivision of a State, has effected an uncompensated taking until the claimant has at least requested compensation from the courts of that State. If the State courts award compensation, then the local government cannot be said to have effected an uncompensated taking. If the State courts deny compensation, or if the State courts lack reasonable procedures for awarding compensation, the Federal takings claim is ripe.[2]

Since the majority report misinterprets and misrepresents the Supreme Court ruling in *Williamson County,* a more detailed discussion of the this requirement (sometimes referred to as the "second prong" of *Williamson County*) is warranted. According to the majority report "the *Williamson County* second prong is only dicta." Significantly, the majority does not cite any support for its idiosyncratic view, which is contrary to the Supreme Court's *Williamson County* decision, and to the many court decisions that have uniformly interpreted the second prong as binding. The majority report relies heavily on what it terms a "landmark study in this area prepared by Gregory Overstreet," but ignores the author's conclusion that the second prong is a holding and that "nearly every circuit has decided at least one case holding that the state compensation prong is not satisfied when a property owner initially files a land use case in federal court, instead of pursuing state court relief."[3] Nor are we aware of any legal commentators who support the majority report. Even Nancie Marzulla of Defenders of Property Rights (whose testimony to the Committee supported the bill) and Roger Marzulla of Defenders of Property Rights reject the view articulated by the majority report:

> In *Williamson County Regional Planning Commission* v. *Hamilton Bank,* the Supreme Court *held* that a claim was not ripe for federal court review if (1) the property owner had not obtained a "final decision" from the applicable administrative agency; and (2) the property owner had not

[2] While the majority report suggests that a litigant may be barred from pursuing a Federal taking claim in Federal court even after seeking available State remedies, that understanding of the Supreme Court's ripeness standards is contradicted by the reasoning of *Williamson County* itself. Moreover, the majority of Federal courts of appeal that have addressed this issue have concluded that a litigant who pursues available State remedies but reserves the right to later pursue his Federal takings claim in Federal court will be granted his day in Federal court. See, e.g., *Front Royal & Warren County Industrial Park Corporation* v. *Town of Front Royal,* 135 F.3d 275, 283 (4th Cir. 1998); *Fields* v. *Sarasota Manatee Airport Authority,* 953 F.2d 1299, 1305 (11th Cir. 1992).

[3] Gregory Overstreet, "The Ripeness Doctrine of the Takings Clause," 10 J. Land Use & Envtl. L. 91, 116–17 (1994) (citing cases in n. 160).

first filed the claim in state court to challenge the government action.[4]

The majority report claims that the text of the takings clause does not require property owners to exhaust all administrative remedies at the State or local level. The majority report's assertion is contrary to what the Supreme Court's held was a constitutional requirement in the *Williamson County* decision. Even the Marzullas admit that "The Court stated that the second prong of its ripeness requirement was based on the just compensation clause itself: "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a Section 1983 action."' See Marzullas, supra at 145, quoting *Williamson County Regional Planning Commission* v. *Hamilton Bank,* 473 U.S. 172, 194 n. 13 (1985).

In addition, the "finality ripeness" requirement demands that, before a litigant files suit in Federal court, the local regulators must have arrived at a "final, definitive position" as to the degree of development allowed on the property. This ripeness requirement also is rooted in the takings clause itself. A takings claim raises the question of whether regulation has gone "too far"; resolution of that issue, the Supreme Court reasoned, requires that a court be able to identify with fair precision what the community will (and will not) allow, which in turn requires that a developer pursue the local administrative process at least to the point of a "final, definitive position" on potential development. In order to provide more specificity to this standard, the Court has said that this ripeness standard requires a developer to pursue at least one "meaningful" development proposal.[5]

What this means in practical terms is that a developer must participate in the local administrative process at least to the point of presenting a development proposal that addresses the legitimate issues the community has raised. In addition, the landowner must pursue any avenues for a variance, waiver, or other exemption from the land use restriction at issue. On the other hand, a developer is not required to go through these procedures to establish a ripe claim if pursuing the procedures would, under the circumstances, be futile.

Abstention

H.R. 1534 also addresses Federal court abstention. Developed by the U.S. Supreme Court in a long series of decisions over the last 50 years, abstention doctrine defines an array of different rules for coordinating the jurisdictions of Federal and State courts. Abstention is a discretionary doctrine under which Federal judges may decline to decide cases which are otherwise properly before them; in other words, a Federal court generally will not address the abstention issue until it has determined that it has been presented with ripe claims within its jurisdiction. There are three basic situations in which the Supreme Court has declared abstention appropriate: (1) where resolution of a unsettled issue of State law could elimi-

[4] Nancie G. Marzulla and Roger J. Marzulla, "Property Rights: Understanding Government Takings and Environmental Regulation," at 145 (1997) (emphasis added).

[5] *MacDonald, Sommer & Frates* v. *County of Yolo,* 477 U.S. 340, 350 n. 7 (1986)("[P]roperty owner is of course not required to resort to * * * unfair procedures * * *").

nate the need to decide a Federal constitutional question,[6] (2) where a Federal action touches on a complex State regulatory scheme and concerns important issues of State policy more appropriately addressed by State courts;[7] and (3) where a grant of relief by a Federal court would interfere with a parallel State court proceeding.[8] While *Younger*-type abstention generally leads to dismissal of the Federal action, when a Federal court abstains under *Pullman* or *Burford* the usual practice is for the Federal court to stay the Federal case pending resolution of the issues referred to the State courts.[9] In our view, each of the three types of abstention serves a highly valuable function in coordinating the sometimes overlapping jurisdictions of Federal and State courts and avoiding destructive and unnecessary Federal court intrusion into matters more appropriately handled by the State courts. While the abstention doctrine is sometimes applied in the land-use context, it represents a set of general principles and is applied in practice to a broad range of legal issues.

Federal takings jurisdiction

The Court of Federal Claims is the primary trial court responsible for resolving claims for just compensation under the takings clause against the United States. Created in 1887, the Court of Federal Claims is an article I court, that is, the judges appointed to this court lack the lifetime appointment and salary protection granted to article III judges. In addition to hearing takings claims, the Court of Federal Claims hears a broad range of other "money" claims against the United States.

Because the Court of Federal Claims is an article I court with specialized jurisdiction, it lacks the authority to resolve a variety of other Federal claims which may arise from agency action generating a claim for compensation. Thus, for example, an action under the Administrative Procedure Act seeking a declaration that an agency regulation of property is invalid generally must be brought in a Federal district court, and cannot be brought in the Court of Federal Claims.

In its justification for their sweeping change to Federal court jurisdiction, the majority asserts that their change is necessary because Government agencies rarely volunteer to pay for taken land and that the property owner must always go to court to vindicate the owner's property rights. This simply is not true. The Department of Justice has been working with Chief Judge Loren Smith and the Court of Federal Claims to streamline the review process for takings claims and has increased the use of alternative dispute resolution to avoid court litigation. In addition, Federal agencies frequently acknowledge the need for a taking—and they pay for it. Payments include fee simple land acquisition for new Federal buildings as well as a wide variety of other property interests including flood and flowage easements, scenic easements, and buffer zone easements for military installations.

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[6] *Railroad Comm'n of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941).
[7] *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943).
[8] *Younger* v. *Harris,* 401 U.S. 37 (1971).
[9] *Quackenbush* v. *Allstate Ins. Co.,* 116 S.Ct. 1712 (1996).

LEGISLATIVE HISTORY

H.R. 1534 is the culmination of a new breed of takings bills in the 105th Congress that purport to only alter the judicial process and not spark the controversy that erupted in previous Congresses over compensation-based takings legislation. Although H.R. 1534 did garner a significant number of cosponsors as the majority states, the number of cosponsors who voted against the bill demonstrates that when Members examined the bill closely, they become opponents of the bill. Thirty Republican Members of the House of Representatives voted against H.R. 1534 on the House floor, including nine who had cosponsored the bill. It is also significant that the House defeated an amendment offered by Representative Sherwood Boehlert to limit the scope of H.R. 1534 to Federal actions and relieve local governments of a potential tidal wave of litigation. That this amendment failed only highlights the intentions of this legislation—to undermine the power of State and local governments to resolve land use disputes.

When the House considered H.R. 992 on the floor, 36 Republicans voted for the Watt-Rothman substitute amendment to allow takings claims to be brought in the U.S. district court, an article III court that has the constitutional authority to dispose of both the compensation issue and the legal substantive issue. The amendment was only defeated on a 206-to-206 tie-vote after Speaker Newt Gingrich was forced to take the highly unusual step of voting on the House floor. Thirty-six Republicans then voted against the final passage of H.R. 992 in the House. Opposition to H.R. 992 even included strong supporters of H.R. 1534. For example, Representative Steve Rothman (D–NJ) was a supporter of 1534 in the Judiciary Committee and on the Floor, but offered the Watt-Rothman amendment to address concerns with H.R. 992 and then voted against final passage of H.R. 992. Both H.R. 1534 and H.R. 992 passed the House by far less than the margin needed to override a threatened Presidential veto.

During Senate consideration of H.R. 1534, a substitute amendment was accepted that combined H.R. 1534 as passed by the House with H.R. 992. The Senate Judiciary Committee moved the bill by a 10-to-8 party line vote. However, several Republicans joined all of the Democrats in voicing serious concerns about the legislation's impact on State and local decisionmaking. So far as we are aware, no genuine attempt has been made to address their fundamental concerns. As Senator DeWine stated:

> This bill will impose tremendous burdens on local communities by providing such a new fast track to Federal court for property owners. I think we need to consider how this will affect local decision making, decisions that will be made by local zoning boards, decisions made by local officials. This bill would, in effect, leave local land use planners with two bad options—acquiesce to developers by making lenient decisions, or do whatever they think necessary to protect the local community and then face multiple suits in Federal court without having much negotiating ability with property owners.

Senator DeWine is correct—H.R. 1534 leaves local officials with no good options. Senators Thompson and Specter also voiced fundamental concerns about this legislation.

DESCRIPTION OF LEGISLATION

H.R. 1534 seeks to change substantially the Supreme Court's standards for determining whether a takings action, or any other action "to redress the deprivation of a property right or privilege secured by the Constitution," is ripe for adjudication. The bill defines property to include "all interests constituting property, as defined by Federal or State law, protected under the fifth and fourteenth amendments to the United States Constitution."

First, the bill completely eliminates the compensation ripeness requirement by attempting to overturn the U.S. Supreme Court's decision in *Williamson County*.

Second, the bill substantially modifies the finality ripeness requirement. The bill states that actions are ripe in Federal court 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." [10] The bill then establishes a complicated three-part conjunctive test for determining whether a decision is "final." First, the bill states that a final decision "exists" if a State or local regulator "makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken." The second part of the conjunctive test is in turn broken down into two alternative subparts. Under alternative subpart one, a decision is final if "one meaningful application, as defined by the locality concerned within that State or territory, to use the property has been submitted but has not been approved, and the party seeking redress has applied for one appeal or waiver which has not been approved, where the applicable statute, ordinance, custom or usage provides a mechanism for appeal to or waiver by an administrative agency." [11]

Under alternative subpart two, a decision is final if "one meaningful application, as defined by the locality concerned within that State or territory, to use the property has been submitted but has not been approved, and the disapproval explains in writing the use, density, or intensity of development of the property that would be approved, with any conditions therefor, and the party seeking redress has resubmitted another meaningful application taking into account the terms of the disapproval," provided (a) that there is (generally) no final decision if no reapplication is submitted, and (b) if the reapplication is not approved, the finality standard is met "if the party seeking redress has applied for one appeal or waiver with respect to the disapproval, which has not been approved, where the applicable statute, ordinance, custom, or usage provides a mechanism of appeal or waiver by an administrative agency." The third part of the conjunctive test comes into play only "where the applicable statute or ordinance provides for review by elected officials." In that event, and where the case "involv[es] the uses of real prop-

[10] H.R. 1534, sec. 2 (to be codified as amended at 28 U.S.C. 1343(e)(1)).
[11] H.R. 1534, sec. 2 (to be codified as amended at 28 U.S.C. 1343(e)(2)(A) and (B)).

erty," then the plaintiff must apply for but be denied review by the elected officials.

The bill also provides that the plaintiff "shall not be required to apply for an appeal or waiver" under the three-part test if (1) "no such appeal or waiver is available"; (2) "it cannot provide the relief requested"; or (3) "application or reapplication to use the property would be futile."

H.R. 1534 also limits the circumstances in which Federal courts may exercise their discretion to abstain in favor of State courts. The bill provides that when a district court exercises jurisdiction "in an action in which the operative facts concern the uses of real property," the district court "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 parallel proceeding in State court arising out of the same operative facts as the district court is not pending."

At the same time, the bill limits the circumstances in which Federal courts may certify questions for resolution by State courts. The bill provides that when a district court exercises jurisdiction "in which the operative facts concern the uses of real property and which cannot be decided without resolution of an unsettled question of State law, the district court may certify the question of State law to the highest appellate court of that State." However, the bill prohibits use of this certification procedure "unless the question of State law (1) will significantly affect the merits of the injured party's Federal claim; and (2) is patently unclear." [12]

With respect to claims against the United States, the bill permits a claimant to file an action "to challenge the validity of any Federal agency action as a violation of the fifth amendment to the United States Constitution in a district court or the United States Court of Federal Claims." In addition the bill provides, "[n]otwithstanding any other provision of law," that "the district court and United States Court of Federal Claims shall each have concurrent jurisdiction over both claims for monetary relief and claims seeking invalidation of any Act of Congress or any regulation of a Federal agency affecting private property rights."

Thus the bill expands the jurisdiction of the district courts (which now have jurisdiction over claims that do not exceed $10,000) to include all takings claims against the United States without regard to the amount of the claim, and grants new jurisdiction to the Court of Federal Claims to grant declaratory or injunctive relief in any action relating to agency action "affecting private property rights." In effect, two court systems of concurrent jurisdiction would be created for challenges to Federal actions adversely affecting property rights. However, the bill would grant "exclusive jurisdiction" to the U.S. Court of Appeals for the Federal Circuit over any appeals in "any action filed [under the bill], regardless of whether the jurisdiction of such action is based in whole or in part [on this bill]." Other provisions of H.R. 1534 would give the Court of Federal Claims supplemental jurisdiction over "any related tort claim," establish that the Administrative Procedure Act (APA) applies to Court of Federal Claims review of agency actions, and re-

[12] H.R. 1534, sec. 2 (to be codified as amended at 28 U.S.C. 1343(d)(1)(2)).

peal 28 U.S.C. 1500. Finally, the bill would change the ripeness finality standards in actions against the United States in a fashion similar to the changes proposed for the ripeness finality standard in actions against local governments.

Last, H.R. 1534 incorporates an amendment offered by Representative Traficant to the House version of this bill. The Traficant amendment states: "Whenever a Federal agency takes an agency action limiting the use of private property that may be affected by this Act (including the amendments made by this Act), the agency shall give notice to the owners of that property explaining their rights under this Act and the procedures for obtaining any compensation that may be due to them under this Act."

ASSERTED NEED FOR LEGISLATION

The majority cites a number of cases that purport to justify the radical proposals contained in H.R. 1534, but they do not. One basic premise of the bill is that State courts are incompetent or otherwise unable to consider suits for compensation arising out of local land use disputes. Yet the majority report fails to cite a single State court case to support this misguided notion. We agree with the views of the Judicial Conference and the Conference of Chief Justices that State courts are best-positioned to resolve most local land use litigation, and we should not pass Federal legislation that effectively strips State courts of their traditional role in this quintessentially local area, as H.R. 1534 would do.[13]

The majority's reliance on reported Federal court decisions is misleading. Most land-use disputes are resolved administratively, and most land-use lawsuits are brought by disgruntled developers. Thus, focusing exclusively on reported Federal court decisions gives a skewed perspective on the relative bargaining positions of developers, neighbors, and communities. As noted by five distinguished land-use experts: "The success of developers in dealing with the land-use system is not reflected in the reported decisions because the lack of opposition at the local level, or the impecunious circumstances of the protesting neighbors, make 'neighbors' cases' comparatively infrequent. This condition of the decisional law obscures what is really happening at local council meetings." Norman Williams, Jr., R. Marlin Smith, Charles Siemon, Daniel R. Mandelker, and Richard F. Babcock, "The White River Junction Manifesto," 9 Vermont Law Review 193, 204–205 (1984). The reported case law thus fails to provide evidence of a systemic, nationwide bias against developers that warrants a Federal response. To the contrary, in many cases the system is already largely biased in favor of developers and against neighboring property owners. Id. at 204–206.

The majority report incorrectly cites *Southview Associates, Ltd.* v. *Bongartz*, 980 F.2d 84 (2d Cir. 1992), as an example of an unfair application of ripeness principles. In that case, the developer sued the individual members of the Vermont Environmental Board based on their denial of an application to build 33 residential units on 88.5 acres of property. The board denied the application because

[13] Letter from the Judicial Conference of the United States to Hon. Henry Hyde (Sept. 29, 1997); letter from the Conference of the Chief Justices to Senator Patrick Leahy with Resolution (Feb. 13, 1998).

the proposed development violated State protections for wildlife and the environment. Id. at 89–92. The Court specifically found, however, that the board "would be receptive to a subdivision proposal that placed lots in a different segment of the 88.5 acre property so as to minimize impact" on environmentally sensitive areas. Id. at 99. The developer refused to consider such relocation. Instead, the developer offered an environmentally destructive proposal on a take-it-or-leave-it basis and then sued in Federal court, forsaking other options that would have allowed for development in a manner consistent with state Law and environmental protection. The trial court and the appeals court quite properly held that the developer should first negotiate in good faith with community officials before subjecting the board members to Federal court litigation. We do not need Federal legislation that would grease the litigation skids for those unwilling to seek reasonable compromises.

The majority report also cites *Schulz* v. *Milne*, 849 F. Supp. 708 (N.D. Ca. 1994), rev'd in part, 98 F.3d 1346 (9th Cir. 1996), noting that the landowners in that case submitted thirteen revisions to the permit application. The Supreme Court has made clear, however, that landowners need not pursue futile or unfair processes in order to ripen a claim under the fifth amendment. *MacDonald, Sommer & Frates* v. *County of Yolo,* 477 U.S. 340, 350 n. 7 (1986). The revisions to the permit application in Schulz resulted from a decision by the landowners to proceed in this fashion, not from a court-imposed requirement. The *Schulz* court found the takings claims in that case to be ripe (849 F. Supp. at 713–14), hardly a ruling that demonstrates a compelling need to radically alter ripeness doctrine.

The majority cites certain cases for the proposition that takings claimant who first sues in State court might be precluded from raising the same claims in subsequent Federal court litigation.[14] However, most Federal appeals courts allow claimants to "reserve" Federal constitutional claims so that the Federal court may address those claims once the state court litigation has ended. In fact, in one case cited by the majority report, the appeals court expressly ruled that such a reservation is effective. *Dodd* v. *Hood River County*, 59 F.3d 852, 862 (9th Cir. 1995) (declining to dismiss a takings claim because "the Oregon courts sufficiently reserved this issue by repeatedly acknowledging that the Dodds' Federal constitutional claims were not before them and were pending in the federal district court").[15]

Finally, the majority purports to find support in *Phillips* v. *Washington Legal Foundation*, No. 96–1578 (U.S. June 15, 1998). There, the Supreme Court ruled that the property in question was the private property of the claimant, but it expressly left open the issue of whether a taking had occurred, and if so, whether any compensation is due. *Phillips* confirms that the issue of whether a

[14] *Dodd* v. *Hood River County*, 136 F.3d 1219 (9th Cir. 1998); *Sante Fe Village Venture* v. *City of Albuquerque*, 914 F. Supp. 478 (D.N.M. 1995).

[15] Far from closing the courthouse door as claimed by the majority report, the *Dodd* court thoroughly analyzed the takings claims in that case, rejecting the claims because the State environmental protections at issue were reasonable and legitimate, and because the landowners lacked any reasonable expectation of using the property in a manner inconsistent with these pre-existing protections. *Dodd*, 136 F.3d at 1229–30. Although the Federal courts in *Dodd* deferred to the State tribunals on one factual issue, the Federal appeals court fully considered the landowners' takings claim as a whole, denying the claim as "a losing cause." Id. at 1230.

taking has occurred may be analytically distinct from the issue of whether compensation is owed. Nothing in *Phillips*, however, undermines the bedrock principle of takings law that "no constitutional violation [of the just compensation clause] occurs until just compensation has been denied."[16] The majority report insinuates that *Williamson County* is no longer good law—particularly its requirement that a takings claimant challenging State or local action first seek compensation in State court under available state law remedies. The Supreme Court, however, has reaffirmed *Williamson County* in many cases, as recently as the 1997 *Suitum* decision.[17] None of the cases cited by the majority calls *Williamson County* into question.

CONCERNS WITH LEGISLATION

A. Local government provisions

Most importantly of all, the proponents of H.R. 1534 have failed to advance any credible evidence or argument to support this proposal to overturn Supreme Court precedent, thoroughly revise existing procedural standards governing the prosecution of takings claims, and encourage developers to sue cities and towns in Federal court early and often.

While the proponents of H.R. 1534 implicitly criticize State courts by attempting to evade their jurisdiction, they have failed to provide any evidence to support this criticism. In our view, State courts fairly and efficiently resolve local land-use issues, and the proponents of the bill have never contended otherwise. Instead they have presented a series of studies in support of the bill that are thoroughly misleading and beside the point. Because most land-use cases are filed in State courts, these studies necessarily examine only a relative handful of cases. For example, one of these studies, prepared by the firm of Linowes & Blocher, purportedly found that over 80 percent of takings cases filed in Federal court during a recent period were dismissed on ripeness grounds. In view of the Supreme Court's clearly established rule that a takings claimant must pursue available State procedures before a taking claim will be "ripe" in Federal court, this statistic is neither surprising nor significant.

Another analysis relied on by bill supporters only looked at 34 cases in 6 years.[18] In view of the hundreds of land-use decisions communities make every day, this is certainly not a representative sample of the cases that are before our courts, much less an indication of some "crisis" demanding a legislative solution. Furthermore, in 25 of the 34 cases used in the study, the claimant failed to pursue State compensation remedies before going to Federal court. In one of the cases, a landlord's case was dismissed as unripe because

[16] *First English*, 482 U.S. at 320 n.10; *Williamson County*, 473 U.S. at 194 n.13.

[17] E.g., *Suitum*, 117 S. Ct. at 1664–65 (to have a ripe claim, a takings claimant challenging State or local action must seek "compensation through the procedures the State has provided for doing so"; this requirement "stems from the Fifth Amendment's proviso that only takings without just compensation infringe that Amendment"; quoting *Williamson County*); *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990) (a takings claimant "has no claim against the Government for a taking" where the State has provided an adequate process for obtaining compensation; quoting *Williamson County*); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) ("so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional'; citing *Williamson County*).

[18] Blaesser article, 2 Hofstra Prop. O.L.J. 73 (1988).

he had failed to even apply for a "certificate of no harassment" of his tenants that was required before altering his building. Three other cases in the study were dismissed because the claimant had failed altogether to submit a sufficient land-use application. In four cases, the challenge was denied because the claimant failed to seek a compromise with the local authority. That leaves us with one case—where the ripeness was actually used to the claimant's benefit. Counter to the majority's assertion, this study demonstrates that Federal courts are appropriately following Supreme Court precedent.

Nor is there any support for the proponents' suggestion that they are simply seeking to vindicate the right of Federal takings claimants to unfettered access to the Federal courts. In fact, the Supreme Court has explicitly rejected the idea that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in federal court." *Allen* v. *McCurry,* 449 U.S. 90, 103 (1980). This proposition is based on the premise, which we acknowledge and support, that "[s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and uphold federal law." *Stone* v. *Powell,* 428 U.S. 465, 493 n.35 (1976). In no sense has the U.S. Supreme Court, which hardly could be characterized as hostile to private property rights, singled out the takings claimants by according them uniquely inferior access to Federal court. For example, the Supreme Court has recognized that an individual required to litigate a fourth amendment search and seizure claim in a State criminal proceeding is completely barred from asserting his constitutional claim in a subsequent section 1983 action in Federal court. *Allen* v. *McCurry.* Under *Williamson County,* a litigant with a Federal takings claim is not denied access to Federal court, but simply must pursue available State remedies before going to Federal court.

Apart from the complete lack of factual or logical support for the provisions of H.R. 1534 concerning takings claims against local governments, the bill would inflict significant harms and produce numerous serious problems, as discussed below,

Short circuits local administrative processes

H.R. 1534 short circuits local administrative procedures for resolving land-use issues by encouraging developers to commence litigation at an earlier point in the process than is permitted under existing law. The purpose and effect of this bill is to truncate current administrative procedures and to move up the point at which developers would be permitted to commence litigation. The bill accomplishes this result by requiring that, after having filed an initial development application, a developer generally only would need to file—but apparently not await the results of—one appeal or application for waiver. Moreover, these limited requirements would apparently be made meaningless by another provision authorizing a developer to skip filing even one appeal or waiver application when the local land use authority "cannot provide the relief requested," which would apparently be the case in all or virtually all cases in which the developer is seeking financial compensation under the fifth amendment. Thus, the assertion by bill supporters

that the bill requires developers to make at least three good-faith attempts to negotiate a reasonable compromise is plainly incorrect.

The net effect is that the existing authority of local governments to resolve local land-use issues in the community would be undermined and these issues would be converted into Federal cases. Instead of trusting mayors, town councils, planning and zoning commissions, and other local officials to determine what is best for their communities, this bill trumps the local process.

The short circuiting of local administrative procedures would not only undermine local governments, but it also would seriously undermine opportunities for the public to participate in local land use decisionmaking affecting their communities. Neighbors trying to address legitimate issues raised by proposed development have a right to have their objections heard in the local administrative process. However, converting local land-use issues into Federal court cases would reduce and undermine the public's right to be heard. Indeed, the United States Catholic Conference and National Council of Churches of Christ joined with Jewish and Evangelical groups in urging the Senate to oppose provisions that "favo[r] those with greater financial resources by turning to federal courts as the first-line remedy * * *" Participation in distant federal courts "can be a great financial burden. * * *" and curtailing "local or state administrative procedures * * * effectively eliminates the easiest point of local citizen access to land-use decisions. Consequently, property owners with sufficient financial resources will be heard—but residents affected by the use of that property who do not have similar financial resources will not." [19]

The House of Representatives added an additional administrative step before a Federal court action would become ripe by authorizing a municipality to include in its disapproval of a proposed development its explanation "in writing [of] the use, density, or intensity of development of the property that would be approved, with any conditions therefor." This extraordinary provision would impose an unprecedented obligation on local governments, over and above their normal planning and zoning responsibilities, to develop site-specific development plans for developers regardless of the actual seriousness or economic viability of the developers' proposed projects. This new requirement that local governments would have to follow to avoid precipitous filing of litigation would impose substantial new costs on local governments, none of which this bill would attempt to fund.

Expands litigation against communities and expands developers' leverage over communities

H.R. 1534 would greatly expand the volume of land-use litigation against local communities. The very purpose and inevitable effect of lowering existing ripeness hurdles to prosecution of takings claims would be to encourage the filing of lawsuits that might never be filed under existing law and therefore to increase the total volume of litigation against local communities. At least in the absence of a compelling public purpose, we oppose legislation that

[19] Letter to the Senate from the United States Catholic Conference, National Council of Churches of Christ, Coalition on the Environment in Jewish Life and Evangelical Environmental Network opposing S. 1256, the Senate companion to H.R. 1534 (Feb. 20, 1998).

would simply expand litigation against State and local governments.

Equally important, the heightened threat of litigation would significantly increase the leverage of developers over local communities in negotiations over land-use issues. As we pointed out in the hearing, the top four residential developers in the country have annual revenues in excess of $1 billion per year. Most of our small towns generate less than $10 million a year in tax revenues. As Mayor Curtis of Ames, IA, testified in the hearing, 90 percent of cities and towns in America have less that 10,000 people. These towns cannot support even one municipal lawyer, much less the number that would be required to battle billion-dollar developers. Under the threat of battling large corporate developers with deep pockets, more local governments would opt to settle the case at inflated compensation standards or let the development go ahead.

During the past years, we have heard from mayors and governors across the country who are concerned about increased legal costs that could arise from this legislation. As Philadelphia Mayor Edward Rendell stated about similar legislation, "it would produce more lawsuits and make litigation more timeconsuming and complicated, and impose increased costs and litigation risks on government at all levels." [20]

Municipalities with limited legal budgets would have to defend numerous takings claims through the process of discovery, pretrial motions, trial, and appeals. Facing this overwhelming cost, a local official may well feel pressured to approve development projects, despite their deficiencies and risks to the community. By pitting local authorities against corporate developers, H.R. 1534 would set up David versus Goliath battles where towns would be tempted to just throw down their swords, or in this case their environmental, public health and safety standards.

Increases burdens on federal courts

H.R. 1534 would significantly increase the workload of the Federal courts by encouraging the filing in Federal court of lawsuits which would ordinarily be filed at least in the first instance in State court. Also, by lowering the finality ripeness hurdle, the bill would encourage more frequent land-use litigation in Federal court. In addition, the bill's limitations on abstention would restrict the ability of Federal courts to abstain in favor of State courts in cases more appropriately resolved in the State court system.

This proposed expansion of Federal court jurisdiction raises a particular concern given the large number of vacant judgeships and the increasing wholesale federalization of other traditional areas of State law (such as criminal law enforcement). The Judicial Conference of the United States highlights the potential increased workload in its letter to House Judiciary Courts and Intellectual Property Subcommittee Chairman Coble, "H.R. 1534 would encourage the filing of cases in federal court that may be either unripe or nonjusticiable or that might have been resolved at the state or local level. Furthermore, this bill is applicable to actions by federal agencies as well as state and local entities. This legislation, there-

[20] Letter to Senator Arlen Specter (Oct. 27, 1997).

fore, will undoubtably add to the workload of the federal courts."[21] This new burden would be imposed at a time when the Federal bench is laboring under the weight of some 80 unfilled vacancies.[22]

The National Conference of State Legislatures recently emphasized the importance of this point by stating, "the only certain result of [H.R. 1534] would be an additional centralization of power in an unelected federal judiciary at the expense of the states." (NCSL letter, Feb. 17, 1998.) Chief Justice Rehnquist, in his 1997 Year End Report of the Federal Judiciary, praised the Antiterrorism and Effective Death Penalty Act of 1996 because it would decrease the number of potential filings in Federal court. He specifically urged Congress to avoid legislature measures that would expand the workload of the Federal courts and also urged Congress to consider "legislative proposals that would reduce the jurisdiction of Federal courts."

While the majority report suggests that H.R. 1534 only affects claims in Federal court, this most assuredly is not the case. Under well established rules regarding "supplemental jurisdiction," a litigant with a Federal takings claim would ordinarily be expected to assert any and all State or local law claims along with the Federal claim in the same lawsuit in the same court.

Encourages wasteful forum shopping

H.R. 1534 would encourage wasteful judge shopping between Federal and State courts. Under current law, a developer suing a community for an alleged taking must in the first instance pursue available State compensation remedies. Under this bill, however, developers would have the option of suing a local community in either Federal district court or the appropriate State court. No valid public purpose is served by encouraging this type of forum shopping.

Places increased fiscal burdens on local governments

H.R. 1534 would impose significant new fiscal burdens on local communities. By short circuiting existing administrative procedures, and encouraging the filing of earlier and more frequent litigation, the bill would impose substantial additional litigation expenses on local communities. The bill would also impose additional costs on local governments by forcing communities to defend local land use regulations more frequently in relatively more expensive Federal court proceedings. In addition, the bill's novel mandate that local communities, in order to avoid precipitous litigation, prepare site-specific development plans for developers would impose significant costs on local communities.

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[21] Letter to Hon. Howard Coble (Sept. 29, 1997).

[22] Thirty of these vacancies have been pending for more than a year and a half. In the first 4 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.

Undermines local zoning protections and homeowners' property rights

H.R. 1534 would undermine zoning and other land use regulations which the vast majority of American property owners rely on to protect their investments. By encouraging more frequent costly litigation against local communities, and increasing developers' negotiating leverage over communities, H.R. 1534 would undermine the ability of towns and cities to enforce their zoning and other land use regulations. Undermining zoning and other similar laws would threaten the property values of tens of millions of American homeowners.

The largest and most important group of property owners are America's homeowners. Two out of every three American families own their own homes. In order to preserve the value of their homes, homeowners rely on zoning and other laws to maintain the quality of the neighborhood in which they live. Takings litigation which challenges citizens' ability to protect their communities is a direct attack on these citizens' property rights. This is one of the many reasons the bill is opposed by major religious organizations, such as the U.S. Catholic Conference which stated, "Given our teaching on private property and the common good, the U.S. Catholic Conference is very concerned about legislative proposals to expand vastly the concept of property rights in which both the social purpose of private ownership and the social responsibilities (and moral limits) of property owners are diminished." [23]

During his testimony before the House Judiciary Subcommittee on the Constitution, New Hampshire State Senator Richard Russman raised the following actual takings claims filed against local communities illustrate how destructive encouraging the filing of additional takings suits against cities and towns would be:

In Tampa, FL, St. Petersburg, FL, and Mobile, AL officials were sued when they tried to restrict topless-dancing bars;

A chemical company challenged Guilford County, NC, denial of a permit to operate a hazardous waste facility;

A landfill operator contested a county's health and safety ordinance prohibiting the construction of additional landfills;

An outdoor advertising company challenged a Durham, NC, ordinance that limited the number of billboards in order to preserve the character of the city;

A gravel mine operation challenged a Hempstead, NY, ordinance prohibiting excavation within two feet of the groundwater table that supplied water for the town.[24]

Places rights of property owners above other civil rights plaintiffs

As introduced in the House of Representatives, H.R. 1534 was drafted to apply to all property-related claims, including claims filed under section 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

[23] Rev. John J. McRaith, Bishop of Owensboro, KY, U.S. Catholic Conference.

[24] Testimony of New Hampshire State Senator Richard Russman before the House Judiciary Subcommittee on the Constitution (Sept. 23, 1997).

specifically designed to halt a wave of lynchings of African-Americans that had occurred under guise of State and local law. The House Judiciary Subcommittee approved an amendment to the House bill offered by Representative Gallegly which limited the application of the abstention provisions of the bill to circumstances "in which the operative facts concern the use of real property." Thus, while abstention is applied to a wide variety of different causes of action, H.R. 1534 would establish special restrictions on abstention only in cases involving real property. During House Committee consideration of H.R. 1534, an amendment was rejected to eliminate this unjustified special treatment for real-property claims. 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-to-17. The effect of the amendment's defeat is to report a bill which grants "affirmative action" to real-property claims.

As a result, H.R. 1534 would establish an insidious discrimination in the application of abstention doctrine depending on the type of claim asserted, and grant plaintiffs alleging infringements on rights in "real property" superior access to Federal court compared to other types of plaintiffs. Thus, individuals who invoke the civil rights laws to challenge police brutality claims, or unreasonable conditions in prisons and juvenile facilities, would continue to face application of normal abstention principles, but after passage of H.R. 1534, real property claimants would not. See House report 105–323.

For example, abstention has been held appropriate in section 1983 actions involving the sixth amendment right to counsel,[25] "cruel and unusual punishment" conditions of confinement at a juvenile facility,[26] the denial of Medicaid benefits and first amendment rights,[27] gender-based discrimination[28] and a parallel State court criminal proceeding.[29] H.R. 1534 would not alleviate or limit the application of the abstention doctrine in these cases, but would do so only in the case of claims involving "real property."

Bill supporters complain that under *Williamson County*, takings claimants who challenge State or local action must first seek compensation in State court, while claimants under other constitutional provisions are not similarly required to file in State court. In this regard, the majority report cites Chief Justice Rehnquist's admonition that the just compensation clause is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment" and should not "be relegated to the status of a poor relation * * *" *Dolan* v. *City of Tigard,* 512 U.S. 374, 392 (1994). The majority's reliance on *Dolan* simply misses the point. No one disputes the importance of the just compensation clause. But this clause is inherently different from other constitutional provisions. It does not prohibit government conduct, but merely conditions certain

[25] *Mann* v. *Jett,* 781 F.2d 1448 (9th Cir. 1986).
[26] *Manny* v. *Cabell,* 654 F.2d 1280 (9th Cir. 1980).
[27] *Winters* v. *Lavine,* 574 F.2d 46 (2d Cir. 1978).
[28] *Tiger Inn* v. *Edwards,* 636 F. Supp. 787 (D.N.J. 1986).
[29] *Heck* v. *Humphrey,* 512 U.S. 477 (1994).

government action on the payment of just compensation. The Supreme Court, including Chief Justice Rehnquist, has emphasized: "[B]ecause the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize [state] procedures for obtaining compensation before bringing a § 1983 action." *Williamson County,* 473 U.S. at 194 n. 13 (emphasis in original). The *Williamson County* requirement that certain takings claimants proceed in State court first does not diminish the importance of the fifth amendment, but instead fully recognizes its appropriate nature and scope.

While we should not treat the fifth amendment as a "poor relation," *Dolan,* 512 U.S. at 392, neither should we treat it as a "rich uncle" by affording property rights special status above other constitutional rights, as H.R. 1534 would do. This literal and symbolic moving of real property claims to the front of the line of civil rights claims—especially when these are frequently filed by relatively well-heeled developers against cities and towns—is simply indefensible as a matter of national civil rights policy. While we all believe that the protection of real property is an important part of our democracy, there is no justification for placing fifth amendment property rights above all other civil rights.

Promotes judicial activism

Another ironic aspect of this legislative proposal is that it would transfer substantial authority from State courts to the very Federal judges so often criticized by proponents of the bill for their supposed "judicial activism." This legislation invites Federal judges to vigorously employ the takings clause to impose new financial burdens on cities and towns. Rebutting their own criticism of activist judges, this bill would encourage judges to use an exaggerated reading of the Federal Constitution as a justification for intervening in problems that belong to legislatures and city councils.

Exceeds Congress' constitutional powers

Finally, we oppose H.R. 1534 because it is very probably unconstitutional. We believe the ripeness standards governing takings actions against local governments in Federal court are beyond the power of Congress to change as proposed by this bill. While there is room for debate on this point, we think the better view, supported by a careful analysis by the Department of Justice, is that these standards are constitutionally based and therefore not subject to legislative revision. Specifically, the Department has concluded that the compensation requirement is based on the fifth amendment itself; while the Congress could declare that takings actions are ripe even though the claimant has not pursued available State remedies, the Department believes that the only constitutional course for the courts if Congress were to adopt this legislation would be to dismiss such actions on the merits. Similarly, because the Supreme Court has said that a "final" government action is necessary to determine whether a government action has gone "too far" and compensation is due under the fifth amendment, the courts very likely could not resolve claims which are declared

"ripe" by this bill but which fail to meet the constitutional standard of "finality."

B. Provisions concerning claims against the United States

The concerns raised by the provisions of H.R. 1534 relating to takings claims against the United States are quite different from the concerns raised by the provisions addressing claims against local governments. Nonetheless, these provisions are equally objectionable as a matter of sound public policy, and raise serious constitutional concerns as well.

First, the proponents of H.R. 1534 have failed to identify a genuine need for these provisions. Legislation to address the so-called Tucker Act "shuffle" was originally developed several years ago to address a problem that formerly existed: namely that a litigant pursuing a takings claim against the United States in the Court of Federal Claims could be forever barred from pursuing a claim based on the same agency action under the Administrative Procedure Act in Federal district court, or, conversely, a litigant pursuing an APA claim in district court could be forever barred from pursuing his takings claim in the Court of Federal Claims. Subsequent to the development of this legislative proposal, this problem was eliminated by the decision of the U.S. Court of Appeals for the Federal Circuit in *Loveladies Harbor, Inc.* v. *United States*. As explained by the Judicial Conference of the United States, the court in *Loveladies Harbor* "held that section 1500 may be read narrowly to include only a claim for the same relief. Under that rationale, a claim for money damages may proceed in the Court of Federal Claims while a claim arising out of the same events, but seeking a different relief, may proceed in district court." Thus, while this proposal was apparently developed to address a legitimate issue, the issue has been resolved and legislation to address it is no longer needed.

We recognize that there remains a separate, relatively narrow issue arising from the fact that an owner seeking to challenge Federal agency action must pursue a takings claim and an APA claim in separate courts. However, this issue can be addressed in a straightforward way without, like this bill, creating the numerous other problems described below. Specifically, the problem of bifurcated jurisdiction can be addressed simply by granting the article III district courts jurisdiction to address takings claims against the United States without regard to the amount of the claim, along with other claims arising from the same agency action. An amendment offering this solution as a substitute for H.R. 992 was defeated in the U.S. House of Representatives by a tie vote of 206-to-206.

Apart from this narrow issue, the provisions of H.R. 1534 concerning claims against the United States do not appear to address any legitimate issue or problem. On the other hand, these provisions raise a number of substantial policy and constitutional concerns.

Encourage extensive forum shopping

These provisions would encourage wasteful forum shopping on substantive challenges attempting to invalidate regulations. By

granting concurrent jurisdiction over any type of legal claim challenging agency action affecting private property to the Federal district courts and the Court of Federal Claims, these provisions would permit litigants to engage in tactical judge shopping between these two courts. Because the Court of Federal Claims is a court with nationwide jurisdiction, a litigant anywhere in the United States seeking to challenge an agency action could choose to bring a property-related action in the Court of Federal Claims or the local Federal district court. For example, a litigant could choose one or the other court depending upon the presence or absence of particular precedent in each court, the perceived predispositions of the judges on each court, and so no public purpose would be served by this forum shopping. On the other hand, this forum shopping would lead to contrary lines of precedent in different courts, differential administration of the law in similar cases, and long-term loss of confidence in the judicial system.

The bill also would encourage forum shopping between different Federal courts of appeal. So long as a lawsuit were filed based "in whole or part" on this bill, appellate jurisdiction would lie exclusively in the U.S. Court of Appeals for the Federal Circuit, whether the suit were initially filed in a Federal district court or in the U.S. Court of Federal Claims. On the other hand, if jurisdiction over a suit were not based on this bill, and the suit were initially filed in a Federal district court, appellate jurisdiction would lie in the regular Federal regional court of appeal. Thus, by "electing" to file an action under this bill, or by choosing not to do so, a litigant could determine which of two Federal appeals courts would have appellate jurisdiction over the case. Again, no legitimate public purpose would be served by creating this option to forum shop. Instead, creating such an option have the same adverse effect as would creating the option to forum shop at the trial level.

Finally, creating concurrent jurisdiction over a broad range of issues affecting private property in different trial courts and different courts of appeal would have the perverse effect of requiring a trial judge to apply different precedents to resolve a particular case depending upon which jurisdictional provisions the claimant chose to rely upon when he or she filed suit. This bill would routinely require the same Federal trial judge exercising jurisdiction in the same case to apply either of two interpretations of a Federal law depending upon which court of appeals would have appellate jurisdiction over the case. Thus, if a litigant chose not to elect to rely on this bill, the trial court would be required to apply relevant precedent from the appropriate regional court of appeal which would have appellate jurisdiction over the case. On the other hand, if a litigant elected to rely on this bill, the trial court would be required to apply relevant precedent from the Federal circuit which would have appellate jurisdiction in that circumstance. The complicated choice of law inquiry mandated by this bill would impose a severe, confusing, and useless burden on the Federal trial courts.

Creates legal uncertainty and confusion

By granting broad new jurisdiction to the U.S. Court of Appeals for the Federal Circuit, the bill also would create significant confusion and uncertainty about the law governing innumerable Federal

actions and programs. The U.S. Court of Appeals for the Federal Circuit was created in 1982 to exercise nationwide appellate jurisdiction in a relatively narrow category of specialized subjects, including takings and other monetary claims against the United States and trademark and copyright cases. Because the court now lacks any appellate jurisdiction over many other types of lawsuits challenging Federal agency actions under the Administrative Procedure Act, there is little or no relevant Federal circuit precedent on these issues. Granting new appellate jurisdiction over these issues to this court of nationwide jurisdiction would encourage efforts to relitigate issues already resolved in other circuits, creating significant new confusion and uncertainty in the law governing numerous Federal actions and programs to the detriment of Federal agencies, the public, and the regulated community.

Similar confusion and uncertainty would be created by the legislation's provisions that authorize the Court of Federal Claims, which also has nationwide jurisdiction, to invalidate Federal statutes, regulations, permit decisions, enforcement activities and other agency actions. This expansion of the Court of Federal Claims' jurisdiction would promote challenges to Federal Government safeguards for people, property, communities and the environment.

Overrides preclusive review provisions

Because the bill grants the Federal district courts and the Court of Federal Claims concurrent jurisdiction over claims against the United States "[n]otwithstanding any other provision of law and notwithstanding the issues of law," the bill would override numerous "preclusive review" provisions assigning jurisdiction over particular claims within the scope of this bill to specific Federal courts. Preclusive review provisions are designed to put an early end to legal disputes over new agency rulemakings, as much for the benefit of the regulated community as for the benefit of the public. An example of the preclusive review provision is found in the Clean Air Act, which limits judicial review of nationally applicable regulations under the Act to the U.S. Court of Appeals for the District of Columbia, requires that petitions for judicial review be filed within 60 days of Federal Register notice, and provides that after such 60 days a regulation may not be challenged in an enforcement action. Other preclusive review provisions are found in the Safe Drinking Water Act, the Occupational Safety and Health Act and the Consumer Product Safety Act.[30] Because the bill would permit actions to be filed in either the Court of Federal Claims or numerous Federal district courts, and establish a 6-year statute of limitation for the filing of such actions, the bill would destroy the prompt and definitive resolution of legal issues intended by the preclusive review provisions and create additional confusion and uncertainty about the legal rules governing many Federal programs.

Promotes judicial activism

The bill would have the effect of subtracting from the authority of all other lower Federal courts and expanding the jurisdiction of

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

the Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit, thereby promoting judicial activism on behalf of an exaggerated reading of the takings clause.

Largely as a result of historical accident, these courts have a philosophical cast that is distinctive within the Federal judiciary. As a result of the Federal Courts Improvement Act of 1982, which created the U.S. Claims Court (now the Court of Federal Claims), President Ronald Reagan was able to appoint every judge on the Court of Federal Claims, and his appointees continue to dominate that court. The 1982 act also established the U.S. Court of Appeals for the Federal Circuit, giving Presidents Reagan and Bush the opportunity to make 11 appointments to this court and to name 8 of the 11 judges currently serving on the court. Perhaps as a result of the unbalanced composition of these courts, certain observers have come to the conclusion that these courts have taken an unusually activist stance in attempting to expand the scope of the takings clause. See, e.g., Michael C. Blumm, "The End of Environmental Law? Libertarian Property, Natural Law, and the just compensation clause in the Federal circuit, 25 Envt'l L. 171 (1995).

The Supreme Court has clearly established that certain regulations can affect takings requiring the payment of just compensation under the fifth amendment and we support this principle. However, until early in this century, the takings clause was not believed to reach regulations under any circumstances. As Justice Scalia stated in *Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003, 1028 n.15 (1992), "early constitutional theorists did not believe that the takings clause embraced regulations of property at all." Moreover, the Supreme Court has repeatedly recognized that the takings clause only applies to regulations under "extreme circumstances." *United States* v. *Riverside Bayview Homes, Inc.,* 474 U.S. 121, 126 (1985).

We are deeply concerned about efforts to unreasonably expand the scope of the takings clause and we oppose this effort to reconfigure the jurisdiction of Federal courts with the apparent goal of encouraging this agenda.

Raises serious constitutional problems

Finally, these provisions are very likely unconstitutional because they would vest broad judicial powers in the article I Court of Federal Claims in violation of the requirement of article III of the Constitution that the judicial power be placed in the hands of an independent judiciary. H.R. 1534 would grant the Court of Federal Claims new and sweeping jurisdiction to invalidate any statute or regulation "affecting private property rights." Congress has an independent responsibility to safeguard our constitutional system of government and to ensure that its actions do not violate the Constitution.

Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[31] The defining attributes of article III judges are life tenure and protected salaries, which are meant to safe-

[31] U.S. Constitution, art. III, sec. 1.

guard their independence from the legislative branch and insulate them from political pressure. The Court of Federal Claims, on the other hand, is an administrative tribunal, or a so-called "legislative" court created under article I. The judges who sit on the Court of Federal Claims do not have the tenure and salary protections of article III judges. Broad grants of judicial power to courts that lack the attributes of article III judges will be struck down by the courts as unconstitutional. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50 (1982).

It is precisely because of their independence that article III judges can exercise the critical responsibility of interpreting the Constitution and invalidating acts of Congress and the Executive. See *Marbury* v. *Madison,* U.S. (1 Cranch) 137, 177 (1803). Similar expansive judicial authority cannot properly be granted to article I courts.

C. Traficant amendment

While undoubtedly well intended, the Traficant amendment added to H.R. 1534 during the House debate, and included in the Senate bill as reported by the Committee, is completely unworkable. Moreover, even if it could be made to work, it would be essentially useless and highly destructive of public confidence in government.

The amendment is unworkable because it is so broad in scope. The amendment would require Federal agencies to give notice to property owners explaining their rights under the bill and the procedures for obtaining any compensation that may be due, "[w]henever a Federal agency takes an agency action limiting the use of private property that may be affected by this Act." The bill defines "private property" for the purpose of this provision as including "all interests constituting property, as defined by Federal or State law, protected under the fifth and fourteenth amendments to the United States Constitution." According to its terms, this amendment would impose an extraordinarily burdensome obligation on Federal agencies to give notice to property owners every time an agency acts to somehow limit or restrict rights in property in any fashion. This requirement would apply to all Federal agencies without limit and therefore would apply, for example, to all actions of the Federal Drug Administration regulating drugs, regulations of the Securities and Exchange Commission affecting interests in securities, safety orders issued by Federal aviation officials, and so on.

While many Federal agencies have appropriate procedures for notifying members of the regulated community of changes in laws and regulations, this broad, ill-defined mandate would impose a sweeping new obligation on every Federal agency to provide notice virtually every time they act. As the Department of Justice noted, the Traficant amendment would "apply to countless Federal protections that prohibit illegal activity or control potentially harmful conduct. For example, a Federal prohibition on flying an unsafe airplane "limits" the use of the plane; emission controls for a hazardous waste incinerator "limit" the use of the incinerator * * *"[32]

[32] Department of Justice letter to Senator Patrick Leahy (Feb. 3, 1998).

And it should be noted, that this amendment makes no exemptions for national security or threats to life, liberty or neighboring property. Thus, this amendment is a mandate for a massive, but ill-defined bureaucratic exercise.

Equally important, the notice called for by the amendment would serve no useful purpose for citizens. The bill would require agencies, every time they take an action affecting property within the meaning of this amendment, to give notice of the owners of affected property "explaining their rights under this Act and the procedures for obtaining any compensation that may be due them under this Act." Because most regulatory actions do not effect takings, and because this bill does not purport to alter the substantive standards for a taking, this notice would be extraordinarily confusing and misleading to most citizens. It would create false expectations of an entitlement to "compensation" from the public treasury, ultimately generating public resentment and confusion.

This amendment would be akin to mailings many Americans receive announcing with great fanfare that "you may already be a winner," when in fact the chances of "winning" are remote, or the available "prize" is of less value than might initially appear. This approach is hardly a sound model for responsible government. Finally, since the amendment requires Federal agencies to give notice to all property owners affected by this Act, Federal agencies would have to develop a massive database of names and addresses of Americans and what property interests they have at every moment in land, buildings, machinery, partnerships, corporations, estates and other types of property.

BROAD OPPOSITION TO H.R. 1534

Although ours is, at least based on the recorded vote, the minority view on this Committee, we find ourselves surrounded by a broad coalition of opposition to H.R. 1534.

A bipartisan group of 40 attorneys general (representing 37 States and 3 territories) 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." [33]

The administration strongly opposes H.R. 1534, including the Tucker Act provisions derived from H.R. 992 and added to H.R. 1534 during markup of the bill in the Senate Judiciary Committee. The Attorney General, the Secretary of the Interior, the Secretary of Transportation, the administrator of the Environmental Protection Agency, and the chair of the Council on Environmental Quality have stated that they would recommend that the President veto H.R. 1534. The administration has followed those recommendations and pledged to veto H.R. 1534. As stated by Vice President Gore, "the President has heard your protests, even if the Congress has not. If H.R. 1534, or any similar measure that would undermine local prerogatives and waste taxpayer money, comes to the President's desk, he will veto it." [34]

[33] Letter from 40 attorneys general to Hon. Henry Hyde (Sept. 24, 1997).

[34] Statement of Vice President Gore before to State municipal league presidents and executive directors (Mar. 9, 1998).

The Department of Justice has written a strong letter in opposition to this bill, citing particularly that the bill would: (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 decisionmaking; (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[35] regarding the relevant "parcel as a whole"; and (6) burden the already overcrowded federal docket at the expense of meritorious claims.[36] The Justice Department subsequently submitted detailed analysis of H.R. 1534 as it passed the House, which concluded that the House amendments "do not address the fundamental flaws inherent in the bill. In some important respects, the changes make the bill even more problematic"[37]

The Conference of Chief Justices, representing the highest courts of all 50 States, passed a resolution that the Conference "strongly believes that 'takings' cases arising under state law should be decided on the merits in state courts prior to any federal court involvement; and strongly opposes legislation that would drastically change the traditional state and federal roles in 'takings' cases and upset the balance of our federal system in an area that is fundamentally a state and local matter."[38]

The State chief justices are joined in opposition to the bill by the National Governors Association, the American Planning Association, the National League of Cities, the U.S. Conference of Mayors, the National Conference of State Legislatures, the National Association of Counties, 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.[39]

Similarly, letters from the Judicial Conference note:

> 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 ad-

[35] U.S. Constitution, amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[36] Letter from the Department of Justice to Hon. Henry Hyde (Oct. 7, 1997).

[37] See letter from Department of Justice to Senator Patrick Leahy (Feb. 3, 1998).

[38] Letter from Conference of Chief Justices to Senator Patrick Leahy with resolution (Feb. 13, 1998).

[39] Letter from the League of Cities and Conference of Mayors to Hon. Henry Hyde (Sept. 24, 1997).

> versely affect the administration of justice and delay the resolution of property claims.[40]

In addition, for the first time, the National Association of Counties is also opposing H.R. 1534 and passed a resolution that states:

> The proposed legislation infringes on a county's regulatory authority and its responsibility to all citizens. Local land use ordinances and environmental and health regulations attempt to balance the interests of all, seeking the proper blend of safety and development to make our communities better places to live. Communities should have the right to keep factories away from residential areas and adult stores away from schools. These types of decisions are best made at the local level, with ample opportunity for all parties to seek nonjudicial solutions.[41]

The National Association of Towns and Townships, representing 11,000 local governments and many tens of thousands of local elected officials, stresses that the bill would "involve federal courts in those disputes well before local governments and landowners have had the opportunity to fully consider the range of development alternatives that would be acceptable to both parties."[42]

Major religious groups, including the U.S. Catholic Conference, the National Council of Churches of Christ and Evangelical and Jewish groups also oppose this legislation. One of the reasons they gave was the lack of equity to neighbors.

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 and other national public interest groups oppose this bill, including the League of Women Voters, American Federation of State, County and Municipal Employees, National Wildlife Federation, League of Conservation Voters, Sierra Club, Center for Marine Conservation, Environmental Defense Fund, National Audubon Society, National Trust for Historic Preservation, Earthjustice Legal Defense Fund, Alliance for Justice, United Steelworkers of America, Izaak Walton League of America, Scenic America, The Wilderness Society, and the Natural Resources Defense Council.

CONCLUSION

We strenuously oppose this legislation. The proponents have failed to identify any significant problem or issue which calls for this type of sweeping legislative response. Moreover, the bill would have numerous adverse effects on local communities across America, tens of millions of homeowners, the regulated community, and the public as a whole. Finally, this legislation, if enacted, would probably be a gesture in futility because it would likely be found unconstitutional in several important respects.

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[40] Letter from the Judicial Conference of the United States to Hon. Henry Hyde (Sept. 29, 1997).

[41] Letter from National Association of Counties with resolution to Senator Patrick Leahy (April 3, 1998).

[42] Letter from National Association of Towns and Townships to Senator Patrick Leahy (Feb. 24, 1998).

We do not doubt that in isolated situations, a landowner may face unreasonable delays and unnecessary bureaucracy in the local land-use planning process. But if land-use procedures in particular areas are in need of reform, the solution is to urge revision of those local laws at the local level. States and localities across the country are responding to the call, adopting permitting deadlines, streamlining application procedures, establishing development ombudsmen, and using other creative solutions to balance the rights of all affected citizens. We should not, however, federalize local land-use planning and effectively revise land-use procedures across the Nation in one fell swoop, as H.R. 1534 would do.

It is a sad commentary on the state of the Congress that the U.S. Senate would seriously entertain this type of legislation, so clearly designed to advance the financial interest of a narrow special interest, over the objection of virtually every responsible institution or interest affected by this legislation, including but not limited to every major national organization representing State and local governments, the Administrative Office of the U.S. Courts, the Conference of State Chief Justices, and the U.S. Department of Justice. This misguided legislative effort is all the more striking because this attempt to federalize local issues, impose national standards on local governments, expand the authority and workload of the Federal courts, and encourage Federal judicial activism, flatly contradicts some of the most fervently held values and beliefs of the supporters of this legislation. Americans realize that a proper respect for property rights can only take place through individualized, targeted approaches to problems and not sweeping changes that undercut local systems for problem-solving.

PATRICK LEAHY.
J.R. BIDEN, Jr.
DIANNE FEINSTEIN.
DICK DURBIN.
TED KENNEDY.
HERB KOHL.
RUSS FEINGOLD.
R.G. TORRICELLI.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by H.R. 1534, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

* * * * * * *

PART IV—JURISDICTION AND VENUE

* * * * * * *

CHAPTER 85—DISTRICT COURTS; JURISDICTION

* * * * * * *

§ 1343. Civil rights and elective franchise

(a) The district * * *

* * * * * * *

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(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 an unsettled question of State law, the district court may certify the ques-

tion 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 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 patently unclear.

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

(i) 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;

(ii)(I) one meaningful application, as defined by the locality concerned within that State or territory, to use the property has been submitted but has not been approved, and the party seeking redress has applied for one appeal or waiver which has not been approved, where the applicable statute, ordinance, custom, or usage provides a mechanism for appeal to or waiver by an administrative agency; or

(II) one meaningful application, as defined by the locality concerned within that State or territory, to use the property has been submitted but has not been approved, and the disapproval explains in writing the use, density, or intensity of development of the property that would be approved, with any conditions therefor, and the party seeking redress has resubmitted another meaningful application taking into account the terms of the disapproval, except that—

(aa) if no such reapplication is submitted, then a final decision shall not have been reached for purposes of this subsection, except as provided in subparagraph (B); and

(bb) if the reapplication is not approved, or if the reapplication is not required under subparagraph (B), then a final decision exists for purposes of this subsection if the party seeking redress has applied for one appeal or waiver with respect to the disapproval, which has not been approved, where the applicable statute, ordinance, custom, or usage provides a mechanism of appeal or waiver by an administrative agency; and

(iii) 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.

(B) The party seeking redress shall not be required to apply for an appeal or waiver described in paragraph (1)(B) if no such appeal

or waiver is available, if it cannot provide the relief requested, or if the application or reapplication would be futile.

(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.

(f) Nothing in subsection (c), (d), or (e) alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.

* * * * * * *

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil * * *

* * * * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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(3) Any civil action filed under section 5 of the Citizens Access to Justice Act of 1998.

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(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

(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; and

(B) one meaningful application to use the property has been submitted but has not been approved, and the party seeking redress has applied for one appeal or waiver which has not been approved, 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 application or reapplication to use the property would be futile.

(3) Nothing in this subsection alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.

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CHAPTER 91—UNITED STATES COURT OF FEDERAL CLAIMS

Sec.

1491. Claims against United States generally; actions involving Tennessee Valley Authority.

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[1500. Pendency of claims in other courts.]

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1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) [The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.] *The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States for monetary relief founded either upon the Constitution or any Act of Congress or any regulation of an executive department or upon any express or implied contract with the United States, in cases not sounding in tort, or for invalidation of any Act of Congress or any regulation of an executive department under section 5 of the Citizens Access to Justice Act of 1998.* For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration, shall be considered an express or implied contract with the United States.

(2) *In any case within its jurisdiction, the Court of Federal Claims shall have the power to grant injunctive and declaratory relief when appropriate.* To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978,

including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(3) In cases otherwise within its jurisdiction, the Court of Federal Claims shall also have supplemental jurisdiction, concurrent with the courts designated under section 1346(b), to render judgment upon any related tort claim authorized under section 2674.

(4) In proceedings within the jurisdiction of the Court of Federal Claims which constitute judicial review of agency action (rather than de novo proceedings), the provisions of section 706 of title 5 shall apply.

(5) 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; and

(B) one meaningful application to use the property has been submitted but has not been approved, and the party seeking redress has applied for one appeal or waiver which has not been approved, 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 application or reapplication to use the property would be futile. Nothing in this paragraph alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.

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[§ 1500. Pendency of claims in other courts

[The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.**]**

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