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Will Supreme Court Reargument of the Knick Takings Case Come Down to the Federal Government's "Klingon Forehead" Argument?

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The evolution of Klingon foreheads. It's not easy to explain how the Star Trek original series Klingons (top row) are really the same species as those from later movies and series (bottom row).

Last month, the Supreme Court heard oral argument in *Knick v. Township of Scott*, an important Fifth Amendment takings case concerning whether property owners can bring regulatory and "inverse condemnation" takings cases in federal court, as opposed to having to go through state court. In *Knick*, the Court will decide whether to overrule or limit *Williamson County Regional Planning Commission v. Hamilton Bank*, a 1985 decision that makes it virtually impossible to bring many types of takings cases in federal court. Williamson County creates a Catch 22 for property owners, under which they cannot file a takings case in federal court until they have first secured a "final decision" from the relevant state regulatory agency and has "exhausted" all possible remedies in state court; but then, the very act of first going to state court precludes a later appeal to a federal court. I explained the issues at stake in the case in a *Wall Street Journal* op ed, and more fully here and in an amicus brief I coauthored on behalf of the Cato Institute, the National Federation of Independent Business, the Southeastern Legal Foundation, the Beacon Center of Tennessee, the Reason Foundation (which publishes *Reason* magazine and this website), and myself.

Like other cases the Court considered during the first week of its sitting, there were only eight justices on the bench, because Justice Brett Kavanaugh's nomination was still held up in the Senate in order to give time for the FBI to investigate sexual assault allegations against him. Ultimately, however, Kavanaugh was confirmed by a narrow margin. And on November 2, the Supreme Court issued an order that *Knick* is to be reargued before the full nine-justice Court.

The order could well have been issued because the eight justices who heard the original oral argument are split 4-4. After the argument, I thought there might be a 5-3 split, with Justice Elena Kagan siding with the four conservatives in support of the property owner. But it's entirely possible I got this wrong. Alternatively, there might not be a 4-4 split on the result, but there is a division on the rationale that Kavanaugh could help clarify. Whatever the reason for the reargument, Kavanaugh will now get to participate in the case, and the result could well hinge on his vote.

What Kavanaugh might do is hard to predict. He has virtually no previous record on takings or other constitutional property rights cases, so no one really knows where he stands on these issues. Takings cases often split the Court along right-left ideological lines. As a conservative, Kavanaugh might therefore be expected to vote for the property owners here. But other conservative justices have broken ranks on takings cases in the past, and we cannot ignore the possibility that Kavanaugh might do so, especially in a case where a decision in favor of the property owner might require overruling or severely limiting a 33-year old precedent. At the very least, Kavanaugh's replacement of Justice Anthony Kennedy creates greater uncertainty for the property rights side in this case, since Kennedy was one of four justices who joined a 2005 concurring opinion urging the Court to consider overruling *Williamson County*. He would likely have voted to get rid of it in this case had he stayed on the Court.

The Supreme Court's order setting the case for reargument also ordered the parties to file supplementary "letter briefs" addressing some specific issues raised in the oral argument and the property owner's brief. The nature of these issues is not easy to figure out, since the Order refers merely to specific page numbers in the oral argument transcript and the brief. At the Inverse Condemnation blog, prominent takings lawyer Robert Thomas plausibly suggests that these might be references to a dubious argument offered not by the parties, but by the Solicitor General in an amicus brief for the federal government.

The Solicitor General's argument attracted only brief attention in the original oral argument. But it's possible some of the justices now want to take a closer look at it, perhaps as a strategy for building a broader consensus on the Court - and a way to mitigate the Catch 22 aspect of *Williamson County* without overruling that precedent completely.

What is the SG's argument? Frankly, it doesn't make much sense to me (or to most other commentators). The standard interpretation of *Williamson County* is that a property owner cannot bring in federal court a takings claim alleging that a state or local government has taken his property without paying the "just compensation" required by the Fifth Amendment unless he has first "exhausted" all possible state court options. As the theory goes, the state has not really denied pay compensation until that happens. The solicitor general, however, argues that this constraint only applies to cases brought under 42 U.S.C. § 1983 (a federal statue authorizing law suits for violations of constitutional rights), but not ones brought to federal court under 28 USC § 1331, the law giving federal courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Robert Thomas gives the best explanation of this argument I have seen, including a helpful analogy to Star Trek producers' dubious efforts to "retcon" the evolution of Klingon foreheads:

Retroactive continuity -- or "retconning" -- is, according to that authoritative source *Wikipedia*, a "literary device in which established facts in a fictional work are adjusted, ignored, or contradicted by a subsequently published work which breaks continuity."

For example, compare the real-world explanation for why the 1960's *Star Trek* show's Klingons didn't have butt heads, but the later-produced shows and movies did. The real-world reason was that the TV show had a bare-bones budget, so couldn't afford the required intricate make-up. The later-produced stuff, having larger budgets, could. But to those concerned with an in-universe explanation that had to line up with the production realities, it turned out to be a big source of contention. Fandom as well as the later shows' writers struggled to come up with a narrative that accounted for both Klingons with butt heads, and those without.

Sorry for the impossibly nerdy detour, but that's what the Solicitor General's argument in *Knick v. Township of Scott* reminded us of....

And now having gone back and reviewed the SG's difficult-to-comprehend argument, we are reminded of retconning. Because it seems to reach back and question the "continuity" of what were, we thought, "established facts."

Recall that in *Williamson County*, it was the SG's amicus brief that raised the whole ripeness argument. Neither party did. Read the Brief Amicus Curiae of Western Manufactured Housing Communities Association in *Knick* for the details on how the argument was first raised in *Williamson County* by the SG's brief, as a substantive requirement under the Fifth Amendment. There's been no constitutional wrong, the brief argued, until the state or local government has *denied* compensation. We disagree with the rationale, but we get the logic.

Flash forward three decades, and you have the SG now coming in on the side of the property owner to argue that federal court *is* an option in Fifth Amendment takings cases. Other than saying "whoops, we were wrong," how was the SG going to frame the government's argument? Retconning, that's how....

First, we think the goal of the SG's brief was to both come in on the side of property owners, while at the same time preserving the rule that compensation need not be provided contemporaneous with a taking, provided there are reasonable, certain, and adequate means to secure compensation after the taking. That rule, after all, allows quick takings and statutory takings, and forces property owners alleging an inverse condemnation or regulatory taking against the federal government to pursue compensation in the Court of Federal Claims in most instances. Above all else, the SG wants to preserve that line of decisions.

[T]he only way to do that was in a way that didn't undermine the *Williamson Count*y rationale first advanced by the SG's amicus was to retcon a new theory. And while it took no less that four reads of the SG's brief, here's our best summary of that retroactive continuity theory:

- [1.] *Williamson County* was only a ruling that under 42 U.S.C. § 1983 a "takings" claim isn't ready for federal court and there's no federal constitutional violation until the state has both taken property, *and* refused to pay compensation.
- [2.] Consequently, a takings claim does not trigger a § 1983 claim until the state has denied compensation, because any constitutional violation isn't complete until the state has denied compensation. Thus, the Court need not overrule *Williamson County*. You still must pursue compensation in state court via a state law inverse condemnation claim and lose it, before you can even state a ripe claim under §1983.
- [3.] *But* (and there's always a "but," isn't there?) an inverse condemnation claim in state court to get compensation under state law is not a § 1983 claim, but independently implicates a substantial federal question.... And thus, federal jurisdiction may be invoked independently of whether there's been a federal constitutional violation, or a ripe cause of action under § 1983. (Knick's Reply Brief (page 4, n.5) rightly refers to this as a "puzzling" argument.)

- [4.] The embedded takings question is a "federal interest in a state claim" (our characterization, not the SG's) and that is enough to trigger federal question jurisdiction under 28 U.S.C. § 1331 (arising under jurisdiction).

There's a certain cleverness to this argument. If it prevails, it will allow property owners to bring many takings cases in federal court, but also allow the federal government to take property without having to pay for it immediately (the main motivation for the SG's intervention, most likely), and enable the Supreme Court to eliminate a ridiculous Catch 22 created by *Williamson County* without having to actually overrule that decision. But ultimately, it is no more persuasive than the Star Trek producers' heroic but nonetheless ridiculous efforts to come up with an in-universe explanation of the variation in Klingon foreheads.

There are two obvious flaws in the SG's argument. First, nothing in *Williamson County* indicates that its logic does not apply to cases brought under 28 U.S.C. § 1331. Second, and much more importantly, Section 1331 only gives federal courts jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." But the whole point of *Williamson County* is that there is no action "arising under" the Takings Clause of the Fifth Amendment, until the government has refused to pay compensation, and there is no sufficiently definitive refusal until the property owner has "exhausted" all possible state court remedies. For reasons I summarized here, hereand in an amicus brief in *Knick*, I think this theory is badly wrong, and at odds with the way the Supreme Court treats other constitutional rights claims, where no such "exhaustion" of state court remedies is required. The Takings Clause is violated from the moment the government seizes property without paying for it, not the moment when a state court reaches a decision on the issue. As Chief Justice John Roberts noted in the earlier oral argument, "the compensation that is due runs from the moment of the taking... In other words, if it takes you six months to adjudicate the -- the claim and you say, well, this is how much you owe, you owe interest going all the way back to the point at which the property was taken." But if the reasoning of *Williamson County* is correct, the theory precludes Section 1331 claims no less than Section 1983 claims.

The SG's theory might be a lesser evil compared to just reaffirming the traditional interpretation of *Williamson County*. It would significantly reduce the harm done by that precedent, though at the cost of making it even more incoherent than it already is. But it would be better still if the Supreme Court relied on Vulcan logic rather than Klingon forehead retconning. As a Vulcan philosopher put it, "[l]ogic is the cement of our civilization with which we ascend from chaos using reason as our guide." Logic says that *Williamson County* is just plain wrong, and should be gotten rid of, not "retconned."

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