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Justice Department Urges High Court To Reject Novel 'Judicial Takings' Doctrine

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The Department of Justice (DOJ) and a slew of states and local government groups are backing Florida's position in a novel "takings" case scheduled for oral argument before the Supreme Court next month, saying the high court should reject attempts to use the case to establish "judicial takings" due to court rulings -- a legal theory that some stakeholders say could have dramatic consequences for state courts and climate change mitigation efforts.

In Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, et al., the petitioners argue that Florida's beach renourishment efforts erase common law rights of waterfront property owners. The petitioners argue that the lower court rulings on the issue result in a "judicial taking," violating the Fifth and 14th amendments of the Constitution (Water Policy Report, July 6).

A dozen parties, including property rights and home-building associations, have entered amicus briefs on behalf of the plaintiffs urging the court to reel in state efforts to conduct environmental restoration projects on private shore-front property and arguing the Supreme Court has never fully addressed this facet of takings law (Water Policy Report, Oct. 12).

But last month, DOJ, along with a coalition of states and groups representing cities, counties, mayors and municipal lawyers, entered the case as amicus on behalf of Florida. The states in the coalition are California, Arkansas, Delaware, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington, West Virginia and Wyoming. The Surfrider Foundation, Coastal States Organization, the American Planning Association and several other environmental, planning and county organizations are also backing Florida's position.

DOJ and the other groups are urging the court to avoid creating a judicial takings doctrine that they say is unfounded and could harm the ability of the federal government and states to protect shorelines, particularly against hurricanes and other storms.

"This case concerns whether a state judicial decision may effect a taking of property for purposes of the Just Compensation Clause. The federal government often defends against takings claims and, in so doing, relies upon background principles of property law. Also, because Federal Emergency Management Agency provides flood insurance to many coastal property owners through the National Flood Insurance Program, the United States has an interest in ensuring that state and local governments are able to protect coastal property against hurricanes and storms," the DOJ brief says. Relevant documents are available on InsideEPA.com. See page 2 for details.

DOJ argues against the court creating any type of judicial takings doctrine, and notes in its brief that the "historical evidence suggests that the Framers viewed the Just Compensation Clause as confined to the government's physical appropriation of private property for public use by eminent domain."

The government concedes that "Several Members of this Court have suggested that a claim for a judicial taking might be available in certain circumstances." But DOJ notes that that would involved "extraordinary cases, in which the State otherwise could 'defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.'"

DOJ notes that a judicial taking would also "intrude on one of the core functions of the state courts" by stepping in on common law property interpretation.

Meanwhile, states in their brief say that the petitioners are "proposing an ill-conceived new doctrine that would undermine the States' well established and traditional authority to determine the scope of their own property laws." Expanding takings law to include judicial takings "would subject state court property laws to unwarranted and unprecedented review by the federal judiciary," and could put a slew of state court decisions to scrutiny, including marital property allocations; inheritance rules; employee rights; scope and location of easements; and other issues.

The Coastal States Organization, in its brief, argues that creating a judicial takings doctrine could put state climate change adaptation plans in serious jeopardy.

The outcome of the case could be significant -- with several legal sources noting that a ruling confirming judicial takings could complicate legal disagreements, because if a state court is accused of enacting a judicial taking, then it would have to be remedied by the Supreme Court.

Doug Kendall, president of the Constitutional Accountability Center, said at a Nov. 3 panel on the case held by the Environmental Law Institute (ELI) the "Judicial takings doctrine . . . which the court is being asked to create here . . . is wholly unnecessary and wholly unworkable." Kendall said the country has been 220 years without the doctrine, and "there's no need or no basis for finding a judicial taking."

But Ilya Shapiro, a senior fellow at the CATO Institute -- a libertarian think tank -- noted at the panel that "states violate rights all the time." Shapiro said the facts in this particular case are complicated, but "clearly there is a change to the rights" and it is "necessary to have this [judicial takings] doctrine."

Panelists at the ELI event said it is surprising that the court chose this particular case to address takings law, though it is a rare chance for the justices to address judicial takings -- long fodder for law school classrooms, but not actual courtrooms. "I don't think anybody . . . thought this was going to be the case the court took," Kendall said, noting that there are dozens of takings cases the Supreme Court gets asked to take each year, and it hasn't accepted one in five or six years.

Several justices have joined the court since the last takings case was heard -- Justices Sonia Sotomayor and Samuel Alito and Chief Justice John Roberts -- and some legal experts say it is very difficult to tell how the court is likely to rule.

Roberts worked at DOJ in 2002 when the high court ruled for the government in "an incredibly important takings case," Kendall said -- Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency. The 2002 ruling involved a local land-use moratorium, and Roberts represented the Tahoe Regional Planning Agency. Justice John Paul Stevens wrote the court's 6-3 opinion, finding that the action did not constitute a taking. Of the justices still on the high court, Anthony Kennedy, Ruth Bader Ginsburg and Stephen Breyer joined the majority while Antonin Scalia and Clarence Thomas dissented.

While Justices Stephen Breyer and Anthony Kennedy are considered to be the most likely swing votes for environmentalists, Richard Lazarus of Georgetown University Law School has said that has not been the case lately (Water Policy Report, Oct. 12).

If the high court endorses the theory of judicial takings, it could create "something new and perhaps difficult," Kendall said, because such cases would always have to be heard for the first time before the Supreme Court, something that could give the court's more conservative members pause.

Ilya noted: "I think that's the precise issue that spooked Scalia in the Cannon beach case," referring to Stevens, et al. v. City of Cannon Beach, et al., a 1994 property rights case denied certiorari by the high court.

Nevertheless, "Justice Scalia has argued in the past that the Court should take up the judicial takings issue," Ben Barros wrote in a July 1 blog post in the Law Professors Blog Network. In a lengthy dissent from a denial of cert in Cannon Beach, Scalia said the Constitution generally leaves property law to the states, but states might wrongfully still deny rights protected under the constitution. "Our opinion in [Lucas v. South Carolina Coastal Council], for example, would be a nullity if anything that a state court chooses to denominate 'background law'-regardless of whether it is really such-could eliminate property rights," the dissent says.

In the landmark 1992 Lucas ruling, often cited in takings litigation, the high court established the so-called "total takings" test, holding generally that a regulatory taking has occurred when a property's entire value has been destroyed by a regulatory action.

But the petitioners in the beach renourishment case argue the Lucas test has enough ambiguity to provide "a loophole" for states to circumvent the rule. The "danger in beach cases . . . is that in the absence of federal review, state courts are free to fashion whatever rules they choose without being cabined by constitutional boundaries," the petitioners' brief says.

"I suspect that Justice Scalia has been looking for a suitable judicial takings case ever since" denying cert in Cannon Beach, Barros notes. Further, he says that the "sentence referencing Lucas in Justice Scalia's Cannon Beach dissent helps to explain how the judicial takings issue fits into the Court's larger regulatory takings jurisprudence. In Lucas, the Court held that a severe limitation on property rights that would constitute a per se taking would only be constitutional if the state's background law of property or nuisance established that the property owner had no property rights to begin with."

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