JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

February 14, 2000

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-1306

Dear Mr. Chairman:

On behalf of the Judicial Conference of the United States, I write to share the concerns of the federal judiciary regarding H.R. 2372, the "Private Property Rights Implementation Act of 2000," as reported by the Constitution Subcommittee on February 2, 2000.

The stated purpose of this bill is 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." H.R. 2372, however, would alter deeply-ingrained federalism principles by prematurely involving the federal courts in regulatory proceedings involving property that have historically been decided by state and local administrative bodies or courts. By relaxing the current requirement of ripeness in takings cases and limiting a federal judge's ability to abstain from hearing certain cases, the bill may also adversely affect the administration of justice and delay the resolution of property claims. These concerns are more fully explained below.[1]

Section 2 of H.R. 2372 includes a novel concept of finality that would significantly alter federal court consideration of takings cases. Under the bill, property owners would be allowed to file a federal suit without having pursued all remedies available at the local and state levels. This definition of "final decision" would offend well-established principles of federalism by

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[1]The position of the Judicial Conference was adopted on September 23, 1997, in response to a similar bill, the "Private Property Rights Implementation Act of 1997" (H.R. 1534), which was considered during the 105th Congress.

prematurely involving the federal judiciary in traditionally local matters and by depriving local and state officials of a full opportunity to resolve local disputes in a manner consistent with both the Constitution and state or local law.

Moreover, filing would be allowed to occur before it is clear that the property owner cannot derive any economic benefit from the land and before the issue of just compensation has been raised and determined within the appropriate state administrative entities and courts. The Supreme Court has required that these two elements of ripeness be met before a Fifth Amendment takings claim can be filed in federal court. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). Because H.R. 2372 does not require exhaustion of all available remedies at the local and state levels, it would permit federal court consideration of such a claim before it may be ready for constitutional review.

Furthermore, enactment of H.R. 2372 will not necessarily accelerate judicial resolution of the claim. Once property owners are in federal court, they may nevertheless find their cases dismissed at the pleading stage for at least two reasons. First, the factual record might not be sufficiently developed for a federal court to assess whether the government has deprived the property owner of the use of his or her property. Secondly, by expediting a federal court's consideration of a takings claim before a property owner has been denied compensation, the bill may circumvent the requirement of a cognizable injury in the context of a constitutional taking. *See, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.7 (1997) (recognizing that the ripeness doctrine has both constitutional and prudential elements). Just last year, the Supreme Court in *City of Monterey v. Del Monte Dunes*, 119 S. Ct. 1624 (1999), restated its long-standing view that a constitutional taking does not exist until the property owner is denied just compensation. The Court noted: "When the government repudiates this duty [to provide just compensation], either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution." *Id.* at 1642.

Federalism issues are also raised in the bill's treatment of abstention. H.R. 2372 provides that in an action in which the operative facts concern the uses of real property and no claim of a violation of state law is alleged, a federal court shall not abstain from exercising jurisdiction unless a parallel proceeding arising out of the same operative facts is pending in state court. The abstention doctrine is founded upon principles of federalism and has been used in the federal courts as an effective tool to balance federal and state interests. The use of this doctrine, however, is not limited to those circumstances in which a parallel proceeding is pending in state court. Federal courts have sometimes abstained, even where no similar proceeding is pending in the state courts, when more complete consideration of the claim is available in the administrative (or state judicial) arenas. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *see also, New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989).

Although constitutional takings claims are ultimately at issue, the federal courts' authority to abstain from deciding an action in particular instances protects and preserves a state's opportunity to consider initially, and perhaps to resolve definitively, property or zoning issues arising within its jurisdiction. Such abstention authority promotes comity, preserves federalism, and conserves scarce judicial resources. The bill's limitation on the use of the abstention doctrine, therefore, is of concern.

Another example of the federalism problems raised by H.R. 2372 is found in section 2. That section provides that district courts "may certify" unsettled questions of state law to a state's highest court in certain circumstances. Not all states, however, currently have formal procedures for answering certified questions of law from other courts. Moreover, of those that do, some states permit certification only from the United States Supreme Court and the federal courts of appeals and do not permit a federal district court to certify an issue to its highest court. Even where a certification procedure exists, states have varying standards for determining when they will accept a certified question.[2] Furthermore, the standard of certification created under the bill as to when it is appropriate to certify an issue may be at odds with existing practices.[3]

It is unclear whether this bill creates a new federal mechanism for certification by allowing a federal district court to certify a legal question to a state's highest court. If it does not provide such authorization, given the absence of certification procedures in some states, and the limitations on the availability of certification in others, H.R. 2372's certification provisions will not help certain district courts that will be faced with unclear questions of state law. If, on the other hand, the bill is interpreted as imposing upon state supreme courts the burden of answering questions certified by federal courts, it may create friction in those states that do not presently permit certification or in any state that has standards that could result in a state court's denial of a request to decide an unsettled question of state law.

Lastly, it is important to note that this legislation could sweep large numbers of takings claims into the federal courts. Such an increase in case filings, especially if brought prematurely, could raise workload impact concerns and contribute to existing backlogs in some judicial districts.

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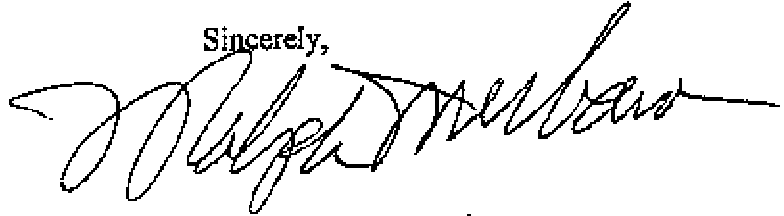
[2] Jona Goldschmidt, Certification of Questions of Law: Federalism in Practice, American Judicature Society (1995).

[3] The predicate for certification under H.R. 2372 is that the question of state law (1) will significantly affect the merits of the injured party's federal claim, and (2) is patently unclear.

The Judicial Conference would appreciate your consideration of its comments on H.R. 2372. If you have any questions, please contact Michael W. Blommer, Assistant Director, Office of Legislative Affairs, at 202-502-1700.

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr., Ranking Member
Members of the House Judiciary Committee