U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

September 18, 2000

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

This letter presents the views of the Department of Justice on S. 1028, the "Citizens Access to Justice Act of 1999." The Administration expressed strong opposition to similar legislation that the Senate considered during the 105th Congress, including S. 2271, which the President stated he would veto if it were presented to him. Although S. 1028 is slightly different from S. 2271, the minor changes do not resolve our concerns and the Department remains strongly opposed to this legislation. The Attorney General would recommend that the President veto S. 1028 if it were passed in its present form.

The Department opposes S. 1028 for several reasons. First, the bill would expand the jurisdiction and the equitable powers of the United States Court of Federal Claims (CFC) in a manner that would raise serious constitutional concerns. Second, by curtailing current abstention and ripeness doctrines, the bill would unjustifiably expand the power of Federal courts in disputes between property owners and local governments and undermine the traditional role of local courts as the principal forum for resolving land-use disputes. Third, S. 1028 would override many statutory "preclusive review" provisions that give particular courts exclusive authority to decide legal challenges to agency action that affects private property rights. Such provisions are intended to ensure prompt and definitive resolution of legal challenges to agency actions, thereby providing businesses with the certainty and consistency that is critical to long-range planning. Fourth, the bill imposes on Federal agencies an overly broad and unworkable notice mandate that would require property owners to be notified whenever their "property rights" are limited, such as when smoking is banned in federal buildings. Finally, S. 1028 would encourage litigation and increase the risk of inconsistent and potentially conflicting rulings by allowing multiple fora to hear the same Fifth Amendment claim.

These and other objections to S. 1028 are described in greater detail below.

S.1028's Expansion of the CFC's Jurisdiction and Equitable Power Raises Serious Constitutional Concerns

A. *The CFC is a Court of Limited Jurisdiction and Equitable Power*

S. 1028 would expand both the subject matter jurisdiction and remedial powers of the Article I CFC. In 1982, Congress abolished the Court of Claims, an Article III court, and shifted its trial functions to the Article I Claims Court, which was later renamed the CFC. Since its recreation as an Article I tribunal in 1982, this court's jurisdiction has essentially been confined to suits seeking monetary judgments against the United States, and the court's equitable powers have been sharply limited.[1] Sections 5 and 6 of S. 1028 would eliminate these limits. These provisions would authorize the CFC to resolve challenges to "the validity of any Federal agency action as a violation of the fifth amendment," and, in the course of adjudicating "any case within its [significantly expanded] jurisdiction . . . to grant injunctive and declaratory relief when appropriate."[2]

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[1]See, e.g., Bowen v. Massachusetts, 487 U.S. 879, 905 n.40 (1988) (although Congress "has subsequently given the Claims Court certain equitable powers in specific kinds of litigation," the court remains without power to grant equitable relief outside these specific circumstances); Central Arkansas Maintenance, Inc. v. United States, 68 F.3d 1338, 1342 (Fed. Cir. 1995) (CFC order in contract dispute exceeded the court's limited injunctive authority under 28 U.S.C. § 1491(a)(3)).

[2]The extent of the bill's intended expansion of CFC jurisdiction is not entirely clear. Section 5(a) appears to create a broad new category of CFC jurisdiction, covering challenges to "the validity of any Federal action as a violation of the fifth amendment" (emphasis added). This provision would appear to embrace claims arising under both the Due Process and Takings Clauses. Section 5(b) could be construed to confine the bill's grant of new jurisdiction over due process claims to claims that do not specifically involve alleged deprivations of property interests, rather than of life or liberty interests. Section 5(b) provides for concurrent district court and CFC jurisdiction over "claims for monetary relief and claims seeking invalidation of any Act of

B. Constitutional Limitations on Congress's Power to Delegate to Non-Article III Courts

Such an expansion of the CFC's jurisdiction and remedial power would raise serious constitutional concerns. Article III states that the "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." U.S. Const. Art. III, § 1. Congress has occasionally invoked legislative powers conferred by Article I (most notably the commerce power) to create specialized courts of limited jurisdiction, including the CFC, the Tax Court, and the Court of Veterans Affairs, whose judges do not enjoy the tenure and salary protections that the Constitution guarantees to Article III judges.

Congress's power to delegate Federal judicial power to Article I tribunals is limited, however, by Article III's instruction that Federal judicial power "shall be vested" in Article III courts. This provision has been held to protect not only litigants' personal rights to have certain issues decided by Article III jurists, but also to preserve the "role of the independent judiciary within the constitutional scheme of tripartite government." Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (citations omitted).[3] Although Schor acknowledged that "bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries," the Court nevertheless identified three factors that courts must examine in determining whether "the adjudication of Article III business in a non-Article III tribunal impermissibly

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Congress or any regulation of a Federal agency affecting private property rights" (emphasis added). Section 5(f), on the other hand, suggests that the CFC's new jurisdiction would only include actions under the Takings Clause; it states that the statute of limitations "for any action filed under [section 5]" will expire "six years after the date of the taking of private property" (emphasis added). This ambiguity concerning the scope of section 5 would needlessly complicate litigation under the bill's new jurisdictional regime.

[3] See Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587-89 (1985) (structural threat posed by Article I adjudications depends in part on a context-specific assessment of the "danger of encroach[ment] on the judicial powers"); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80-87 (1982) (plur. op.) (evaluating danger of "'encroachment or aggrandizement' by Congress at the expense of the other branches").

threatens the institutional integrity of the Judicial Branch": 1) "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts"; 2) "the origins and importance of the right to be adjudicated"; and 3) the concerns that drove Congress to place adjudication outside Article III. Schor, 478 U.S. at 857 (discussing Thomas, 473 U.S. at 587, 589-93); see also Northern Pipeline, 458 U.S. at 84-86 (plur. op.) (statute granting extensive Federal judicial power to Article I bankruptcy courts, including the power to issue declaratory judgments, went too far). Applying this framework, Schor and Thomas upheld congressional grants of adjudicatory authority to Article I tribunals based in large measure on the limited jurisdiction and powers that were assigned to those tribunals.

C. Constitutional Concerns Raised by S. 1028's Delegation of Expanded Jurisdiction and Equitable Power to the CFC

S. 1028 raises significant concerns under the framework established by these decisions. Under S. 1028, the CFC would adjudicate a broad range of law suits challenging actions of the Executive branch and would exercise remedial powers essentially identical to those of Federal district courts. Most significantly, CFC judges could enjoin Federal agency action that they regarded as violating constitutional or statutory protections of property rights. The constitutional concerns raised by legislation authorizing the entry of such injunctions by Article I judges, who lack the protection from political pressure that the Constitution confers on Article III judges, are heightened by the fact that injunctions issued to Executive branch officials by the CFC would be backed by the threat of criminal contempt. See 28 U.S.C. § 2521(b) (vesting CFC with the "power to punish by fine or imprisonment" various forms of contempt of its authority).

Moreover, the concerns motivating this expansion of CFC jurisdiction and equitable power would appear to be less than compelling. Because the bill would expand district court jurisdiction, allowing claimants to seek complete relief in Federal district court or the CFC, expansion of the CFC's powers could not be based on the need for specialized expertise. Nor, given the likelihood that the bill's invitation to forum shopping at both the trial and appellate levels would lead to substantial increases in property rights litigation (a concern that we discuss below), could the expansion of the CFC's powers be

defended as a response to the increasing workloads of the lower Article III courts.[4]

S. 1028 Would Undermine Existing Preclusive Review Provisions and Encourage Inappropriate Forum Shopping

A. S. 1028 would Override "Preclusive Review" Provisions Thereby Creating Uncertainties and the Risk of Inconsistent Rulings

In addition to the constitutional concerns that are raised by S. 1028's assignment of Article III responsibilities and powers to the CFC, the bill's jurisdictional provisions are also objectionable on policy grounds. One especially harmful feature of S. 1028 is its wholesale revision of numerous carefully crafted judicial review mechanisms. A great many Federal

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[4]Some proponents of S. 1028 and its precursors have suggested that the "public rights" doctrine obviates any concern that the assignment of such extensive judicial powers to an Article I court such as the CFC would impermissibly undermine the role of the Article III judiciary. We recognize that the plurality opinion in Northern Pipeline distinguished between private-rights disputes involving "the liability of one individual to another under the law as defined," which are located "at the core of the historically recognized judicial power" (458 U.S. at 69-70), and public-rights disputes involving "matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,'" which may be committed for determination "to a legislative court or an administrative agency," id. at 67-68 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)). However, even the Northern Pipeline plurality, which represented the highwater mark of the public rights doctrine in Article III jurisprudence, recognized that Congress's broad discretion to allow adjuncts to exercise traditionally judicial powers in adjudications of congressionally created rights does not extent to adjudications of constitutional rights. Id. 458 U.S. at 81-84. Moreover, subsequent decisions have rejected any notion that the constitutionality of particular delegations of adjudicatory authority to non-Article III tribunals can be definitively decided by reference to the public rights, private rights distinction. See Thomas, 473 U.S. at 587 ("practical attention to substance rather than doctrinaire reliance on formal categories should inform the application of Article III"); accord Schor, 478 U.S. at 853 (Thomas "rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights") (characterizing Thomas).

statutes contain "preclusive review" provisions, which give particular courts exclusive authority to decide legal challenges to particular types of agency action. For example, challenges to EPA regulations promulgated under the Clean Air Act must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days after the rule is published in the Federal Register. See 42 U.S.C. § 7607(b). In enacting such preclusive review provisions, Congress has sought to ensure prompt, definitive resolutions of legal challenges to agency rules and decisions, especially where Federal law calls upon regulated entities and the general public to make far-reaching decisions predicated on the validity of particular agency actions.

Section 5(b) of S. 1028 would defeat the purposes of these preclusive review provisions by allowing claimants to challenge agency action affecting private property rights in the CFC or Federal district court "[n]otwithstanding any other provision of law." This provision would allow challenges to an agency action to be filed in the CFC or district court for up to six years (the limitations period established by section 5(f)), even if current law otherwise would require that any challenge be filed in a single, specified court within a much shorter period of time. This provision would undermine numerous preclusive review provisions devised by Congress to minimize the risk of multiple, inconsistent rulings and the time required for the courts to resolve uncertainties concerning the validity of agency action.

B. S. 1028 Would Invite Inappropriate Forum Shopping at the Trial and Appellate Levels

S. 1028 also would invite inappropriate forum shopping at both the trial and appellate levels. The bill's provisions establishing concurrent CFC and district court jurisdiction over suits seeking redress for Federal agency actions adversely affecting private property rights (sections 5(b), 6(a) and 6(b)) would give claimants an unwarranted choice of trial court forum. In fact, the bill would even allow plaintiffs to obtain CFC adjudications of some tort claims against the United States. Because these claims are decided under State-law tort principles, the bill could require a single court, based in Washington, D.C., to apply fifty separate bodies of tort doctrine.[5] While we have

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[5]The bill would not merely authorize claimants to proceed in either the CFC or district court, it would allow them to proceed in both fora simultaneously. Section 6(a)(2) would repeal 28 U.S.C. § 1500, which bars litigation of a claim in the CFC if the same claim

no doubt that the CFC is competent to do so, we believe that it is more appropriate in the first instance for State courts to adjudicate tort claims founded on State law.

The bill would also invite forum shopping at the appellate level. Under current law, most challenges to the validity of Federal action affecting private property rights are filed in district court under the Administrative Procedure Act, 5 U.S.C. § 500 et seq. (APA) (with appeals routed to the court of appeals for the relevant region), or directly in a regional court of appeals under petition procedures specified in a preclusive review statute. Section 5(e) of the bill would give the Court of Appeals for the Federal Circuit exclusive jurisdiction over appeals of actions in which jurisdiction is based "in whole or in part on section 5." Thus, a claimant could opt for appellate review in the Federal Circuit, thereby avoiding unfavorable decisions issued by the regional court of appeals that would otherwise hear its claim, through the simple expedient of adding a Fifth Amendment property rights claim to an APA challenge. By affording claimants this appellate level forum choice, S. 1028 would cast doubt on previously settled case law, increase the incidence of litigation challenging agency action (particularly in the early years following the enactment of S. 1028, as the Federal Circuit developed a body of case law on important administrative law issues), and increase the number of legal conflicts among the Federal courts of appeals.

S. 1028 Would Alter Existing Abstention Doctrine and Prohibit Federal Courts From Deferring to State Courts on Delicate Issues of State Law

S. 1028 contains restrictions on abstention that would override long-established case law that allows Federal courts to defer to State courts on delicate issues of State law. Existing abstention doctrine allows a Federal court in cases that involve important issues of State law to decline the exercise of its jurisdiction in order to allow resolution of those issues by a State or local tribunal. Abstention reflects a proper respect for State sovereignty and a recognition that local tribunals are better positioned than Federal courts to interpret complex local laws.

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is pending in another court. By allowing simultaneous prosecution of parallel lawsuits, this provision would invite manipulation of the courts and wasteful, duplicative filings.

Section 6(c) of S. 1028 would sharply limit the ability of Federal district courts to abstain from resolving State-law issues in cases arising under 28 U.S.C. § 1343, the jurisdictional counterpart to section 1983. District courts generally would be prohibited from abstaining in such suits unless a claimant pleaded a State-law violation or attempted to pursue parallel Federal-court and State-court proceedings "arising out of the same core of operative facts." (A special rule for section 1343 actions concerning uses of real property would also permit abstention where a claimant had not submitted an application to use the property or sought to challenge the legality of a locality's actions under State law.) Although the bill would permit district courts to certify unsettled State-law questions to a State's highest appellate court in certain narrowly defined circumstances, several State courts do not accept certified questions. Thus, the bill would direct Federal courts to resolve State-law issues upon which they otherwise would defer to State and local tribunals. This significant change in abstention procedures would impair State sovereignty, undermine Federalism, and increase the frequency of inconsistent rulings by Federal and State courts on State-law questions.

S. 1028 Would Allow Developers and Others to Sue in Federal Court Without First Seeking to Resolve Their Disputes with State and Local Officials

S. 1028 also would revise the two-part test under which Federal courts evaluate the ripeness of takings challenges to State and local actions under the Just Compensation Clause in an effort to shift power from State and local officials (including both land-use planners and State judges) to Federal judges.

Under existing ripeness doctrine, articulated by the Supreme Court in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), a takings claim is not ripe until: 1) State and local authorities have issued a final, definitive decision regarding permissible uses of the property at issue; and 2) the property owner has sought and been denied just compensation in the State court.

Under the first component of the Williamson County ripeness test, a claimant must pursue available avenues of State or local decision making, and the decision obtained from State or local authorities must be final and definitive, before a claim is

considered ripe for Federal court review.[6] By preventing a landowner from filing an immediate Federal suit for compensation based upon a State or local land-use authority's initial refusal to approve a proposed land use, this ripeness requirement encourages landowners to work with State and local officials to resolve land-use conflicts outside the courtroom. At present, if a developer files a Federal lawsuit without engaging in good faith negotiations with State and local officials, the locality can immediately move to dismiss the suit on ripeness grounds.

S. 1028 would overturn this longstanding ripeness doctrine. Section 6(f) of the bill would deem ripe for Federal court adjudication a property rights claim after the claimant has filed one "meaningful" application as defined by applicable law that had not been approved within a reasonable time and then applied for one appeal or waiver that had not been approved within a reasonable time. S. 1028, § 6(f)(2)(A)(ii)(I).[7] Thus, developers and others could sue State and local officials in Federal court far earlier in the land-use planning process without adequately seeking to resolve their disputes outside the courtroom through local procedures.

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[6]See Greenbrier v. United States, 193 F.3d 1348, 1358-59 (Fed. Cir. 1999) (the rule that an as-applied takings challenge does not ripen until the government entity charged with restricting property uses reaches a "final decision" is "'compelled by the very nature of the inquiry required by the Just Compensation Clause' because the factors applied in deciding a takings claim 'simply cannot be evaluated until the administrative agency has arrived at a final definitive position regarding how it will apply the regulations at issue to the particular land in question.'" (quoting Williamson County, 473 U.S. at 190-91)), cert. denied without dissent, -- U.S. --, 120 S. Ct. 2740 (June 29, 2000).

[7]The bill does not define "a reasonable time" nor does it specify who is to determine the length of that period. Arguably, a developer could contend that one week is "a reasonable time" for the local land-use planning board to act upon a development application and if no action is forthcoming in that period, proceed to file in Federal court. This language would also presumably preempt time limits that many State and local governments already have instituted for administrative decisions. Consequently, the bill would impose a vague new Federal standard of "reasonableness," the meaning of which would be determined by Federal courts through future case-by-case litigation.

For example, suppose that a developer applies for approval of a very intensive development plan, and the city concludes that the proposed development would create traffic hazards and other harm to the local community. Suppose further that the city is willing to approve less intensive development. Under S. 1028, if the city denies approval of the intensive plan and then denies one appeal involving the same plan (or simply fails to approve it "within a reasonable time"), the developer could file a takings claim against the city in Federal court. The suit could proceed even though the city might approve less intensive development consistent with the public good. The result could be far more litigation and far less incentive for developers to work with local planning officials to achieve workable compromises.

These substantial changes to ripeness doctrine would dramatically shift the balance of power between developers and State and local officials. S. 1028 would hand developers a new club to wield in their negotiations with community officials: the threat of premature and potentially expensive Federal court litigation. This new weapon could well be used to disrupt State procedures designed to protect public health and safety, public resources, and the environment. Confronted with the prospect of a potentially costly and time-consuming Federal court lawsuit, State and local officials would feel new pressures to approve land-use proposals to avoid litigation, even if the proposed use might harm neighboring property owners and the community at large.

Sections 6(a)(1)(C) and 6(b)(2) of the bill would make virtually identical changes to standards of administrative ripeness in alleging infringements or takings of property rights by the United States, and would therefore disrupt the administration of Federal programs designed to protect public health and safety, public resources, and the environment.

S. 1028 Would Allow Developers and Others to Sue in Federal Court Without First Seeking Compensation in State Court

S. 1028 would also purport to overrule the second component of the Williamson County ripeness test by instructing Federal courts to treat takings claims against State and local land-use authorities as ripe for adjudication even if the claimant has not sought compensation in State court. S. 1028, § 6(c) (provisions proposed for codification as 28 U.S.C. § 1343(f)(1), (3)). These provisions of the bill rest on a misunderstanding of the rights conferred by the Just Compensation Clause. As the Supreme Court held in Williamson County, a property owner cannot establish that a State or local government has violated the Just Compensation

Clause unless that property owner first exhausts any means that the State makes available for securing compensation. Williamson County, 473 U.S. at 194-97; see id. at 194 n.13 (obligation to pursue compensation derives not from prudential considerations, but from the nature of the Fifth Amendment itself). This is so, as the Supreme Court recently explained, because the constitutional injury alleged in an inverse condemnation action "is not that property was taken but that it was taken without just compensation." City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624, 1638-39 (1999) (discussing Williamson County).[8] If the government pays for the property up front or provides an adequate post-deprivation remedy, the plaintiff "suffer[s] no constitutional injury from the taking alone." Id. The nature of the right that a property owner asserts against a State or locality in a section 1983 action under the Just Compensation Clause -- that is, a protection not against takings in general, but only against uncompensated takings -- requires that a property owner utilize a State-provided procedure for obtaining compensation before bringing a Section 1983 action.[9]

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[8]Some supporters of earlier versions of this legislation have argued that Williamson County's identification of compensation ripeness as a constitutional requirement was mere dictum, which Congress should feel free to ignore. However, the Court's decision in Del Monte Dunes strongly reaffirmed Williamson County's analysis of compensation ripeness. In ruling that a section 1983 takings claimant had requested a form of legal relief to which the Seventh Amendment applied, the Court, citing Williamson County, stated that "in a strict sense [the claimant] sought not just compensation per se but rather damages for the unconstitutional denial of such compensation." 119 S. Ct. at 1639.

[9]There may be circumstances in which a State can decline to provide a compensatory remedy (at least for a permanent taking) and choose instead to provide declaratory and injunctive relief to reverse the challenged government action. Cf. Eastern Enterprises v. Apfel, 524 U.S. 498, 517-19 (1998) (plurality op.) (where a Federal statute required a direct transfer of funds to a third party, Congress was presumed not to have contemplated the payment of compensation from the Treasury, and aggrieved parties were permitted to bypass the Tucker Act and sue in district court for equitable relief). However, if a State validly decided that its courts or administrative tribunals, upon determining that a particular land-use decision effected a taking, should reverse the challenged decision rather than award compensation, invalidation rather than compensation would also be the appropriate remedy in any Federal

S. 1028, as written, would instruct Federal district courts to deem takings claims against State and local land-use authorities ripe for review even if the plaintiff had failed to pursue compensation in State court. This could lead to an anomalous and self-defeating result. To the extent that State and local officials continued to disallow land uses that those officials regarded as harmful to their communities (notwithstanding the heightened threat of costly Federal-court litigation), many of the resulting section 1983 actions seeking just compensation would be subject to dismissal on substantive grounds due to the claimant's failure to seek compensation in State court. The district courts, though instructed by S. 1028 to uphold the ripeness of such claims, would nevertheless be required by Williamson County and Del Monte Dunes to dismiss them for failure to state a claim upon which relief could be granted. Thus, the bill could engender in many property owners a false hope of avoiding State-court litigation, resulting in confusion and wasteful litigation as claimants needlessly shuttle back and forth between State and Federal courts.

S. 1028 Needlessly Duplicates and Expands Existing Statutory Authority for the Award of Attorneys' Fees

Section 5(g) of S. 1028, which provides that a court may award costs of litigation, including reasonable attorneys' fees, to a plaintiff who prevails in a private property action, unnecessarily duplicates existing law that provides for the award of attorneys' fees whenever a party is awarded compensatory relief in a condemnation case involving the United States. Section 5(g) also unnecessarily expands the availability of attorneys' fees to prevailing takings plaintiffs who seek injunctive or declaratory relief. Moreover, section 5(g) makes pre-litigation expenses available to prevailing takings plaintiffs seeking compensatory relief.

Under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), a plaintiff who is awarded compensation for the inverse taking of property by a Federal agency can seek reasonable attorneys' fees. 42 U.S.C. § 4654(c). Under the Equal Access to Justice Act (EAJA), a property owner who prevails in a direct condemnation case brought by the United States can seek attorneys' fees. 28 U.S.C.

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court action under section 1983. Williamson County would still require claimants seeking compensation to pursue any available, State-provided compensation remedy before proceeding in Federal court.

§ 2412(d). EAJA also provides for the award of attorneys' fees to prevailing takings plaintiffs who seek declaratory or injunctive relief in litigation against the United States. However, EAJA limits the availability of an attorneys' fee award to those cases where: 1) the court finds that the position of the United States was not "substantially justified;" and 2) the party's net worth or size is not too large to justify reimbursing attorneys' fees expended in challenging the Government's action.[10] These provisions limit attorneys' fee awards to those cases where such an award will further EAJA's objectives of eliminating "financial disincentives for those who would defend against unjustified governmental action" and deterring "the unreasonable exercise of Government authority." See Ardestani v. INS, 502 U.S. 129, 138 (1991) (citations omitted).

In contrast, section 5(g) of S. 1028 would make the United States liable for attorneys' fees whenever it did not prevail in a direct condemnation action, regardless of whether its position was justified and regardless of the wealth and size of the opposing party. Further, Section 5(g) would lower requirements prevailing takings plaintiffs seeking injunctive or declaratory relief in litigation with the United States must satisfy under EAJA to qualify for attorneys' fees. Finally, section 5(g) would supersede the URA's sensible exclusion of pre-litigation expenses from the reasonable attorneys' fees available to prevailing plaintiffs in compensatory relief actions.

In short, section 5(g) of S. 1028 is redundant because: 1) in takings cases involving a claim for compensation, the URA already provides for the award of reasonable attorneys' fees to a prevailing plaintiff; and 2) in takings cases seeking declaratory

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[10]28 U.S.C. § 2412(d)(2)(B) provides that "party" means "(i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, or unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed[.]"

In addition, EAJA specifically defines "reasonable" attorneys' fees, id. at § 2412 (d)(2)(A) and, in the case of eminent domain proceedings, specifically defines "prevailing party" to include only a party who obtains a monetary judgment that is at least as close to its own highest valuation of the property as it is to the highest valuation offered by the Government. Id. at § 2412 (d)(2)(H).

or injunctive relief, EAJA also provides for an award of reasonable attorneys' fees to a prevailing plaintiff -- but does so in a more sensible and limited fashion.

S. 1028 Would Impose an Unworkable Notice Requirement on Federal Agencies

Section 9 of S. 1028 would impose the overly broad and unworkable mandate on Federal agencies of giving property owners a notice of their rights under the bill whenever a Federal agency action "limit[s] the use of private property." Evidently intended to ensure that property owners are aware of available remedies for property claims against the United States, this requirement would apply to countless Federal protections that prohibit illegal or harmful activity. For example, a ban on smoking in Federal buildings "limits" the use of cigarettes; a prohibition on flying an unsafe airplane "limits" the use of the plane; a ban on unsafe medical devices "limits" the use of those devices; emission controls for a hazardous waste incinerator "limit" the use of the incinerator. No one can predict precisely how courts would apply this provision, but persons who challenge Federal protections undoubtedly will argue for the broadest possible reading.

The notice requirement also would lead to significant confusion among property owners. Absent a physical occupation, Federal agency action constitutes a compensable taking under the Fifth Amendment only in those relatively rare instances in which the action "goes too far." See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). By requiring notice of procedural rights to those whose use of their property is limited by a Federal agency action, the bill would create the false expectation that the owners are entitled to substantive relief under the Fifth Amendment, when in fact no relief would be available.

Thank you for this opportunity to present our views. The Office of Management and Budget has advised us that there is no objection to submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert Raben
Assistant Attorney General

IDENTICAL LETTER SENT TO THE HONORABLE ORRIN HATCH, CHAIRMAN