JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

November 16, 2006

Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

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. 4772, the "Private Property Rights Implementation Act of 2005," which passed the House of Representatives on September 29, 2006. The Judicial Conference expressed concern with similar legislation considered in the 105th and 106th Congresses. H.R. 4772 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.

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. H.R. 4772 contains provisions that were not included in previous versions of the legislation, but I wanted to share with you and other members of the Committee the existing position of the Conference which is applicable to the provisions of section 2 of H.R. 4772.

Section 2 of H.R. 4772 would alter the abstention doctrine as it applies to claims in federal court alleging that state or local governments have taken property without paying just compensation in violation of the Fifth Amendment. In particular, section 2 would amend 28 U.S.C. § 1343 to provide that a federal district court may not relinquish its jurisdiction over takings claims to a state court where no state law claims have been raised in the federal action and where there is no parallel proceeding pending in state court. The bill would also provide that if the federal court cannot decide the federal law issue without resolving "an unsettled question of State law," the court may certify the question of state law to the highest appellate court of that state.

This section would make important changes in the operation of abstention doctrines that have long served to protect the states' opportunity to consider and resolve unsettled questions of state law that might bear on the federal court's ultimate determination of federal takings claims.[1] In *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), the Supreme Court held that federal courts should abstain from hearing federal constitutional claims when those claims may be obviated or rendered moot by the determination of unsettled questions of state law. *Pullman* abstention thus comes into play only where state law is unsettled and where a state court decision could avoid the federal issue that the parties submitted to the federal court for determination. The doctrine reflects traditional concerns of comity and federalism in seeking both to defer to state court decisions and to avoid unnecessary federal judicial resolution of complex constitutional issues. It applies generally in federal court, both to takings claims and to other claimed violations of the federal Constitution.

H.R. 4772 would alter the operation of the *Pullman* doctrine in takings cases by enabling the federal plaintiff to initiate an action alleging only federal claims and thereby avoid the doctrine's application. While the legislation provides for certification of unsettled questions of state law to the state's highest court, it specifically limits the certification option to situations in which the resolution of a "patently unclear" issue of state law is "necessary to resolve the merits of the federal claim." This formulation appears to eliminate that portion of the *Pullman* doctrine that holds that federal courts should abstain from determination of the federal question to permit the state court to resolve unsettled questions of state law, which may obviate the need for the federal court to decide the constitutional claim. It would thus upset the federalism balance that has governed the interaction of state and federal constitutional adjudication for over sixty years.

The certification option could also raise independent federalism issues. Decisions of the Supreme Court make clear that district courts should ordinarily rely upon the certification procedure in cases where unsettled questions of state law arise and the state has made the certification procedure available. *See Arizonans for Official English v.*

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[1]For example, federal courts may abstain in deference to certain parallel proceedings pending in state court, thereby avoiding wasteful duplication of effort. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Federal courts have also abstained in deference to the state's interest in preserving an integrated regulatory system, even when no parallel proceeding is pending in state court. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989).

Arizona, 520 U.S. 43 (1997). The legislation appears to assume that such certification procedures are available in every state, but that assumption may not be warranted. Some states do not have procedures for answering certified questions of law from other courts. Some states permit certification *only* from the United States Supreme Court and the federal courts of appeals.[2]

H.R. 4772 also seeks to define when a takings claim is "ripe" for adjudication. It would expedite access to the federal courts for individuals whose property rights and privileges secured by the Constitution have allegedly been deprived by a "final decision" of any person acting under the color of state law, where such final decision causes actual and concrete injury. H.R. 4772 provides that a final decision exists if: (1) the United States or a person acting under color of state law makes a "definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere;" and (2) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but has been denied one waiver and one appeal.[3]

This definition of final decision conflicts with well-established principles of federalism by 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. Filing of a federal case may occur before the extent of any loss of economic benefit from the land has been determined 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

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[2]As of 2000, 47 jurisdictions, including the District of Columbia and Puerto Rico, had adopted certification procedures under which a federal court may submit novel or difficult state law questions to the state's highest appellate court. *See* R. Fallon, B. Meltzer, & D. Shapiro, *The Federal Courts and the Federal System*, p. 1201 n.5 (5th ed. 2003). As of 2006, only 38 such jurisdictions would permit federal district courts, as well as the courts of appeals and the U.S. Supreme Court to certify questions. Charles A. Wright, Arthur Miller & Edward Cooper, 17A *Federal Practice and Procedure*, § 4248, p. 167, n.31 (1988 & Supplement).

[3]Sections 3 and 4 of the bill provide an identical definition of what constitutes a "final decision." Section 3 pertains to takings claims against the United States where the damages sought are less than $10,000—the federal district courts have jurisdiction of such cases (*see* 28 U.S.C. § 1346). Section 4 is identical to section 3 but applies to takings claims against the United States involving damages in excess of $10,000—the United States Court of Federal Claims has jurisdiction over such cases (*see* 28 U.S.C. § 1491).

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. 4772 does not require exhaustion of available remedies at the local and state levels, it would arguably permit federal courts to begin consideration of such a claim before it is ripe for constitutional review.

Furthermore, enactment of H.R. 4772 may not necessarily accelerate judicial resolution of the claim. Once property owners are in federal court their cases may be 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 any economic benefit 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).

We appreciate your consideration of the views of the federal judiciary. If you have any questions, please do not hesitate to contact me at (202) 502-3000, or if you prefer, you may have your staff contact Karen Kremer or Ralph Watkins, Counsel in the Office of Legislative Affairs, at (202) 502-1700.

Sincerely,

James C. Duff
Secretary

Letters were also sent to:
Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
Members of the Committee on the Judiciary