109TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 109–262

PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2005

OCTOBER 31, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 4128]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4128) to protect private property rights, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

49–006

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Property Rights Protection Act of 2005".

SEC. 2. PROHIBITION ON EMINENT DOMAIN ABUSE BY STATES.

(a) IN GENERAL.—No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property to be used for economic development or over property that is subsequently used for economic development, if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so.

(b) INELIGIBILITY FOR FEDERAL FUNDS.—A violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any Federal economic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated, and any Federal agency charged with distributing those funds shall withhold them for such 2-year period, and any such funds distributed to such State or political subdivision shall be returned or reimbursed by such State or political subdivision to the appropriate Federal agency or authority of the Federal Government, or component thereof.

(c) OPPORTUNITY TO CURE VIOLATION.—A State or political subdivision shall not be ineligible for any Federal economic development funds under subsection (b) if such State or political subdivision returns all real property the taking of which was found by a court of competent jurisdiction to have constituted a violation of subsection (a) and replaces any other property destroyed and repairs any other property damaged as a result of such violation.

SEC. 3. PROHIBITION ON EMINENT DOMAIN ABUSE BY THE FEDERAL GOVERNMENT.

The Federal Government or any authority of the Federal Government shall not exercise its power of eminent domain to be used for economic development.

SEC. 4. PRIVATE RIGHT OF ACTION.

(a) CAUSE OF ACTION.—Any owner of private property who suffers injury as a result of a violation of any provision of this Act may bring an action to enforce any provision of this Act in the appropriate Federal or State court, and a State shall not be immune under the eleventh amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. Any such property owner may also seek any appropriate relief through a preliminary injunction or a temporary restraining order.

(b) LIMITATION ON BRINGING ACTION.—An action brought under this Act may be brought if the property is used for economic development following the conclusion of any condemnation proceedings condemning the private property of such property owner, but shall not be brought later than seven years following the conclusion of any such proceedings and the subsequent use of such condemned property for economic development.

(c) ATTORNEYS' FEE AND OTHER COSTS.—In any action or proceeding under this Act, the court shall allow a prevailing plaintiff a reasonable attorneys' fee as part of the costs, and include expert fees as part of the attorneys' fee.

SEC. 5. NOTIFICATION BY ATTORNEY GENERAL.

(a) NOTIFICATION TO STATES AND POLITICAL SUBDIVISIONS.—

(1) Not later than 30 days after the enactment of this Act, the Attorney General shall provide to the chief executive officer of each State the text of this Act and a description of the rights of property owners under this Act.

(2) Not later than 120 days after the enactment of this Act, the Attorney General shall compile a list of the Federal laws under which Federal economic development funds are distributed. The Attorney General shall compile annual revisions of such list as necessary. Such list and any successive revisions of such list shall be communicated by the Attorney General to the chief executive officer of each State and also made available on the Internet website maintained by the United States Department of Justice for use by the public and by the authorities in each State and political subdivisions of each State empowered to take private property and convert it to public use subject to just compensation for the taking.

(b) NOTIFICATION TO PROPERTY OWNERS.—Not later than 30 days after the enactment of this Act, the Attorney General shall publish in the Federal Register and make available on the Internet website maintained by the United States Department of Justice a notice containing the text of this Act and a description of the rights of property owners under this Act.

SEC. 6. REPORT.

Not later than 1 year after the date of enactment of this Act, and every subsequent year thereafter, the Attorney General shall transmit a report identifying States or political subdivisions that have used eminent domain in violation of this Act to the Chairman and Ranking Member of the Committee on the Judiciary of the House of Representatives and to the Chairman and Ranking Member of the Committee on the Judiciary of the Senate. The report shall—

(1) identify all private rights of action brought as a result of a State's or political subdivision's violation of this Act;

(2) identify all States or political subdivisions that have lost Federal economic development funds as a result of a violation of this Act, as well as describe the type and amount of Federal economic development funds lost in each State or political subdivision and the Agency that is responsible for withholding such funds;

(3) discuss all instances in which a State or political subdivision has cured a violation as described in section 2(c) of this Act.

SEC. 7. SENSE OF CONGRESS REGARDING RURAL AMERICA.

(a) FINDINGS.—The Congress finds the following:

(1) The founders realized the fundamental importance of property rights when they codified the Takings Clause of the Fifth Amendment to the Constitution, which requires that private property shall not be taken "for public use, without just compensation".

(2) Rural lands are unique in that they are not traditionally considered high tax revenue-generating properties for state and local governments. In addition, farmland and forest land owners need to have long-term certainty regarding their property rights in order to make the investment decisions to commit land to these uses.

(3) Ownership rights in rural land are fundamental building blocks for our Nation's agriculture industry, which continues to be one of the most important economic sectors of our economy.

(4) In the wake of the Supreme Court's decision in *Kelo v. City of New London*, abuse of eminent domain is a threat to the property rights of all private property owners, including rural land owners.

(b) SENSE OF CONGRESS.—It is the sense of Congress that the use of eminent domain for the purpose of economic development is a threat to agricultural and other property in rural America and that the Congress should protect the property rights of Americans, including those who reside in rural areas. Property rights are central to liberty in this country and to our economy. The use of eminent domain to take farmland and other rural property for economic development threatens liberty, rural economies, and the economy of the United States. Americans should not have to fear the government's taking their homes, farms, or businesses to give to other persons. Governments should not abuse the power of eminent domain to force rural property owners from their land in order to develop rural land into industrial and commercial property. Congress has a duty to protect the property rights of rural Americans in the face of eminent domain abuse.

SEC. 8. DEFINITIONS.

In this Act the following definitions apply:

(1) ECONOMIC DEVELOPMENT.—The term "economic development" means taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health, except that such term shall not include—

(A) conveying private property to public ownership, such as for a road, hospital, or military base, or to an entity, such as a common carrier, that makes the property available for use by the general public as of right, such as a railroad, or public facility, or for use as a right of way, aqueduct, pipeline, or similar use;

(B) removing harmful uses of land provided such uses constitute an immediate threat to public health and safety;

(C) leasing property to a private person or entity that occupies an incidental part of public property or a public facility, such as a retail establishment on the ground floor of a public building;

(D) acquiring abandoned property;

(E) clearing defective chains of title; and

(F) taking private property for use by a public utility.

(2) FEDERAL ECONOMIC DEVELOPMENT FUNDS.—The term "Federal economic development funds" means any Federal funds distributed to or through States

or political subdivisions of States under Federal laws designed to improve or increase the size of the economies of States or political subdivisions of States.

(3) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

SEC. 9. SEVERABILITY AND EFFECTIVE DATE.

(a) SEVERABILITY.—The provisions of this Act are severable. If any provision of this Act, or any application thereof, is found unconstitutional, that finding shall not affect any provision or application of the Act not so adjudicated.

(b) EFFECTIVE DATE.—This Act shall take effect upon the first day of the first fiscal year that begins after the date of the enactment of this Act, but shall not apply to any project for which condemnation proceedings have been initiated prior to the date of enactment.

SEC. 10. SENSE OF CONGRESS.

It is the policy of the United States to encourage, support, and promote the private ownership of property and to ensure that the constitutional and other legal rights of private property owners are protected by the Federal Government.

SEC. 11. BROAD CONSTRUCTION.

This Act shall be construed in favor of a broad protection of private property rights, to the maximum extent permitted by the terms of this Act and the Constitution.

PURPOSE AND SUMMARY

The purpose of H.R. 4128, the "Private Property Rights Protection Act of 2005," is to preserve the rights granted to our Nation's citizens under the Fifth Amendment of the Constitution and jeopardized by the Supreme Court decision in *Kelo* v. *City of New London.*

BACKGROUND

The fundamental importance of private property rights

The protection of private property rights lies at the foundation of American government. As James Madison wrote in the Federalist Papers, "[G]overnment is instituted no less for the protection of property than of the persons of individuals."[1]

In 1795, the Supreme Court clearly articulated our citizens' fundamental right to private property under the Constitution when it declared: "possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. * * *"[2] And as Justice Story explained years later, "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require; that the rights of personal liberty and private property, should be held sacred."[3]

President Abraham Lincoln often spoke of how at the heart of the evil practice of slavery was a denial of property rights: "It is the same tyrannical principle," he said. "It is the same spirit that says, 'You work and toil and earn bread, and I'll eat it.'"[4]

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[1] The Federalist No. 54, at 370 (Jacob E. Cooke ed., 1961) (James Madison) *see also* James Madison, Property, National Gazette (Mar. 27, 1792), reprinted in 14 The Papers of James Madison 266 (Robert Rutland, et al. eds., 1983) ("Government is instituted to protect property of every sort * * * This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.").

[2] *Vanhorne's Lessee* v. *Dorrance,* 2 U.S. 304, 310 (1795).

[3] *Wilkinson* v. *Leland,* 27 U.S. (2 Pet.) 627, 657 (1829).

[4] Seventh Lincoln-Douglas debate, 15 October 1858; speech at Springfield, 26 June 1857; in Abraham Lincoln, Collected Works, ed. Roy P. Basler (New Brunswick: Rutgers University Press, 1953), 3:315; 2:405.

More recently, the Supreme Court again rightly stated that "[t]he right to enjoy property without unlawful deprivation * * * is, in truth a personal right. * * * In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."[5] The sanctity and centrality of private property rights are thus ingrained in our constitutional design.

The Supreme Court's Kelo decision

Notwithstanding this long history of the protection of private property rights, on June 23, 2005, the Supreme Court held in *Kelo* v. *City of New London,*[6] that "economic development" was a "public use" under the Fifth Amendment's Takings Clause, which provides that "nor shall private property be taken *for public use* without just compensation."[7] As the Court described the motivation for the Government's taking of private property: "the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation."[8] The Supreme Court held that these properties "were condemned only because they happen to be located in the development area," and that the taking was constitutional because it "would be executed pursuant to a 'carefully considered' development plan."[9]

Justice O'Connor's dissenting opinion correctly summarized the terrifying import of the Supreme Court's decision, stating that "To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property—and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment."[10]

The importance of the Takings Clause and its protection of property rights is that it "provid[es] safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will. * * * The public use requirement * * * imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person. This requirement promotes fairness as well as security."[11]

As the dissent points out, as a result of the majority's decision, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. * * * Today nearly all real property is susceptible to con-

[5] *Lynch* v. *Household Fin. Corp.,* 405 U.S. 538, 552 (1972).
[6] 125 S.Ct. 2655 (2005).
[7] U.S. Const., Amend. V (emphasis added).
[8] Id. at 2659.
[9] Id. at 2660–61.
[10] Id. at 2671 (O'Connor, J., dissenting).
[11] Id. at 2672.

demnation on the Court's theory. * * * Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result." [12]

The Supreme Court's Kelo decision threatens the most vulnerable

Private business development can and does regularly occur without an eminent domain proceeding. Economic development of private property can take place without force, through voluntary negotiation. When the agreements regarding economic development cannot be reached, then economic development of private property can only occur for public purposes. Local governments have many different kinds of incentive, zoning, and code enforcement tools to promote economic development. The *Kelo* Court's endorsement of the Government's raw taking of entire tracts of private property from one private person to give to another private person who can put the land to some imagined more valuable use threatens to enshrine into law, in lieu of the free market a bureaucratic "command and control" of the economy long thought to have been relegated to the dustbin of history.[13]

African-Americans and the elderly

The National Association for the Advancement of Colored People ("NAACP") and the American Association of Retired Persons ("AARP") stated in their amicus brief to the Supreme Court in the *Kelo* case that:

> [The] holding that government may take property from a private citizen for the purpose of giving it to another private party purely for "economic development" is both inconsistent with the language of the Constitution and dangerous. Elimination of the requirement that any taking be for a true public use will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged. These groups are not just affected more often by the exercise of eminent domain power, but they are affected differently and more profoundly. Expansion of eminent domain to allow the government or its designated delegate to take property simply by asserting that it can put the property to a higher use will systematically sanction transfers from those with less resources to those with more. This will place the burden of economic development

[12] Id. at 2676.

[13] As the National Association of Home Builders has stated, "In *Kelo,* the Supreme Court ruled that government entities can condemn any property in the name of 'economic development.' NAHB believes that it is proper to use eminent domain when the project is for public use, but it should not be used to transfer private property to another private owner for the purpose of 'upgrading' the land * * * *Kelo* substantially weakens the rights of private land owners—the government can now take, for nearly any reason, your land, subject to just compensation. This decision has rightfully alarmed many Americans." Letter from National Association of Home Builders to Members of Congress (June 30, 2005).

on those least able to bear it, exacting economic, psychic, political and social costs.[14]

To hold that the public use requirement is satisfied wherever there are potential economic benefits to be realized is to render the public use requirement meaningless.[15]

The history of eminent domain is rife with abuse specifically targeting minority neighborhoods. Indeed, the displacement of African-Americans and urban renewal projects were so intertwined that "urban renewal" was often referred to as "Negro remova1." [16]

Well-cared-for properties owned by minority and elderly residents have repeatedly been taken so that private enterprises could construct superstores, casinos, hotels, and office parks. For example, four siblings in their seventies and eighties were forced to leave their homes and Christmas tree farm to enable the city of Bristol, Connecticut to erect an industrial park.[17] Several African-American families in Canton, Mississippi were similarly forced to leave the homes they had lived in for over sixty years to clear land for a Nissan automobile plant.[18]

Eminent domain abuse has a history of disproportionately impacting the minority community. For example, of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite.[19] Racially changing neighborhoods that lacked institutional and political power were selected as blighted areas and designated for redevelopment through urban renewal programs.[20] "The purpose behind the designation of certain areas as blighted was clear. Renewal advocates believed that the blighted land could be put to a 'higher use' under the right circumstances." [21] As a result, "across the nation, inner city neighborhoods were designated as blighted, properties condemned, and land turned over to private properties." [22]

In 1981, urban planners in Detroit, Michigan, uprooted the largely lower-income and elderly Poletown neighborhood for the benefit

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[14] Brief of Amici Curiae National Association for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Association, Inc., and the Southern Christian Leadership Conference in Support of Petitioners, 2004 WL 2811057, at *3–*4.

[15] Brief of Amici Curiae National Association for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Association, Inc., and the Southern Christian Leadership Conference in Support of Petitioners, 2004 WL 2811057, at *6.

[16] Brief of Amici Curiae National Association for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Association, Inc., and the Southern Christian Leadership Conference in Support of Petitioners, 2004 WL 2811057, at *7.

[17] Brief of Amici Curiae National Association for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Association, Inc., and the Southern Christian Leadership Conference in Support of Petitioners, 2004 WL 2811057, at *7.

[18] Brief of Amici Curiae National Association for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Association, Inc., and the Southern Christian Leadership Conference in Support of Petitioners, 2004 WL 2811057, at *9 (citing *Bugryn* v. *City of Bristol,* 774 A.2d 1042 (Conn. App. Ct. 2001), appeal denied, 776 A.2d 1143 (Conn. 2001), cert. denied, 534 U.S. 1019, 122 S. Ct. 544 (2001); David Firestone, "Black Families Resist Mississippi Land Push," The New York Times (September 10, 2001) at A20).

[19] See B. Frieden & L. Sagalayn, Downtown, Inc. How America Rebuilds Cities 28 (1989).

[20] See Wendell E. Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 6 (2003).

[21] Id. at 21.

[22] Id. at 47.

of the General Motors Corporation.[23] The Poletown condemnation became so notorious that the 1981 decision by the Michigan Supreme Court that upheld it was overturned by that same court just last year.[24] In San Jose, California, ninety-five percent of the properties targeted for economic redevelopment are Hispanic or Asian-owned, even though only thirty percent of businesses are owned by minorities.[25]

Martin Luther King III, a former president of the Southern Christian Leadership Conference, has said that "eminent domain should only be used for true public projects, not to take from one private owner to give to another wealthier private owner."[26]

Houses of worship

Houses of worship and other religious institutions are, by their very nature, non-profit and almost universally tax-exempt. These fundamental characteristics of religious institutions render their property singularly vulnerable to being taken under the rationale approved by the Supreme Court in favor of for-profit, tax-generating businesses. In addition, many other charitable organizations will face similar threats because of their tax-exempt status.[27]

The Becket Fund for Religious Liberty wrote in their amicus brief in the *Kelo* case:

> To affirm this broad expansion of eminent domain power [as the Supreme Court did] is to grant municipalities a special license to invade the autonomy of and take the property of religious institutions. Houses of worship and other religious institutions are, by their very nature, non-profit and almost universally tax-exempt. These fundamental characteristics of religious institutions render their property singularly vulnerable to being taken under the rationale approved by the [Supreme Court]. Religious institutions will always be targets for eminent domain actions under a scheme that disfavors non-profit, tax-exempt property owners and replaces them with for-profit, tax-generating businesses. Such a result is particularly ironic, because religious institutions are generally exempted from taxes precisely because they are deemed to be "beneficial and stabilizing influences in community life."[28]

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[23] See J. Wylie, Poletown: Community Betrayed 58 (1989).

[24] See *County of Wayne* v. *Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004) (overruling *Poletown* v. *Detroit*, 304 N.W.2d 455 (Mich. 1981), in which the court upheld Detroit's condemnation of the homes of approximately 3,438 persons, most of whom were elderly, retired, Polish-American immigrants, to build a General Motors plant).

[25] See Derek Werner, Note: The Public Use Clause, Common Sense and Takings, 10 B.U. Pub. Int. L.J. 335, 350 (2001).

[26] Letter from Martin Luther King III, President of the Southern Christian Leadership Council, to The Fort Trumbull Homeowners in New London, Connecticut (December 2, 2002).

[27] See, e.g., Sue Britt, "Moose Lodge Set for Court Fight; Group to Fight Home Depot Land Takeover," Belleville News-Democrat (Missouri) (April 1, 2002) at 1B (Moose Lodge faced condemnation in order to bring a Home Depot to the city); April McClellan-Copeland, "Hudson, American Legion Closer on Hall; City Wants Building to Demolish for Project," Plain Dealer (Cleveland) (March 8, 2003) at B3 (American Legion property faced condemnation to make way for small upscale shops, restaurants, and offices); Todd Wright, "Frenchtown Leaders Want Shelter to Move; Roadblock to Revitalization?" Tallahassee Democrat (July 13, 2003) at A1 (describing threatened condemnation of homeless shelter to clear the way for business development); Joseph P. Smith, "Vote on Land Confiscation," Daily Journal (Illinois) (October 6, 2004) at 1A (detailing threatened condemnation of a Goodwill thrift store in order to build a shopping center).

[28] Brief of Amicus Curiae the Becket Fund for Religious Liberty, 2004 WL 2787141, at *3 (quoting *Walz* v. *Comm'r*, 397 U.S. 664, 673 (1970)).

> Because religious institutions are overwhelmingly non-profit and tax-exempt, they will generate less in tax revenues than virtually any proposed commercial or residential use. Accordingly, when a municipality considers what properties should be included under condemnation plans designed to increase for-profit development and increase taxable properties, the non-profit, tax-exempt property of religious institutions will by definition always qualify and always be vulnerable to seizure.[29]
>
> It bears noting that while religious institutions face additional eminent domain risks stemming from religious discrimination, many other charitable organizations will face similar dangers because of their tax-exempt status alone. Indeed, several charitable organizations have faced condemnation threats in recent years to satisfy municipal appetite for more tax revenue.[30]

Farmers

According to the amicus brief filed in the *Kelo* case by the American Farm Bureau Federation:

> The farmer and rancher members of amici curiae own and lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. As valuable as that land is to our members and to the rest of the country, however, it will often be the case that more intense development by other private individuals or entities for other private purposes would yield greater tax revenue to local government. Thus, each of our members is threatened by the decision * * * with the loss of productive farm and ranch land solely to allow someone else to put it to a different private use * * * American farmers and ranchers need the protection of the Fifth Amendment if they are to find economically feasible ways to use their land and remain in the agriculture business—the business of feeding the American populace.[31]

And according to American Farmland Trust President Ralph Grossi, "With so much farmland on the urban edge and near cities still in steep decline, ex-urban towns could be tempted by this ruling to make farmland available for subdivisions."[32]

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[29] Brief of Amicus Curiae the Becket Fund for Religious Liberty, 2004 WL 2787141, at *11.

[30] Brief of Amicus Curiae the Becket Fund for Religious Liberty, 2004 WL 278714l, at *11 n.22 (citing Sue Britt, Moose Lodge Set for Court Fight; Group to Fight Home Depot Land Takeover, "(Belleville News-Democrat (Missouri) (April 1, 2002) at 1B (Moose Lodge faced condenmation in order to bring a Home Depot to the city); April McClellan-Copeland, Hudson, American Legion Closer on Hall; City Wants Building to Demolish for Project," Plain Dealer (Cleveland) (March 8, 2003) at B3 (American Legion property faced condenmation to make way for small upscale shops, restaurants, and offices); Todd Wright, Frenchtown Leaders Want Shelter to Move; Roadblock to Revitalization? Tallahassee Democrat (July 13, 2003) at Al (describing threatened condemnation of homeless shelter to clear the way for business development); Joseph P. Smith, Vote on Land Confiscation, Daily Journal (Illinois) (October 6, 2004) at 1A (detailing threatened condenmation of a Goodwill thrift store in order to build a shopping center)).

[31] Brief Amici Curiae of the *American Farm Bureau Federation et al.,* 2004 WL 2787138, at *2–4.

[32] American Farmland Trust Policy Update (July 6, 2005).

The American people resoundingly reject the Supreme Court's Kelo decision

The Supreme Court's *Kelo* decision has been resoundingly criticized from all quarters. A resolution, H. Res. 340, expressing grave disapproval of the *Kelo* decision, was approved by the House of Representatives on June 30, 2005, by a vote of 365–33.

The protection of private property rights is an issue of primary concern to Americans today. According to a Wall Street Journal/NBC News poll, "In the wake of court's eminent domain decision, Americans overall cite 'private-property rights' as the current legal issue they care most about."[33] As reported in the Wall Street Journal:

> [T]he issue has struck a nerve with Americans. In Connecticut, where the Supreme Court case originated, a Quinnipiac University poll shows just how much the eminent-domain issue resonates. By an 11–to–1 margin, those surveyed said they opposed the taking of private property for private uses, even if it is for the public economic good. According to the poll, 89 percent of those surveyed were against condemnations for private economic development, compared with 8 percent for them. Douglas Schwartz, head of the poll, says he has never seen such a lopsided margin on any issue he has polled.[34]

Also, according to an American Survey poll conducted July 14–17, 2005, among 800 registered voters nationwide:

> Passing legislation limiting the government's ability to snatch private property should not be a heavy lift—especially if lawmakers listen to their constituents * * * Congressional action gets plenty of sympathy from constituents. Sixty-eight percent of registered voters favor legislative limits on the government's ability to take private property away from owners. Public support for limiting the power of eminent domain is robust and cuts across demographic and partisan groups. 62 percent of self-identified Democrats, 74 percent of independents and 70 percent of Republicans support limits. Few issues in recent memory have mobilized citizens against a Supreme Court decision with such ferocity.[35] Then people were asked, "Congress is considering legislation that would say the Federal government cannot take private property for private commercial development if homeowners object. It would also say State and local governments can NOT take private property for private commercial development against homeowners wishes if any federal funds are being used in the project. What about you, would you favor or oppose Congress placing these limits on the ability of government to take private property away from owners?" A resounding 68 percent favored such Congressional action.[36]

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[33] John Harwood, "Poll Shows Division on Court Pick," Wall Street Journal (July 15, 2005).

[34] Michael Corkery and Ryan Chittum, "Eminent-Domain Uproar Imperils Projects," The Wall Street Journal (August 3, 2005) at B1.

[35] Gary Andres, "The Kelo Backlash: Americans Want Limits on Eminent Domain," The Washington Times (August 29, 2005) at A21.

[36] Gary Andres, "The Kelo Backlash: Americans Want Limits on Eminent Domain," The Washington Times (August 29, 2005) at A21. Indeed, Americans' confidence in the Supreme Court

Even Justice John Paul Stevens, who wrote the *Kelo* decision for the five Justice majority, has said publicly he has concerns about the results of that decision, if not the legal reasoning behind it. Justice Stevens recently told the Clark County, Nevada, Bar Association that if he were a legislator instead of a judge, he would have opposed the results of his own ruling by working to change current law.[37]

H.R. 4128, the "Private Property Rights Protection Act"

Property rights are civil rights. There can be no individual freedom without the power of an individual to control their own autonomy through the free use of their own property. The Supreme Court's recent *Kelo* decision poses an immediate threat to that essential freedom, and the most likely victims will be the most vulnerable in our society if Congress does not act.

Congress' power to condition the use of Federal funds extends to prohibiting States and localities from receiving any Federal economic development funds for a specified period of time if such entities abuse their power of eminent domain, even if only State and local funds are used in that abuse of power. Such a broader penalty is an appropriate use of Congress' spending power, as the Supreme Court has made clear that Congress may attach conditions to the receipt of any Federal funds provided such conditions are related to the "Federal interest in particular national projects or programs" and that they are "unambiguous."[38]

H.R. 4128 denies States or localities that abuse eminent domain all Federal economic development funds for a period of two years.[39] Under such a penalty, there is a clear connection between the Federal funds that would be denied and the abuse Congress is intending to prevent: States or localities that have abused their eminent domain power by using "economic development" as an improper rationale for a taking should not be trusted with Federal taxpayer funds for other "economic development" projects which could themselves result in abusive takings of private property.

To ensure that any conditioning of the use of Federal funds is unambiguous, H.R. 4128 includes a "notification" section that would require the Attorney General to compile a list of the Federal laws under which Federal economic development funds are distributed and communicate such list to the chief executive officer of each state (its Governors) and also make it available on the Internet for use by the public and by the authorities in each State and political subdivisions of each State empowered to take private property and convert it to public use subject to just compensation for

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keeps getting worse. On June 21, 2005, the Gallup Poll released a survey in which it asked whether people had confidence in the Supreme Court. The survey concluded that the reported "41% confidence rating is among the lowest Gallup has ever found for this institution, and it perpetuates a gradual decline in the public's confidence over the past three years." Joseph Carroll, Gallup Poll Assistant Editor, "Americans' Confidence in High Court Declines" (June 21, 2005). In fact, respect for the Supreme Court has dropped among citizens of all political dispositions, including conservatives, moderates, and liberals Id.

[37] Samantha Young, "Committee Tackles Court's Property Ruling, the Las Vegas Review Journal (September 8, 2005) ("Justice Stevens told the Clark County Bar Association that if he were a legislator instead of a judge bound by the law, he would have opposed the court's ruling in the case, *Kelo* v. *the City of New London*").

[38] See *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (upholding as constitutional legislation in which Congress provided that a state would lose 5% of its federal transportation funds unless states mandated a drinking age of 21).

[39] H.R. 4128 also provides that any two year penalty period will begin only after final judgment on the merits by a court that the state or locality has violated the terms of this legislation.

the taking. That way, States and localities will be put on notice that if they receive any Federal funds under the listed Federal laws, they must refrain from abusing their power of eminent domain or risk losing such funds for a period of two years. Further, only the locality, and not the whole State, would suffer the punishment if only the locality abused its eminent domain powers. H.R. 4128 also contains a definition of "Federal economic development funds" that the Department of Justice would use when putting together its list of those Federal laws that meet such definition. The notification provisions also provide that basic information about the legislation be made available to the public through the Department of Justice's Internet website.

H.R. 4128 provides States and localities with an opportunity to cure any violation before they lose any Federal economic development funds by either returning or replacing the improperly taken property.

H.R. 4128 also includes an express private right of action to make certain that those suffering injuries for a violation of this legislation be allowed access to State or Federal court to enforce the provisions of the bill. Further, H.R. 4128 contains a statute of limitations of seven years following the conclusion of any condemnation proceedings improperly condemning the private property for an improper private use or any subsequent allowance of the use of such property for an improper private use.[40]

H.R. 4128 also includes a fee-shifting provision—identical to those in other civil rights laws—that allows a prevailing property owner to be awarded attorney and expert fees as part of the costs of bringing the litigation to enforce the bill's provisions.

H.R. 4128 also includes a definition of "economic development" that allows the types of takings that have traditionally been considered appropriate public uses. The bill also includes exceptions for the transfer of property to public ownership, and to common carriers[41] and public utilities, and for related things like pipelines. The bill also makes reasonable exceptions for the taking of land that is being used in a way that constitutes an immediate threat to public health and safety. The bill also makes exceptions for: the merely incidental use of a public property by a private entity, such as a retail establishment on the ground floor in a public property; for the acquisition of abandoned property; and for clearing defective chains of title in which no one can be said to really own the property in the first place.

H.R. 4128 also includes a rule of broad construction that provides that the Act shall be construed in favor of a broad protection of private property rights, to the maximum extent permitted by the terms of the Act and the Constitution.

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[40] This is to allow enforcement of the Act if the government says it needs to use eminent domain to build a road, and it takes private property to do so, but then it never actually builds the road but instead gives the land to a large private company for use as a business.

[41] Black's Law Dictionary defines "common carrier" as an entity that is "generally required by law to transport * * * without refusal, if the approved fare or charge is paid." Black's Law Dictionary (8th ed. 2004). The term "as of right" is defined in Black's Law Dictionary as "by virtue of a legal entitlement," ibid, which is part of the criteria that defines a common carrier's legal obligations, as a publicly regulated entity, to allow access to the public. A common carrier is something entirely different from, for example, a private shopping mall, which is not open to the public as of right, as a shopping mall generally has the right to exclude anybody from its premises.

Finally, H.R. 4128 includes a provision providing that the legislation would not become effective until the start of the first fiscal year following the enactment of the legislation in order to provide States and localities with sufficient lead time within which to come into compliance with the legislation, and in any case the legislation would not apply to any project for which condemnation proceedings have been initiated prior to the date of enactment.

HEARINGS

The House Committee on the Judiciary held no hearings on H.R. 4128.

COMMITTEE CONSIDERATION

On October 25, 2005, the House Committee on the Judiciary received a referral of H.R. 4128. On October 27, 2005 the Committee met in open session and ordered favorably reported the bill H.R. 4128 as amended to the House by a recorded vote of 27–3, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth the following rollcall votes that occurred during the Committee's consideration of H.R. 4128:

ROLL CALL NO. 5 DATE: 10-27-05

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
109th CONGRESS 1st SESSION

SUBJECT: Nadler Amendment #1 to strike reference to public facility in H.R. 4128, was not agreed to by a vote of 7 ayes to 20 nays.

	Ayes	Nays	Present
MR. HYDE			
MR. COBLE		x	
MR. SMITH		x	
MR. GALLEGLY			
MR. GOODLATTE		x	
MR. CHABOT		x	
MR. LUNGREN		x	
MR. JENKINS		x	
MR. CANNON		x	
MR. BACHUS		x	
MR. INGLIS		x	
MR. HOSTETTLER		x	
MR. GREEN		x	
MR. KELLER		x	
MR. ISSA		x	
MR. FLAKE			

MR. PENCE			
MR. FORBES			
MR. KING		x	
MR. FEENEY			
MR. FRANKS		x	
MR. GOHMERT		x	
MR. CONYERS	x		
MR. BERMAN			
MR. BOUCHER			
MR. NADLER	x		
MR. SCOTT		x	
MR. WATT		x	
MS. LOFGREN		x	
MS. JACKSON - LEE	x		
MS. WATERS	x		
MR. MEEHAN			
MR. DELAHUNT			
MR. WEXLER			
MR. WEINER			
MR. SCHIFF		x	
MS. SANCHEZ	x		
MR. VAN HOLLEN	x		
MRS. WASSERMAN SCHULTZ	x		
MR. SENSENBRENNER, CHAIRMAN			
TOTAL	7	20	

Final Passage. The motion to report the bill, H.R. 4128, favorably as amended to the House was agreed to by a roll call vote of 27 yeas to 3 nays.

ROLL CALL NO. 6 DATE: 10-27-05

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

109th CONGRESS 1st SESSION

SUBJECT: Motion to Report H.R. 4128, as amended, was agreed to by a vote of 27 ayes to 3 nays.

	Ayes	Nays	Present
MR. HYDE			
MR. COBLE	x		
MR. SMITH			
MR. GALLEGLY			
MR. GOODLATTE	x		
MR. CHABOT	x		
MR. LUNGREN	x		
MR. JENKINS	x		
MR. CANNON	x		
MR. BACHUS	x		
MR. INGLIS	x		
MR. HOSTETTLER	x		
MR. GREEN	x		
MR. KELLER	x		
MR. ISSA	x		
MR. FLAKE			

MR. PENCE			
MR. FORBES	x		
MR. KING	x		
MR. FEENEY	x		
MR. FRANKS	x		
MR. GOHMERT	x		
MR. CONYERS	x		
MR. BERMAN	x		
MR. BOUCHER			
MR. NADLER		x	
MR. SCOTT		x	
MR. WATT		x	
MS. LOFGREN	x		
MS. JACKSON - LEE	x		
MS. WATERS	x		
MR. MEEHAN	x		
MR. DELAHUNT			
MR. WEXLER			
MR. WEINER			
MR. SCHIFF	x		
MS. SANCHEZ	x		
MR. VAN HOLLEN	x		
MRS. WASSERMAN SCHULTZ	x		
MR. SENSENBRENNER, CHAIRMAN			
TOTAL	27	3	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 4128, the following estimate and comparison prepared by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

OCTOBER 31, 2005.

Hon. F. JAMES SENSENBRENNER, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4128, the Private Property Rights Protection Act of 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Gregory Waring (for federal costs) and Marjorie Miller (for the state and local impact).

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure.

H.R. 4128—Private Property Rights Protection Act of 2005

H.R. 4128 would deny federal economic development assistance to any state or local entity that uses the power of eminent domain for economic development and would prohibit federal agencies from engaging in this practice. The bill would specifically prohibit state and local governments from taking private property and conveying or leasing that property to another private entity, either for a commercial purpose or to generate additional taxes, employment, or general economic health. A state or local government found to have violated this prohibition would be ineligible for certain federal economic development funds for two years, but could become eligible by returning or replacing the property. The bill would give private property owners the right to bring legal actions seeking enforcement of these provisions and would waive states' constitutional immunity to such suits.

CBO expects that implementing the bill would have no significant impact on the federal budget because most jurisdictions would not risk the economic development assistance they receive from the federal government by using eminent domain as described in the bill. Further, a few states are considering legislation that would re-

strict the authority of localities to take private property for economic development projects. Because the bill would deny certain economic assistance for up to two years to localities using eminent domain in a way proscribed in the bill, the pace of spending for some discretionary grant programs could be marginally reduced. Enacting the bill would not affect direct spending or revenues.

H.R. 4128 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA), but it would impose significant new conditions on the receipt of federal economic development assistance by state and local governments. (Such conditions are not considered mandates under UMRA.) Because these conditions would apply to a large pool of funds, the bill would effectively restrict the use of eminent domain, and would have a significant impact on local governments' powers to manage land use in their jurisdictions. Further, state and local governments could incur significant additional legal expense to respond to private legal actions authorized by the bill.

On October 19, 2005, CBO transmitted a cost estimate for H.R. 3405, the Strengthening the Ownership of Private Property Act of 2005, as ordered reported by the House Committee on Agriculture on October 7, 2005. H.R. 3405 contains similar provisions that would deny federal economic development assistance to any jurisdiction that uses the power of eminent domain for economic development. CBO also estimates that neither piece of legislation would have a significant impact on the federal budget.

The CBO staff contacts for this estimate are Gregory Waring (for federal costs) and Marjorie Miller (for the state and local impact). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4128 is designed to preserve the property rights granted to our Nation's citizens under the Fifth Amendment of the Constitution following the Supreme Court's decision in *Kelo* v. *City of New London,* which puts those rights in jeopardy.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in art. I, § 8, cl. 1 (the Spending Clause), art. I, § 8, cl. 3 of the Constitution, and § 5 of Amendment XIV.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following section-by-section analysis describes the bill as reported by the Committee on the Judiciary.

Section 1. Short title

Section 1 provides for the short title of the legislation, the "Private Property Rights Protection Act of 2005."

Section 2. Prohibition of eminent domain abuse by States

Section 2(a) provides that no State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property to be used for economic development or over property that is subsequently used for economic development, if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so.

Section 2(b) provides that a violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any Federal economic development funds for a period of two fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated, and any Federal agency charged with distributing those funds shall withhold them for such two year period, and any such funds distributed to such State or political subdivision shall be returned or reimbursed by such State or political subdivision to the appropriate Federal agency or authority of the Federal Government, or component thereof.

Section 2(c) provides that a State or political subdivision shall not be ineligible for any Federal economic development funds under subsection (b) if such State or political subdivision returns all real property the taking of which was found by a court of competent jurisdiction to have constituted a violation of subsection (a) and replaces any other property destroyed and repairs any other property damaged as a result of such violation.

Section 3. Prohibition on eminent domain abuse by the Federal Government

Section 3 provides that the Federal Government or any authority of the Federal Government shall not exercise its power of eminent domain to be used for economic development.

Section 4. Private right of action

Subsection (a) provides that any owner of private property who suffers injury as a result of a violation of any provision of this Act may bring an action to enforce any provision of this Act in the appropriate Federal or State court, and a State shall not be immune under the eleventh amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. Any such property owner may also seek any appropriate relief through a preliminary injunction or a temporary restraining order.

Subsection (b) provides that an action brought under this Act may be brought if the property is used for economic development following the conclusion of any condemnation proceedings condemning the private property of such property owner, but shall not be brought later than seven years following the conclusion of any such proceedings and the subsequent use of such condemned property for economic development.

Subsection (c) provides that in any action or proceeding under this Act, the court shall allow a prevailing plaintiff a reasonable attorneys' fee as part of the costs, and include expert fees as part of the attorneys' fee.

Section 5. Notification by Attorney General

Subsection (a) provides that not later than 30 days after the enactment of this Act, the Attorney General shall provide to the chief executive officer of each State the text of this Act and a description of the rights of property owners under this Act. It also provides that not later than 120 days after the enactment of this Act, the Attorney General shall compile a list of the Federal laws under which Federal economic development funds are distributed. The Attorney General shall compile annual revisions of such list as necessary. Such list and any successive revisions of such list shall be communicated by the Attorney General to the chief executive officer of each State and also made available on the Internet website maintained by the United States Department of Justice for use by the public and by the authorities in each State and political subdivisions of each State empowered to take private property and convert it to public use subject to just compensation for the taking.

Subsection (b) provides that not later than 30 days after the enactment of this Act, the Attorney General shall publish in the Federal Register and make available on the Internet website maintained by the United States Department of Justice a notice containing the text of this Act and a description of the rights of property owners under this Act.

Section 6. Report

Section 6 provides that not later than 1 year after the date of enactment of this Act, and every subsequent year thereafter, the Attorney General shall transmit a report identifying States or political subdivisions that have used eminent domain in violation of this Act to the Chairman and Ranking Member of the Committee on the Judiciary of the House of Representatives and to the Chairman and Ranking Member of the Committee on the Judiciary of the Senate. The report shall (1) identify all private rights of action brought as a result of a State's or political subdivision's violation of this Act; (2) identify all States or political subdivisions that have lost Federal economic development funds as a result of a violation of this Act, as well as describe the type and amount of Federal economic development funds lost in each State or political subdivision and the Agency that is responsible for withholding such funds; and (3) discuss all instances in which a State or political subdivision has cured a violation as described in section 2(c) of this Act.

Section 7. Sense of Congress regarding rural America

Section 7 contains findings and a Sense of Congress that the use of eminent domain for the purpose of economic development is a threat to agricultural and other property in rural America and that the Congress should protect the property rights of Americans, including those who reside in rural areas.

Section 8. Definitions

Section 8 contains the following definitions of terms used in the Act. The term "economic development" means taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic

health, except that such term shall not include (A) conveying private property to public ownership, such as for a road, hospital, or military base, or to an entity, such as a common carrier, that makes the property available for use by the general public as of right, such as a railroad, or public facility, or for use as a right of way, aqueduct, pipeline, or similar use; (B) removing harmful uses of land provided such uses constitute an immediate threat to public health and safety; (C) leasing property to a private person or entity that occupies an incidental part of public property or a public facility, such as a retail establishment on the ground floor of a public building; (D) acquiring abandoned property; (E) clearing defective chains of title; and (F) taking private property for use by a public utility.

The term "Federal economic development funds" means any Federal funds distributed to or through States or political subdivisions of States under Federal laws designed to improve or increase the size of the economies of States or political subdivisions of States.

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

Section 9. Severability and effective date

Subsection (a) provides for a severability clause. Subsection (b) provides that this Act shall take effect upon the first day of the first fiscal year that begins after the date of the enactment of this Act, but shall not apply to any project for which condemnation proceedings have been initiated prior to the date of enactment.

Section 10. Sense of Congress

Section 10 contains a Sense of Congress providing that it is the policy of the United States to encourage, support, and promote the private ownership of property and to ensure that the constitutional and other legal rights of private property owners are protected by the Federal Government.

Section 11. Broad construction

Section 11 provides that the Act shall be construed in favor of a broad protection of private property rights, to the maximum extent permitted by the terms of this Act and the Constitution.

CHANGES IN EXISTING LAW BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, the Committee notes that H.R. 4128 makes no changes to existing law.

ADDITIONAL CONCURRING VIEWS OF REPRESENTATIVE LOFGREN

At markup, I intended to offer an amendment to this legislation creating an exception to the definition of "economic development" for the development of affordable housing for low-income residents. I ultimately decided not to offer this amendment, however, based on my recognition, and the apparent recognition of my colleagues, that this bill as introduced does not in any way limit the ability of states and local governments to exercise their eminent domain powers for the building of affordable housing for low-income residents. In fact, during markup, I pointed this out and received no objections from my colleagues.

The provision of low-income housing, whether by a for-profit or a non-profit entity, should not constitute "economic development" under the definition in this bill because such activity constitutes neither "commercial enterprise" nor an activity designed to "increase tax revenue, tax base, employment or general economic health." Rather, the development of affordable housing for low-income residents constitutes a traditional public purpose for which eminent domain powers have long been recognized. Given that this bill will not in any way limit the exercise of eminent domain powers for the development of affordable housing, I concur in the Committee's report.

ZOE LOFGREN.

DISSENTING VIEWS

We share our colleagues' concern that the Supreme Court's recent decision in *Kelo* v. *City of New London*[1] could open the door to a dangerous expansion of the eminent domain power. We are also concerned that this legislation, far from providing a remedy for the historic abuses of eminent domain, will permit the sorts of injustices with which we are all too familiar while, at the same time, crippling local governments in the pursuit of their legitimate public duties. This poorly crafted bill, with broad, if uncertain, application, would place every state and locality in permanent peril, without providing the protection vulnerable communities need.

We share the unanimous conviction that private property should never be taken for the private benefit of another private person. There can be no more fundamental meaning of the "public use" clause of the Fifth Amendment.[2] The awesome power of eminent domain may not be exercised under our constitution, regardless of the extent of due process or compensation, if the purpose for which it is exercised is to benefit a private party rather than the public interest.

The Supreme Court's efforts to define "public use," and Congress' legislative efforts to do so, are at the heart of this debate.

While the Supreme Court has left the outer boundaries of the definition of "public use" for future cases, the Committee has attempted to provide a bright-line test to settle the issue with finality. Unfortunately, a plain reading of the legislation, and the debate in the Committee on its meaning, show that the one thing it lacks is a bright-line. What exactly is permitted or prohibited appears to have been unclear even to the proponents of the legislation, many of whom could not agree on the meaning of the definitions, nor could they agree on the policy they were attempting to enact.

If the legislative history so far shows anything, it is that Congress has no clear intent, and that the language it has chosen is even less clear. Courts and local governments trying to apply the standards in this bill will encounter rules so convoluted, they could not hope to comply with any reasonable degree of certainty.

The costs of running afoul of this legislation would be catastrophic. Any taking, for any project, later determined to have been in violation of this statute, would result in the loss of two years of economic development funding for the state or local government, even if the project received no such funds. This determination and penalty could arise years, even decades, after the original taking. The financial cloud hanging over the entire jurisdiction ad infinitum would disrupt every aspect of local governance.

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[1] 2005 Westlaw 1469529 (No. 04–108) (U.S. June 23, 2005).

[2] U.S. Const. amend. V: "nor shall private property be taken *for public use*, without just compensation" (emphasis added).

For these reasons, we believe that this legislation is not ready to be considered by the full House, and we respectfully dissent.

Takings, public works and displacement

The history of eminent domain and displacement need not be fully recounted here. Suffice to say that the exercise of eminent domain has long fallen most heavily on the shoulders of poor, minority, immigrant, working class, and other communities lacking in political and economic power. As Hilary O. Shelton, Director of the NAACP Washington Bureau, told the Subcommittee on the Constitution:

> The history of eminent domain is rife with abuse specifically targeting racial and ethnic minority and poor neighborhoods. Indeed the displacement of African Americans and urban renewal projects are so intertwined that "urban renewal" was often referred to as "Black Removal."[3]

Mr. Shelton testified that the burden on minority communities has not been confined to projects involving private economic development of the type at issue in *Kelo*. Mr. Shelton cited a 1990 study showing that "90% of the 10,000 families displaced by highway projects in Baltimore were Africans American."[4]

In his seminal work on urban political power, The Power Broker, Robert Caro reports:

> [D]uring the seven years since the end of World War II, there had been evicted from their homes in New York City for public works * * * some 170,000 persons. * * * If the number of persons evicted for public works was eye-opening, so were certain of their characteristics. Their color for example. A remarkably high percentage of them were [African American] or Puerto Rican. Remarkably few of them were white. Although the 1950 census found that only 12 percent of the city's population was nonwhite, at least 37 percent of the evictees * * * and probably far more were nonwhite.[5]

The record indicates that, in addition to the impact on property owners and their communities, families and small business who rent rather than own property suffer displacement often without compensation or a right to contest their displacement.[6] These bur-

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[3] Oversight Hearing on "The Supreme Court's *Kelo* Decision and Potential Congressional Responses Before the Subcomm. on the Constitution of the House Judiciary Committee (2005) (Statement of Hilary O. Shelton at 2) (Hereafter "Shelton Testimony").

[4] Id. Citing Bernard J. Frieden & Lynn B. Sagalyn, Downtown, Inc.: How America Rebuilds Cities 29, (1990).

[5] Robert Caro, The Power Broker 967–8 (1974).

[6] Renters are often innocent, and powerless, bystanders in this process. In poorer communities, absentee slum-lords have rights denied to their tenants.

"Eminent domain is a vitally important tool. It is a power that can be abused, as the painful experience in Boston's West End reminds us. But Boston is also a place where eminent domain has been used creatively. Consider the experience of the Dudley Street Neighborhood Initiative, which has enabled a low-income community in Roxbury to reclaim its future. The community confronted a serious problem. Absentee owners held decaying properties that stood in the way of redevelopment plans. The initiative lobbied the city to give it the power of eminent domain. The result of this public/private partnership has been a widely acknowledged improvement in the neighborhood.

David J. Barron and Gerald E. Frug, Make Eminent Domain Fair for All, Boston Globe, August 12, 2005.

dens, whether for classically public projects, or for economic development projects, fall most heavily on those who can least afford the burden. As Mr. Shelton observed, "even if you dismiss all other motivations, allowing municipalities to pursue eminent domain for private development as was upheld by the U.S. Supreme Court in *Kelo* will clearly have a disparate impact on African Americans and other racial and ethnic minorities in our country." [7]

The penalty is disproportionate and threatens city and State financial solvency

H.R. 4128 would impose a penalty on any jurisdiction out of all proportion to the harm, or even the offending project, involved. It would extend not just to those projects receiving federal economic development assistance, but to any activity by a state or local government, including those receiving no federal funds of any kind.[8] Similarly, all economic development funds, including those having nothing to do with the project in question, would be lost to the state or local jurisdiction for two years. Unquestionably meritorious public projects, even those that do not use eminent domain, would lose funding. Because of the catastrophic loss of federal funds, the municipality would face bankruptcy, endangering all municipal functions.

The jurisdiction would appear to face an open-ended risk of this expansive penalty. A property owner would have seven years from the conclusion of a condemnation proceeding to bring an action alleging a violation of the Act.[9] The Act would allow such an action to be brought for an additional seven years following "the subsequent use of such condemned property for economic development" [10]

This would appear to leave the jurisdiction open to legal attack, and expansive penalties, years, perhaps decades, after the initial development. If, at any time in the future, any portion of an otherwise permissible development is put to a prohibited use, an action may be commenced within seven years. There appears to be no point beyond which a jurisdiction could consider other uses of land without risking potentially catastrophic legal and financial exposure.

Once the property is taken, the jurisdiction's only recourse would be to return the property and "replace[ ] any other property destroyed and repair[ ] any other property damaged as a result of such violation." [11] If this means what it appears to say, the government would be forced to clear the property previously taken, and restore any structures, including homes, to their previous condition. It does not specify how the subsequently vested rights of other parties are to be handled. A jurisdiction could conceivably be required to raze a half-acre plot in the middle of a multi-acre development and rebuild a home in order to protect the public fisc.

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[7] Shelton testimony, at 2–3.

[8] "No State or political subdivision of a state shall exercise its power of eminent domain * * * if that state or political subdivision receives Federal economic development funds during any fiscal year in which it does so." H.R 4128, § 2(a).

[9] H.R. 4128, § 4(b).

[10] Id.

[11] Id. § 2(c).

This unpredictable, open-ended, and substantial financial exposure would be faced by any jurisdiction exercising eminent domain with respect to even one property. It would be a risk so great that cities would lose their ability to issue bonds. States would face whatever liability might be imposed on cities, and would suffer similar financial instability as a result of this uncertainty. Even if the penalty is never imposed, the mere uncertainty would be enough to place a cloud over any jurisdiction's finances.

The prohibition if over broad and unreasonably vague

At the heart of the legislation is section 8(1) which defines "economic development." It is the inherent vagueness of this definition, most of which consists of exceptions to the general definition, that makes the bill truly unworkable.

The prohibition applies only to non-consensual takings, and only to the actual conveying of that property from one private person to another private person "for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health." [12]

The definition contains a number of exceptions which create a number of ambiguities and would seem to leave open the possibility for perverse results.

For example, eminent domain is permitted if it conveys the private property to a private entity "such as a common carrier, that makes the property available for use by the general public as of right, such as a railroad, public utility, or public facility. * * *" [13] A public facility, which is privately owned, open to the public as of right would appear to include a sports stadium or a shopping center. They are at least as open to the public as a railroad, which provides a seat as of right for the price of a ticket. Indeed, unlike the railroad or the stadium, a shopping center is open to the public without the need to purchase a ticket.[14]

There appears to have been a concern that private for-profit uses might fall within the bill's prohibition because they are not necessarily a "common carrier, that makes the property available for use by the general public as of right." Mr. Goodlatte offered an amendment, accepted by a voice vote, that moved "public utility" from the common carrier clause of paragraph (1)(A), and creating a new paragraph (1)(F) allowing the "taking of private property for use by a public utility" thus removing any requirement that a public utility behave in its traditional role as a common carrier in

[12] § 8(1). By its own terms, the bill excludes any claims not involving a transfer of title. It would not include an assertion of a regulatory or other taking theory. While some have attempted to broaden the debate over *Kelo* to include so-called regulatory takings theories, neither the Court, nor the proponents of this legislation, has attempted to raise this far more dubious legal theory in this context.

[13] § 8(1)(A).

[14] Mr. Nadler offered an amendment to strike the phrase "public facility," which was rejected by the Committee. There was some doubt whether a stadium would be a permitted use. Rep. Goodlatte argued that a stadium might be a permitted use if it were open to the public as a matter of right, but that a shopping center could never be a permitted use because they are not, in his view, open to the public as a matter of right. Markup of H.R. 4128, Unofficial Transcript 159–160 (Statement of Mr. Goodlatte). Ms. Waters took the position that a stadium that was privately owned could never be a permitted use. Id. at 165.

order to benefit from the extraordinary governmental power of eminent domain.[15]

The term "blight" is no longer used to describe a permitted use, but the bill does refer to "removing harmful uses of land provided such uses constitute an immediate threat to public health and safety."[16] It is our hope that this language will prove sufficiently narrow to eliminate the past abuses of eminent domain under the pretext of removing "blight." We remain concerned, however, that the new language could be abused in the same manner as the "blight" exception. We would hope that further clarification on this important point would be possible.

Public developments are also precluded if they lease property to a private person "that occupies an incidental part of public property or a public facility, such as a retail establishment on the ground floor of a public building."[17] This would seem to prohibit the use of eminent domain to build such projects as New York's World Trade Center, which included public offices, transportation facilities, public open space, leased office space, and leased retail space. If a public project were later privatized, the former property owner would have a seven-year window to bring an action against the jurisdiction that would result in the loss of all economic development funds for two years.

For these reasons, we believe that, however well intentioned, the proposed legislation would fail to protect vulnerable communities, allow projects of the type many proponents seek to prohibit, and hinder many projects normally considered to be in the public interest. Worse still, it would create financial chaos for cities, states, and the bond and insurance markets.

This careless response to the *Kelso* decision is also unnecessary. States and localities are more than able to respond to this decision. To the extent that they fail to do so, the Congress would retain the ability and the authority to deal more narrowly with any problems that may arise. As the National League of Cities has reported,

> The *Kelo* Court, affirming federalism, did not preclude 'any state from placing further restrictions on its exercise of the Takings power.' Approximately 30 states are already reviewing or planning to review their eminent domain laws during upcoming legislative sessions, with the majority focused on just compensation and comprehensive planning process modifications. Since June 2005, Alabama, Texas, and Delaware enacted laws that tighten the application of eminent domain power in each state.[18]

Land use planning is primarily a state and local function. For Congress to step in so precipitously, while states are still acting, violates fundamental principles of federalism. Were the states moving to take full advantage of the broadest possible reading of the *Kelo* decision, Congress might well have reason to move with equal dispatch. Just the opposite is true. States and localities are re-

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[15] Congress has expanded the power of eminent domain for transmission lines in recent energy legislation. Energy Policy Act of 2005, Pub. L. No. 109–58, § 216(e) 119 Stat. 594, 948 (2005).

[16] § 8(1)(B).

[17] § 8(1)(C).

[18] Letter to Hon. F. James Sensenbrenner & Hon. John Conyers, Jr., from Donald J. Borut, Executive Director, National League of Cities (Oct. 30, 2005).

sponding to the same concerns behind this legislation. They are, however, better able to respond to local needs and local realities. Congress is still free to respond to actual, rather than hypothetical, problems should the need arise.[19]

We urge our colleagues to move with great care. The uncertainty with which the Judiciary Committee proceeded during its recent markup demonstrates just how chaotic a congressional effort to act as a national zoning board would likely be. At the very least, we would urge greater caution.

JERROLD NADLER.
ROBERT SCOTT.

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[19] Representative Watt offered an amendment that would have left only the "Sense of the Congress" language of section 7, reflecting the view that Congress should state the principle that the power of eminent domain must be exercised properly and with restraint, but that congressional control over the minute details of these decisions goes too far.