109TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 109–262
1st Session } { Part 2

PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2005

NOVEMBER 3, 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

SUPPLEMENTAL REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 4128]

[Including cost estimate of the Congressional Budget Office]

This supplemental report shows the markup transcript with respect to the bill (H.R. 4128), as reported, which was not included in part 1 of the report submitted by the Committee on the Judiciary on October 31, 2005 (H. Rept. 109–262, pt. 1).

Due to the brief period of time between the markup and floor consideration of H.R. 4128, the transcript was unavailable for inclusion in H. Rept. 109–262, Part 1. Chairman Sensenbrenner has long maintained that the inclusion of the markup transcript in the Committee report provides important public insight into Committee consideration of legislation reported to the full House. To that end, the Committee is filing a supplemental report to H.R. 4128 to ensure that the Committee's markup transcript is available in the public record.

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49–006

THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

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 re-

visions 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 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.*

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

[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).

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]

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 * * *

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[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.
[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).

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 condemnation 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

[11] Id. at 2672.
[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).

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 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

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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).

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 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

[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.
[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).

> 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]
>
> 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 re-

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[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)).

[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)).

> main 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]

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

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[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).

[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.

> 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]

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

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[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 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.

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 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

[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.

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.

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.

1. 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.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		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			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
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. Sánchez	X		
Mr. Van Hollen	X		
Ms. Wasserman Schultz	X		
Mr. Sensenbrenner, Chairman.			
Total	7	20	

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

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith (Texas)			
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		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Van Hollen	X		
Ms. 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 restrict 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 MADE 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.

MARKUP TRANSCRIPT

BUSINESS MEETING

THURSDAY, OCTOBER 27, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Coble, acting Chair, presiding.

Mr. COBLE. I note the presence of a working quorum and we will come to order.

Before we start, I want to advise Members of the Committee that the Chairman's sister-in-law died as a result of an accident last night, and he will not be able to be here today. But we will proceed accordingly. I have been pressed into duty here, so we will do the best we can today, folks.

[Intervening business.]

Mr. COBLE. [presiding.]: The Committee on the Judiciary will again come to order. Pursuant to notice, I call up the bill H.R. 4128, the "Private Protection"—the "Private Property Protection Act of 2005" for purposes of markup and move its favorable recommendation to the House. Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 4128, follows:]

I

109TH CONGRESS
1ST SESSION

H. R. 4128

To protect private property rights.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 25, 2005

Mr. SENSENBRENNER (for himself, Mr. GOODLATTE, Mr. CONYERS, Ms. WATERS, Mr. BONILLA, Ms. HERSETH, Mr. DELAY, and Mr. BLUNT) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To protect private property rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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 Depart-

ment 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; 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.

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 prop-

erty. 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, public utility, 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; and

(E) clearing defective chains of title.

(2) FEDERAL ECONOMIC DEVELOPMENT FUNDS.—The term ''Federal economic development funds'' means any Federal funds distributed to 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.

○

Mr. COBLE. The Chair recognizes himself for 5 minutes to explain the bill.

This is—I will read Chairman Sensenbrenner's statement.

I bring up for markup today H.R. 4128, the "Private Property Rights Protection Act of 2005," which is co-sponsored in addition to the Chairman, by Mr. Goodlatte, along with Ranking Member Conyers and Ms. Waters.

On June 23rd, the Supreme Court, in a 5–4 decision in *Kelo v. City of New London,* held that economic development can be a public use under the fifth amendment's "taking clause." In doing so, the Supreme Court allowed the Government to take perfectly fine property from one small homeowner and give it to a large corporation for a private research facility.

As the dissent in that case pointed out, under the majority's opinion, any property may now be taken for the benefit of another private party. 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.

The NAACP and the AARP have said the takings that result from the Court's decision will disproportionately affect and harm the economically disadvantaged, and in particular racial and ethnic minorities and the elderly. And the representatives of religious organizations have stated that 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 as singularly vulnerable to being taken under the rationale approved by the Supreme Court.

The public reaction to the *Kelo* decision was swift and strong. The protection of private property rights is the number one issue that concerns Americans today, according to the Wall Street Journal-NBC News poll, by an 11 to 1 margin. Americans say they oppose the taking of private property for private uses, even if it is for public economic good.

According to an American Survey poll, public property for limiting the power of eminent domain is robust and cuts across demographic and partisan groups. Even Justice John Paul Stevens, who wrote the *Kelo* decision for the 5-Justice majority, 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 the current law.

A week after the Supreme Court's now notorious *Kelo* decision, Mr. Sensenbrenner introduced H.R. 3135, the "Property Rights Protection Act of 2005," to help restore the property rights the Supreme Court took away.

On October 25th, Chairman Sensenbrenner introduced the even stronger legislation before us today, which has benefitted greatly from the contributions of Ranking Member Conyers, Ms. Waters, Mr. Goodlatte, and others, including Mr. Cannon and Mr. Flake, representing the Western Caucus.

H.R. 4128 enhances the penalty for States and localities that abuse their eminent domain powers by denying States or localities that commit such abuse all Federal economic development funds for a period of 2 years.

Under this legislation, there is a clear connection between the Federal funds that would be denied and the abuse Congress is intending to prevent. The policy is that States or localities that abuse their eminent domain power by using economic development as the rationale for the takings should not be trusted with Federal economic development funds that could contribute to similarly abusive land grabs.

H.R. 4128 also includes an express private right of action to make certain that those suffering injuries from a violation of the bill will be allowed access to State or Federal court to enforce its provisions.

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

Under H.R. 4128, States and localities will have the clear 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 includes carefully crafted refinements of the definition of economic development that specifically allow the types of takings that prior to the *Kelo* decision had achieved a consensus as to their appropriateness.

We are very mindful of the sad history of the abuse of eminent domain, particularly in low-income and often predominantly minority neighborhoods and the need to stop it.

I'm also very mindful of the reasons we should allow the Government to take land, when the way in which the land is being used constitutes an immediate threat to the public health and safety.

I believe this bill accomplishes both goals.

Finally, H.R. 4128 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 prepare to come into compliance with the legislation. And H.R. 4128 would not apply to any project for which condemnation proceedings had begun prior to enactment.

I look forward to reporting to the full House bipartisan legislation that will limit the effect of the *Kelo* decision.

Who would like to be recognized? The distinguished gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, I move to strike the last word.

Thank you, Mr. Chairman.

Mr. Chairman, for once the Supreme Court defers to the elected officials and Congress cries foul. The power of eminent domain should never be abused to take property for the private benefit of another. But this bill goes both too far and not far enough.

It has a laudable purpose, but it is not well thought out, and needs further work before it is ready for a markup.

This bill would permit many of the abuses and injustices of the past, while crippling the ability of State and local governments to perform genuine public duties.

The bill does not, for example, deal with many of the problems of the use of eminent domain, which its supporters talk about.

It would allow takings for private rights of way—for pipelines, transmission lines, railroads.

It allows private land to be annexed for the benefit of these giant corporations. The bill would still allow highways to cut through communities and would not hinder in any way all the other public projects that have historically fallen most heavily on the poor and powerless.

Hillary Shelton of the NAACP testified that these projects are just as burdensome as projects including private development.

The bill does nothing to protect displaced renters. They are usually poor and often minority, but they get no compensation, no day in court, only the absentee slumlords get a day in court.

On the other hand, the bill allows a taking to give private property—to give property to a private party "such as a common carrier that makes the property available for use by the general public as a right."

So private land could be condemned for a privately-owned passenger rail system, a common carrier, but not for a freight rail or marine terminal because they operate through contracts, not common carrier status.

The bill apparently allows for a private sports stadium. Such a stadium is privately owned "available for use by the general public as of right" at least as much as a railroad. You can buy a seat.

The bill would seem to include permission to use eminent domain to build a private shopping center. You don't even need a ticket.

I don't think the drafters had allowing private stadiums and private shopping centers in mind.

The World Trade Center, however, could not have been built under this law. It was publicly owned, but was predominantly leased for office space and retail.

Affordable housing like the Hope Six or the fabled Nehemiah Program, a faith-based affordable housing program in New York, could never have gone forward had this bill been in place.

The local government would risk all of its economic development funding for 2 years, even for unrelated projects and face bankruptcy under this bill. If a city guesses wrong as to what's permitted, it could bulldoze the new downtown and rebuild the old house.

If you want to give someone the power to extort an entire city, this bill does it.

Mr. Chairman, allowing enforcement of the bill by seeking injunctive relief against an improper taking if the city accepts Federal economic development funds may be appropriate.

The lawsuits permitted, however, and the uncertainty of the bill's definitions would cast a cloud over legitimate projects. A property owner, under this bill, has 7 years after the condemnation before the litigation and appeals even begin.

Providing a 7-year window for a retroactive challenge to every eminent domain proceeding that may have violated the terms of the bill, a challenge that, if successful, will result in refund of all economic aid over 2 years will put a cloud over the financing of every project dependent, in whole or in part, on Federal economic development funds.

Local governments, even those that do not violate the terms of this bill, will find themselves unable to issue bonds. Who would

buy the paper of a local government or of a State government for that matter that might suddenly lose a significant part of its revenue base?

I wonder if the trial lawyers wrote this provision of the bill?

Mr. Chairman, this goes well beyond taking a Motel 6 to build a Ritz-Carlton without protecting the vulnerable.

The remedies in this bill, some of them are well thought out—the injunctive relief provision; some of them would almost put the equivalent of a cloud of title over every economic development project; in fact, over every project that requires bonding by a city or State or local government.

I don't think that's the intention of the authors of this bill, but that probably will be the effect.

I urge either the defeat of the bill or preferably I urge that this bill be withdrawn for further reworking before it comes up for markup. Let me emphasize I basically approve the purpose of the bill.

I am as upset with the Supreme Court decision as anyone. I do think remedial legislation is in order. I think some of the provisions of this bill make sense. Some of the provisions of this bill, however, without I think the authors intending it, go so far in putting a cloud over the economics and the bonding ability of State and local governments who do not. Any State or local government that uses eminent will always face a possibility for 9 years, for 7 years afterwards that someone could come along and say—and bring a lawsuit and say that project that you did, that economic—that eminent domain that you used 5, 6, 7 years ago that violated the Federal law; therefore, you got to give back 2 years of all economic aid from the Federal Government; and, therefore, you can't float your bonds because bond counsel will warn against this.

I think this bill needs some serious work before it goes any further.

I thank you. I yield back.

Mr. COBLE. The gentleman's time has expired.

Are there amendments?

Mr. GOODLATTE. Mr. Chairman?

Mr. COBLE. The gentleman from Virginia, Mr. Goodlatte, for what purpose do you wish to speak?

Mr. GOODLATTE. Mr. Chairman, I move to strike the last word.

Mr. COBLE. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I thank you for holding this markup on this important piece of legislation.

Private ownership of property is vital to our freedom and our prosperity, and is one of the most fundamental principles embedded in our Constitution.

The Founders realized the 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. That clause answers many of the objections raised by the gentleman from New York, because many of the things he's objecting to are provided for in the United States Constitution so long as the taking is for a public use.

This clause created two conditions to the Government taking private property: that the subsequent use of the property is for the public and that the Government gives the property owners just compensation.

However, the Supreme Court's recent 5 to 4 decision in *Kelo v. City of New London is a step in the opposite direction. This controversial ruling expands the ability of State and local governments to exercise eminent domain powers to seize property under the guise of economic development when the public use is as incidental as generating tax revenues or creating jobs even in situations where the Government takes property from one private individual and gives it to another private entity.*

By defining public use so expansively, the Court essentially erased any protection for private property as understood by the Founders of our Nation.

In the wake of the decision, State and local governments can use eminent domain powers to take the property of any individual for nearly any reason.

Cities may now bulldoze private citizens' homes, farms, and small businesses to take away—to make way for shopping malls or other developments. Because shopping malls do not have public use as matter of right, the gentleman is incorrect when he suggest that this prohibition would not cover shopping malls.

For these reasons, I joined with you, Mr. Chairman—Chairman Sensenbrenner to introduce H.R. 4128, the "Private Property Rights Protection Act of 2005."

This important piece of legislation incorporates many provisions from the Stop Act, which is legislation I introduced, along with Representatives Bonilla and Herseth. Specifically, this new legislation would prohibit all Federal economic development funds for a period of 2 years for any State or local government that abuses its eminent domain powers.

In addition, this new legislation would allow State and local governments to cure violations by giving the property back to the original owner.

Furthermore, this bill specifically grants adversely affected landowners the right to use appropriate legal remedies to enforce the provisions of the bill.

The Stop Act was reported out of the House Agriculture Committee by a strong bipartisan vote of 40 to 1 earlier this month.

And I thank Chairman Sensenbrenner for his willingness to produce one new piece of legislation that adds these important provisions from the Stop Act.

No one should have to live in fear of the Government snatching up their home, farm, or business, and the Private Property Rights Protection Act will help to create the incentives to ensure that these abuses do not occur in the future.

This legislation has strong bipartisan support. I thank Ranking Member Conyers and Congresswoman Waters for their participation in joining with us on the Committee to do something to discourage the abuse of power that was authorized by the *Kelo* decision.

I yield back the balance of my time.

Mr. COBLE. The gentleman yields back. Are there amendments?

Mr. GOODLATTE. Mr. Chairman? Mr. Chairman, I have an amendment.

Mr. COBLE. The gentlelady from California. I saw her hand first.

Ms. WATERS. Thank you very much, Mr. Chairman.

I do have an amendment.

First, let me say to Chairman Sensenbrenner and all of the co-authors on the bill that I certainly appreciate all of the work that has gone into this bill and the bipartisan effort that have been forth to deal with the Supreme Court decision.

I too share my shock at that decision, because I never thought that I would witness the Supreme Court of the United States issue or render a decision that would basically legalize the taking of private property for private use.

I am adamantly opposed to the taking of private property for private use. As a matter of fact, I'm suspicious about eminent domain as we know it, the taking of private property for public use. And even when a government entity decides to use eminent domain, I think it should it be scrutinized. I think the citizens must be involved——

Mr. COBLE. Ms. Waters, will you suspend for just a minute?

Ms. WATERS. Yes.

Mr. COBLE. Do you have an amendment?

Ms. WATERS. I have an amendment at the desk.

Mr. COBLE. Very well.

The Clerk will report.

Ms. WATERS. It is number one.

The CLERK. Amendment to H.R. 4128, offered by Ms. Waters of California.

Mr. COBLE. I ask unanimous consent that the amendment be considered as read.

[The amendment offered by Ms. Waters follows:]

AMENDMENT TO H.R. 4128

OFFERED BY MS. WATERS OF CALIFORNIA

Beginning in line 13 on page 8, strike ", except that such term" and all that follows through "title" in line 7 on page 9.

Ms. WATERS. Thank you very much, Mr. Chairman. I said most of what I wanted to say. Before I had the amendment brought up.

Mr. COBLE. Very well.

Ms. WATERS. But basically that I am adamantly opposed. I'm rather a purist on this issue. I do not think there should be any exceptions, none.

I think that the Constitution refers to proper compensation for the taking of land for public use. I think that should guide our cities, our counties, our community redevelopment agencies.

I am told who I have had discussions with about this issue that no matter what that many of these entities are taking private land for private use, despite the fact that eminent domain is thought to be the taking of property for public use. It's going on now.

And if that is the case and if *Kelo* has helped to highlight this, then I think that the fact that this bill would not allow entities to use Federal funds in the taking of private property for private use is a proper response to that Supreme Court decision.

So, therefore, again my full appreciation for the work that has been done, but my amendment basically would not allow any exceptions, none, no exceptions, not even for our so-called safety reasons. I just don't think it's needed.

For those people who would like to talk about properties that are unsafe, they have condemnation proceedings that can be utilized in cities and counties and these other entities.

And so I would put forth this amendment and ask my colleagues to support excluding from this bill the taking of private property for any use. There should be no waivers, no exceptions.

Mr. COBLE. I thank the gentlelady from California.

Mr. Goodlatte, I believe you handled these matters in some detail in the AG Committee so the Chair recognizes you in response.

Mr. GOODLATTE. Well, thank you, Mr. Chairman. And I, first of all, want to thank Ms. Waters for her purism. I very much respect her position on this. She testified before the Agriculture Committee on this, and I understand where she's coming from on this, because quite frankly when eminent domain powers are abused, often low-income people are the first people who are on the block because their properties are worth less than others and a community has the greatest temptation to take that property to increase its value.

But a person's home is their castle no matter what their economic status might be.

However, having said that, I must reluctantly oppose the gentlewoman's amendment because it goes well beyond the intent of this legislation to cure the *Kelo* decision. The problem with the *Kelo* case involved the Court saying that something as marginal as increasing the economic tax base, the tax revenues to the community would be a justification for taking private property and turning it over to another private entity for any kind of private economic development purpose.

The gentlewoman's amendment, however, would eliminate the ability to use eminent domain for things that were intended I believe by our Founding Fathers in the Constitution, and which I think are essential for any community to operate under like building roads, having power lines and gas lines and other public utility lines, having schools and other public uses. And we have to draw the distinction in this legislation between a public purpose, and

this private use that was the subject of the *Kelo* decision, and some decisions quite frankly that came before *Kelo* that I think are equally controversial.

This legislation will address all those. It will go a long way to reduce the number of occurrences that the gentlewoman is concerned about.

Ms. WATERS. Will the gentleman yield?

Mr. GOODLATTE. I don't think we can eliminate them. Yes, I'll be happy to yield to the gentlewoman.

Ms. WATERS. Again, I have great appreciation for the work that you have done. However, you know that there is nothing in this amendment that would stop eminent domain usage for public purposes. That is what the law is now in every State, every municipality. There is nothing in this amendment that would prohibit, in any shape, form, or fashion, the taking of private property for public use.

There is no need for us to even address that here. That is what takes place. That was not what the *Kelo* decision was all about. The *Kelo* decision was about the taking of private property for private use.

Mr. GOODLATTE. Well, reclaiming——

Ms. WATERS. This does not in any way stop any entity from exercising eminent domain for public use. So.

Mr. GOODLATTE. Reclaiming my time.

Ms. WATERS. Yes.

Mr. GOODLATTE. I have to respectfully strongly disagree. The problem with the *Kelo* case is that there was no definition of where the line would be drawn between public use and private use. And the things that the gentlewoman strips out of the bill are those provisions that make that clear distinction between private use and public use.

So it would be my hope that the Committee would reject the amendment. We certainly would want to continue to work with Ms. Waters to find other ways to make it clear that there can't be abuses, but I think she—her amendment goes too far.

Ms. WATERS. Will the gentleman yield?

Mr. GOODLATTE. I'd yield further.

Ms. WATERS. What you attempted to do in the bill is cite some public use. I mean that's really redundant, because entities do that now. As a matter of fact, you can't cite all of the public reasons—I mean all of the reasons why eminent domain could be used for public use. There are a thousand and one of those reasons or more. Thousands of uses.

So what you attempted to do was to cite some of the public uses, and the bill makes it seem as if you would now allow for the taking of private property for these public uses.

Again, it's redundant. That already—that happens already.

There is nothing in this bill that would stop that.

Mr. GOODLATTE. Reclaiming my time.

Ms. WATERS. Yes.

Mr. GOODLATTE. There is no definition in the United States Constitution of what constitutes public use, and that was what gave the *Kelo* Court the freedom to determine that public use included simply taking private property for other private economic develop-

ment purposes just to increase the tax revenue base of the City of New London, Connecticut.

And we need to have those provisions in there. Otherwise, you're correct: there would be no eminent domain authority whatsoever for any public use because it is not defined anywhere else.

Ms. WATERS. If the gentleman would yield for a question.

Mr. GOODLATTE. And you either bring it back to the Court or you would be eliminating them altogether; and, therefore, I must object.

Ms. WATERS. Would you yield for a question?

Mr. GOODLATTE. I would.

Ms. WATERS. Are you saying that you have identified all of the public uses for which eminent domain would be used for in this bill?

Mr. GOODLATTE. Reclaiming my time, I'm saying that I have identified all of the public use purposes for which we're asking this Committee to authorize, and we're not asking them to authorize any beyond that.

And if the gentlewoman's objective is to limit the number of instances in which eminent domain can be used, she would want to see those limitations in the bill.

Ms. WATERS. The gentleman's interpretation is——

Mr. COBLE. The gentleman's time has expired.

Ms. WATERS.—incorrect.

Mr. COBLE. The question occurs on the Waters Amendment. All in favor say aye.

Opposed no?

I appears the noes have it. The noes have it.

Are there further amendments?

Mr. CANNON. Mr. Chairman?

Mr. COBLE. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I have an amendment at the desk.

Mr. COBLE. The Clerk will report.

The CLERK. Amendment to H.R. 4128, offered by Mr. Cannon of Utah. Add at the end the following section:

Mr. COBLE. Unanimous consent that the amendment be considered as read.

[The amendment offered by Mr. Cannon follows:]

AMENDMENT TO H.R. 4128

OFFERED BY MR. CANNON OF UTAH

Add at the end the following:

SEC. ___. 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.

Mr. CANNON. Thank you, Mr. Chairman. It's actually a very simple amendment.

Perhaps I can start as we're passing it out. In fact, I'll read it. It's very short; very simple.

It's a rule of construction and it reads: "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."

The intent of the legislation is to protect private property rights. And this amendment will help make sure judges can't find ways to wiggle out of the protections this bill gives to property owners.

This rule of construction will tell every judge interpreting this legislation that if there's any doubt about how it should be applied, the judge should err on the side of the property owner.

Let me also thank all those who worked on this bill, especially Chairman Sensenbrenner, who is not with us. He has my condolences on his family circumstances——

Mr. COBLE. Would the gentleman yield to the Chair?

Mr. CANNON. I'd be happy to yield, Mr. Chairman.

Mr. COBLE. Mr. Cannon, this appears to be a technical amendment. The Chair will accept it.

Mr. CANNON. Thank you. I yield back. Well, I yield to the gentleman from Virginia.

Mr. GOODLATTE. It's more than a technical amendment. I think it is a strengthening amendment, and it is along the lines of what Ms. Waters has attempted to accomplish. It will be one more way to assure that the law is construed in favor of the private property owner to the maximum extent possible.

Mr. CANNON. Thank you, Mr. Chairman. Does the gentlelady from California wish to yield from me. I'll give it to you.

Ms. WATERS. Yes. Thank you very much.

I appreciate you attempt to strengthen the bill with that language, and I certainly will support it.

Your language, which requires a judge to err on the side of the property owner, gets closer to where I would like to be so that we don't have all of these interpretations that would allow for waivers or exceptions in ways that would harm the property owner.

So I certainly will support it. And I will ask my colleagues to please support it.

Mr. COBLE. The question occurs on the Cannon amendment. All in favor say aye.

Opposed no?

It appears the ayes have it. The ayes have it, and the amendment is approved.

Are there additional amendments?

Mr. NADLER. Mr. Chairman.

Mr. COBLE. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Mr. Chairman, I have an amendment at the desk, Mr. Chairman.

Mr. COBLE. The clerk will report.

The CLERK. Mr. Chairman, I have two amendments for Mr. Nadler.

Mr. NADLER. The short one.

The CLERK. Amendment to H.R. 4128, offered by Mr. Nadler Page 8, 20——

Mr. NADLER. That should be line 20.

The CLERK. Page 8, line 20, insert "or" before "public utility" and strike "or public facility."

Mr. NADLER. Mr. Chairman, I ask unanimous consent to insert the word "line" before 20?

Mr. COBLE. Without objection.

[The amendment offered by Mr. Nadler follows:]

Amendment to H.R. 4128
Offered by Mr. Nadler

Page 8, line 20, insert "or" before "public utility" and strike "or public facility,"

Mr. NADLER. Thank you.

Mr. COBLE. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you. Mr. Chairman, this amendment I think will accomplish what everybody who drafted this bill wants to accomplish.

If you look at the language on page 8, it says the term economic development means taking private property without the consent of the owner, conveying or leasing such property from one private person or entity to another, et cetera, et cetera, or to increase tax revenue, tax base. And all that would be prohibited except that such terms shall not include—so the following is not included within the proscription of the bill. The following is permitted: conveying private property to public ownership, such as for a road, hospital, or military base, or to an entity such as 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.

Now I believe a public facility would mean a stadium or a shopping mall or a shopping center. So all this amendment would do is to remove the phrase or public facility on line 20 and put the word or in front of public utility.

So you would have in the bill then that the following does not—that the bill does not apply to the following. The following is permitted: conveying private property to public ownership for a road, hospital, military base, blah, blah, or to an entity such as a common carrier that makes the property available for use by the general public as a right, such as a railroad or public utility, or for uses of right of way. And it would not include public facility.

So all this does is take out or public facility, which would mean no stadiums, no shopping malls, which is what I assume the authors of the bill intended in the first place.

Mr. GOODLATTE. Mr. Chairman? Mr. Chairman?

Mr. COBLE. I thank the gentleman from New York.

Mr. NADLER. And I yield to the gentleman from——

Mr. GOODLATTE. I'm asking for recognition.

Mr. COBLE. The gentleman from Virginia is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman. I must rise in opposition to this amendment.

The operative words in the section cited by the gentleman are "as a matter of right." Now, a public facility, like a stadium is, and would only be protected under this law if it was open the public as a matter of right. And if it were not, if there were restrictions on the use of the facility, then it would not be appropriate to use the eminent domain power for that purpose or the community would risk losing their public funding for 2 years—their Federal funding for 2 years.

However, a shopping mall is a private entity that is not open to the public as a matter of right. Shopping centers, individual stores, are not open to the public as a matter of right. The shopping center can chose at any time to exclude a particular person from entering that shopping center if they have cause to do so, and that is the difference and is the operative provision in the language.

And that—I will in a minute. And that is why you have to allow for public facility; otherwise, you would be encompassing all kinds of things that are public entities, not private entities, but public entities that would be excluded from eminent domain powers unless you have that provision in there.

And the protection against abuse is the language as a matter of right.

Mr. NADLER. Now, would the gentleman yield?

Mr. GOODLATTE. I will happily yield. Yes.

Mr. NADLER. Well, the problem with that, Mr. Goodlatte, is that a railroad is not available to the public unless you buy a ticket.

Mr. GOODLATTE. Well, reclaiming my time, that's why railroads are specifically mentioned in the legislation as opposed to being encompassed by the——

Mr. NADLER. Would the gentleman yield again?

Mr. GOODLATTE. I will.

Mr. NADLER. It says by the—it says a common carrier that makes the property available for use by the general public as of right, such as a railroad. In other words, it is saying that a railroad or a public utility are examples of what—of things that are available as of right. And anybody will—what a court will read this as is that anything that is available to the general public, even if you have to buy a ticket, even if they retain the right to exclude you, is excluded. And that—and it certainly a stadium would be equivalent to a railroad, because you have to buy a ticket. And a shopping mall is even loser, because you don't have to buy a ticket.

Mr. GOODLATTE. Reclaiming my time, the term "as of right" is defined in Black's Law Dictionary as "by virtue of a legal entitlement." Certainly, a private store, such as a Target store or a Home Depot is not open to the public as of right. Such stores have the right to kick anybody out of their stores as they see fit. Unless, of course, they're illegally discriminating against a legally protected class.

So a Target or a Home Depot store or a shopping mall would clearly not meet the criteria of this exception.

Mr. COBLE. The time of the gentleman has expired. The question occurs on the Nadler Amendment. All in favor?

Ms. WATERS. Mr. Chairman? Mr. Chairman? Mr. Chairman?

Mr. COBLE. The gentlelady from California.

Ms. WATERS. I rise in support of the gentleman's amendment. He's absolutely correct. And I think that——

Mr. COBLE. For what purpose does the gentlelady seek recognition. Move to strike the last word?

Ms. WATERS. Strike the last word.

Mr. COBLE. The gentlelady is recognized for 5 minutes.

Ms. WATERS. I think that what this Committee is going to have to focus on is whether or not we are attempting to put a bill out that's going to protect private property without trying to massage it in ways that would allow people to build public stadiums and other kinds of buildings and developments so that they can take people's property for it. We see it all over the country taking place now.

And so I think that the gentleman to the right of me, Mr. Watt, makes a good—raises a good question, when he asked about this right that you try and define whether or not you have to pay to go into this public stadium that you are allowing to be built with this exception that you have put into this bill.

Mr. NADLER. Would the gentlelady yield?

Ms. WATERS. Yes, I'll yield.

Mr. NADLER. Thank you. I—you know, I disagree with the—I agree with the gentlelady. I disagree with the gentleman from Virginia, because I think he's reading it too finely, and I think that the way that any court will read that if a railroad is available as of right, so is a stadium. They both sell tickets. They both retain the right to kick people out. A shopping mall doesn't bother selling tickets. It retains the right to keep people out.

Perhaps a better way, and maybe I should ask the gentleman from Virginia would he accept an amendment that I'll draft that will simply leave the language as it is, but add after the words "or public facility, but not including stadiums or shopping malls." That would seem to accomplish what I think everybody wants to accomplish however you chose to read the language.

Mr. GOODLATTE. If the gentlewoman would yield, I'd be happy to respond to the gentleman's——

Ms. WATERS. Yes, I'll yield.

Mr. GOODLATTE. Well, I would not agree to that because the distinction has to be made between public use and private use under the law, and that is what the language that's in the bill already does. And a public stadium, operated with access to the public as a matter of right, should be and would be allowed under the law. A shopping mall would not.

Ms. WATERS. No.

Mr. NADLER. Wait a minute. Would the gentlelady yield again?

Mr. GOODLATTE. So it would be inaccurate.

Ms. WATERS. Yes, I'll be happy to yield.

Mr. NADLER. Do I understand the gentleman to say that a stadium would be available; that you could build a private stadium through use of eminent domain under this provision?

Mr. GOODLATTE. Only if it's open to the public as a matter of right.

Mr. NADLER. As any stadium is. But in other words——

Mr. GOODLATTE. Now, I don't say that.

Mr. NADLER.—sports stadium——

Mr. GOODLATTE. I would not say that any stadium is open as a matter of fact.

Mr. NADLER. All right. A sports stadium for the Nationals or for the Mets or for the Yankees would that—you would that that should be available to develop that under use of eminent domain?

Mr. GOODLATTE. If it's open to the public as a matter of right, yes.

Mr. NADLER. Well, let me simply say I thought the major purpose of this bill was that that kind of abuse of the power of eminent domain for private purposes is what we want to prohibit. And now you're telling us that that is—that a stadium that sells tickets for a Yankee game or a Nationals game or a Knicks game or even the White Sox games that that's okay for eminent domain?

Ms. WATERS. Reclaiming my time—is it my time? Reclaiming my time.

Mr. NADLER. Yes. It's your time.

Mr. COBLE. The gentlelady from California——

Ms. WATERS. Reclaiming my time.

Mr. COBLE.—controls the time.

Ms. WATERS. That's precisely why I thought we were putting forth this legislation, to stop that kind of abuse where you have even your local elected officials and mayors, in cooperation with developers, who want to take people's property and build stadiums and other private development. It's no right to be able to buy a ticket to a stadium where homeowners have lost their property because somebody likes football or whatever it is they play in these stadiums.

I just think we don't want to do that. We are fooling ourselves if we put forth legislation that we claim protects our citizens from having their private property taken when we have these kinds of exceptions and loopholes, and I will yield to the gentleman from New York.

Mr. COBLE. She yields to you, Mr. Nadler, did you want to.

Mr. NADLER. Yes. I—thank you. I simply want to say that I have to go back to what I observed earlier in my opening statement. Most of the people who are drafting this bill, most of the Members of this Committee, want to eliminate the abuse that we all believe that the Supreme Court decision in *Kelo* opens us up to; that if we have a bill that allows the taking of or the use of taking of private property under the power of eminent domain, and giving it to a multi-millionaire to build a sports stadium for the Yankees or the Mets or whoever for private property, which is what that sports stadium is, that's not solving the problem. That's not solving the problem.

Now, Mr. Goodlatte says that under this bill, it would allow the taking of private property by eminent for a stadium and that's okay, but not for a shopping mall, and that's not okay. I don't see the distinction.

I again think the bill ought to go back to the drawing boards, because we agree on what we want to do, at least I think we agree on what we want to do. I think most people on this Committee, on both sides of the aisle, think it shouldn't—that we don't want to see private property used for stadiums.

Mr. COBLE. The gentlelady's time has expired. For what purpose does the gentleman from Texas seek recognition?

Mr. SMITH. Mr. Chairman, I move to strike the last word.

Mr. COBLE. The gentleman is recognized for 5 minutes.

Mr. SMITH. Mr. Chairman, I will yield my time to the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. I thank the gentleman from Texas for yielding.

That is not what this bill does. The distinction, and you're right. We want to address the *Kelo* decision. The *Kelo* decision. The *Kelo* decision addresses the issue of a government taking private property and turning it over to another entity for private development purposes. Ninety-five percent of the stadiums in the United States are publicly owned facilities, open to the public as matter of right. If you have a stadium that is privately owned, and it is not open to the public as a matter of right, then the sanctions imposed in this bill would apply to that eminent domain taking.

Now, I understand Ms. Waters would like to stop any public taking of private property for any public purpose.

Ms. WATERS. That's not true.

Mr. GOODLATTE. Well, all right. Well, then I——

Ms. WATERS. Don't misinterpret. Don't do that.

Mr. GOODLATTE. I have the time. The fact of the matter is that is—if that' the gentlewoman's goal, then that's great, 'cause that's my goal, too. The fact of the matter is that this will only take effect for public uses where—I mean for private uses where the facility is not open to the public as a matter of right.

And that's why I must strongly oppose the gentleman's amendment, because he's trying to confuse shopping malls, which would clearly not be covered under this legislation and a public stadium, which clearly would, and he is mixing public and privately-owned stadiums to suggest that a private stadium—a city could take land, turn it over to a private entity and have them develop it, privately own it, privately restrict access to it, and they would still be able to use the eminent domain power.

This would stop that practice from occurring, but it would not stop the practice of a public—of a community taking property for a public purpose, as is intended under the Constitution—a public use.

Mr. COBLE. Does the gentleman yield back?

Mr. SMITH. Mr. Chairman, I'll yield back the balance of my time.

Mr. COBLE. The question occurs on the Nadler Amendment. All in——

Mr. SCOTT. Mr. Chairman? Mr. Chairman?

Mr. COBLE. The gentleman from Virginia.

Mr. SCOTT. Move to strike the last word.

Mr. COBLE. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, I think this entire discussion shows the problems in the underlying bill. I mean, you kind of know it when you see it. And we're trying to define it. And going back and forth on when a stadium is available—when you can build a stadium using eminent domain and when you can't is just—we don't—you can't define it. I mean when it's public and when it's private, you can't—you can have a private developer. How you build a stadium for the Nationals is going to determine whether or not you can use eminent domain, whether the city has sole title or whether a developer can hold title, and that's how you're going to build a

stadium. I think that shows when you know it when you see it, but you can't define it. And that's what we're trying to do is define what cannot be defined. And this bill for that reason is fatally flawed and this amendment and the discussion on the amendment show part of the problem with the underlying legislation.

I yield to the gentleman from New York.

Mr. NADLER. Thank you. Thank you. First of all, I thank the gentleman for yielding.

First of all, I think this does show the problem here; that the bill needs further work. Now, frankly, I was referring to a privately owned stadium, and I thought Mr. Goodlatte was talking about a privately-owned stadium would be okay under this bill, too. I'm glad to hear he doesn't mean that. But as I read the bill, the bill seems to say that, because a private railroad—anything that makes the property available for the use by the general public as a right, such as a railroad. A railroad is privately owned. A railroad makes the facilities available to anybody who pays a ticket, retains the right to kick somebody off or say we don't like you unless he says it for the wrong, and that would seem to—and when you say that, that would seem to indicate that a—I'll yield in a moment—that it would seem to indicate that a privately-owned stadium or a privately-owned shopping mall would fall under the same thing.

And I think we can clarify the privately-owned shopping center since you seemed to—it's harmless to specify that if you think it's already included. But then the question comes up with a stadium, for instance. You said that 95 percent of stadiums are publicly-owned that are now built. That may or may not be true. I don't know, but assuming it is true, that means if you want to use eminent domain for the next stadium, well, you just structure the deal so you get in the city government to agree to condemn it, sell it to you for a dollar or lease it to you for 99 years, and it's a public facility, as opposed to condemning it and giving it to you.

I don't see the practical distinction.

So I think that, again, I would hope that this amendment or some other version of an amendment to make clear that stadiums and shopping malls are not included. Otherwise, the distinction you're making may be a legal distinction, but it does not do what I thought we all wanted to do.

Now, I do not agree with Maxine, if what she wants to do is eliminate all public use. I certainly don't want to eliminate all public use.

Ms. WATERS. Will the gentleman yield?

Mr. NADLER. I'll yield.

Ms. WATERS. Please I——

Mr. COBLE. The gentleman from Virginia controls the time.

Ms. WATERS. Listen. I think it's very important if——

Mr. NADLER. Yes. I'll yield.

Ms. WATERS. I do not wish to have what I believe defined incorrectly. So I want to make it clear that I do not in any shape, form, or fashion——

Mr. NADLER. Right.

Ms. WATERS.—in anything that I've said or done——

Mr. NADLER. I stand corrected.

Ms. WATERS.—interfere with eminent domain as we know it for public use. This is about taking of private property for private use.

I believe there should be no exceptions for the taking of private property for private use. That's very different from eminent domain for public use. Let's be clear about that. I yield back.

Mr. SCOTT. Reclaiming my time, Mr. Chairman, I think this also points out, they're trying to build a stadium in Washington, D.C. If a private individual decides he's going to do it himself, that would be prohibited under this language. If you're using public money and soaking the public to build it, then that would be okay.

That's absurd. I yield back.

Mr. COBLE. The gentleman yields back. The question occurs on the Nadler Amendment. All in favor say aye.

Opposed no?

It appears the noes have it. A rollcall vote having been requested on the amendment, Members will when their names are called answer aye. Those who approve—a no—in opposition. The Clerk will call the roll.

The CLERK. Mr. Hyde?
[No response.]
The CLERK. Mr. Smith?
Mr. SMITH. No.
The CLERK. Mr. Smith, no. Mr. Gallegly?
[No response.]
The CLERK. Mr. Goodlatte?
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte, no. Mr. Chabot?
Mr. CHABOT. No.
The CLERK. Mr. Chabot, no. Mr. Lungren?
Mr. LUNGREN. No.
The CLERK. Mr. Lungren, no. Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no. Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon, no. Mr. Bachus?
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no. Mr. Inglis?
Mr. INGLIS. No.
The CLERK. Mr. Inglis, no. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no. Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no. Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
[No response.]
The CLERK. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
[No response.]
The CLERK. Mr. Franks?

Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
[No response.]
The CLERK. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Pass.
The CLERK. Mr. Scott, pass. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
Ms. LOFGREN. Pass.
The CLERK. Ms. Lofgren, pass. Ms. Jackson Lee?
Ms. JACKSON LEE. I'm going to pass for a moment. Thank you.
The CLERK. Ms. Jackson Lee, pass. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
[No response.]
The CLERK. Mr. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Ms. Wasserman Schultz?
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Ms. Wasserman Schultz, aye. Mr. Chairman?
Mr. COBLE. No.
The CLERK. Mr. Chairman, no.
Mr. COBLE. Are Members wanting to change their vote or vote? The gentleman from Virginia, Mr. Scott.
Mr. SCOTT. Mr. Chairman, I vote no.
The CLERK. Mr. Scott, no.
Mr. COBLE. The gentleman from North Carolina, Mr. Watt.
Mr. WATT. I'm not voting.
The CLERK. Mr. Chairman, Mr. Watt vote aye.
Mr. WATT. I would like to change my vote to no.
Mr. COBLE. The gentleman changes his vote to no.
The gentlelady from California, Ms. Lofgren?
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no.
Mr. COBLE. The Ranking Member, the gentleman from Michigan, Mr. Conyers?
Mr. CONYERS. Aye.

The CLERK. Mr. Conyers, aye.
Mr. COBLE. Are there—the gentleman from California, Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no.
Mr. COBLE. Are there other Members who wish to vote or change their votes? Ms. Jackson Lee, the gentlelady from Texas.
Ms. JACKSON LEE. How am I recorded?
The CLERK. Mr. Chairman, Ms. Jackson Lee is recorded as a pass.
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye.
Mr. COBLE. The Clerk will report.
The CLERK. Mr. Chairman, there are 7 ayes and 20 noes.
Mr. COBLE. And the amendment fails. Are there additional amendments?
Mr. WATT. Mr. Chairman?
Mr. COBLE. The gentleman from North Carolina, Mr. Watt.
Mr. WATT. Mr. Chairman, I have an amendment at the desk.
Mr. COBLE. I'll get you next, Mr. Cannon.
The gentleman from North Carolina, Mr. Watt.
Mr. WATT. I have an amendment at the desk.
Mr. COBLE. The Clerk will report.
The CLERK. Amendment to H.R. 4128, offered——
Mr. WATT. I ask unanimous consent the amendment be considered as read.
Mr. COBLE. Without objection.
[The amendment offered by Mr. Watt follows:]

Amendment to H.R. 4128

Offered By Mr. Watt (N.C.)

On page 1, Sec. 1, delete line 3 and all that follows through page 6, line 13.

On page 6, Sec. 8, delete line 4 and all that follows.

Renumber remaining Sec. 7 as Sec. 1, and omit from caption "Regarding Rural America".

Mr. COBLE. The gentleman is recognized for 5 minutes.
Mr. WATT. Thank you, Mr. Chairman. This amendment would strike the entirety of the bill other than section 7, which is the Sense of Congress section. There are some things in this—in section 7 that expresses the Sense of Congress that emphasizes our concern and desire for condemnation, eminent domain to be properly used and with restraint, but I think once we go beyond that, I think we have just gone too far.
I sit here sometimes, and I think I live in a different world than my colleagues. I live in a city in which at least half of the downtown area has been taken from African Americans and poor people

primarily under eminent domain on the theory that the parts of the city were blighted and that you had to remove those parts of the city to—for a public purpose. Back in the '70's and '80's everybody was calling it urban renewal. Throughout my community, we were calling it urban removal, because that's exactly what it was.

As a result of those condemnations, there's an Adams Mark Hotel that sits in the middle of where the Black community used to be. There is a Board of Education that's there, which I guess could still be done under this bill. There's an office building that I helped develop when I was practicing law. That's there because we Black folks went to the City Council and said, hey, you've taken all this property and you're giving it to rich White people, and the least you could do is allow one little minority business development to take place.

There is a Baptist Church on land. That's a private use that was taken. And more recently, I live in a city that has condemned for eminent domain the property that the Bank of America Stadium is built on. That's the stadium that the Panthers play in.

We don't have an idea whether it's privately-owned or publicly-owned, to be honest with you, because the football team certainly is privately-owned. They're the only tenant that will be able to use it. The payment of the bonds that were used to build the darn thing are paid for from a seat tax.

So I mean I don't know what world you all are living in. The *Kelo* decision has been the story of the African American and poor community for years and years and years. And so I just don't understand what world you're living in.

And this bill is not going to solve the problem that I'm describing because, still, blighted neighborhoods will be taken for a public purpose, and they will be predominantly minority communities, and certainly mostly poor communities. We're getting ready to take property by eminent domain to build a transit center. Is that public or private? The private trains will come into it. That is Amtrak public or private? We don't know whether it's public or private. Nobody sitting here knows whether Amtrak is public or private. We're certainly putting money into it as if it were public. But they charge a fee, just like our football team charges a fee. This public access that Mr. Goodlatte is talking about. I don't know what in the world he's talking about when you start charging a fee to get into something. I get into a lot of shopping centers a lot cheaper than I can get into our public-private partnership football stadium.

So I just don't understand what all this flap has been about, and I don't understand how this bill does anything to address it. We ought to be restrained in our use of eminent domain. I agree with that. The Sense of Congress part of this expresses that, and I think that's enough. I yield back the balance of my time.

Mr. COBLE. The gentleman's time has expired. The gentleman from Virginia.

Mr. GOODLATTE. I thank the Chairman. Mr. Chairman, I appreciate very much the sentiments expressed by the gentleman from North Carolina, but the fact of the matter is if his amendment is adopted, which guts the entire bill, then the legislation will indeed do as he says, achieve nothing.

What the legislation will achieve now is to have the effect of very, very strongly discouraging, as I think the gentleman from

New York has noted earlier, communities from taking the chance of taking private property for private economic development purposes. Some of the things the gentleman described that had occurred in his home city would be prevented by this. Some would not.

And the purpose of the bill is not to reverse the provision in the Constitution, which recognizes that you can take private property for public uses with just compensation. It is to say that when the Court defines what that private purpose is to mean simply increasing the amount of tax revenue for the community that that goes well beyond the meaning of public use. And we put the exercise and use of eminent domain back where it properly is.

I urge my colleagues to defeat this amendment. It would simply gut the bill.

Mr. COBLE. The gentleman yields back. The question occurs on the——

Ms. LOFGREN. Mr. Chairman? Mr. Chairman?

Mr. COBLE. The gentlelady from California.

Ms. LOFGREN. I move to strike the last word.

Mr. COBLE. The lady is recognized for 5 minutes.

Ms. LOFGREN. I want to speak in favor of the amendment, and, you know, I disagreed with the *Kelo* decision. And I've actually seen in my own community what I think is very questionable use of eminent domain where private property owners are removed and then other private property owners are given the property and benefit. And I think most people in my community disagree with that. I disagree with it.

But the question is, where is the appropriate remedy? The *Kelo* case outlined the maximum really that localities could go, but it doesn't mean the localities should go there. And the real question I've been struggling with is whether this is something that States ought to take up or whether it's something the Federal Government ought to insert itself into.

Every condemnation is done pursuant to a statute, and I may be the only Member of the Committee that's actually voted to condemn property when I was in local government to build—or maybe others did, too—but to build highways and the like. There is an appropriate case to be made if you're building a highway, as we built, you know, 60 miles of interstate highway, you have—we had to condemn some land to do that, and I think everybody understood that.

But I don't think this is drafted well, to be honest. And I think there's going to be a lot of questions about it. I was going to offer an amendment about public non-profit housing or affordable housing, and I now realize I don't even need to offer that amendment because that's going to be—fall into the exception here.

So I really think that a strong condemnation of this activity is warranted, and encourage States to do the right thing might be the better approach.

I think that this bill, although I'm sure well intentioned, is going to lead to a lot more litigation and lot more confusion than is even the current case, and that's why I support the gentleman's amendment, even though I oppose the kind of condemnation that was permitted in the *Kelo* decision.

And I yield back.

Mr. COBLE. The gentlelady yields back. All the——
Mr. NADLER. Mr. Chairman? Mr. Chairman?
Mr. COBLE. The gentleman from New York.
Mr. NADLER. Thank you. I'll be very brief.

I agree with the gentlelady from California. I think the problems we're getting into in this bill and the problems that are highlighted by Mr. Goodlatte's amendment that we'll be considering in a few minutes are showing that the distinctions that we think are clear cut between private and public are not so clear cut; that public utilities, for instance, which we think of as public utilities now under deregulation don't want to be common carriers anymore, and we'll talk about this under Mr. Goodlatte's amendment, but they're partaking more and more the character of private enterprises, and why should we give an exemption to this private enterprise to that private stadium, but not to that shopping center.

And I'm not sure—I thought when I started this meeting that this bill could be reworked and that we could have better definitions and so forth. And that's why I offered some of my amendments.

But as I'm listening to the discussion, I'm not sure that's really feasible. And maybe what the gentlelady suggested is right. Maybe we should simply have a strong Sense of Congress, and let the State legislatures work it out, and be the laboratories of democracy that we always talk about and not use the heavy hand of the Federal Government to say do it this way, especially when exactly what we mean by this way is very difficult to ascertain. So I support the gentleman's amendment.

Mr. WATT. Would the gentleman yield?
Mr. NADLER. Sure.
Mr. WATT. Just for a second. Mr. Chairman, Mr. Scott has pointed out to me that there's a wrong page reference in my amendment, so I ask unanimous consent on the second line of my amendment to change the number six to the number eight.
Mr. COBLE. Without objection.
Mr. WATT. Page number. Yeah.
Mr. NADLER. I yield back.
Mr. COBLE. The gentleman yields back.
Ms. WATERS. Mr. Chairman?
Mr. COBLE. The gentlelady from California.
Ms. WATERS. I move to strike the last word.
Mr. COBLE. The gentlelady is recognized.

Ms. WATERS. Let me oppose the amendment because I think if you have no punishment, no enforcement, and simply a Sense of Congress, that you're going to end up with these entities doing exactly what they want to do. I think that it is generally understood or accepted, you know, throughout this country, that eminent domain for public use is acceptable. And the citizens have a right to oppose it, and to the degree that citizens are not aware of their rights, or they don't feel powerful enough to fight City Hall, they do get run over. And that happens in many poor communities and minority communities.

When eminent domain for the taking of private property for private use hits a better off community, a more well-financed community, they fight it. That's why you have this case that wound its way up to the Supreme Court.

And so I think that when you start to make exceptions, that's where you get in trouble.

It should be straightforward, and eminent domain for public use, as it is understood, should remain. This bill should not in any way try to deal with that. This bill should simply say that there should be no taking of private property for private use and we should have the sanctions in the bill to say if you do it, you can't get any Federal money, and if you return it in 2 years and make the person whole that you took it from, then you will be eligible again. That's all the bill should do.

Mr. WATT. Will the gentlelady yield?

Ms. WATERS. Not yet.

When you start to list what you think is acceptable—and much of it is redundant because it is already acceptable for, you know, public use—but you really get into trouble when you start to list these exceptions that really protect certain developments and allow them to be used for private use. That's where you get in trouble. You can't have it both ways.

If you respect property rights and you want to protect property rights, you will be straightforward with it, and you would simply say no taking of private property for private use, period. That's all you have to say.

You don't have to list any exceptions. You don't have to talk about protecting public developments. That's already protected in law and in the Constitution.

So if there's any altering of the bill or amending the bill, I think that the amendment that I offered right in the beginning would take care of all of this. We wouldn't even be in this discussion. It's only when you try to have it both ways and you want a little bit of room so that some private takings can be okay for private use. That' when you get into trouble.

And, yes, I'll yield to the gentleman from North Carolina.

Mr. WATT. I thank the gentlelady for yielding.

The problem I have with the approach, though, is that leaves you able to condemn properties still for the removal of blight. That's a public purpose.

Ms. WATERS. No.

Mr. WATT. And—isn't it?

Ms. WATERS. No.

Mr. WATT. Well, I don't think there's anything in this bill that's going to change that. It is generally forever and a day as long as I've known been a public purpose that the removal of blight is a public purpose.

So here's where you're going to end up unless you deal with this, you give people—give public local governments the right to condemn for the removal of blight, but then there's no way—so then you have all this property sitting in the middle of our neighborhoods vacant and empty and nothing can be done with it because unless the city or the local government is going to build a retail establishment, you can't go into any kind of public-private partnership under that arrangement. You don't want the city to start going into business enterprise.

So then all you can do is take the property and let it sit there vacant.

Ms. WATERS. Reclaiming my time. I think that what you have described is an extended definition and understanding of the taking of private property for public use. That is not the accepted definition of the taking of private property under eminent domain laws.

And you will not find that it is used in that manner consistently throughout this country. It is only—that is only attempted in places where people don't fight back and people don't understand what the generally accepted definition is of the taking of property.

Mr. COBLE. The gentlelady's time has expired. The question occurs on the Watt Amendment. All in favor say aye.

Mr. SCOTT. Mr. Chairman, I move to strike the last word.

Mr. COBLE. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, I support the amendment, and I'm opposed to the underlying legislation, which is the response to the *Kelo* decision.

By enacting this legislation, we're undermining State's rights and assuming the role of City Council.

The fact that Members of Congress disagree with the decision of a locality in this regard is not—does not mean that we should change Federal law. So we should not create a Congress prerogative to either encumber the rights of States or their political subdivisions to make such decisions—when they make such decisions or penalize them for decisions that are theirs to make.

Mr. Chairman, even if we disagree with the judgment of the local elected officials, we should not change the law. We're elected, Mr. Chairman, as Members of Congress, not members of local City Councils.

Mr. Chairman, it is impossible for Congress to draw a bright line separating those cases in which economic development is appropriate for a particular area and when it is not.

This is for the local City Council to determine. Economic development is a process, clearly distinct from simply taking property from person A and giving it to person B for a "commercial enterprise carried on for profit." Trying to define it either affirmatively or through exclusions would either result in an overbroad or under inclusive result.

It would be impossible for Congress to define economic development so that it covers situations we want it to cover, such as the condemnation to eliminate blight, whatever that is, in an essentially deserted area to create an industrial park and not cover instances that we would not want to cover, such as taking the home of a woman who was born in the house, lived there all here life, and raised her children there to build a hotel.

It is not our job to do so. The needs of a particular community and the government interest in taking over rights of individual property owners are a balance that we must leave to the localities. We have to entrust individual localities to use good judgment in assessing their own needs, and sometimes it might mean taking the property for the purpose of economic development; sometimes it might not; sometimes we will agree, and sometimes we're not going to agree.

But I can't think of anymore fitting example than we've had this discussion is that the D.C. stadium issue. I find it ironic that at the same time we're making up this bill, Washington, D.C. is using

eminent domain to build a baseball stadium. And just listen at the result.

Depending on how the title of the stadium is held, it might be okay or not okay. If they soak the public for $300 million to build the thing, well, that would be okay.

If the owner decides to build it on his own, then he can't use eminent domain. You can go around the country and see all different kinds of ways that stadiums are built; some with a little private ownership; some public-private—all kinds of different ways. Some could have used eminent domain under this bill. Some could not.

The fact is, Mr. Chairman, that the World Trade Center and the Lincoln Center in New York, the Baltimore Inner Harbor, President Bush's stadium in Houston were all made possible by taking for purpose of economic development, and they all used eminent domain. We can agree or disagree whether these should have—whether they provide a benefit for their communities, but we should I think agree that those projects should not have been rendered illegal as they would be under this bill.

Sitting here in Washington, on Capitol Hill, we should not have the final say on projects such as these nor should we be enacting legislation to punish States or their political subdivisions by withholding Federal funds or determining which projects can go forward, and which cannot.

Mr. Chairman, if we cannot leave eminent domain to the States, then we ought to concentrate on the root issues that upset people, such as the lack of a guarantee for just compensation, including replacement costs, not just technical appraised value, relocation expenses for owners, as well as tenants, whether it's in residential or commercial context.

The bill does nothing to ensure that displaced individuals receive not only reasonable replacement value, but compensation for goodwill of businesses and due consideration for the length of time a family or business has been in the particular area.

And there's nothing in the bill to deal with the fact that victims of eminent domain are usually poor and minority. Let's put some protection in eminent domain to protect the poor and minorities from abuse. There's nothing in the bill to do that.

I'd like to submit, Mr. Chairman, letters from the National League of Cities and the National Conference of State Legislatures, which not surprisingly opposed the legislation, and, Mr. Chairman, I agree with their assessment that the decision of when property should be taken and when it should not should be made at the local and State level, not on a congressional level in the abstract. And, Mr. Chairman, I ask unanimous consent for those letters to be entered into the record.

Mr. COBLE. Without objection.

[The information follows:]

To strengthen and promote cities as centers of opportunity, leadership, and governance.

National League of Cities

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VIA FACSIMILE

November 3, 2005

The Honorable James Sensenbrenner, Chair
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr., Ranking Member
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Sensenbrenner and Ranking Member Conyers:

The National League of Cities (NLC) strongly opposes H.R. 4128, the *Private Property Rights Protection Act of 2005*. NLC is the country's largest and oldest organization serving municipal government, with nearly 1,600 direct member cities and 49 state municipal leagues, which collectively represent more than 18,000 United States communities.

NLC acknowledges the spirit underlying this bill and does not condone abuse of eminent domain power that violates state law. However, NLC believes this bill, or any anti-eminent domain bill pending in Congress, is unnecessary at this time because of the ongoing actions of state legislatures and the absence of direct evidence confirming that alleged abuses of eminent domain authority are of a national scope and scale that demand immediate federal action.

Despite fearful rhetoric in the press, the Supreme Court's decision in *Kelo v. City of New London* did not expand the use or powers of eminent domain. The *Kelo* decision confirmed that eminent domain, a power derived from state law, is not a one-size-fits-all power. The Court declared that this power is one best left to the states and their political subdivisions. 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.

NLC urges Congress to let state governments act on their own eminent domain laws and not move forward with federal legislation.

Many aspects of H.R. 4128, led by the proposed definition at Section 8 of "economic development," trouble NLC. Economic development is a process, not the concrete act of taking private property from A and giving it to B for a "commercial enterprise carried on for profit." If enacted, the bill could have the unintended consequence of preventing hurricane-damaged communities from rebuilding. In those communities, eminent domain may be necessary to assemble land and help with negotiations associated with comprehensive redevelopment plans. Implementing those comprehensive redevelopment plans would "increase tax revenue, tax base, employment, or general economic health," violating the bill's further definition of economic development.

Moreover, the bill at Section 2(b) grants final authority to the appointed – not elected – judiciary to determine what constitutes "economic development." Curiously, this was an important argument against the *Kelo* decision raised by property rights activists.

The practical effects from this bill, including its loose definition at Section 8 of "Federal economic development funds" and its creation of a private right of action at Section 4 that invites forum shopping, would not chill, but rather freeze the process of economic development across the country.

Eminent domain is a powerful tool for local governments -- its prudent use, when exercised in the sunshine of public scrutiny, helps achieve a greater public good that benefits the entire community.

Again, NLC opposes H.R. 4128 for the reasons stated in this letter. Please weigh carefully the unintended consequences from a rush to pass federal legislation in response to unsubstantiated fears over the Supreme Court's decision in *Kelo v. City of New London*.

Sincerely,

Donald J. Borut
Executive Director

NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

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Assistant Senate Minority Leader
Illinois
President, NCSL

Susan Clarke Schaar
Clerk of the Senate
Virginia
Staff Chair, NCSL

William T. Pound
Executive Director

October 25, 2005

The Honorable James Sensenbrenner
Chair, Judiciary Committee
Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers
Ranking Member, Judiciary

U.S. House of Representatives
Washington, DC 20515

SUBJECT: H.R. 3135

Dear Chairman Sensenbrenner and Ranking Member Conyers:

On behalf of the National Conference of State Legislatures (NCSL), I write in strong opposition to H.R. 3135 the "Private Property Rights Protection Act of 2005" which is scheduled to be marked up on October 26. This ill-advised bill would severely chill state and local revitalization efforts, preempt state and local land use laws, and curtail many valid and constitutional state and local projects that require the use of the eminent domain power by prohibiting any federal funding that goes to the states from being used for "any activity, including increasing tax revenue, other than making private property available in substantial part for use by the general public or by an entity that makes the property available for use by the general public, or as a public facility, or to remove harmful effects." This means that if a state or locality were to use the power of eminent domain for economic development purposes, even if such action was completely in accordance with its own statutes and land use development ordinances and regulations, the state could lose all applicable federal funding. This piece of legislation amounts to federal blackmail of states for using a completely constitutional and valid state power.

The power of eminent domain has always been, and should remain, a state power. **The *Kelo v. New London* Supreme Court decision did not expand state authority to condemn private property for economic development. It merely reaffirmed existing law on the subject.** There is substantial Supreme Court case law dating as early as 1954 which upholds the power of state and local governments to take and retransfer property, upon payment of just compensation, in order to promote economic development.[1]

It is also important to be aware that in the aftermath of the *Kelo* decision, twelve states – Alabama, California, Delaware, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Texas – have already introduced bills, and three of these states – Alabama, Delaware, and Texas – have already enacted legislation in special session to address the power of eminent domain in their state. We expect to see many more states address the issue of eminent domain

[1] *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407(1992); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Ruckleshaus v. Monsanto*, 467 U.S. 986 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

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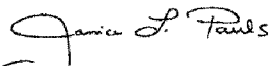
in their next legislative session. All of our state materials on eminent domain can be found on NCSL's website:

www.ncsl.org/programs/natres/EMINDOMAIN.htm

Again, I urge you to oppose H.R. 3135. If you have any questions, please contact Susan Parnas Frederick, Senior Committee Director at 202-624-3566, susan.frederick@ncsl.org. Thank you.

Respectfully,



Representative Janice L. Pauls
Kansas House of Representatives
Chair, NCSL Committee on Law & Criminal Justice

Cc: Members of Judiciary Committee, United States House of Representatives

Mr. SCOTT. And I yield back the balance of my time.

Ms. JACKSON LEE. Mr. Chairman? Mr. Chairman?

Mr. COBLE. All right, Mr. Scott. Folks, I'm going to try one more time.

Ms. JACKSON LEE. Mr. Chairman?

Mr. COBLE. I failed again. The gentlelady from Texas.

Mr. COBLE. For what purpose does the gentlelady seek recognition?

Ms. JACKSON LEE. I ask to strike the last word.

Mr. COBLE. The gentlelady is recognized.

Ms. JACKSON LEE. I thank the Chairman very much for his indulgence. I think the overwhelming impact, or the shocking impact, of the recent Supreme Court decision causes the need for the debate on this question. I am quarreling with the underlying bill, which I happen to be a co-sponsor of, but I'm not quarreling with the premise. And that is that, in spite of my good friends, the State Legislators and the National League of Cities, which I've served as a member of the board as a member of the Houston City Council, I do think that there is a need for a strong statement to be made on behalf of the United States Congress.

The act of the Supreme Court was egregious as it relates to the *Kelo* decision. It made a statement that they could take, without due process, private property for a public use, in this instance economic development. I am concerned, as the gentlelady from California has so noted, the chronicling of exceptions, and there is a long list. I'm probably going to support the underlying bill so that it can make its way through to the floor of the House, and then hopefully have some sort of effective discussion between the House and the Senate.

With respect to my colleague from North Carolina, I'm not sure if the best approach is to retain only a sense of Congress, because, as I said, I think that the decision was egregious enough, I guess, from the perspective of so many that it warrants an effective response. This bill may not be the best response because it delineates a number of exceptions which may add more confusion than what we have now.

One of the other elements that I'd like to raise, and I join with the comments that have been made that there are no protections against communities—or for communities who would have their property taken on the pretense of eliminating blight. And I raise this issue because we have a serious concern to address with respect to the Hurricane Katrina survivors and those who have left properties in Mississippi, Alabama, and Louisiana. Now Wilma has waged a devastating impact. We know that the eyes of the culprits, economic developers—visionaries, allegedly—are eyeing the properties of those in New Orleans.

One of the things that poor people do not understand, and I do not know the Louisiana property laws, is that the house may be lost but you may have some vested interest, and should have some vested interest in the plot of land. If that is the case, then they're going to be subjected to massive eminent domain or the taking, under the pretense that their property is untenable and not viable to be rebuilt because of where it is, or that it is for the betterment of New Orleans to rebuild it as a fabulous resort city.

So I am concerned that this bill does not—and it was obviously written, maybe, before Hurricane Katrina, but we're now taking it up in the midst of it—does not take into consideration the needs of those populations, the needs of impoverished people, the concerns about blight, because those of us who have lived in blighted neighborhoods, grown up in blighted neighborhoods, we know that our areas have been encroached upon and many of our homesteads that we grew up in don't exist anymore, because it was unsightly to some and it was a prime area to take over, such as what is happening in Anacostia today in Washington, D.C.

So I would just simply to proponent Mr. Goodlatte and Mr. Sensenbrenner—Mr. Goodlatte, I see that you've kept the rule protection in, but I raise this concern with you because I do think that this legislation could have been less riddled with exceptions and we could have made our point very clear in following the sort of simplicity of the gentlelady from California's point, get right to the point of what we want to do, is to protect people from having their private property condemned for private use. And I think that's a simple state of affairs that we could have written in this bill and left to the local jurisdictions their way of complying with that Federal law. And believe me, they would have been able to build whatever they wanted to build, to build whatever hospitals, whatever public schools, with that kind of legislation. But they would not have been able to come and build a waterfront, a beautiful waterfront, and taking people's properties or other kinds of properties to take for someone else's pretty development.

And that's the difficulty I have with this legislation and, as well, my concern with the amendment that is now before us.

I yield back.

Mr. COBLE. The gentlelady yields back. For what purpose does the gentleman from California seek recognition?

Mr. LUNGREN. Strike the requisite number of words.

Mr. COBLE. You will be recognized for 5 minutes.

Mr. LUNGREN. Mr. Chairman, I have to respond to the comments by my friend from Virginia, who basically is asking us why are we here and what are we doing with this. He suggests we don't need to do anything.

I would just refer as to the words in the dissent in the *Kelo* case in which the dissent made the point that as a result of the majority's decision, now any property may now be 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 for those with fewer resources to those with more. And then they say the Founders cannot have intended this perverse result.

Now, I remember the words of the minority leader, I think 1 or 2 days after the *Kelo* decision, when asked whether Congress ought to act, and she said no, and she looked at the *Kelo* decision, in her words, It was as if God has spoken. There are some of us who don't believe the Supreme Court speaks as if it has divine intervention powers. And yet, the influence of that decision, *Kelo*, is to essentially give free rein to local communities to violate what many of

us think is the original intent of the Founders when they enacted this provision in the Constitution.

This simply says that to the extent we in this branch of Government, the Federal branch of Government, can influence whether or not we are going to distort the meaning of the Founders in the original sense, that we can act and say that Federal dollars will not be used for this purpose. That's solely what we are doing. If they want to make other decisions at the local level, they are perfectly entitled to do that using their own money. And they can say, We make the decision that we're going to expand the idea of how we can take property from private people and use it for economic purposes, and we are so sure of our position there that not only do we believe that our constituents will support us, but we don't need Federal funds to do it.

And that's simply all we are doing. It is our only ability to respond to the Supreme Court decision, which roundly was seen as an aberration, I would say. I've never seen such condemnation on both Democrat and Republican sides. And to those who say, you know, it took something like this to wake up some on our side as to the abuses that have taken place in the past, if that's a criticism, I'll accept that criticism. But it doesn't render the essential analysis as inappropriate or ineffective or without content.

Frankly, I didn't think we'd ever see a day when the Supreme Court would go this far and give such wide parameters to abuse in this area of the Constitution. And for that reason, I think it's an imperative that we act on this bill and we act on this bill now, and we not gut this bill with amendments which render the bill ineffective.

Ms. WATERS. Will the gentleman yield?

Mr. LUNGREN. I'd be happy to yield to my friend from California.

Ms. WATERS. Well, you know, essentially I agree with you and everything that you have said. I feel the absolute same way. And this decision I think was one of the most stunning decisions I've experienced. And so I don't understand, then, given that we both think that way, why you would accept any exceptions in this bill, to the taking of private property for private use. Why would you agree that there should be some exceptions?

Mr. LUNGREN. I don't believe that I would consider these exceptions in the definitional sense. Rather, we are establishing bright lines between that which is public use and that which is not public use. And it seems to me if we have missed some, we can go back and we can look at that. With the question of stadia that people have talked about in terms of private stadia and public stadia, I think we've gone far enough here. At the same time, I would look at what I think are the abuses right now in terms of bonds and tax exempt bonds used for what essentially are private purposes in some of these stadiums. But that's a different issue, and I don't think we ought to confuse it here.

And I thank the gentlelady for her comments, and it is nice to see that we can agree on something.

Ms. WATERS. Almost.

Mr. LUNGREN. Well, I think we're both going to vote for the bill.

Mr. COBLE. Mr. Watt, I was going to try one more time on your amendment, but I see the gentleman from Alabama wants to be recognized, and the chair recognizes him.

Mr. BACHUS. Mr. Chairman, there's one thing that's been said today that——

Mr. COBLE. For what purpose does the gentleman seek recognition?

Mr. BACHUS. I beg your pardon?

Mr. COBLE. For what purpose does the gentleman seek recognition? Strike the last word?

Mr. BACHUS. Strike the last word.

Mr. COBLE. The gentleman is recognized for 5 minutes. [Laughter.]

Mr. BACHUS. Mr. Chairman, one thing that has been said today that we need to be very careful about, and we've talked about railroads. In this country since we started building railroads in the 1820's, we have known that railroads, although they were private companies in many cases, most cases, now almost all cases, that they were constructed for the public benefit. And today railroads—and I'm not talking about Amtrak, I'm talking about private freight railroads. Shippers will tell you today, in fact shippers all over the country urge a lot of times that a railroad be built so that they can have two different sources to ship their goods on. We could not ship agriculture goods in this country without our railroads. And coal. We couldn't heat our homes. The lights in this building are dependent on railroads. Every water system, clean drinking water is dependent on the railroads because the railroads ship 99 percent of your chlorine.

And for that reason, as we talk about private use, I hope that we will remember that whether it's bringing coal from the West to the East or whatever, that taking land for railroads is really a traditional use.

Mr. NADLER. Will the gentleman yield?

Mr. BACHUS. And the reason railroads, you know, not barges, because, you know, our barges are on navigable waterways, we provide those paths. Airports, we build airports. Even though there are private airplanes, I hope we're not going to say here that because it's private companies that land at those airports, we're going to continue—seize lands for the airports.

Mr. NADLER. Would the gentleman yield on that point?

Mr. BACHUS. I will.

Mr. NADLER. I agree with the gentleman. I would point out that under a reading of the bill, and I don't know how a court would come out, if you look at page 8, where it exempts certain things from the provisions of the bill, it says "conveying private property to public ownership, such as for" various things, "that makes the property available for use by the general public as of right, such as a railroad, public utility" et cetera, I would read that to mean a passenger railroad, because the passenger railroad is a common carrier and anybody can get on it, whereas a freight railroad such as you're talking about operates by contract, and doesn't have to accept any shipper.

Mr. BACHUS. We've used as one example of what we would or wouldn't do, where we would seize private——

Mr. NADLER. What I'm saying, sir——

Mr. BACHUS.—private property for a private industry. We've always done that——

Mr. NADLER. No, no, I'm agreeing with you. What I'm saying, sir, is that as I read this bill, that would change. And a passenger railroad would be exempted from the provision of the bill, but a freight railroad that operates by contract might not be exempted, as you and I would both wish.

Mr. GOODLATTE. Would the gentleman yield?

Mr. BACHUS. I would yield.

Mr. GOODLATTE. I thank the gentleman for yielding. There is no difference. Both a private freight railroad and a private passenger railroad are common carriers under the law and——

Mr. NADLER. Oh, that's true.

Mr. GOODLATTE.—completely exempted under this language.

Mr. BACHUS. If it says "common carrier," that includes our freight——

Mr. SCOTT. Will the gentleman yield?

Mr. BACHUS. I think my time is up. I will yield if I have any time.

Mr. COBLE. The gentleman has 1 minute left.

Mr. BACHUS. I'll yield to the gentleman from Virginia.

Mr. SCOTT. I point out that the requirement under the law, with or without the Supreme Court decision or with or without the bill, has to be public benefit. And we've heard that the stadiums may count and may not. I guess it depends on if the skyboxes are publicly auctioned rather than you can pick and choose. You might lose your exemption under this. Industrial parks are clearly private, but there'd be something that the city council might want to use eminent domain to put together an industrial park. But it has to be public benefit. And that doesn't change under this amendment. You still have to have public benefit.

Mr. BACHUS. Again, let me just summarize again. I just, as we continue to use examples, I hope we'll leave the railroads out, because it's not a good example.

Mr. COBLE. Does the gentleman yield back?

Mr. BACHUS. And I yield the balance of my time.

Mr. COBLE. Folks, before the Watt amendment expires, I want to call the question on the Watt amendment.

All in favor, say aye?

Opposed, no?

It appears the noes have it. The noes have it, and the amendment fails.

Are there additional amendments?

Mr. CANNON. Mr. Chairman?

Mr. COBLE. The gentleman from Virginia, Mr. Goodlatte. Then I'll get you next, Mr. Cannon.

Mr. GOODLATTE. Thank you, Mr. Chairman. I appreciate the gentleman from Utah forbearing, but while we're talking about this particular section of the bill, I do want to offer an amendment, which I have at the desk. Amendment number 1.

Mr. COBLE. The clerk will report.

The CLERK. Amendment to H.R. 4128, offered by Mr. Goodlatte.

Mr. COBLE. Without objection, the amendment will be considered as read.

[The amendment offered by Mr. Goodlatte follows:]

Amendment to H.R. 4128
Offered by the Hon. Bob Goodlatte #1

Page 8, line 20, stike "public utility,".

Page 9, after line 7, insert the following: "(F) taking private property for use by a public utility"

Mr. COBLE. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

This is an amendment that makes it clear that a public utility, which is commonly understood as a type of common carrier, Black's Law Dictionary, for example, defines public utility as follows: A company that provides necessary services to the public, such as telephone lines and service, electricity, and water. A person, corporation, or other association that carries on an enterprise for accommodation of the public, the members of which are entitled as a matter of right to use its facilities.

The Government could take property for use as a public utility under the bill. This language would make that very clear.

Mr. COBLE. The question occurs on the Goodlatte amendment.

All in favor, say aye?

Opposed, no?

It appears the ayes have it. The ayes have it, and the amendment passes.

Mr. NADLER. Mr. Chairman?

Mr. COBLE. Are there additional amendments? The gentleman from New York, Mr. Nadler, is recognized.

Mr. NADLER. Thank you, Mr. Chairman.

I have the other amendment at the desk.

Mr. COBLE. The clerk will report.

Ms. JACKSON LEE. Mr. Chairman? I'm not recorded.

Mr. COBLE. The gentlelady from Texas? There's been no rollcall vote, Ms. Jackson Lee.

Ms. JACKSON LEE. Was that a vote?

Mr. COBLE. Voice vote.

Mr. NADLER. It's not the final passage?

Mr. COBLE. No.

Ms. JACKSON LEE. Okay. Thank you.

The CLERK. Amendment to H.R. 4128, offered by Mr. Nadler. Page——

Mr. COBLE. Without objection, the amendment will be considered as read.

[The amendment offered by Mr. Nadler follows:]

Amendment to H.R. 4128
Offered by Mr. Nadler

Page 4, line 5, strike the period and insert:

", or if such property is condemned in good faith for a public use, as defined in this Act, but is subsequently used for economic development due to a change in circumstances not reasonably foreseeable at the time such condemnation proceedings were concluded."

Mr. COBLE. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you.

Mr. Chairman, there's a problem, I believe, in the bill that says—if you look at the bottom of page 3, section 4(b), it says "Limitation on bringing an action. An action brought under this act may be brought if the people 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 7 years following the conclusion of any such proceedings and the subsequent use of such condemned property for economic development."

Now, I'm not sure how that is supposed to be read, whether it means you can't bring it more than 7 years after the conclusion of the condemnation proceedings or more than 7 years after the subsequent use of such condemned property for economic development, 10 or 12 years after the conclusion of the condemnation proceedings.

But regardless of that question, this holds open—Mr. Goodlatte, I hope you listen to this—this holds open the possibility of a lawsuit, whose successful conclusion would deprive the city or the State or whoever of Federal funds for 2 years, for years—either 7 years or perhaps longer, depending how you read that, after the condemnation proceedings if—if the land that is condemned, ostensibly for public use, is later used for a private use.

Now, let me give you an example. Suppose that a city decides to build a 5-mile-long subway line and condemns property for that public purpose. And 10 years later, they determine they only have the funds to complete 3 miles of the line. So the land that they've condemned for one or two stops along the line is never going to be used. So they're now with a piece of surplus property that was supposed to be used for a subway stop, but the line stopped short of that. So now they're going to sell it for a private purpose.

Well, they would seem to be subject now to a lawsuit. So what this amendment says is that you shall not be subject to the lawsuit if the property were condemned in good faith for a public use, as defined in the act, and is subsequently used later because of a change in circumstances not reasonably foreseeable at the time of the condemnation for other purposes, for private economic development.

In other words, you condemn land in good faith for a public use, later something happens that was not foreseeable, and it results in your using that land—selling it for private economic development, you should not hold the city or State open for 7 years or longer to losing 2 years of Federal aid then. It doesn't serve the purpose of the bill and it really puts a cloud on all the city finances for the future.

Mr. CONYERS. Mr. Chairman?

Mr. NADLER. So I urge the adoption of the amendment and I yield back.

Mr. GOODLATTE. [Presiding] I thank the gentleman. The chair recognizes himself in opposition to the amendment.

I appreciate the gentleman's concern and the circumstances. However, the phrases that are used in this amendment—"good faith," "reasonably foreseeable"—move us back in the direction of the *Kelo* decision of giving too much discretion to the courts to determine what we're talking about. And I would strongly oppose it just because those are very, very subjective terms. What we're trying to address here are specific uses that we're allowing, and that's where the language in the bill is headed. If we were to adopt this amendment, we would be moving back toward a situation where the court would be able to determine what indeed good faith is, what indeed reasonably foreseeable is.

I would yield to the gentleman.

Mr. NADLER. Yes, the court would have to determine that. But if you don't do this, if you don't do this, then you're leaving open any city or State to a real problem in case something happens. You can't foresee everything. And again, let me give you that example.

Ms. WATERS. Will the gentleman yield?

Mr. NADLER. No, I won't yield for the moment. In good faith——

Mr. GOODLATTE. I have the time, so——

Mr. NADLER. Oh.

Mr. GOODLATTE. I will allow the gentleman to make his point, then I will yield to the gentlewoman.

Ms. WATERS. Thank you.

Mr. NADLER. But in good faith, there is a public purpose, something subsequently changes years later. You have to allow for some flexibility.

Ms. WATERS. Will the gentleman yield?

Mr. GOODLATTE. Reclaiming my time, I will say to the gentleman I would have to oppose this amendment. I would be happy to work with the gentleman on the matter that he is concerned with, but I cannot support this amendment.

I yield to the gentlewoman.

Ms. WATERS. Thank you. And I would agree with you, Mr. Chairman. If in so-called good faith private property is taken and then it is not used, this bill is designed to give it back to the people you took it from, not to talk about, Oh, now I can use it for something else. So I would oppose the amendment.

Mr. CONYERS. Mr. Chairman?

Mr. GOODLATTE. The gentleman from Michigan is recognized for 5 minutes.

Mr. CONYERS. Well, I won't need 5 minutes because I don't want States and cities to get into the habit of taking property for a public purpose and then later deciding, intentionally or unintentionally, that they need to use it for economic development. To allow them to use condemned property for economic development, so long as it was taken originally in good faith, is, I say to my friend from New York, a bit of a stretch. And I think it goes away from the concept that many of us here, and certainly I as a proponent of the measure before us, we want to tighten this thing up. And I'm not sure if that does it. And I reluctantly oppose the amendment of my friend from New York.

I return the balance of my time.

Mr. GOODLATTE. The question occurs on the amendment offered by the gentleman from New York.

All those in favor, respond by saying aye?

Opposed, no?

In the opinion of the chair, the noes have it and the amendment is not agreed to.

Are there further amendments?

Mr. CANNON. Mr. Chairman?

Mr. GOODLATTE. The gentleman from Utah.

Mr. CANNON. There are two amendments at the desk under the name of Mr. Flake that I would like to offer en bloc.

Mr. GOODLATTE. The clerk will report the amendments.

The CLERK. Amendment to H.R. 4128, offered by Mr. Cannon. Page 9, line 10, insert "or through" after "distributed to."

Amendment to H.R. 4128, offered by Mr. Cannon. Add at the end the following:

Mr. GOODLATTE. Without objection, the amendments will be considered as read. And the chair seeks unanimous consent for the amendments to be considered en bloc.

There being no objection, the amendments will be considered together.

[The amendments offered by Mr. Cannon follow:]

AMENDMENT TO H.R. 4128

OFFERED BY MR. FLAKE OF ARIZONA

Add at the end the following:

SEC. ____. 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.

H.L.C.

AMENDMENT TO H. R. 4128

OFFERED BY MR. FLAKE OF ARIZONA

Page 9, line 10, insert "or through" after "distributed to".

Mr. GOODLATTE. The gentleman from Utah is recognized for 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman.

In this legislation we're trying to prohibit Federal funds being distributed to States or political subdivisions from being used for eminent domain for economic development. That does not prevent Federal funds from being passed through States or political subdivisions for such uses. By inserting, in the first—the short amendment, "or through" after "distributed to," we clarify that Federal funds would not be able to be funneled by a State or County to another political subdivision to circumvent the principles of this legislation. And I urge the Committee to adopt that portion of the en bloc amendment.

The second amendment, the longer amendment, clearly states that the policy of the United States to protect and promote private property rights is prescribed under the United States Constitution. Beyond the *Kelo* decision, we are confronted with the problems our Government has in protecting private property rights in our country, especially in the West. Prior to the *Kelo* decision, the Supreme Court rulings had reaffirmed private property rights but also ruled that Government actions other than condemnation may result in taking, for which compensation is required. Over 80 percent of Mr. Flake's home State, Arizona, and over ⅔ of my home State, Utah, are public lands. And the decisions out of Washington, D.C. have negatively affected landowners, and just compensation for regulatory takings has been denied. So it is my hope that this amendment will send a signal to bureaucrats here in Washington that this Government's policy is to protect the rights of landowners in the United States.

Thank you, Mr. Chairman. With that, I yield back the balance of my time.

Mr. GOODLATTE. Will the gentleman yield?

Mr. CANNON. I will be happy to yield.

Mr. GOODLATTE. I have no objection to these amendments and would be happy to accept them, on my part. Is there further discussion on the amendments?

Being none, the question occurs on the amendments.

All those in favor, respond by saying aye.

Opposed, no.

In the opinion of the chair, the ayes have it. The amendments are agreed to.

Are there further amendments?

The question occurs on the motion to report the bill, H.R. 4128——

Mr. CHABOT. Mr. Chairman?

Mr. GOODLATTE. Who seeks recognition? The gentleman from Ohio.

Mr. CHABOT. Move to strike the last word. I would just ask unanimous consent to have my opening statement entered into the record, and yield back.

Mr. GOODLATTE. Without objection, so ordered.

Mr. CHABOT. Thank you.

[The prepared statement of Mr. Chabot follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE CHABOT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

The Fifth Amendment to our Constitution provides critical protections that prevent the government from unlawfully seizing private property. There should be no doubt that the Fifth Amendment is essential to protecting our basic freedoms and the economic vitality of our nation. Yet it is a right so fundamental, that it has been taken for granted since the founding of our nation.

That, of course, changed with the Supreme Courts decision in *Kelo vs. City of New London*—a decision that places all privately held property at risk to government seizure.

The idea that a persons home or business can be taken by the government and transferred to another private entity simply to allow the government to collect additional tax revenue seems anathema to the values Americans cherish.

However, the Supreme Court has now thrown its weight behind this distinctly un-American ideal by ruling that economic development can be a public use under the Fifth Amendment's Takings Clause. Essentially, the court held that private property can be taken from homeowners through a process called eminent domain and put to public use by a private business.

Few would question that the Constitution provides a legitimate role for eminent domain when the purpose is a true public use and the property owner receives just compensation. Properly used, eminent domain should give communities an option of last resort to complete the development of roads, schools, utilities and other essential public infrastructure projects.

A few weeks ago, however, I chaired a hearing in the Constitution Subcommittee that made it clear that eminent domain is not always properly used and that *Kelo* may further open the floodgates to abuse. In fact, we were told that a minimum of 10,000 properties were either seized or threatened with condemnation for private development in the five-year period between 1998 and 2002. And following the *Kelo* decision, high-profile economic development takings were on the fast track from Connecticut to California with judges across the country relying on *Kelo* to support government takings that forcibly transfer private property from one owner to another.

As a former member of the Cincinnati City Council and Hamilton County Commission, I would be remiss if I did not mention my concern for the unintended consequences that congressional action could have on communities—especially struggling urban areas—throughout the United States. My friend from Ohio and former Mayor of the City of Dayton, Congressman Mike Turner, who leads the Speaker's "Saving America's Cities Working Group" has been a strong advocate for revitalizing our nations cities and raising these same concerns about unintended consequences to urban areas.

During our hearings in the Constitution Subcommittee, Indianapolis Mayor Bart Peterson warned that overly broad legislation could have a "chilling effect" on urban renewal efforts. He asked that Congress work to balance the important interests involved and recognize that the availability of eminent domain has led to more job creation and home ownership opportunities than any other economic development tool. If that tool vanishes, he said, redevelopment experienced in many communities in recent years would literally come to a complete halt.

Now, I recognize that some of those concerns may be overstated. We should not lose sight of the fact that local governments have many different kinds of incentive, zoning, and code enforcement tools to promote economic development without having to resort to the taking of private property. However, Mayor Peterson raises some credible issues that we should continue to consider as we move forward with this legislation.

I want to thank Chairman Sensenbrenner and ranking-member Conyers for their leadership on this critical issue. Many members of this Committee—myself included—raised concerns about a long-term assault on property rights in America even before the *Kelo* decision. Today, we have an opportunity to defend an important constitutional principle and the fundamental rights of our constituents. As Justice O'Connor wrote in her *Kelo* dissent, "Nothing is to prevent a state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

Mr. GOODLATTE. The question occurs now on the motion to report the bill, H.R. 4128, favorably as amended.

All in favor, say aye.

Opposed, no.

In the opinion of the chair, the ayes have it. The motion to report favorably is adopted.

Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted here today.

Mr. SCOTT. rollcall?

Mr. GOODLATTE. A rollcall vote is requested. All those in favor of reporting the bill favorably, respond by saying—will respond favorably to the clerk's call of the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Lungren?

Mr. LUNGREN. Aye.

The CLERK. Mr. Lungren, aye. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Bachus?

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye. Mr. Inglis?

Mr. INGLIS. Aye.

The CLERK. Mr. Inglis, aye. Mr. Hostettler?

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye. Mr. Green?

Mr. GREEN. Aye.

The CLERK. Mr. Green, aye. Mr. Keller?

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye. Mr. Issa?

Mr. ISSA. Aye.

The CLERK. Mr. Issa, aye. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?

Mr. FORBES. Aye.

The CLERK. Mr. Forbes, aye. Mr. King?

Mr. KING. Aye.

The CLERK. Mr. King, aye. Mr. Feeney?

Mr. FEENEY. Aye.

The CLERK. Mr. Feeney, aye. Mr. Franks?

Mr. FRANKS. Aye.

The CLERK. Mr. Franks, aye. Mr. Gohmert?

[No response.]

The CLERK. Mr. Conyers?

Mr. CONYERS. Conyers votes aye.

The CLERK. Mr. Conyers, aye. Mr. Berman?

[No response.]

The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no. Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Ms. Wasserman Schultz?
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Ms. Wasserman Schultz, aye. Mr. Chairman?
Mr. GOODLATTE. Aye.
The CLERK. Mr. Chairman, aye.
Mr. COBLE. Are there Members who wish to vote?
The gentleman from California?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Mr. GOODLATTE. The gentleman from California, Mr. Lungren?
[No response.]
Mr. GOODLATTE. Mr. Gohmert?
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert, aye.
Mr. COBLE. The gentleman from Massachusetts, Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye.
Mr. GOODLATTE. The clerk will report.
The CLERK. Mr. Chairman, there are 27 ayes and 3 noes.
Mr. GOODLATTE. And the bill is reported favorably.

Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted here today.

Without objection, the staff is directed to make any technical and conforming changes. All Members will be given 2 days, as provided by the House rules, in which to submit additional, dissenting, supplemental, or minority views.

That concludes the markup. I thank everyone for their participation. Without objection, the markup is adjourned.

[Whereupon, at 6:22 p.m., the Committee was adjourned.]

ADDITIONAL CONCURRING VIEWS

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 burdens, whether for classically public projects, or for economic devel-

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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.

opment 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.

This unpredictable, open-ended, and substantial financial exposure would be faced by any jurisdiction exercising eminent domain

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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).

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

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[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.

[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).

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 responding to the same concerns behind this legislation. They are, however, better able to respond to local needs and local realities.

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[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).

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.