MARKUP OF H.R. 1689

"PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2017"

Wednesday, April 25, 2018

House of Representatives,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to call, at 2:00 p.m., in Room 2141, Rayburn House Office Building, Hon. Bob Goodlatte [chairman of the committee] presiding.]

Present: Representatives Goodlatte, Sensenbrenner, Chabot, King, Gohmert, Jordan, Marino, Collins, DeSantis, Buck, Ratcliffe, Gaetz, Biggs, Rutherford, Handel, Rothfus, Nadler, Lofgren, Jackson Lee, Johnson, Deutch, Cicilline, Lieu, Raskin, Schneider, and Demings.

Staff Present: Shelly Husband, Majority Staff Director;
Brandon Ritchie, Majority Deputy Staff Director; Zach
Somers, Majority Parliamentarian and General Counsel; Bobby Parmiter, Majority Chief Counsel, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations; Jason Cervenak, Majority Counsel, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations; Meg Barr, Majority Counsel, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations; Paul Taylor, Majority Chief Counsel, Subcommittee on the Constitution and Civil Justice; David Greengrass, Minority Counsel; James Park; Matthew Morgan, Minority Counsel; Danielle Brown, Minority Legislative Counsel; Joe Graupensperger; Rachel Calanni, Minority Professional Staff Member; and Alley Adcock, Clerk.
Chairman Goodlatte. The Judiciary Committee will come to order. Without objection, the chair is authorized to declare a recess at any time. Our first order of business is ratifying an updated subcommittee roster. Every member should have a copy on his or her desk.

I ask unanimous consent that the committee approve the appointments and assignments for our subcommittees as shown on the roster. Without objection, the updated subcommittee roster is approved. Before we begin today's markup, I would also -- well, I think we will wait until he is actually here.

Today we were scheduled to consider H.R. 3356, the Prison Reform and Redemption Act, introduced by Congressman Doug Collins and Congressman Hakeem Jeffries. It is cosponsored by a bipartisan group of committee members, including four Republicans and seven Democrats.

Given the time constraints we have today and a request from members to work out some minor changes, we will postpone consideration of that bill and the Juvenile Justice legislation. We will consider the prison reform bill at the next markup of the committee, which will occur the week of May 7, and I look forward to considering it then.

Mr. Nadler. Mr. Chairman?

Chairman Goodlatte. For what purpose does the gentleman from New York seek recognition?
Mr. Nadler. I just want to comment briefly on the issue of our consideration of criminal justice reform. I want to first recognize the hard work of crime subcommittee member Sheila Jackson Lee, Hakeem Jeffries, Doug Collins, Karen Bass, and others including the chairman, who have attempted to develop a consensus bill on prison reform. I understand that the chairman intends to continue to work on that legislation during the coming weeks. During this time, I hope that we will also return to discussions concerning sentencing reform.

Explosion of the population of our Nation’s prisons in recent decades has led to a crisis of overincarceration, which is the result of unwise and unjust sentencing laws. In my view, considering prison reform without consideration of sentencing reform has the process backward and would avoid the difficult but necessary legislating on that critical issue. Therefore, I hope that we will recognize the importance of sentencing reform in our work in the weeks ahead.

Chairman Goodlatte. Would the gentleman yield?

Mr. Nadler. Sure.

Chairman Goodlatte. I thank the gentleman for yielding, and the gentleman knows my longstanding interest in also doing sentencing reform. We have not been able to reach a meeting of the minds on that, and I am fully
dedicated to continuing to do that. We also have a number of other criminal justice reform measures, including related to civil asset forfeiture, mens rea or criminal intent, policing strategies, making sure that innocent people do not go to prison. And I am committed to doing as much work as possible in all of those areas, provided that we can achieve the kind of bipartisan consensus that we have achieved with regard to prison reform and prison reentry reform.

And so, it is my hope that we can move as many of those bills as possible, but it is also my belief that each has strong merits on their own, and that we should not delay proceeding with those that can proceed and that have that kind of strong bipartisan support while we work on the others. But you have my commitment to work on all of those.

Mr. Nadler. Reclaiming my time, I appreciate the chairman’s commitment. I agree with the chairman on the importance of all these subjects that he mentioned. I do think, however, that prison reform and sentencing reform are very intermixed and really should be considered together. I yield back.

Chairman Goodlatte. Pursuant to notice, I now call up H.R. 1689 for purposes of markup and move the committee report the bill favorably to the House. The clerk will report the bill.

Ms. Adcock. H.R. 1689, to protect private property
rights --

[The bill follows:]

********** INSERT 1 **********
Chairman Goodlatte. Without objection, the bill is considered as read and open for amendment at any time, and I will begin by recognizing myself for an opening statement.

The protection of private ownership of property is vital to individual freedom and national prosperity. It is also one of the most fundamental constitutional principles, as the Founders enshrined property rights protections throughout the Constitution, including in the Fifth Amendment, which provides that private property shall not be taken for public use without just compensation.

This clause created two conditions to the government taking private property. First, the subsequent use of the property must be for the use of the public. And second, that the government must pay the owner just compensation for the property. However, more than a decade ago, the Supreme Court, in a controversial 5-to-4 decision, in Kelo v. City of New London, expanded the ability of State and local governments to exercise eminent domain powers beyond what is allowed by the text of the Constitution, by allowing government to seize property under the vague guise of economic development, even when the public use turns out to be nothing more than the generation of tax revenues by another private party after the government takes property from one private individual and gives it to another private entity.
As the dissenting justices observed, by defining public use so expansively, the result of the Kelo decision is effectively to delete the words "for public use" from the takings clause of the Fifth Amendment.

The specter of condemnation hangs over all property. The government now has license to transfer property from those with few resources to those with more. The Founders cannot have intended this perverse result. In the wake of this 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 citizens' homes, farms, churches, and small businesses to make way for shopping malls and other developments.

To help prevent such abuse, using Congress's constitutional legislative powers, it is important that Congress finally passes the Private Property Rights Protection Act.

I want to thank Mr. Sensenbrenner for reintroducing this legislation. He and I have worked together on this issue for many years, and I am pleased that this legislation incorporates many provisions from legislation I helped introduce in the 109th Congress, the STOP Act.

Specifically, the Private Property Rights Protection Act would prohibit State and local governments from receiving Federal economic development funds for two years
when they use economic development as a justification for taking property from one person and giving it to another private entity. In addition, this legislation grants adversely-affected landowners the right to use appropriate legal remedies to enforce the provisions of the bill and allows State and local governments to cure violations by giving the property back to the original owner.

The bill also includes a carefully-crafted definition of "economic development" that protects traditional uses of eminent domain, such as taking land for public uses like roads, while prohibiting abuses of the eminent domain power. No one should have to live in fear that the government could take their home, farm, or business, simply to give it to a wealthier person or corporation.

As the Institute for Justice has witnessed, observed during a hearing on this bill, using eminent domain so that another richer, better-connected person may live or work on the land you used to own, tells Americans that their hopes, dreams, and hard work do not matter as much as money and political influence. The use of eminent domain for private development has no place in a country built on traditions of independence, hard work, and protection of property rights.

This legislation has passed the House three times previously, either by voiced vote or with the support of at least 80 percent of House members in an overwhelmingly
bipartisan vote -- only to be stalled in the Senate. But the fight for people's homes continues, as will this committee's efforts to protect Federal taxpayers from any involvement in eminent domain abuse.

Just a few years ago, every single Republican member voted for the very same legislation on the House floor, as did two-thirds of Democratic members. I urge all of my colleagues to join me in supporting this overwhelmingly bipartisan effort.

It is now my pleasure to recognize the ranking member of the Judiciary Committee, the gentleman from New York, Mr. Nadler, for his opening statement.

[The prepared statement of Chairman Goodlatte follows:]

********** COMMITTEE INSERT **********
Mr. Nadler. Thank you, Mr. Chairman. Mr. Chairman, I question whether marking up H.R. 1689, the Private Property Rights Protection Act of 2017, is the wisest use of the committee's time. To begin with, the bill is a response to Kelo v. City of New London, a now well-established 13-year old Supreme Court decision to which most State legislatures have already reacted by curtailing their eminent domain authority.

Worst yet, this measure could potentially devastate the finances of State and local governments. It also raises federalism concerns. For these reasons, I most oppose the bill.

Kelo affirmed the right of a city to use eminent domain to take and transfer property from one private party to another for the public purpose of economic development. Building on a century of precedent defining "public use" to include a public purpose, the Court held that such a transfer satisfied the Fifth Amendment's takings clause, which provided no person's -- quote -- "private property shall be taken for public use without just compensation" -- close quote.

This legislation seeks to overturn Kelo by prohibiting the use of eminent domain for the purpose of economic development through private-to-private property transfers by any State or local government that receives Federal economic
development funds. The bill defines "economic development funds" broadly, to include any Federal funds distributed to States and localities under laws designed to improve or increase their economies. Should a State or local government violate this prohibition, it is subject to the loss of all such funds for two years.

The power of eminent domain is an extraordinary one and should be used with great care. Historically, there are examples of States and localities abusing eminent domain power for purely private gain or to benefit one community at the expense of another. Eminent domain, however, is also an important tool, making possible transportation networks, irrigation projects, and other public works that support communities and are integral to their economic and social well-being.

I continue to believe, as I have since 2005, when we first considered this bill, that it is the wrong approach to a very serious issue. Most importantly, this bill would cast the cloud over potential future takings and could destroy State and local governments' ability to float bonds because of the increased risk and the attendant increased interest rates.

The loss of all Federal economic development funds is so draconian and misguided a penalty, that a government that never takes a prohibited action would be financially hobbled
by it. Municipal bonds could not be sold or could be sold only for very high interest rates because of the fear that the municipal government might, in the future, use eminent domain improperly, and thereby lose all Federal economic aid, and with it, the ability to repay the bonds.

Even projects unrelated to takings could lose funding, and cities could face bankruptcy simply by incorrectly guessing whether a given project would sufficiently qualify as being a public use.

In addition, the bill's definitions appear to prohibit some projects that might have a genuine public purpose, while allowing other uses that historically have been abused. There is no obvious rhyme nor reason to such disparate treatment.

For example, H.R. 1689 allows the use of eminent domain 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." Does that include, for example, a stadium? A stadium is privately owned and available for use by the general public as a right. Affordable housing, such as the HO-6 program, which uses Federal money to encourage private development of mixed-income housing as a way to respond to failing public housing projects, or the Nehemiah Program, a faith-based affordable housing program in Brooklyn, could never have gone forward.
So, under this bill, public housing completely constructed by the government is permissible, but public-private partnerships for affordable housing are not. In addition, the bill is unnecessary. Since the Kelo decision, there have been new developments that call into question whether Congress should even act at this point. In response to Kelo, more than 40 States have moved aggressively to narrow their eminent domain laws. In doing so, States have carefully considered the implications of this decision and the needs of their citizens.

H.R. 1689 does not even help an aggrieved property owner or tenant because they cannot sue to stop the allegedly prohibited taking. They cannot get any damages, other than the just compensation they got at the time of the taking. The bill only authorizes suit after a condemnation proceeding, when it is too late. All that injured persons can get is the psychic satisfaction that they may get from bankrupting their community. In other words, this bill provides no remedy to the victim of the improper taking.

Finally, H.R. 1689 undermines federalism and may raise constitutional concerns. Subject to the takings clause, local land use decisions are generally left to the judgments of State and local governments, which are in the best position to weigh local conditions and competing interests. This is the essence of federalism, and Congress should not
be in the business of sitting as a national zoning board. Also, the loss of all economic funding, even for projects that may have nothing to do with takings, is so draconian that it may amount to an unconstitutional coercion of State and local governments.

The bill takes a sledgehammer to what may not even be a nail. It threatens communities with bankruptcy without necessarily protecting property owners or the communities most vulnerable to abuse of the eminent domain power, all while raising potential federalism concerns. For these reasons, I urge the committee to reject this bill.

And before yielding back the balance of my time, as ranking member of the Committee on the Judiciary, I want to express my appreciation for Mauri Gray's work with the committee over the past 2 years, as this is her last week. Mauri came to us as a detailee, having worked for nearly 6 years as an assistant public defender in Puerto Rico. As counsel to the committee's Democrats, Mauri provided indispensable analysis and advice concerning oversight hearings and a wide range of legislation. We have appreciated and benefited from Mauri's energy, enthusiasm, and insight over the past two years, and wish her the best in her move to Phoenix, Arizona.

With that, I yield back the balance of my time.

[The prepared statement of Mr. Nadler follows:]
325  ********** COMMITTEE INSERT **********
Chairman Goodlatte. Thank you, Mr. Nadler. And I want to join you in expressing the committee's appreciation to Ms. Gray for her service to the --

Ms. Jackson Lee. Does the gentleman yield?

Mr. Nadler. Certainly.

Ms. Jackson Lee. May I just add my appreciation to Mauri Gray, with a caveat that we hope we will see her soon. But she has been outstanding and a real commitment to justice issues, and as well to issues in particular dealing with the criminal justice sub-committee. So, let me wish her a farewell, but a temporary one, and much appreciation and applause for her service to the Nation. I yield.

Chairman Goodlatte. Thank you, Ms. Jackson Lee. The chair now recognizes the gentleman from Wisconsin, chairman of the Crime Subcommittee, and the chief sponsor of this legislation, Mr. Sensenbrenner, for his opening statement.

Mr. Sensenbrenner. Thank you very much, Mr. Chairman. I am pleased that the committee is considering H.R. 1689, the Private Property Rights Protection Act. This is an oldie but goodie. You know, it has been overwhelmingly passed in this committee and in the House of Representatives three times in the past. The Senate has failed to do the right thing, and we ought to give them a chance to recant.

My bill aims to restore the property rights that the Supreme Court usurped in 2005. Our nation's Founders
recognized the importance of the individual right to personal property and enshrined it in the Constitution. The Fifth Amendment plainly states, "Nor shall private property be taken for public use without just compensation."

However, our legal understanding of public use changed drastically by the Supreme Court when it ruled, in Kelo v. the City of New London, that economic development can be a public use under the Fifth Amendment's takings clause.

In the 5-to-4 decision, the Court held that the government could take private property from an owner -- in this case, Susette Kelo, to help a corporation or a private developer -- in this case, Pfizer. And the now-infamous Kelo decision generated a massive backlash. The former Justice O'Connor stated in her dissent, "The government now has license to transfer property from those with fewer resources to those with more. The Founders could not have intended this perverse result."

Even 13 years after Kelo, polls show that Americans overwhelmingly oppose property being taken and transferred to another private owner, even if it is for the public economic good -- read, more taxes. If the Private Property Restoration Act is needed to restore these individual property rights that the Supreme Court invalidated -- although several States have passed legislation to limit their power of eminent domain, a number of State supreme
courts have barred this practice under their State constitution. And these laws only exist to a varying degree.

H.R. 1689 would prohibit state and local governments that receive federal, economic development funds from using those funds as a justification for using eminent domain powers. The state and local government that violates this prohibition will be ineligible to receive Federal economic development funds for 2 years. This is the stick to make sure that this law works.

The protection of private property rights is one of the most important freedoms guaranteed under the Bill of Rights. I am mindful of the need to end the long history of eminent domain abuse, particularly in low-income neighborhoods, which consist of predominantly minority communities. I am also mindful of the reason we should allow the government to take lands that is deemed hazardous and constitute an immediate health [sic] to public health and safety.

I believe this bill accomplishes both goals. I urge my colleagues to join me in protecting private property rights for all Americans and limiting the dangerous effect of the Kelo decision, and yield back the balance of my time.

[The prepared statement of Mr. Sensenbrenner follows:]

********** COMMITTEE INSERT **********
Chairman Goodlatte. We will come back to the
gentleman. Mr. Cohen has stepped out. So, we will go to
the gentleman from Iowa, Mr. King, the chairman of the
Subcommittee on the Constitution and Civil Justice, for his
opening statement.

Mr. King. Thank you. Thank you, Mr. Chairman, and I
appreciate being recognized, and I appreciate Mr.
Sensenbrenner, and you, and others working to bring the Kelo
decision forward.

I wanted to recap some of my memories with regard to
the Kelo decision. And when that decision came down, it was
shocking to us who read the Constitution -- "nor shall
private property be taken for public use without just
compensation." It is very, very clear. Our Founding
Fathers had great reverence for property -- life, liberty,
and property. And yet, the effect of that decision was, as
Chairman Goodlatte said, to strike three words from the
Fifth Amendment, “for public use."

And I was livid at that decision of the Supreme Court.
I could not think it could be more starkly wrong. And when
the Court comes down with a decision that does not match up
to what the Constitution says, then we look at that and we
think, "Well, how are we going to amend the Constitution to
fix this one?" And the only words we could come up with
were "And we really mean it this time; put those three words
back in." Of course, we know that is not any more effective
than the original words that were there.

So, we brought a resolution within 7 days. We brought
a resolution of disapproval to the Florida House of
Representatives. And I had not yet read Justice O'Connor's
dissent. But when I went to the floor, I found out that,
later on, that my words matched hers. And I was sitting in
the front row, waiting for the former member of this
committee, Barney Frank, to finish his statements, planning
on rebutting Mr. Frank. And what I found out was he agreed
with me. And it all flowed out the same way -- that "for
public use" is an important clause within the Fifth
Amendment and it needs to be restored within the Fifth
Amendment. So, Justice O'Connor, Barney Frank, Steve King,
and a whole list of others, agreed that the Fifth Amendment
means what it says.

I brought, also, an amendment to the appropriations
bill to strike, as my memory tells me, $1.5 million from the
administrative budget of the Supreme Court, which was a
nominal amount of the property that was confiscated in New
London. And of course, that amazingly did not pass off the
floor of the House at that time. But it sent a message to
the Court, and the Court was completely out of bounds. I
hosted a breakfast with Justice Scalia some months after
that. And this a part that I wanted to make sure goes into
the record. He said he expected the erroneous -- that is my
word, "erroneous" -- I will just put it this way: he
expected the Kelo decision, at some point, to be reversed by
the Court. I look forward to that day, and we are doing
what we can do this day to restore as many property rights
as we can, legislatively.

So, I applaud the authors of this legislation, urge its
adoption -- yield back the balance of my time.

[The prepared statement of Mr. King follows:]

********** COMMITTEE INSERT **********
Chairman Goodlatte. The chair thanks the gentleman.

Are there any amendments to --

Mr. Nadler. Mr. Chairman?

Chairman Goodlatte. For what purpose does the gentleman from New York seek recognition?

Mr. Nadler. I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Adcock. Amendment to H.R. 1689, offered by Mr. Nadler of New York. Page 1, Line 8, strike "in general."

Page 2, strike Line --

[The amendment of Mr. Nadler follows:]

********** COMMITTEE INSERT **********
Chairman Goodlatte. Without objection, the amendment is considered as read and the gentleman is recognized for 5 minutes on his amendment.

Mr. Nadler. Thank you, Mr. Chairman. Mr. Chairman, my amendment is very straightforward, and I hope the members, regardless of their views on the underlying bill, will consider its merits.

The amendment would strike the bill's draconian penalty and replace it with one that would enable aggrieved parties to go to court before a taking occurs, to try to stop it, rather than waiting until after it is too late, when the only remedy under this bill is to cause their community financial ruin.

The bill, as proposed, imposes a substantial penalty on any jurisdiction that is found to have used the power of eminent domain for a prohibited purpose or that has put the condemned property to a prohibited use at a later time.

The penalty is the loss of all economic development funding for a two-year period. As the bill does not specify what the term "economic development funding" means, we can only guess. We can assume that if it includes most of the programs we normally associate with economic development, the loss of that funding or the requirement that it be repaid to the Federal Government would be financially devastating to the jurisdiction hit by the penalty.
Given the tight budget States and localities face, it would probably bankrupt most of them. But the problem does not end there. In view of the threat of the bill's penalty and in view of the uncertainty of what a subsequent mayor and governor might do, it is inescapable that no jurisdiction could ever float another bond again. No prudent bond underwriter would ever take a chance that, over the life of a bond, over the 25 to 30-year life of the bond, a future administration might make a mistake and compromise its ability to repay the note by giving up the Federal aid for two years, by an improper taking at some future time.

Even if the jurisdiction does nothing wrong, even if it never uses eminent domain at all, it will be paralyzed financially by the penalty in this bill, because the fear that it might, at some point in the future, use eminent domain improperly and might, therefore, lose all Federal aid would inhibit its ability to sell bonds.

And it makes no sense, because the bill does not even help aggrieved property owners since it does not let them go to court until the condemnation has been completed. At that point, they have lost their property, and they have received whatever compensation they are entitled to under the law. The bill does not give them the opportunity to stop the condemnation. It does not give them the ability to go to court to have their property returned. It does not give
them any damages. The only thing they can get is the
perverse satisfaction of bankrupting their community.

My amendment takes another approach, which I think
achieves the goals of the bill without destroying the
finances of every State and local government in the country.
The amendment allows the property owner, or his tenant, or
the Attorney General, to go to court not after the
condemnation, but when it begins. The property owner would
be able to seek equitable relief, including an injunction
against the taking, damages, if appropriate, and attorney's
fees.

If the taking is illegal under this bill, it would be
stopped, and the property owner would get to keep his
property. If he is damaged by the illegal taking, he can
get compensation. That is what every homeowner wants. A
homeowner wants to keep his property and protect it from
illegal takings. That is what my amendment would give him.

Now, frankly, somebody asked, if I do not like this
bill, why am I making it effective? And the answer is
because I do not want every locality, whether they ever use
eminent domain or not, to have a cloud on their future
Federal aid that will inhibit them from floating bonds. So,
to prevent the cloud on the future Federal aid that would
limit or eliminate the ability of local governments to float
bonds, and to give property owners faced with an improper
taking the ability to stop that taking, rather than to sit
around, cry after it, and do nothing to get compensation or
get equitable relief to stop it, but only to ruin their
community, I move this amendment. I yield back the balance
of my time.

Mr. Sensenbrenner. Mr. Chairman?

Chairman Goodlatte. For what purpose does the
gentleman from Wisconsin --

Mr. Sensenbrenner. I rise in opposition to the
amendment.

Chairman Goodlatte. The gentleman is recognized for 5
minutes.

Mr. Sensenbrenner. Now, Mr. Chairman, this amendment
guts the bill. There is no two ways about that. You know,
and it seems to me that in order to make the bill effective,
there has got to be a stick involved with the carrot. And
the stick is very simple. And that is, if you break the
law, you are going to have to pay for it. And the paying
for this is not getting economic development funds for two
years.

Now, in many cases, the economic development funds are
used to help finance the taking. So, you know, where are we
at? You know, if you do not have that kind of a penalty,
you are going to see communities that want to take people's
property because they can get more tax revenue out of
putting a shopping mall or a Four Seasons Hotel up instead of the old house or houses that are there, going ahead and trying to do that as well, as a way of relieving their budget problems.

So, the amendment is really a canard. Now, let me talk about the type of relief that is available in the bill without the amendment of the gentleman from New York. They are comprehensive. They include all manner of relief from preliminary injunctions and temporary restraining orders, the award of attorneys' fees, and the ability of the State or locality to return or replace the property to avoid the penalties under this bill. That is key.

Without Mr. Nadler's amendment, if the municipality has broken the law and has taken a piece of private property for some nebulous economic development reason, they can get out of losing their Federal economic development funds for the next two years simply by offering to return or replace the money or the property. So, you know, really, you know, what is the beef?

You know, Mr. Nadler's complaint about bond counsel being very squeamish about authorizing or signing off on bond issues, in my opinion, is a canard. You know, the thing is, there are all kinds of laws on the books. And maybe there will be a penalty involved, and bonds cannot be marketed if they break another part of the law that does not
deal with this. So, I think we have to assume that the
 States and localities will be law-abiding. They will follow
 this law as they have to follow all of the other laws
 relative to the flotation of bonds or other types of debts.
 And we even give the states or localities some wiggle room
 to get out of this simply by offering to return or replace
 the property. I believe that this amendment should be
 overwhelmingly rejected. I urge a no vote and yield back
 the balance of my time.

 Chairman Goodlatte. For what purpose does the
gentleman from Maryland seek recognition?

 Mr. Raskin. Move to strike the last word. I want to
speak in favor of the amendment.

 Chairman Goodlatte. The gentleman is recognized for 5
minutes.

 Mr. Raskin. Mr. Chairman, thank you very much. I rise
in support of the amendment, not just because it makes the
underlying intent of the bill effective, as Mr. Nadler says,
but because it makes the bill constitutional. Otherwise,
without it, I think the way the bill is written is
unconstitutional. Everybody here knows about the Supreme
Court's decision in NFIB v. Sebelius in 2012, which struck
down the provision in the Affordable Care Act -- in
Obamacare -- which said that "If you, the State, do not go
along with the Medicaid expansion, we are going to cut off
all Medicaid funds to you." And the Supreme Court said that that was coercive and abusive use of the spending power. It must be much more closely targeted so that it could only really be said, "if you do not expand, you will not get the money that we are giving to the States that are, in fact, expanding."

But look at what the bill does as I read it -- and please correct me if I am wrong, Mr. Chair -- if the Commonwealth of Virginia -- if the city of Alexandra, for example, engages in use of eminent domain power, which is declared to run afoul of the provision in this bill which says you cannot use it for economic development. At that point, no city or county in Virginia or the State itself could receive any economic development funding from the U.S. government. That is Richmond, and Charlottesville, and Roanoke. Everybody is cut off. At least that is the way that I am reading it. And you know, if that is not right, I hope we can clarify that.

I think that that is clearly unconstitutional under the Supreme Court's authority on what is proper use of our spending power discretion.

But let me just also --

Mr. Sensenbrenner. Will the gentleman yield?

Mr. Raskin. Please.

Mr. Sensenbrenner. Okay. You know, I believe the
court in Sebelius made it clear that Congress may attach appropriate conditions to the Federal taxing and spending programs to preserve its control over the use of Federal funds. You know, that is --

Mr. Raskin. You are just stating a truism there. But what about my point?

Mr. Sensenbrenner. No. I am stating what the Supreme Court said in the case that you cited. And that is --

Mr. Raskin. Okay. Well --

Mr. Sensenbrenner. -- 132 Supreme Court --

Mr. Raskin. -- let me reclaim my time, then.

Mr. Sensenbrenner. -- 2566 at 2603, 2012.

Mr. Raskin. Let me reclaim my time, if I could. Well, what the Supreme Court said in striking down that provision was the Congress could not punish the State for not participating in that particular expansion of the Medicaid program by taking away all Medicaid funding. And that is exactly the design of this bill here, which is -- "If you engage in what we view as an improper" -- not even an unconstitutional, but an improper -- "use of eminent domain in one of your subdivisions, we will cut off all economic development funding to you in all of the programs."

And please correct me on that specific point, if you can. I am happy to yield. Okay. Thank you. So --

Mr. Raskin. By all means.
Mr. Nadler. I think the gentleman is entirely correct, because clearly, Congress can condition Medicaid funds on certain things connected with the use of the use of the Medicaid funds. What the court found was that a draconian punishment of cut-off of all Medicaid was coercion of the State, and here what you are talking is all economic development funds, whether connected with that taking or not, whether connected in any logical way with the taking or not. It is clearly punitive. The bill makes it punitive, and it is clearly coercive, and it falls squarely afoul of the Sebelius decision. In fact, I would say it is far more coercive and more unconstitutional, if you can say that, than the case in the Sebelius decision.

Mr. Cicilline. Will the gentleman yield to a question?

Mr. Raskin. By all means.

Mr. Cicilline. As I think about the gentleman’s argument, is not this actually even more egregious? Because at least in the Sebelius case there was a decision by the State that was attempted to be punished. In this example, there will be counties that did not make a decision that was inconsistent with the legislative intent of the decision that will be punished. I mean, there seem to be due process arguments even.

Mr. Raskin. Well, yes. Reclaiming my time, that is the point I am trying to make about Richmond and
Charlottesville and Roanoke.

Mr. Raskin. You are essentially punishing the entire State for what one city or town has done in running afoul of congressional intent.

Mr. Rothfus. Will the gentleman yield?

Mr. Raskin. Yes, by all means.

Mr. Rothfus. Just a question. I am looking at Page 2, Line 8: “A violation of Subsection A by a State or political subdivision shall render such State or political subdivision.” I think it is pretty clear there that we are talking about not an entire State. So, in your example, if Alexandria did something, Charlottesville is not going to be affected.

Mr. Raskin. Well, let’s see. Except that if you look at the beginning of it, “No State or political subdivision shall exercise its power of domain or allow the exercise of such power by any person or entity,” et cetera. As you know, under Dillon’s rule, all power in the local governments is derivative of State power. So any power that Charlottesville or Richmond has, or Alexandria, or Arlington, comes from the State. The State would be allowing it to exercise its eminent domain power in a way that is antithetical to congressional purpose. So, I think unless we clarify it, all of the public funds would have to be revoked at that point. Mr. Chair, if I could just
reclaim my time --
Chairman Goodlatte. The time of the gentleman has expired. The chair recognizes himself in opposition to the amendment in defense of the Commonwealth of Virginia and its subdivisions and yields to the gentleman from Wisconsin.

Mr. Sensenbrenner. Well, I thank the gentleman for yielding. Again, with all due respect, I think the gentleman from Maryland has erroneously interpreted the law. The Sebelius case, you know, also said that the Federal Government could not kill all Medicaid funds, because Medicaid funds frequently exceed 20 percent of the total State budget.

Now, you know, South Dakota ended up suing the Federal Government over withholding 5 percent of highway funds for States that did not raise the drinking age to 21. That was upheld. Now, there is no way that taking away economic development funds for a jurisdiction that has been found by a court to violate this proposed law will come to close to the 5 percent that was okayed in South Dakota v. Dole. So, you know, with all due respect, Chicken Little is wrong on this one. The sky is not falling because of the small amount of funds for economic development that will be denied for two years to a jurisdiction that has been found by a court to violate the law that is being proposed here.

Mr. Raskin. Will the gentleman yield?
Mr. Sensenbrenner. The time belongs to the Chairman.

Chairman Goodlatte. I will be happy to yield.

Mr. Raskin. Thank you, Mr. Chairman. Just two points on that. One is, does everyone then agree that the punishment, the financial punishment, should not apply to other subdivisions of the State? It should apply only to the subdivision which runs afoul of congressional purpose? Is that the intent? That would be my first question. The second is, I am not quite sure what the 5 percent --

Chairman Goodlatte. Reclaiming my time, the answer to that is yes. We only intend the subdivision that violates the law to receive that penalty.

Mr. Raskin. Okay. And so, but I am not quite sure what the 5 percent and 20 percent from those two disparate contexts refer to. One, I recall, is about highway funding in States that do not adjust the drinking age --

Chairman Goodlatte. It is saying that there are many subdivisions in the Commonwealth of Virginia, the example that you cited, and that the economic development funds from the Federal Government to any one of them would be a tiny percentage of the amount paid to the State of Virginia.

Mr. Raskin. But the constitutionally relevant point is, what percentage of the funding is cut off? And here it would be 100 percent of economic development funding that would be --
Chairman Goodlatte. To the community that had violated law, and a court had found them to have violated the law, very different than the Sebelius case in which the Supreme Court noted that the States had agreed to and were participating in the existing Medicaid program. And the Federal Government saying they would cut off all of those funds for not expanding the program is a very different dynamic than breaking the law and saying you are going to lose the funds if you break the law.

Mr. Nadler. Would the gentleman yield?

Chairman Goodlatte. I will yield.

Mr. Nadler. It is not different at all, because you are breaking the law by engaging in a taking, and maybe you thought you were not breaking it, but you know, the question is how economic the taking was. But the punishment is not funding related to that taking. The punishment is all economic development funds. It is precisely congruent with the Sebelius case. I yield back.

Chairman Goodlatte. The question occurs on the amendment offered by the gentleman from New York. All those in favor, respond by saying aye.

Those opposed, no.

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

Are there further amendments to H.R. 1689? A reporting
quorum being present, the question is on the motion to report the bill H.R. 1689 as amended favorably to the House. Those in favor will respond by saying aye. Those opposed, no. In the opinion of the chair, the ayes have it, and the bill is ordered reported favorably. Members will have two days to submit views. And before we adjourn I would like to take a moment to welcome back to the committee a returning veteran of the committee, and that is Representative Keith Rothfus. He previously served on the committee in the 113th Congress, and we are very thrilled to have him rejoin us. As the representative of Pennsylvania’s 12th District, his experience in the private sector helping small businesses expand and create jobs for Americans will be invaluable once again to the committee. So, please join me in welcoming him back. Does the gentleman from New York seek to say anything on this subject? Mr. Nadler. Yes, I join the chairman in welcoming the gentleman from Pennsylvania back to the committee. Some good sense from Pennsylvania is always to be desired. Chairman Goodlatte. I thank the gentleman from Pennsylvania. This concludes our business for today. Thanks to all the members for attending, and the markup is adjourned.
[Whereupon, at 4:03 p.m., the committee adjourned subject to the call of the chair.]