HEARING ON THE "PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2013"

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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APRIL 18, 2013

HEARING ON THE "PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2013"

THURSDAY, APRIL 18, 2013

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10:09 a.m., in room 2141, Rayburn Office Building, the Honorable Trent Franks, (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, Chabot, Gohmert, DeSantis, Nadler, Conyers, and Scott.

Staff present: (Majority) Zach Somers, Counsel; Sarah Vance, Clerk; (Minority) David Lachmann, Subcommittee Staff Director; Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We have called this hearing to examine the continuing need for Congress to pass the Private Property Rights Protection Act. This legislation is needed to blunt the negative impact of the Supreme Court's decision in *Kelo v. City of New London*, which permits the use of eminent domain to take property from homeowners and small businesses and transfer it to others for private economic development.

In Justice O'Connor's words, the *Kelo* decision pronounced that, "Under the banner of economic development, all private property is now vulnerable to be taken and transferred to another private owner so long as it might be upgraded. Nothing is to prevent a state from replacing any Motel 6 with a Ritz Carlton, any home with a shopping center, or any farm with a factory."

The *Kelo* decision was resoundingly criticized from across all quarters. In 2005, the House voted to express grave disapproval of the decision and overwhelmingly passed the Private Property Rights Protection Act, with 376 Members voting in favor and only 38 Members voting against.

In the last Congress, the House once again passed this legislation, this time by voice vote. Unfortunately, the bill has not been taken up by the Senate.

The Private Property Rights Protection Act prohibits states and localities that receive Federal economic development funds from using eminent domain to take private property for economic development purposes. States and localities that use eminent domain for private economic development are ineligible to receive Federal economic development funds for 2 fiscal years.

Every day, local governments in search of more lucrative tax bases take property from homeowners, small businesses, churches and farmers and give it to large corporations for private redevelopment. Federal law currently allows Federal funds to be used to support such condemnations, encouraging this abuse nationwide. This bill will restore Americans' faith in their ability to build, own, and keep their property without fear that the government will take it and give it to someone else. It will tell commercial developers that they should seek to obtain property through private negotiation, not by government force.

Too many Americans have lost homes and small businesses to eminent domain abuse, forced to watch as private developers replace them with luxury condominiums and other "upscale" uses. Family farms have been wiped out by eminent domain to make way for shopping centers and big-box stores. Churches, generally entitled to tax-exempt status, are often seized through eminent domain to be replaced by more lucrative private development.

Unfortunately, it is usually the most vulnerable who suffer from economic development takings. As Justice Thomas observed in his dissenting opinion in *Kelo*, "Extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use but are also the least politically powerful. The deferential standard this Court has adopted for the public use clause encourages the citizens with disproportionate influence and power in the political process, including large corporations and development firms, to victimize the weak."

I am pleased this week that Mr. Sensenbrenner and Ms. Waters introduced again the Private Property Rights Protection Act. We must restore the private property rights protections that were erased from the Constitution by the *Kelo* decision. John Adams wrote over 200 years ago that, "property must be secured or liberty cannot exist." As long as the specter of condemnation hangs over all property, our liberty is threatened.

I look forward to the witnesses' testimony, and now I recognize the Ranking Member, Mr. Nadler, for 5 minutes for his opening statement.

[Discussion Draft of H.R. _____, the "Private Property Rights Protection Act of 2013" follows.]

.....

(Original Signature of Member)

113TH CONGRESS
1ST SESSION

H. R. _____

To protect private property rights.

IN THE HOUSE OF REPRESENTATIVES

Mr. _____ introduced the following bill; which was referred to the Committee on _____

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 2013".

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 used for economic development within 7 years after that exercise, if that State or political subdivision receives Federal economic development funds during any fiscal year in which the property is so used or intended to be used.

(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. In addition, the State or political subdivision must pay any applicable penalties and interest to reattain eligibility.

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 (1) owner of private property whose property is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, or (2) any tenant of property that is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, may bring an action to enforce any provision of this Act in the appropriate Federal or State court. A State shall not be immune under the 11th Amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. In such action, the defendant has the burden to show by clear and convincing evidence that the taking is not for economic development. Any such property owner or tenant may also seek an appropriate

relief through a preliminary injunction or a temporary restraining order.

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

(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. REPORTING OF VIOLATIONS TO ATTORNEY GENERAL.

(a) SUBMISSION OF REPORT TO ATTORNEY GENERAL.—Any (1) owner of private property whose property is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, or (2) any tenant of property that is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, may report a violation by the Federal Govern-

ment, any authority of the Federal Government, State, or political subdivision of a State to the Attorney General.

(b) INVESTIGATION BY ATTORNEY GENERAL.—Upon receiving a report of an alleged violation, the Attorney General shall conduct an investigation to determine whether a violation exists.

(c) NOTIFICATION OF VIOLATION.—If the Attorney General concludes that a violation does exist, then the Attorney General shall notify the Federal Government, authority of the Federal Government, State, or political subdivision of a State that the Attorney General has determined that it is in violation of the Act. The notification shall further provide that the Federal Government, State, or political subdivision of a State has 90 days from the date of the notification to demonstrate to the Attorney General either that (1) it is not in violation of the Act or (2) that it has cured its violation by returning all real property the taking of which the Attorney General finds to have constituted a violation of the Act and replacing any other property destroyed and repairing any other property damaged as a result of such violation.

(d) ATTORNEY GENERAL'S BRINGING OF ACTION TO ENFORCE ACT.—If, at the end of the 90-day period described in subsection (c), the Attorney General determines that the Federal Government, authority of the Federal

Government, State, or political subdivision of a State is still violating the Act or has not cured its violation as described in subsection (c), then the Attorney General will bring an action to enforce the Act unless the property owner or tenant who reported the violation has already brought an action to enforce the Act. In such a case, the Attorney General shall intervene if it determines that intervention is necessary in order to enforce the Act. The Attorney General may file its lawsuit to enforce the Act in the appropriate Federal or State court. A State shall not be immune under the 11th Amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. In such action, the defendant has the burden to show by clear and convincing evidence that the taking is not for economic development. The Attorney General may seek any appropriate relief through a preliminary injunction or a temporary restraining order.

(e) LIMITATION ON BRINGING ACTION.—An action brought by the Attorney General under this Act may be brought if the property is used for economic development following the conclusion of any condemnation proceedings condemning the property of an owner or tenant who reports a violation of the Act to the Attorney General, but

shall not be brought later than seven years following the conclusion of any such proceedings.

(f) ATTORNEYS' FEE AND OTHER COSTS.—In any action or proceeding under this Act brought by the Attorney General, the court shall, if the Attorney General is a prevailing plaintiff, award the Attorney General a reasonable attorneys' fee as part of the costs, and include expert fees as part of the attorneys' fee.

SEC. 6. 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 and tenants under this Act.

(2) Not later than 120 days after the enactment of this Act, the Attorney General shall compile a list of the Federal laws under which Federal economic development funds are distributed. The Attorney General shall compile annual revisions of such list as necessary. Such list and any successive revisions of such list shall be communicated by the Attorney General to the chief executive officer of each State and also made available on the Internet

website maintained by the United States Department of Justice for use by the public and by the authorities in each State and political subdivisions of each State empowered to take private property and convert it to public use subject to just compensation for the taking.

(b) NOTIFICATION TO PROPERTY OWNERS AND TENANTS.—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 and tenants under this Act.

SEC. 7. REPORTS.

(a) BY ATTORNEY GENERAL.—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 violations reported by property owners and tenants under section 5(c) of this Act;

(3) identify the percentage of minority residents compared to the surrounding nonminority residents and the median incomes of those impacted by a violation of this Act;

(4) identify all lawsuits brought by the Attorney General under section 5(d) of this Act;

(5) 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

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

(b) DUTY OF STATES.—Each State and local authority that is subject to a private right of action under this Act shall have the duty to report to the Attorney General such information with respect to such State and local au-

thorities as the Attorney General needs to make the report required under subsection (a).

SEC. 8. 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. The taking of farmland and rural property will have a direct impact on existing irrigation and reclamation projects. Furthermore, the use of eminent domain to take rural private property for private commercial uses will force increasing numbers of activities from private property onto this Nation's public lands, including its National forests, National parks and wildlife refuges. This increase can overburden the infrastructure of these lands, reducing the enjoyment of such lands for all citizens. 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. 9. 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. 10. RELIGIOUS AND NONPROFIT ORGANIZATIONS.

(a) PROHIBITION ON STATES.—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 of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto 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) PROHIBITION ON FEDERAL GOVERNMENT.—The Federal Government or any authority of the Federal Government shall not exercise its power of eminent domain over property of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto.

SEC. 11. REPORT BY FEDERAL AGENCIES ON REGULATIONS AND PROCEDURES RELATING TO EMINENT DOMAIN.

Not later than 180 days after the date of the enactment of this Act, the head of each Executive department and agency shall review all rules, regulations, and procedures and report to the Attorney General on the activities of that department or agency to bring its rules, regulations and procedures into compliance with this Act.

SEC. 12. SENSE OF CONGRESS.

It is the sense of Congress that any and all precautions shall be taken by the government to avoid the

unfair or unreasonable taking of property away from survivors of Hurricane Katrina who own, were bequeathed, or assigned such property, for economic development purposes or for the private use of others.

SEC. 13. DISPROPORTIONATE IMPACT.

If the court determines that a violation of this Act has occurred, and that the violation has a disproportionately high impact on the poor or minorities, the Attorney General shall use reasonable efforts to locate former owners and tenants and inform them of the violation and any remedies they may have.

SEC. 14. 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—

(i) to public ownership, such as for a road, hospital, airport, or military base;

(ii) to an entity, such as a common carrier, that makes the property available to the general public as of right, such as a railroad or public facility;

(iii) for use as a road or other right of way or means, open to the public for transportation, whether free or by toll; and

(iv) for use as an aqueduct, flood control facility, 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;

(F) taking private property for use by a public utility, including a utility providing electric, natural gas, telecommunications, water, and wastewater services, either directly to the public or indirectly through provision of such

services at the wholesale level for resale to the public; and

(G) redeveloping of a brownfield site as defined in the Small Business Liability Relief and Brownfields Revitalization Act (42 U.S.C. 9601(39)).

(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. 15. LIMITATION ON STATUTORY CONSTRUCTION.

Nothing in this Act may be construed to supersede, limit, or otherwise affect any provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.).

SEC. 16. 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.

SEC. 17. 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. NADLER. Thank you, Mr. Chairman. Before we begin, I want to thank you for moving this hearing back an hour to accommodate a conflict the Democratic Members had due to our regularly scheduled meeting.

Mr. Chairman, for once the Supreme Court defers to the elected officials, and Congress cries foul. The power of eminent domain is an extraordinary one and should be used rarely and with great care. All too often, it has been abused for private gain or to benefit one community at the expense of another. It is, however, an important tool, making possible transportation networks, irrigation projects, and other public purposes. To some extent, all of these projects are "economic development projects." Members of Congress are always trying to get these projects for our districts, and certainly the economic benefits to our constituents is always a consideration.

Has this bill drawn the appropriate line between permissible and impermissible uses of eminent domain? I think this is one of the questions we will need to consider. We all know the easy cases. As the majority in *Kelo* said, "The city would no doubt be forbidden from taking petitioner's land for the purpose of conferring a private benefit on a particular private party, nor would the city be allowed to take property under the mere pretext of a public purpose when its actual purpose was to bestow a private benefit." But which projects are appropriate and which are not can sometimes be a difficult call.

Historically, eminent domain has been abused and has destroyed communities for projects having nothing to do with economic development, at least as defined in this bill. For example, highways have cut through neighborhoods, destroying them. Some of these communities are in my district that have yet to recover from the wrecker's ball. Yet that would still be permitted by this bill. Other projects might have a genuine public purpose and yet would be prohibited. The rhyme or reason of this bill is not clear.

One of our witnesses today will discuss the use of eminent domain to facilitate a project that many of my Republican colleagues want to see built and that this bill would permit. I think we owe it to the many property owners who have been subject to eminent domain by this foreign corporation to consider whether that use of the takings power is appropriate or whether, as many have argued, it is simply a case of the rich and powerful using governmental power to dispossess those without power.

I continue to believe that this bill is the wrong approach to a very serious issue. The bill would permit many of the abuses and injustices of the past to continue by excluding from its coverage many of the projects that cause those abuses, including pipelines, transmission lines and railroads. It would allow the Keystone Pipeline to cut through the heartland of America and condemn property all along its route. It would allow highways to cut through communities. It would allow all the other public projects that have historically fallen most heavily on the poor and powerless. As Hillary Shelton at the NAACP has previously testified, these projects can be just as burdensome as projects that include private development.

This bill 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 of right." Does that mean, for example, a stadium? 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, but that would apparently be permitted by this bill. Is it a shopping center? You don't even need a ticket.

The World Trade Center could not have been built under this law. It was publicly owned but was predominantly leased for office space and retail use. Neither could Lincoln Center have been built. Affordable housing like the Hope VI or the Nehemiah program, a faith-based affordable housing program in Brooklyn, could never have gone forward. So public housing, apparently, completely constructed by the government, public housing projects are okay, but public-private partnerships for affordable housing are not okay.

Since the *Kelo* decision, there have been new developments that call into question whether Congress should even act at this point. In response to the *Kelo* decision, states have moved aggressively to reconsider and amend their own eminent domain laws. More than 40 states have acted to narrow their eminent domain laws. States have carefully considered the implications of this decision and the needs of their citizens. I question whether Congress should now come charging in and presume to sit as a national zoning board, aggregating to our national government the right to decide which states have gotten the right balance and deciding which projects are or are not appropriate.

The lawsuits authorized by this bill and the vagueness of the bill's definitions would cast a cloud over legitimate projects. A property owner or a tenant would have 7 years after the condemnation before the litigation and appeals need even begin. Did the trial lawyers write this bill?

Most importantly, even if my colleagues believe that Congress needs to act in response to *Kelo*, the penalties in this bill are so draconian and misguided that even a government that never took a prohibited action would be hobbled financially by it. The local government would risk all of its economic development funding for 2 years even for unrelated projects and face bankruptcy if it guessed wrong about a given project. Even if a jurisdiction did not use eminent domain at all, the cloud this bill would cast over the possibility of some future taking, or that property taking for a permitted purpose could not be used because the funding dried up, would be enough to destroy their ability to float bonds at any time.

And what does this bill give to an aggrieved tenant or homeowner who was aggrieved by the misuse of eminent domain? What does the bill give them? Nothing. They cannot sue to stop the taking. They cannot get any damages other than the compensation they got at the time of the taking. All they can get is the psychic satisfaction that they get from bankrupting their community.

Mr. Chairman, this legislation goes well beyond dealing with a hypothetical taking of a Motel 6 to build a Ritz Carlton, which despite dire warnings at the time of the *Kelo* decision was simply not what the Court authorized. This bill threatens communities with bankruptcy without necessarily protecting the most vulnerable populations. It comes after years of state action in which states have

decided which approach would satisfy their concerns and protect their citizens the best.

I think this bill is unnecessary, and if it is to pass, it should certainly be changed as to the remedy so that the remedy deals with the problem and doesn't bankrupt communities that never even availed themselves of eminent domain.

I want to join you in welcoming our witnesses, and I yield back the balance of my time.

Mr. FRANKS. And I thank the gentleman, and I now yield to the Chairman of the Committee, Mr. Goodlatte from Virginia.

Mr. GOODLATTE. Well, thank you, Chairman Franks. I very much appreciate your holding this hearing on a very important subject.

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 by enshrining 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: that the subsequent use of the property is for the public, and that the government gives the property owner just compensation. However, the Supreme Court's 5–4 decision in *Kelo v. City of New London* was a step in the opposite direction. This controversial ruling expanded 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.

The *Kelo* decision even permits the government to take property from one private individual and give 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 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 private citizens' homes, farms and small businesses to make way for shopping malls and other developments. For these reasons, it is important that Congress finally pass the Private Property Rights Protection Act.

I am pleased that this legislation incorporates many provisions from legislation I helped introduce in the 109th Congress, the STOPP act. Specifically, the Private Property Rights Protection Act would prohibit all Federal economic development funds for a period of 2 years for any state and local government that uses economic development as a justification for taking property from one person and giving to another private entity.

In addition, this 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 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 eminent domain powers. 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 incentives to ensure that these abuses do not occur in the future.

This bill is very bipartisan in nature, and the adage that one's home is one's castle applies to people across the economic spectrum.

I look forward to the witnesses' testimony, and I am particularly looking forward to the testimony of Mrs. Kelo. I thank you very much for coming to the Committee.

It is my understanding this is the first time that you have testified before the Judiciary Committee, and I want to say to you that as a woman who had the courage to take on the bureaucracy and take a case all the way to the United States Supreme Court, even though it resulted in an unfortunate decision by the Court, has helped to highlight this plight that many property owners face. The gentleman from New York is correct, 40 states have changed their laws as a result of your good work. So I thank you very much for that, and I will tell you that the decision that came down that many of us have protested was at the time the most unpopular Supreme Court decision in the history of polling when people were surveyed about that.

I agree very much with Congresswoman Maxine Waters, who represents one of the poorest congressional districts in an urban area in the entire country and who strongly supports this measure because she knows two things: one, that a person's property is their castle, no matter what their background is; and she knows that so often it is people of lower incomes who are the first targets of the government saying I am going to take your property for economic development purposes because I think we collectively as a government can do better with your property than you can yourself. That is wrong. In my opinion, it is a clear violation of the United States Constitution, and anything this Congress can do to protect it will be wonderful.

But nothing we do will ever match what you have already done. So thank you and God bless you.

Mr. FRANKS. And I thank the gentleman.

I would now yield to the Ranking Member of the Committee, Mr. Conyers from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman. I rise as one who has changed my opinion of this measure. I was going to put my statement in the record, and my colleague from Virginia, Mr. Scott, reminded me that I might better, more ably explain why I have changed my position.

I don't like the *Kelo* decision of the Supreme Court, and neither do I like the bill that was put in for this and that will be coming in very shortly.

Mr. Scott also reminds me that downtown Detroit was built off the whole idea that eminent domain could pose a problem. So I am happy to make a few comments about the decision and the bill itself.

Now, in the wake of the *Kelo* decision, the concern has arisen that state and municipalities can use this decision to expand their power of eminent domain, whether for the benefit of private parties or public projects, to the detriment of those who are the least powerful—the poor, the elderly, and the communities of color. While I believe that eminent domain can and has been abused, particularly with respect to those lacking this economic and/or political power, I have come to conclude that for the time being we should allow the states to craft responses rather than impose an awkward one-size-fits-all Federal legislative response.

It is important to note that in *Kelo*, the Court acknowledged that the state courts may interpret their own eminent domain powers in a manner that is more protective of property rights. I am encouraged that no less than 43 states, as has been mentioned, have followed that advice and taken steps to restrict their own powers of eminent domain to guard against abuse.

In my own State of Michigan, voters adopted an amendment to amend the Michigan Constitution to preclude takings for economic development or tax enhancement, among a number of other protections for property owners and tenants.

Given the fact that our system of federalism appears to be working and that the states are in consensus on the need to prevent abuse, I don't think that we need Federal intervention at this time.

The bill's enforcement provisions are very troubling. For example, a jurisdiction found in violation of the measure would be stripped of all Federal economic development funds for 2 years, which could possibly bankrupt that jurisdiction. Despite that draconian penalty, the actual property owner would get nothing. The bill does not even give the property owner the right to sue to stop the taking in the first place. A suit can only be brought after the property is taken.

The Supreme Court has long held that when Congress attaches conditions to a state's acceptance of Federal funds, the conditions must be set out unambiguously. The bill, however, fails to satisfy this requirement with respect to its definition of economic development funds, which therefore could subject a jurisdiction to its punitive provisions.

For instance, the Government Accountability Office, GAO, testified in the last Congress about the difficulty of determining what qualifies as an "economic development program." GAO has also warned that the loss of Federal funding to a state and local government could encompass highway trust funds, community development block grants and other Department of Housing and Urban Development programs intended to assist vulnerable communities. Of course, the sequester doesn't help much either.

Mr. Chairman, I will stop at this point, put the remainder of my statement in the record, and thank the Chairman for the additional time that he has given me.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

In the wake of the Supreme Court's decision in *Kelo v. City of New London,* I have been concerned that states and municipalities could use this decision to expand their power of eminent domain—whether for the benefit of private parties or for public projects—to the detriment of those who are the least powerful, namely, the poor, elderly, and communities of color.

While I believe the power of eminent domain can and has been abused—particularly with respect to those lacking economic or political power—I have come to conclude that for the time being we should allow the states to craft responses, rather than impose and awkward and one size fits all federal legislative response. I have reached this conclusion for several reasons.

First and foremost, it is important to note that in *Kelo,* the Supreme Court acknowledged that state courts may interpret their own eminent domain powers in a manner that is more protective of property rights.

I am therefore encouraged that no less than 43 states have followed that advice and taken steps to restrict their own powers of eminent domain to guard against abuse.

For example, in 2006 Michigan voters adopted an amendment to Michigan's Constitution to preclude takings for economic development or tax enhancement, among a number of other protections for property owners and tenants.

Given the fact that our system of federalism appears to be working and that the states are in consensus on the need to prevent abuse, I do not believe that federal intervention is necessary or appropriate at this time.

Second, the bill's enforcement provisions are very troubling. For example, a jurisdiction found in violation of the measure would be stripped of all federal economic development funds for two years, which could possibly bankrupt that jurisdiction.

Despite that draconian penalty, the actual property owner would get nothing. The bill does not even give the property owner the right to sue to stop the taking in the first place. A suit can only be brought *after* the property is taken.

The Supreme Court has long held that "when Congress attaches conditions to a State's acceptance of Federal funds, the conditions must be set out 'unambiguously.'" [1]

The bill, however, fails to satisfy this requirement with respect to its definition of "economic development funds," which therefore could subject a jurisdiction to its punitive provisions.

For instance, the Government Accountability Office testified in the last Congress about the difficulty of determining what qualifies as an "economic development program."

GAO also warned that the loss of federal funding to a state and local government could encompass Highway Trust Funds, Community Development Block Grants, and other Department of Housing and Urban Development programs intended to assist vulnerable communities.

The recent sequester has further diminished the already shrinking federal funds that assist state and local governments.

Given all of the uncertainty that sequestration has cast over the viability of states to stimulate job creation, provide health care, and build infrastructure, the bill's punitive provisions could prove devastating.

Finally, against this backdrop, we need to remember that eminent domain abuse has a long and shameful history of disproportionately impacting minority communities.

Inner city neighborhoods that lacked institutional and political power were often designated as blighted areas slated for redevelopment through urban renewal programs. Properties were condemned and land was turned over to private parties.

In Detroit Michigan, neighborhoods such as Poletown have experienced firsthand how eminent domain can destroy neighborhoods, presenting issues similar to those in the *Kelo* case.

This underscores why it is important that we continue to monitor the facts on the ground and hold hearings like we are today. If the states do not continue to act to protect our citizens, Congress should remain ready, willing and able to do so.

Thank you.

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[1] *Arlington Cent. School Dist. Bd. Of educ. V. Murphy,* 548 U.S. 291, 296 (2006) (quoting *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981) (citations omitted).

Mr. FRANKS. I thank the gentleman, and without objection, other Members' opening statements will be made part of the record.

Let me now introduce our witnesses. I welcome you all here today, along with those welcomes you have already received.

Susette Kelo purchased and lovingly restored her dream home in 1997, a little pink house with views of the water in New London, Connecticut. Tragically, the City of New London turned her dream home into a nightmare. Ms. Kelo was the lead plaintiff in the landmark Supreme Court case *Kelo v. City of New London*. In that case, the Court ruled that the city could take her home and give it to a private developer for economic development purposes. Sadly, Ms. Kelo's story is all too familiar to many other Americans trying to save their private property from governmental seizure.

David—is it Beito, sir? David Beito is an historian and professor of history at the University of Alabama. His research focuses on civil rights history. Dr. Beito is the author of three books and has also written numerous scholarly articles. In 2007, Dr. Beito was appointed to the Chair of the Alabama State Advisory Committee of the U.S. Commission on Civil Rights. As chair, he has addressed eminent domain abuse as a civil rights issue.

Julia Trigg Crawford manages a 600-acre farm in Northeast Texas that has been in her family since 1948. Ms. Crawford is fighting the use of eminent domain to take a portion of her family's farm as part of the Keystone Pipeline project. Her case is currently before the Texas 6th Circuit Court of Appeals. Ms. Crawford is challenging TransCanada's authority under Texas law to exercise the power of eminent domain.

Scott Bullock is a senior attorney at the Institute for Justice, a non-profit public-interest firm that represents people whose rights are being violated by the government. Since his time with the Institute for Justice, Mr. Bullock has brought numerous cases in which homes or small businesses have been seized by the government through the power of eminent domain and transferred to another private party. In 2005, he argued *Kelo v. City of New London* before the United States Supreme Court.

Each of the witness' written statements will be entered into the record in its entirety, so I would ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

Before I recognize the witnesses, it is the tradition of the Subcommittee that they be sworn. So if you would please stand to be sworn.

[Witnesses sworn.]

Mr. FRANKS. You may be seated.

Let the record reflect that the witnesses answered in the affirmative.

I now recognize our first witness. Please turn on your microphone, Ms. Kelo, before you speak. Thank you.

TESTIMONY OF SUSETTE KELO, NEW LONDON, CT

Ms. KELO. I want to thank Representative Waters——

Mr. FRANKS. Ms. Kelo, I am not sure that went on. Did the light turn on? Maybe pull it a little bit closer to you.

Ms. KELO. I want to thank Representative Waters and Sensenbrenner for their sponsorship of the Private Property Rights Protection Act and for their support of property owners and tenants nationwide. My name is Susette Kelo, and I am the Kelo in *Kelo v. the City of New London*, the case in which the United States Supreme Court ruled that private property, including my home, could be taken by another private party who promises to create more jobs and taxes with the land.

While we homeowners of New London may have lost that battle, we are winning the war. The decision sparked a nationwide revolt against eminent domain abuse and demonstrated that virtually the entire country, regardless of background or political party, is against this practice.

But Congress has so far refused to join the rest of the Nation in *Kelo* backlash and continues to fund eminent domain abuse.

My 9-year battle began in 1997 when I searched all over New London for a house and finally found the perfect Victorian cottage with beautiful views of the water. I knew when I first entered it that I was meant to be there. My husband and I spent every spare moment fixing it up and creating the kind of home we had always dreamed of, and I painted it salmon pink, my favorite color.

When I first bought the house, it had been run down. When finished, we made it beautiful. But the New London Development Corporation decided it wanted to give my property to a private developer, so it told my neighbors and me we had to sell or be condemned. But we all loved our homes and neighborhood and we were not prepared to give in. Nine years later, the United States Supreme Court ruled against us.

My story is not unique. In just the year after the decision, almost 6,000 homes and businesses were threatened or condemned for private development. Just as my neighbors and I didn't want to sell and didn't ask to be condemned, neither did the hard-working, taxpaying Americans fighting to keep their homes and businesses.

Congress must stop funding this abuse of power. Our Federal tax dollars shouldn't be used to take away our homes and businesses so that developers can build shopping malls and high-priced condominiums. For the project that was supposed to replace my New London home, New London received $2 million in funds from the Federal Economic Development Administration. If this bill had been in place, it could have helped prevent New London from seizing my little pink cottage, which my husband and I spent years making into the kind of home we could be proud of.

And all of this was for nothing. After spending close to $80 million in taxpayer money, there has been no construction whatsoever in the neighborhood. To this day, it remains a barren field, home to weeds and feral cats. In 2009, Pfizer, the linchpin of the plan, announced that it was closing its research and development headquarters and leaving New London for good.

My battle started as a way for me to save my home, but it has rightfully grown into something much larger, the fight to restore the American Dream and sacredness and security of each one of our homes.

Property owners across the Nation are now up in arms and united in the fight to end eminent domain abuse. I thank Representative Waters and Sensenbrenner for being on the front lines, and I ask Congress to join them by passing the Private Property Rights Protection Act. Thank you.

[The prepared statement of Ms. Kelo follows:]

Testimony of Susette Kelo
Lead plaintiff, *Kelo v. City of New London*
United States House Committee on the Judiciary
Subcommittee on the Constitution & Civil Justice
Hearing on the Private Property Rights Protection Act of 2013
April 18, 2013

I thank the House Judiciary Subcommittee on the Constitution and Civil Justice for the opportunity to testify about legislation to cut off funding to governments that abuse eminent domain for private development.

My name is Susette Kelo and I used to live in New London, Connecticut. I am the Kelo in *Kelo v. City of New London* – the infamous U.S. Supreme Court case in which the Court ruled that private property, including my home, could be taken by another private party who promises to create more jobs and taxes with the land.

I sincerely hope that Congress will do what the U.S. Supreme Court refused to do for me and for thousands of people like me across the nation: protect our homes under a plain reading of the U.S. Constitution. Federal lawmakers should pass legislation that will withhold federal development funding from cities that abuse eminent domain for private development – such as the one that took my home, which received $2 million in federal funds. What we had in the wake of this decision at the local, state and federal level amounted to "government by the highest bidder," and while eminent domain abuse has slowed down thanks to a national backlash to the decision, it still exists and has got to stop.

I would like to tell you a little more of my story so you can hopefully see why the law needs to be changed.

In 1997, I searched all over for a house and finally found this perfect little Victorian cottage with beautiful views of the water. I was working then as a paramedic and was overjoyed that I was able to find a beautiful little place I could afford on my salary. I spent every spare moment fixing it up and creating the kind of home I always dreamed of. I painted it salmon pink, because that is my favorite color.

In 1998, a real estate agent came by and made me an offer on the house on behalf of an unnamed buyer. I explained to her that I was not interested in selling, but she said that my home would be taken by eminent domain if I refused to sell. She told me stories of her relatives who had lost their homes to eminent domain. Her advice? Give up. The government always wins.

So why did the City and the New London Development Corporation (NLDC) want to kick us out? To make way for a luxury hotel, up-scale condos, and other private developments that could bring in more taxes to the City and possibly create more jobs. The poor and middle class had to make way for the rich and politically connected. As quickly as the NLDC acquired homes in my neighborhood, they came in and demolished them, with no regard for the remaining residents who lived there, most of whom were elderly.

In late 1999, after graduating from nursing school, I became a registered nurse and began working at Backus hospital in Southeastern Connecticut. Early in 2000, the public hearings were eventually held, and the Fort Trumbull plan was finalized. Our homes were not part of that plan. By that time, I had met a man who shared my dreams and the two of us spent our spare time and money fixing up our house. We got a couple of dogs, we planted flowers, I braided my own rugs, we found a lot of antiques which were just perfect for our home, and Timmy – who is a

stone mason – did all kinds of stone work around the house. When I first bought it, it had been run down. We made it beautiful.

On the day before Thanksgiving in 2000, the sheriff taped a letter to my door, stating that my home had been condemned by the City of New London and the NLDC. We did not have a very pleasant holiday, and each Thanksgiving after was bittersweet for all of us; we were happy to still be in our homes, but afraid we could be thrown out any day. The following month, the Institute for Justice agreed to represent us. Without them, we would not have been able to fight, because none of us could have afforded the tremendous legal costs that we would have incurred over the years.

A year later, in 2001, we went to trial in New London, and after hearing 10 different reasons why our homes were being seized – from so-called "park support," to roads, to a museum, to warehousing – the judge decided no one could give him a straight answer and he overturned the demolition sentences on our homes.

Then one night in late 2002, I was working at the hospital in the emergency room when a trauma code was called and a man who had been in a car accident was wheeled into the trauma room. To my horror, after several minutes of working alongside doctors and nurses I realized it was my partner Tim. For two weeks he lay in a coma and we did not know if he would live or die. He finally pulled through and although permanently disabled, it was a miracle he was finally able to walk out alive two months later.

While he was still hospitalized, the Connecticut Supreme Court heard our case. A while later, after Tim was well enough, we made it official by getting married. We still had no idea if we would get to keep our home, as the Connecticut court would take 15 months to reach a decision. When they ruled against us by a 4-3 decision, we were stunned. Our lives were on hold for another year as we waited for the U.S. Supreme Court to hear our case. We had high hopes that the Supreme Court would protect our home, but by one vote, they let us and all other Americans down.

My neighborhood was not blighted. It was a nice neighborhood where people were close. We didn't want to leave.

All of this was for nothing. After spending close to $80 million in taxpayer money, there has been no construction whatsoever and the neighborhood to this day remains a barren field, home to weeds and feral cats. And in 2009, Pfizer—the lynchpin of the plan—announced that it was closing its research and development headquarters and leaving New London for good, just as its tax breaks were about to expire.

Fortunately, my home was saved and moved to a new location, and is now the home of a local preservationist. Property rights activists from across the country have visited it to pay tribute to our fight.

None of us asked for any of this. We were simply living our lives, working, taking care of our families and paying our taxes.

The City may have narrowly won the battle on eminent domain, but the war remains, not just in Fort Trumbull but also across the nation. In response to the Supreme Court's decision, 44 states have changed their eminent domain laws. Some laws are great and others need improvement, but the bottom line is that state legislators have heard the public's outrage over this decision and responded. Congress has yet to do so.

What happened to me should not happen to anyone else. Congress needs to send a message to local governments that this kind of abuse of power will not be funded or tolerated.

This battle against eminent domain abuse may have started as a way for me to save my little pink cottage, but it has rightfully grown into something much larger – the fight to restore the American Dream and the sacredness and security of each one of our homes.

Thank you very much for your time.

Mr. FRANKS. Mrs. Kelo, thank you very much.
Dr. Beito?

TESTIMONY OF DAVID T. BEITO, PROFESSOR, UNIVERSITY OF ALABAMA

Mr. BEITO. Thank you, sir, for this opportunity to come here today and speak on this issue. My focus is going to be on how expansive eminent domain to benefit private interests as a consequence of subsidizing private development has posed and con-

tinues to pose a threat to the civil rights of minorities and the poor. In my view, the Private Property Rights Protection Act of 2013 provides the best available means to provide some measure of corrective relief.

In the history of the United States during the last 100 years, no group has suffered more from eminent domain abuse than African-Americans. According to one typical study, two-thirds of those displaced by urban renewal, often via eminent domain, were non-White. Another study found that four-fifths of these paid substantially higher rents than they had before. Commenting on the fact that government-sponsored urban renewal destroyed far more housing units than it ever replaced, author James Baldwin charged that "urban renewal means moving the Negroes out. It means Negro removal. The Federal Government is an accomplice."

The pattern of abuse did not end in the 1960's and 1970's. It has often continued to the present. In San Jose, California, for example, 95 percent of the businesses in recent years, destroyed by eminent domain, were minority owned, even though they constituted only 30 percent of the businesses in the city.

In 2005, this long record of eminent domain overreach prompted several important minority organizations, including the NAACP and the Southern Christian Leadership Conference, to jointly file an amicus brief for the plaintiffs in the *Kelo* case. After reviewing the historical background, this brief warned that enabling local governments to take "property simply by asserting that they can put the property to a higher use will systematically sanction transfers from those with less resources to those with more. . . . Even absent illicit motives, eminent domain power has affected and will disproportionately affect racial and ethnic minorities, the elderly and the economically disadvantaged. Well-cared-for properties owned by minority and elderly residents have repeatedly been taken so that private enterprise could construct superstores, casinos, hotels, and office parks."

It might be asked why Congress needs to step in now. Can't the states be trusted to prevent the abuse of eminent domain? Unfortunately, the 8-year aftermath of *Kelo* shows that they all too often will not, especially when Federal money is potentially at stake. My own state of Alabama is a case in point. In the wake of national outrage over *Kelo*, it was one of the first to enact corrective reform which greatly limited eminent domain for private purposes. Only last month, however, Alabama reversed course and gutted a key element of this reform.

Now, while some who have voted for it have since stated that they did not intend to undermine the earlier reform, and even acknowledged the need to close inadvertent loopholes in the new law's wording, they have made no apparent effort to do so.

If the states will not act to defend the property rights of the poor and vulnerable, Congress must. As generations of civil rights champions have stressed, the protection of the right to acquire and hold property is critical to the economic progress of the poor and oppressed. In 1849, for example, Frederick Douglass declared that the chief end of civil government is "to protect the weak against the strong, the oppressed against the oppressor, the few against the

many, and to secure the humblest subject in the full possession of his rights of person and of property."

During a time of recession, it is all the more important to heed Douglass' timeless words. In this same spirit, it is also past due to start viewing the existing property owners in lower-income neighborhoods as assets to the community. The passage of the Private Property Rights Protection Act of 2013 will greatly contribute to this goal by fostering an environment which will treat low-income property owners and entrepreneurs as valuable urban pioneers rather than as obstacles to be pushed out of the way if their rights conflict with some broader governmental or private agenda.

Thank you.

[The prepared statement of Mr. Beito follows:]

TESTIMONY BEFORE THE JUDICIARY COMMITTEE OF THE U.S. HOUSE

By David T. Beito

April 18, 2013

Good morning. I am the head the Alabama State Advisory Committee of the U.S. Commission on Civil Rights and a professor of history at the University of Alabama. My research specialties as a scholar include black history and civil rights history. Although the State Advisory Committee since 2005 has studied, and expressed great concern about, eminent domain abuse in Alabama, I am speaking here as a private individual not in my capacity as chair.

My focus today will be on some of the ways in which expansive eminent domain to benefit private interests has posed, and continues to pose, a threat to the civil rights of minorities and the poor. In my view, the Private Property Rights Act of 2013 provides the best available means to provide some measure of corrective relief.

In the history of the United States during the last hundred years, no group has suffered more from eminent domain abuse than African Americans. A major turning point for the worse was the landmark U.S. Supreme Court decision of *Berman v. Parker* in 1954. The case came out of a massive urban development project by the District of Columbia which involved the taking of a large

section of the city. Several non-blighted businesses in the area challenged the taking arguing that that it was violating the requirement of public use. The Court upheld the District's use of eminent domain by interpreting the definition of public use to include a more expansive doctrine of public purpose. The ruling enabled the District of Columbia to forcibly remove some 5,000 low-income African Americans from their homes to facilitate "urban renewal." In 1977, a mall which had replaced the original businesses that were parties to Berman was declared a "disaster" and later demolished.

Berman opened the eminent domain floodgates in urban renewal, often serving to enrich private interests. The evidence is overwhelming that minorities suffered the most. According to one typical study, two-thirds of those displaced by urban renewal, often via eminent domain, were non-white. Another found that four-fifths of those displaced paid substantially higher rents than they had before. Commenting on the fact that governments bringing urban renewal had destroyed far more housing units that they ever replaced, author James Baldwin, charged that urban renewal "means moving the Negroes out. It means Negro removal. The federal government is an accomplice to this act."

This pattern of abuse did not end in the 1960s and 1970s. It has often continued to the present. In San Jose, California, for example, ninety-five percent of the businesses in recent years destroyed by eminent domain were minority owned even though these constituted only 30 percent of the businesses in the city. A study from 2004 estimated that eminent domain has destroyed 1,600 African-American neighborhoods in Los Angeles.

In 2005, this long record of eminent domain overreach prompted several important minority organizations, including the NAACP and the Southern Christian Leadership Conference, to jointly file an amicus brief for the plaintiffs in the *Kelo* case. After reviewing the historical background, it warned that enabling local governments to take "property simply by asserting that [they] can put the property to a higher use will systematically sanction transfers from those with those with less resources to those with more....Even absent illicit motivations, eminent domain power has affected and will disproportionately affect, racial and ethnic minorities, the elderly and the economically disadvantaged. Well-cared properties owned by minority and elderly residents have repeatedly been taken so that private enterprise could construct superstores, casinos, hotels, and office parks."

It might be asked why Congress needs to step in now. Can't the states enact necessary checks on the misuse, and overuse, of this power? Unfortunately the eight year aftermath of *Kelo* shows that they all too often will not, especially when federal money is potentially at stake. My own state, Alabama, represents a case in point. In the wake of national outrage after the Court's decision, it was one of the first to enact a corrective reform which, at least on paper, greatly limited eminent domain for private purposes. Only last month, however, our state reversed course and gutted a key element of this reform. The new law, passed overwhelmingly by a conservative Republican legislature and signed by a Republican governor, expressly allows the deployment of eminent domain to benefit the automotive industry and other private interests. While some who voted for it have since indicated that they did not intend to undermine the earlier reform, and even acknowledged the need to close possible "loopholes" in the new law's wording, they have made no apparent effort to do so.

If the states will not act to defend the property rights of the poor and vulnerable, Congress must. As generations of civil rights champions have stressed, the constitutional protection of the right to acquire and hold property is essential to the economic progress of the poor and oppressed. In 1849, for

example, Frederick Douglass declared that the chief end of "civil government" is "to protect the weak against the strong, the oppressed against the oppressor, the few against the many, and to secure the humblest subject in the full possession of his rights of person and of property."

During a time of recession, it is all the more important to heed Douglass's timeless words. In this same spirit, it is also past due to start viewing the existing property owners in lower-income neighborhoods as assets to the community. The passage of the Private Property Rights Act of 2013 will greatly contribute to this goal by fostering an environment which will respect low-income property-owners and entrepreneurs as valuable urban pioneers rather than as obstacles to be pushed out of the way if their rights conflict with some broader governmental or private social and economic agenda.

Mr. FRANKS. Thank you, sir.
Ms. Crawford, you are recognized now for 5 minutes.

TESTIMONY OF JULIA TRIGG CRAWFORD, FARM MANAGER, SUMNER, TX

Ms. CRAWFORD. Good morning. My name is Julia Trigg Crawford, and I manage the Texas farm my grandfather bought in 1948. Our land was taken by TransCanada for the Keystone project, so I absolutely support measures to limit eminent domain. But I strongly oppose an exemption for TransCanada, Keystone XL, and any other entity that cannot provide proof their projects are for the public benefit.

TransCanada abused the right of eminent domain in taking our land as it was the elbow they so desperately needed to avoid nearby wetlands, waterways and pipelines. We never wanted them on our place to start with, and told them so in 2008. We asked them to find another route through a willing neighbor, just a little further west. They refused.

We told them we wanted to protect the 1,000-year-old Caddo Indian relics on our farm. TransCanada's archaeologists recently found 145 artifacts within the proposed easement, some as large as silver dollars, yet their report discounts their merit. How curious that TransCanada and the Texas Historical Commission concur that my entire 30-acre pasture qualifies for National Registry of Historic Places except for the one sliver of land that TransCanada must have to connect the two sections of pipe already built.

We told them we feared for Bois d'Arc Creek. Water is a farmer's lifeblood, and pipelines leak, and we didn't want to be a guinea pig for how to clean up tar sands spills in Texas waters. TransCanada said they are coming anyway.

But more than anything else, we do not believe a foreign corporation transporting a product produced outside of Texas meets our state's qualifications of common carrier. No common carrier, no eminent domain. But TransCanada moved ahead anyway, exploiting Texas' flawed permitting process, and starts construction on my land tomorrow.

But we are pushing back. The 2011 Texas Supreme Court ruling in Denbury Green said that private property rights are too precious to be taken by simply checking a box on a form. They also said, when challenged by a landowner, the pipeline has the burden to present reasonable proof it meets the requirements of a common carrier. So we asked for the proof. TransCanada hid behind the skirts of the Texas Railroad Commission, an entity that fully admits they rubberstamp every application they receive.

So we asked again for their tariff schedule. TransCanada said they could not have that tariff schedule until about the time product started flowing, meaning they could not produce the proof, they could take my land, until after they took my land, construction of the pipeline and tar sands were about to flow.

These examples of abuse are why TransCanada and the Keystone XL must not be granted an extension, and it is why I cannot support this bill in its entirety. If we allow these exemptions, we will be setting a dangerous precedent, leaving the door open for further misuse of our legal system and abuse of landowners. The

same system that enabled a judge to rule against us with a 15-word ruling sent from his iPhone would enable TransCanada and other pipeline companies to use this incredible legal and psychological leverage of eminent domain to continue stealing property from American citizens.

We have appealed to the Sixth Circuit, and if our funds hold out we will take it to the Texas Supreme Court. My family and I are standing tall for what we believe.

I have not seen one shred of documentation that proves that one single drop of the products in Keystone's pipeline will wind up in my gas tank or yours, for that matter, yet we are supposed to relinquish our family's tradition and the cultural heritage of the Caddo and endanger my land and water just because TransCanada says, without proof, that their pipeline is for the public good. How can this pipeline be for the public good when so much information about it is not even in the public record? Diluted bitumen, tar sands, whatever you want to call it, is a product we should fully understand before we start pumping it through waterways. TransCanada has called this product proprietary, refusing to provide specifics. How can we ensure the safety of a substance when we don't even know its ingredients?

Pipeline companies do not deserve a free ride, especially when they can't clean up their own messes. Look at Enbridge in Michigan or Exxon in Arkansas, a spill I went to see for myself. The thought of that kind of destruction on my farm in my creek is frightening. America already subsidizes the oil industry at a monumental disproportion to other industries. Why should we further underwrite pipelines with our safety, our security, and our dignity?

This bill, with its exemption of TransCanada and the Keystone XL, turns a blind eye to the most flagrant abuser of eminent domain today. Hold everyone to the same standards and let those who manipulate the system for their own good suffer the consequences. TransCanada stole land that has been in my family for six decades for a project that will line their pockets. To allow them to walk away from past abuses without penalty is unforgivable.

I will continue to fight these injustices because life as we know it depends on it, and I am not alone. Thank you.

[The prepared statement of Ms. Crawford follows:]

Prepared Statement of Julia Trigg Crawford,
Farm Manager, Summer Texas

Testimony submitted to the House Judiciary Committee
Subcommittee on the Constitution and Civil Justice
Hearing on the Private Property Rights Protection Act
April 18, 2013

My name is Julia Trigg Crawford. I am the third-generation manager of the farm my grandfather bought in 1948. As a landowner along TransCanada's conveniently uncoupled Keystone Gulf Coast Project, I absolutely support measures to limit eminent domain. But I strongly oppose an exemption for TransCanada, its Keystone XL, and any other foreign or domestic for-profit entity that cannot provide proof that their projects are for public benefit.

I believe, as do countless others following my family's legal case, that TransCanada has abused the power of eminent domain in taking our land. When another pipeline asked to come across our place, we said we did not want them here and asked they would find a different route through a willing neighbor. That pipeline company did just that—and eminent domain was never mentioned.

When they came knocking in 2008 we told TransCanada the same thing: we don't want a pipeline here, and asked them to find another route. They said no, then exploited a flawed permitting process in Texas, and used eminent domain to take the easement they wanted across our land.

There are a host of reasons why we don't want a pipeline across our property. First, we don't believe a foreign corporation should have more of a right to our land than we do. Secondly, we need to protect its Caddo Indian heritage, specifically the 145 artifacts TransCanada's archeologists recently found within the proposed pipeline easement. How curious that TransCanada and the Texas Historical Commission concur that my entire 30-acre pasture qualifies for National Registry of Historic Places recognition, EXCEPT for the one sliver of land TransCanada must have on our place to connect the two sections of pipeline they've already build adjacent to our land

We don't want them horizontally drilling under the Bois d'Arc Creek where we have State-given water rights. We irrigate 400 acres of cropland from this creek, and the pipeline would be just a couple hundred yards upstream from our pumps. Any leak from that pipeline would contaminate our equipment, and then our crops in minutes.

Furthermore, the neighbor directly to the west of us owns thousands of acres, and had granted TransCanada an easement anyway. When we politely asked them to seek a way around us, TransCanada could have slightly altered their route and traversed that neighboring land differently, avoiding our property altogether. But instead they just pulled out the club of eminent domain, telling a reporter later it was just too late to make any changes.

As some of you may know, in 2011 the Texas Supreme Court ruled in Denbury Green that private property rights are far too precious to be taken by simply checking a box on a form. Furthermore, the Supreme Court said that when challenged by a landowner, the burden falls on the pipeline to present reasonable proof it meets the requirements of a common carrier. So we did just that, we asked for the proof.

In challenging TransCanada, we asked them to provide proof they met the qualifications as a common carrier and had the right of eminent domain. And once again they hid behind the skirts of the Texas Railroad Commission, saying in essence, The Railroad Commission believes us, you should too. The embattled Railroad Commission has proven to be nothing more than a rubber stamp, they have never denied anyone common carrier status. So, when we asked for another element of proof, their tariff schedule, TransCanada said in court they would not have that tariff schedule until about the time product started flowing. In other words, they could not produce this particular proof they were entitled to take my land until after my land was condemned, handed over to them, construction was completed and tarsands, the product for which Keystone is being built, was flowing. This is wrong, and is precisely why the Keystone XL should not be granted an exemption from this bill's much needed eminent domain restrictions.

If I read it correctly, this bill's exemptions for pipelines already under construction allow current eminent domain abuses to go unpunished. The bill addresses the problems, and outlines important solutions, yet allows those who exploited the process up until a certain date on a calendar to get off "scot-free". And as someone who has lost part of her family farm to this abuse, that's leaves me, and lots of people like me out in the cold. And add insult to injury: our land was taken through abusive means, and the abusers could get off without even a hand-slap.

Two years ago when our family first began our stand against eminent domain abuse, TransCanada was flying below the radar screen. No one seemed to know much about the Keystone XL Pipeline. But now the light is blindingly bright on TransCanada, the tarsands, and the threat to everyone's land and water. People around the world see that TransCanada represents eminent domain gone unchecked and horribly wrong. Why else would there be so much pushback, by so many people, from so many backgrounds, in so many ways, to the Keystone XL project?

If we allow an exception for TransCanada and the Keystone XL, we will be setting a dangerous precedent, leaving the door open for even further misuse of our legal system and more abuse of landowners unwilling to risk their property for foreign profits. The same system that enabled the judge in our case to issue a 15-word ruling from his iPhone would enable TransCanada and other pipeline companies to use the incredible legal and psychological leverage of eminent domain to continue stealing property from American citizens.

We have appealed that iPhone ruling, and look forward to our day in court with an experienced panel of judges in the 6th Circuit Court of Appeals in Texarkana, Texas. And if our legal defense fund holds out, we may take it to the Texas Supreme Court.

Eminent domain abuse at the hands of one greedy corporation is unforgivable, but it is part of something even bigger. While all land is invaluable to its owners, farmland holds a particularly unique position. Rural property rights, like mine, are the "fundamental building blocks for our Nation's agricultural industry." [1] "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."[2] And TransCanada is at the heart of these issues right now. Their

1 H.R. 1433, 112th Congress, 2nd Session
2 H.R. 1433, 112th Congress, 2nd Session

advertisements in my local newspaper say "We want to be more than just a pipeline company: we want to be a trusted neighbor". They've given me no reason to trust them.

I do not believe there has been even one shred of documentation that proves that one single drop of the products transported through TransCanada's pipeline will be refined for use in the U.S. Yet we are supposed to relinquish our family's tradition and the cultural heritage of the families who lived on our land before us, just because TransCanada says, without proof, that their pipeline is for the public good. How can this pipeline be for the public good when so much information about it is not even in the public record? Diluted bitumen, tarsands, whatever you want to call it, is a product we should fully understand before we start pumping it through major waterways, sometimes through 70-year-old pipelines built before tarsands extraction was economically viable. TransCanada has called this product proprietary, refusing to provide specifics. How can we ensure the safety of a substance when we don't even know its ingredients?

Pipeline companies do not deserve a free ride, especially when they can't clean up their own messes, and especially when we taxpayers are subsidizing the cleanup attempts. Look at Enbridge in Michigan. Look at Exxon in Arkansas. This is a spill I went to see for myself. Standing at a culvert, I saw the 5 foot high imprint of the oil rush to the local wetlands. The thought of seeing the equivalent on my creek bank is disheartening. America already subsidizes the oil industry at a monumental disproportion to other industries. Are we to further subsidize pipelines with our safety, our security, and our human dignity?

Corporations may be considered to be people, but dollars do not yet count as votes. TransCanada's money never sleeps, but neither do landowners like me, faced with the threat of losing our property, or seeing our land and identities torn apart.

This bill brings much needed reform to a sometimes flawed system, and a platform where wrong can be made right. But with this exception that includes TransCanada, it is turning a blind eye to the most flagrant abuser of eminent domain today. I urge you to remove that exclusion, and let those who have abused be exposed, and suffer the consequences. TransCanada stole land that has been in my family for 6 decades, and all for a project that will line their pockets. To allow them to walk away from past abuses without penalty is egregious. I will continue to fight these injustices because life, as we know it, depends on it. And I am not alone.

Respectfully submitted,

Julia Trigg Crawford

Mr. FRANKS. Thank you, Ms. Crawford.
Now, Mr. Bullock, I recognize you, sir.

TESTIMONY OF SCOTT BULLOCK, SENIOR ATTORNEY, INSTITUTE FOR JUSTICE

Mr. BULLOCK. Thank you, Mr. Chairman. Thank you for the opportunity to testify regarding eminent domain abuse, an important issue that has received significant national attention as the result

of, as one of the Members just recently pointed out, one of the nearly universally despised Supreme Court decisions, certainly in recent memory.

This Committee is to be commended for responding to the American people by continuing to examine this misuse of government power, and it is our hope that the Congress passes the Private Property Rights Protection Act.

I did have the great honor of representing Susette Kelo and the other homeowners in New London and many other home and small business owners throughout the country that have been fighting this combination of public power and private gain.

The *Kelo* case signaled that the U.S. Constitution provides very little protection for private property rights of Americans faced with eminent domain abuse. Indeed, the Court ruled that is it is acceptable to use the power of eminent domain where there is a mere possibility that something could make more money than the homes or small businesses that currently occupy the land. The Supreme Court has so far refused to reconsider the *Kelo* decision, just this week turning down another case that would have permitted the Court to reconsider its misguided ruling in *Kelo*.

Because this threat has been noted by several people who have testified and by Members of this Subcommittee, there has been considerable public outcry against the closely divided Supreme Court decision. Organizations spanning the political spectrum have united in opposition to eminent domain abuse. Unfortunately, while several bills have been introduced in Congress, including one in the 109th Congress that passed the House by a vote of 376 to 38, Congress has yet to pass this legislation.

The Private Property Rights Protection Act introduced in this Congress is commonsense legislation that will stop the Federal Government from being complicit in an abuse of power already deemed intolerable by most individuals.

It should be noted that eminent domain abuse was a problem before the *Kelo* decision, and it remains a problem today. We noted in the study that we released in 2003 that there were over 10,000 instances of private-to-private transfers of property in a mere 5-year period. That is certainly an undercount of the number of times that eminent domain abuse occurs. In my written testimony we have documented several instances of eminent domain abuse that occurred, including several instances both before the *Kelo* decision and after the *Kelo* decision where these projects received Federal funds for this.

As mentioned above, heeding a deafening public outcry against eminent domain abuse, 44 states have reformed their eminent domain laws in the wake of *Kelo*. These reforms vary greatly, and indeed no two states enacted the same legislative reforms, but eminent domain abuse has become virtually nonexistent in some states, while in others there remains serious abuse and much need for improvement.

As Professor Beito just recently noted, Alabama passed legislation to roll back its eminent domain reform after being the first state to react legislatively to give its citizens stronger protection against this abuse of power. This demonstrates an ongoing need to remain vigilant against eminent domain abuse and for this Con-

gress to act in order to not give Federal sanction to these abuses of private property rights.

The legislation also contains important protections in order to preserve communities' ability, for instance, to deal with truly blighted properties, properties that are abandoned, properties that pose direct threats to public health and safety. It should also be noted that this bill will not interfere with communities' abilities to engage in economic development. Thankfully, most development occurs in this country without the use of eminent domain. These reforms and the reforms that have been passed by the states do not interfere with the ability of private property owners to sit down, negotiate, and engage in economic development projects.

In this economy especially, Congress does not need to be spending scarce economic development funds for projects that not only abuse eminent domain and strip hard-working, tax-paying home and small business owners of their constitutional rights, but in many instances these projects fail. The project in New London, as Ms. Kelo mentioned, is Exhibit A for what happens when governments abuse eminent domain and engage in massive corporate welfare. After $80 million being spent over 12 years since the redevelopment plan has passed, over six or 7 years since Mrs. Kelo and her neighbors were forced out of their homes, there remains no economic development in this peninsula whatsoever, and it is a barren field. That is too often the legacy left behind this abuse of eminent domain.

So we ask the Congress to pass the Private Property Rights Protection Act to protect homeowners like Ms. Kelo and small business owners throughout the country. Thank you very much.

[The prepared statement of Mr. Bullock follows:]

Testimony of Scott Bullock
Senior Attorney, Institute for Justice
United States House Committee on the Judiciary
Subcommittee on the Constitution & Civil Justice
Hearing on the Private Property Rights Protection Act of 2013
April 18, 2013

Thank you for the opportunity to testify regarding eminent domain abuse, an important issue that has received significant national attention as a result of the U.S. Supreme Court's universally reviled decision in *Kelo v. City of New London*. This committee is to be commended for responding to the American people by continuing to examine this misuse of government power, and it is our hope that Congress finally passes the Private Property Rights Protection Act.

My name is Scott Bullock, and I am a senior attorney at the Institute for Justice, a nonprofit public interest law firm in Arlington, Virginia, that represents people whose rights are being violated by the government. One of the main areas in which we litigate is property rights, particularly in cases where homes or small businesses are taken by the government through the power of eminent domain and transferred to another private party. I have represented property owners across the country fighting eminent domain for private use, and I represented the homeowners in *Kelo v. City of New London,* the case in which the U.S. Supreme Court ruled by a bare majority that eminent domain could be used to transfer perfectly fine private property to a private developer based simply on the mere promise of increased tax revenue.

The *Kelo* case signaled that the U.S. Constitution provides very little protection for the private property rights of Americans faced with eminent domain abuse. Indeed, the Court ruled that it is acceptable to use the power of eminent domain when there is a mere *possibility* that something else could make more money than the homes or small businesses that currently occupy the land. It's no wonder, then, that the decision caused Justice O'Connor to remark in her dissent: "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 center, or any farm with a factory."

One Institute for Justice study found that eminent domain disproportionately impacts minorities, the less educated, and the less well-off. That report, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse,* can be found at http://www.ij.org/1621 and is the subject of "Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?" (*Urban Studies*, October 2009, vol. 46, no. 11, at 2247-2461).

Because of this threat, there has been a considerable public outcry against this closely divided decision. Organizations spanning the political spectrum have united in opposition to eminent domain abuse, including the National Association for the Advancement of Colored People, Mexican American Legal Defense and Education Fund, League of United Latin American Citizens, the Farm Bureau, and the National Federation of Independent Business. Overwhelming majorities in every major poll taken after the *Kelo* decision have condemned the result. 44 states have reformed their eminent domain laws in the wake of the decision. Nine state supreme courts have made it more difficult for the government to engage in eminent domain abuse, and three of those have explicitly rejected *Kelo*. Unfortunately, while several bills have been introduced in both the House and the Senate to combat the abuse of eminent domain with significant bipartisan support—the original version of this bill, H.R. 4128 in the 109th Congress, passed the House by a vote of 376 – 38—Congress has yet to pass any legislation.

The Private Property Rights Protection Act is common sense legislation that will stop the federal government from being complicit in an abuse of power already deemed intolerable by most states.

Before Kelo, the use of eminent domain for private development had grown to become a nationwide problem, and the Court's decision quickly encouraged further abuse.

Eminent domain, called the "despotic power" in the early days of this country, is the power to force citizens from their homes, small businesses, churches and farms. Because the Founders were conscious of the possibility of abuse, the Fifth Amendment provides a very simple restriction: "[N]or shall private property be taken for public use without just compensation."

Historically, with very few limited exceptions, the power of eminent domain was used for things the public actually owned or used—schools, courthouses, post offices and the like. Over the past 60 years, however, the meaning of public use has expanded to include ordinary private uses like condominiums and big-box stores.

The expansion of the public use doctrine began with the urban renewal movement of the 1950s. In order to remove so-called "slum" neighborhoods, cities were authorized to use the power of eminent domain. Urban renewal wiped out entire communities, typically African American, earning eminent domain the nickname "negro removal." (See "Eminent Domain & African Americans: What is the Price of the Commons?" by Dr. Mindy Fullilove at http://www.castlecoalition.org/187.) This "solution," which critics and proponents alike consider a dismal failure, was given ultimate approval by the Supreme Court in *Berman v. Parker*. The Court ruled that the removal of blight was a public "purpose," despite the fact that the word "purpose" appears nowhere in the text of the Constitution and government already possessed the power—and still does—to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened up a Pandora's box, and in the wake of that decision properties were routinely taken pursuant to redevelopment statutes when there was absolutely nothing wrong with them, except that some well-heeled developer covets them and the government hoped to increase its tax revenue.

The use of eminent domain for private development was widespread. We documented more than 10,000 properties either seized or threatened with condemnation for private development in the five-year period between 1998 and 2002. Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnations and threatened condemnations. For example, in Connecticut, we found 31, while the true number of condemnations was 543.

After the Supreme Court actually sanctioned this abuse in *Kelo*, the floodgates opened; the rate of eminent domain abuse tripled in the one year after the decision was issued (see *Opening the Floodgates: Eminent Domain Abuse in a Post-*Kelo *World*, available at http://www.castlecoalition.org/189). With the high court's blessing, local government became further emboldened to take property for private development. For example:

- Freeport, Texas: Hours after the *Kelo* decision, officials in Freeport began legal filings to seize some waterfront businesses (two seafood companies) to make way for others (an $8 million private boat marina).
- Oakland, Calif.: A week after the Supreme Court's ruling in 2005, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family had

owned since 1949. Revelli and a neighboring business owner had refused to sell their property to make way for a new housing development. Said Revelli of his fight with the city, "We thought we'd win, but the Supreme Court took away our last chance."

- Hollywood, Fla. For the second time in a month, Hollywood officials have used eminent domain to take private property and give it to a developer for private gain. Empowered by the *Kelo* ruling, City commissioners took a bank parking lot to make way for an exclusive condo tower. When asked what the public purpose of the taking was, City Attorney Dan Abbott didn't hesitate before answering, "Economic development, which is a legitimate public purpose according to the United States Supreme Court."
- Arnold, Mo. The St. Louis Post-Dispatch reported that Arnold Mayor Mark Powell "applauded the [*Kelo*] decision." The City of Arnold wanted to raze 30 homes and 15 small businesses, including the Arnold VFW, for a Lowe's Home Improvement store and a strip mall—a $55 million project for which developer THF Realty would receive $21 million in tax-increment financing. Powell said that for "cash-strapped" cities like Arnold, enticing commercial development is just as important as other public improvements.
- Sunset Hills, Mo.: Less than three weeks after the *Kelo* ruling, Sunset Hills officials voted to allow the condemnation of 85 homes and small businesses for a shopping center and office complex.
- New York, N.Y.: In 2010, the New York Court of Appeals—the state's highest court—allowed the condemnation of perfectly fine homes and businesses for two separate projects. First, a new basketball arena and residential and office towers in Brooklyn, and then for the expansion of Columbia University—an elite, private institution—into Harlem.

As mentioned above, heeding a deafening public outcry against eminent domain abuse, 44 states have reformed their eminent domain laws in the wake of *Kelo*. These reforms varied greatly—indeed, no two states enacted the same legislative reforms. Eminent domain abuse has become virtually non-existent in some states, and in others there remains much room for improvement. Alabama recently passed legislation to roll back its eminent domain reform, after being the first state to react legislatively to give its citizens stronger protections against this abuse of power after *Kelo*. This demonstrates an ongoing need to remain vigilant in the fight against eminent domain abuse.

Congress should take this opportunity to stop being complicit in eminent domain abuse where it exists and where it may reappear in the future.

Despite the nationwide revolt against *Kelo*, federal action is still needed, as federal law and funds currently support eminent domain for private development.

Federal agencies themselves rarely if ever take property for private projects, but federal funds support condemnations and support agencies that take property from one person to give it to another. There has been improvement from state legislative reform, but not enough. Although eminent domain for private development is less of a problem in nearly half of the states in the wake of *Kelo*, it remains a major problem in many other states. Unfortunately, some of the states that were the worst before *Kelo* in terms of eminent domain abuse did little or nothing to reform

their laws. New York remains the worst state in the country, and it has gotten even worse since *Kelo*. Missouri, also a major abuser, passed only weak reform, as did Illinois. In other states, like Washington and Texas, the prospect of federal money for Transit Oriented Development has inspired municipalities to seek enormous areas for private development (areas not needed for the actual transportation). Eminent domain abuse is still a problem, and federal money continues to support the use of eminent domain for private commercial development. A few examples of how federal funds have been used to support private development include:

- New London, Conn.: This was the case that was the subject of the Supreme Court's *Kelo* decision. Fifteen homes were taken for a private development project that was planned to include a hotel, upscale condominiums, and office space. The project received $2 million in funds from the federal Economic Development Authority—and ultimately failed.
- Brea, Calif.: The Brea Redevelopment Agency demolished the city's entire downtown residential area, using eminent domain to force out hundreds of lower-income residents. The Department of Housing and Urban Development (HUD) launched an investigation into the potential misappropriation of federal development grants totaling at least $400,000, which made their way to the city in the late 1980s and early 1990s. FBI agents investigated the Redevelopment Agency based on evidence that the Agency used coercive tactics to acquire property.
- Garden Grove, Calif.: Garden Grove has used $17.7 million in federal housing funds to support its hotel development efforts—efforts that included, at least in part, the use of eminent domain. In 1998, the City Council declared 20 percent of the city "blighted," a move that allowed the city to use eminent domain for private development. Using that power—and federal money—the city acquired a number of properties, including a mobile-home park full of senior citizens, apartment renters and small businesses, in order to provide room for hotel development.
- National City, Calif.: In 2007, the National City Community Development Commission, which receives significant federal funding, authorized the use of eminent domain over nearly 700 properties in its downtown area, calling the area "blighted." One of the planned projects was the replacement of the Community Youth Athletic Center, a boxing gym and mentoring program for at-risk youth, with an upscale condominium project. Fortunately after four years of hard-fought litigation by my organization, the Institute for Justice, we prevailed in getting the blight designation struck down.
- Normal, Ill.: Normal officials condemned the properties of Orval and Bill Yarger and Alex Wade, including the Broadway Mall, for a Marriott Hotel and accompanying conference center being built by an out-of-town developer. The town secured at least $2 million in federal funding for downtown projects, and once the cost of the Marriott nearly doubled, approved giving the developer $400,000 in Community Development Block Grant money.
- Baltimore, Md.: In December 2002, the Baltimore City Council passed legislation that gave the city the power to condemn about 3,000 properties for a redevelopment project anchored by a biotechnology research park. The development would contain space for biotech companies, retail, restaurants and a variety of housing options. HUD provided a $21.2 million loan to the city. Many projects in Baltimore involving the use of eminent domain for private development are overseen by the Baltimore Development Corporation, which receives federal funding.

- Somerville, Mass.: In October 2012, Somerville authorized the use of eminent domain over a 117-acre neighborhood, identifying seven blocks with 35 properties to be acquired first. The Union Square Revitalization Plan is a transit-oriented development with residences, retail, restaurants and office space. The city has received at least $29 million in stimulus funds and around $35 million in other federal and state funding. The owner of a threatened gym said that he believes in the revitalization of Union Square: "That's why I purchased the property." He said it would be difficult to develop his business with "the threat of seizure hanging over our head."
- St. Louis, Mo.: In 2003 and 2004, the Garden District Commission and the McRee Town Redevelopment Corporation demolished six square blocks of buildings, including approximately 200 units of housing, some run by local non-profits. The older housing was to be replaced by luxury housing. The project received at least $3 million in Housing and Urban Development (HUD) funds, and may have received another $3 million in block grant funds as well.
- Elmira, N.Y.: Eight properties—including apartments, a garage, carriage house and the former Hygeia Refrigerating Co.—were condemned and six were purchased under the threat of eminent domain for Elmira's South Main Street Street Urban Development project. HUD funds were used to create a 6.38-acre lot for development.
- Mount Vernon, N.Y.: In October 2012, this suburb of New York City declared almost eight acres in a neighborhood that is 90 percent black "blighted" and subject to condemnation. The blight study was paid for by the developer who wants to build there. Threatened properties include homes, churches, and businesses including a daycare with a well-maintained playground, a nail salon, delis, a Jamaican restaurant, and small grocery stores. Mount Vernon received at least $1.7 million in CDBG and HOME funds in 2012.
- New Cassell, N.Y.: St. Luke's Pentecostal Church saved for more than a decade to purchase property and move out of the rented basement where it held services. It bought a piece of property to build a permanent home for the congregation. The property was condemned by the North Hempstead Community Development Agency, which administers funding from HUD, for the purpose of private retail development. The land remained vacant for at least six years.
- New York, N.Y.: Developer Douglas Durst and Bank of America enlisted the Empire State Development Corporation to clear a block of midtown Manhattan for their 55-story Bank of America Tower at One Bryant Park. The ESDC put at least 32 properties under threat of condemnation and initiated eminent domain proceedings. All of the owners eventually sold. Durst had abandoned the project prior to 9/11, but an infusion of public subsidies—including $650 million in the form of Liberty Bonds—and a $1 billion deal with Bank of America put plans back on track.
- Ardmore, Pa.: The Ardmore Transit Center Project had some actual transportation purposes, but Lower Merion Township officials also planned to remove several historic local businesses, many with apartments on the upper floors, so that it could be replaced with mall stores and upscale apartments. The project received $6 million in federal funding, which went to the Southeastern Pennsylvania Transit Authority. But for a tirelessly waged grassroots battle—which no American should have to wage to keep what is rightfully theirs—that ultimately stopped the project, the federal government would be complicit in the destruction of successful, family-owned small businesses.

- Washington, D.C.: The National Capital Revitalization Corporation received $28 million in HUD funds to buy or seize up to 18 acres of land for a private developer to replace old retail with new retail. Over the course of seven years, affected business owners challenged the District in a dozen different eminent domain cases—but the city won or settled every dispute.

Congress can and should take steps to ensure that federal funds do not support the abuse of eminent domain.

The *Kelo* decision continues to cry out for Congressional action, eight years later. Even Justice Stevens, the author of the opinion, stated in a speech that he believes eminent domain for economic development is bad policy and hopes that the country will find a political solution.

Some states did, but those reforms not embedded in state constitutions will always be subject to repeal or exception whenever a pie-in-the-sky project catches the eye of state legislators or local officials. Congress needs to finally make its opposition heard on this issue, and the sponsors of this bipartisan legislation are all to be commended for their efforts to provide protections that the Supreme Court denied in 2005.

Funding restrictions will only be effective if there exists a procedure for enforcement, so any reform must also include a mechanism by which the economic development funding for the state or local government can be stopped. Part of this procedure should be a private method of enforcement, whether through an agency or court, so that the home or small business owners or, importantly, tenants that are affected by the abuse of eminent domain, or any other interested party like local taxpayers, can alert the proper entity and funding can be cut off as appropriate. The diligence of ordinary citizens in the communities where governments are using eminent domain for private development, together with the potential sanction of lost federal funding, will most certainly serve to return some sense to state and local eminent domain policy—especially in the absence of substantive eminent domain reform that effectively protects property owners.

This legislation also allows cities and agencies to continue to receive federal funding when they acquire abandoned property and transfer it to private parties. When the public thinks about "redevelopment," it is most concerned with the ability to deal with abandoned property. With this legislation, cities can continue to clear title to abandoned property and then promote private development there without risking losing their federal funding. Additionally, the clear and limited exception for taking property to remove "harmful uses of land provided such uses constitute an immediate threat to public health and safety" will discourage cities from taking perfectly fine homes and businesses as is common practice under some state's vague blight laws.

Congress's previous efforts to restrict the use of certain federal funds for eminent domain (from the Departments of Transportation, Treasury and/or Housing and Urban Development) have unfortunately been ineffective. There does not seem to be any way for individuals to enforce this restriction. Nor does it appear that any of these departments have ever investigated a violation of the spending limitation or enforced the limitation. Instead, the local governments that receive the funds are expected to understand and apply the prohibition. In other words, the same local governments that are planning to use eminent domain are also expected to limit their own

funding, despite the fact that there is no prospect of enforcement. It is therefore not surprising that the funding restriction has not protected the rights of people faced with eminent domain.

Given the climate in the states as a result of *Kelo*, congressional action would do even more to both discourage the abuse of eminent domain nationwide and encourage sensible state-level reform. Reform at the federal level would be a strong statement to the country that this awesome government power should not be abused. It would restore the faith of the American people in their ability to build, own and keep their homes and small businesses, which is itself a commendable goal.

It should also be noted that development occurs everyday across the country without eminent domain and will continue to do so should this committee act on this issue, which I recommend. Public works projects like flood control will not be affected by any legislation that properly restricts eminent domain to its traditional uses since those projects are plainly public uses. But commercial developers everywhere need to be told that they can only obtain property through private negotiation, not government force and that the federal government will not be a party to private-to-private transfers of property. As we demonstrate in a recent study, restricting eminent domain to its traditional public use in no ways harms economic growth. (See report at http://ij.org/1618, and Carpenter, D.M. and John K. Ross. "Do Restrictions on Eminent Domain Harm Economic Development?" *Economic Development Quarterly*, 24(4), 337-351.) Indeed, congressional action will not stop progress.

Conclusion

In this economy, Congress does not need to be sending scarce economic development funds to projects that not only abuse eminent domain and strip hard-working, tax-paying home and small business owners of their constitutional rights, but projects that may ultimately fail. Let New London be a lesson: After $80 million in taxpayer money spent, years tied up in litigation and a disastrous U.S. Supreme Court ruling, the Fort Trumbull neighborhood is now a barren field home to nothing but feral cats. The developer balked and abandoned the project, and Pfizer—for whom the project was intended to benefit—also left New London.

Eminent domain sounds like an abstract issue, but it affects real people. Real people lose the homes they love and watch as they are replaced with condominiums. Real people lose the businesses they count on to put food on the table and watch as they are replaced with shopping malls. And all this happens because local governments prefer the taxes generated by condos and malls to modest homes and small businesses. Federal law currently allows expending federal funds to support condemnations for the benefit of private developers. By doing so, it encourages this abuse. 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 the protection of property rights.

Again, thank you for the opportunity to testify before this subcommittee.

Mr. FRANKS. Thank you, Mr. Bullock.

Thank you all for your testimony, and we will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself for 5 minutes. Ms. Kelo, I will begin with you.

Let me add my own special expression of gratitude to you for being here and for all the things that you did to get here.

Mrs. Kelo, you were provided monetary compensation for the property that the City of New London took from you, but could you

explain the emotional and sentimental costs that losing your home inflicted, a cost that money simply doesn't compensate for?

Ms. KELO. Correctly said. It really didn't matter what they gave us. We did not want to leave our homes, all of us. It was never about the money, and we never talked about money. We never engaged in money conversations until the end, when we were forced to do so, after we had no choice and knew that we had to go.

We had one family that was there since the 1890's, and what they did to us was absolutely horrible. Nobody in this country should have to live the way we lived. Nobody in this country should have to live the way we lived and lose what we lost.

Mr. FRANKS. Yes. Well, thank you.

Mr. Bullock, let me ask you, this legislation takes Federal economic development funds away from local governments that violate private property rights for a period of 2 years. Some have argued that the removal of these funds is unnecessary and that the right of private action would be sufficient. Could you explain why, from an enforcement perspective, that taking away Federal economic development funds is an important component of the legislation?

Mr. BULLOCK. Well, it would provide a very strong incentive for local communities to not engage in these types of abuses. It should be noted that this bill would not override the substantive rights that would still be given to private property owners to fight against takings of property. So this is not a bill that tries to impose some type of Federal standard of substantive rights into the court procedures that occur. So property owners would still, hopefully, if their state has passed good eminent domain legislation, would have the ability to fight the taking itself. What this bill I think really aims at is to try to persuade communities that engage in economic development to not abuse eminent domain in the first instance. If they don't abuse eminent domain and if they are not taking people's property against their will for private development projects, then there would be no effect upon those Federal economic development funds.

Mr. FRANKS. Let me continue with you. It is very unfortunate that some of Ms. Crawford's land is being taken to build the Keystone Pipeline. However, it is my understanding that, unlike the economic development taking in *Kelo*, that using eminent domain to take land to build a pipeline has traditionally been accepted to be a public use. Is using eminent domain for building a pipeline or any other public utility project a traditional, pre-*Kelo* use of the eminent domain power. Can you give us some contrasts?

Mr. BULLOCK. Sure. That is something that Justice Thomas in his dissent in *Kelo* went through very carefully in looking at the history of eminent domain and in giving examples of how eminent domain is being used. Of course, he took the most restrictive definition of eminent domain possible. He really dissented alone, and he noted that common carriers and utilities have typically been granted eminent domain power to carry out those public uses.

So that is quite different from the government taking land directly from one private property owner and handing it over to another private property owner that is not in any way a common carrier, has a special status under the law, but is just a garden-variety developer, whether it is a condominium developer or a big-box

retail developer, the creator of a lifestyle center, which if you look through my written testimony and most of the examples of eminent domain abuse, that is what these cases involve, is just pure private development takings.

Mr. FRANKS. Thank you, sir.

Dr. Beito, some of the opponents of this legislation have argued that there is no reason for Congress to step in and try to limit economic development takings, that states have already done enough. How would you respond to such an argument?

Mr. BEITO. Well, again, the example of Alabama, this bill just last month was passed almost unanimously, and it specifically uses the term "eminent domain." It gives an eminent domain protection for the automotive industry, I think biotech, several other industries. Now, what is interesting about this is that just after it passed, people were challenged on it, and some people who voted for it said, well, oh, we didn't mean to undermine eminent domain, but maybe our wording was sloppy and maybe we need to do something about it. So this kind of thing I think happens a lot in legislative bodies. Bills sort of are pushed through, nobody is really paying attention, and before you know it, it is there, and it stays there usually, even though we have some regret being expressed, and I suspect this kind of thing happens a lot.

This doesn't limit the freedom of states, the ability of states to use eminent domain, even for private development. All it is saying is that we don't want our Federal subsidies to go for this, which I think is an important distinction to make.

Mr. FRANKS. Well, I thank you all. I will now recognize the Ranking Member for 5 minutes for his questions.

Mr. NADLER. Thank you, Mr. Chairman.

We all have considerable unease about eminent domain. I certainly do, too, and it certainly has been abused in the past. I prefer to let the states deal with it to a large extent, but my real concern with this bill goes beyond generalities. I want to ask Mr. Bullock a few questions about it.

The bill says that a state, a political subdivision, cannot condemn by eminent domain a property for purposes of economic development, and if it does, for a period of 7 years thereafter, for a period of 7 years from when such a use is consummated, the former property owner may sue. And if he sues, the remedy is cessation of economic aid from the Federal Government. That is the remedy scheme.

Now, what bothers me about this is, aside from the fact that it doesn't help the property owner, all it does is perhaps bankrupt the municipality.

Let's assume that a municipality condemns a property for a use which it thinks proper, let's say for a school, a public use. Let's assume that the funding for the school dries up because Congress enacts a sequestration and there is no more money for schools. That has been known to happen. Let's assume that a few years later, after five or 6 years, the municipality realizes it has no money for a school, and anyway there aren't that many school kids anymore because everybody has moved away because they closed the defense plant, so now it sells the property.

The original purpose was a legitimate use, for a school. Now it sells the property to a private developer as surplus property. Now someone can come in and sue the government and sue the municipality to eliminate Federal aid for a few years. That is the way this bill works. Am I correct in saying that?

Mr. BULLOCK. Well, that is not my understanding of how the bill would work.

Mr. NADLER. Well, that is exactly what the bill says.

Mr. BULLOCK. And I think if it goes to the private enforcement mechanism for it, I think it is important to have that because——

Mr. NADLER. Never mind if it is important to have it. Why wouldn't it operate as I just said?

Mr. BULLOCK. I am sorry?

Mr. NADLER. Why wouldn't it operate as I just said? I don't doubt that the authors of the bill thought it important to have that clause in it for various reasons. I think it is a very misguided clause. I think all it will do is enable states to be sued, to lose their economic aid even if they proceed in perfectly good faith and for some reason the public purpose fell through and now they sell it as surplus property.

Mr. BULLOCK. The reason why you have the 7-year limit in there and why I think it is a central part of the bill is so you do not get into a situation——

Mr. NADLER. I understand that, but why wouldn't it operate the way I just said? And if it does operate the way I just said, wouldn't that be a pretty perverse result?

Mr. BULLOCK. A pretty perverse result?

Mr. NADLER. Yes. In other words, a state decides they are going to build a school. It condemns the property for the school. For some reason, the school doesn't get built, and then five or 6 years later it sells the property as surplus property to some private owner, at which point it is subject to lawsuits to stop economic aid.

Mr. BULLOCK. Right. I don't know in those circumstances who would actually sue, because——

Mr. NADLER. The former property owner would sue.

Mr. BULLOCK. Right, but there could be a solution to this.

Mr. NADLER. Well, I would like to see it. I have been asking this question for 4 years now.

Mr. BULLOCK. Sure. But, I mean, you can always come up with certain types of hypotheticals that might——

Mr. NADLER. But this is very important. This is how it would normally operate.

Mr. BULLOCK. I have never heard of this situation.

Mr. NADLER. You haven't gone to the—well, here is the bill, page 2. The bill is very clear in what it says, and it would operate the way I just said, unless you can tell me why it wouldn't.

Mr. BULLOCK. You are asking the question as a hypothetical, and I am saying could this possibly happen? Maybe. I don't know of any other instances where it has happened.

Mr. NADLER. Well, we haven't had this bill.

Mr. BULLOCK. Right, but I am talking about——

Mr. NADLER. But that scenario happens all the time.

Mr. BULLOCK. No, it does not happen all the time.

Mr. NADLER. It does not happen all the time that a government entity condemns the property from eminent domain for a project that ultimately falls through and then sells the property?

Mr. BULLOCK. The key to this and why this provision is in there and why it is important to have it in there, leaving aside whatever hypothetical that might come up, that you might come up with, is to prevent a situation, the government from engaging in——

Mr. NADLER. I understand that. That is the purpose. The effect is quite different. The purpose may be laudable. The effect is what I just said, and you haven't told me why the effect isn't as I just said.

Mr. BULLOCK. Well, I don't know how you remedy a situation that is both hypothetical——

Mr. NADLER. Well, let me ask you a different question, then. Let's assume that the government does nothing wrong. It doesn't even, in fact, condemn anything by eminent domain, but it wants to float a bond for economic development, and part of the revenue stream against which it is going to float the bond is anticipated Federal aid, which is what governments do. We are anticipating X dollars in Federal aid per year. We are going to float a bond for economic development, and this is part of our backing for the bond.

Along comes bond counsel and says you can't do that because maybe the mayor who hasn't been elected yet—the mayor is going to be elected 4 years from now—maybe he will misuse the power of eminent domain and subject the county to this penalty, in which case there will be no Federal economic aid, and therefore we can't okay this bond. So you are destroying the bonding capacity of local governments without the government ever even doing anything.

Mr. FRANKS. The gentleman's time has expired, but the witness may answer the question.

Mr. BULLOCK. If I could just respond directly. There is one simple solution to this, and it is a solution to even your original hypothetical. Don't use eminent domain, don't use the property——

Mr. NADLER. What I just said would happen if they didn't use eminent domain. Just the existence of the statute would present that possibility.

Mr. BULLOCK. If a future mayor did not use eminent domain for private development, there would not be an issue with it. That is what this does.

Mr. NADLER. No, no. You are missing the point.

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

Mr. NADLER. Can I ask for one additional minute?

Mr. FRANKS. Without objection.

Mr. NADLER. Thank you.

The point is, the existence of this statute on the books would put a cloud, like a cloud of title, like a cloud on title, here being a cloud on future revenue. In case the city in the future screwed up and improperly used eminent domain, that would eliminate Federal aid in the future. Therefore, you cannot depend on the Federal aid now. Therefore, you can't float the bond. Any bond counsel would rule that way.

Mr. BULLOCK. Right. And if a future counsel or a future mayor does not abuse eminent domain, which is the whole point of this, is to provide a strong disincentive——

Mr. NADLER. Underwriting the bond, you have to assume that that might happen. The point is that now, that bonds could not be underwritten now because maybe that improper use would happen in the future, and the bill would then eliminate the ability to pay back the bond. So you couldn't underwrite the bond now even if no one ever misbehaves in any way.

It puts a cloud on—not a cloud on title but a cloud on revenue, even if nobody ever does anything, and that is the basic flaw in this bill. It would eliminate the possibility, to a very large extent, of use of Federal financing as a basis for bonding for future economic development in states.

I thank the Chairman for yielding me the extra time.

Mr. FRANKS. The Chairman now recognizes Mr. DeSantis, the gentleman from Florida, for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman, and thank you for holding this very important hearing.

Kelo v. City of New London to me was wrongly decided. I think it is actually an example of judicial activism. Now, the Court didn't actually strike anything down. It allowed this to go, but I think when courts twist texts to fit their desired outcome, when they manipulate or abuse precedent, that is a form of judicial activism in that you are abandoning, I think, the traditional judicial role, and that is really the key takeaway from *Kelo*, is that you had five justices empower the government at all levels at the expense of private property owners.

I thought Sandra Day O'Connor hit it on the head in her dissent when she said, "Under the banner of economic development, all private property is now vulnerable to be taken and transferred to another private owner so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process." And so under *Kelo*, private property is essentially at the mercy of central planners who may very well deem an individual's property too blighted and not optimal for commandeering the amount of tax revenues required to fund the ambitions of the central planners. So I just think it was a wrong turn.

Mrs. Kelo, I want to thank you for what you did to fight this and for coming and appearing today. In terms of fighting this, I mean, how many different cases—because it went all the way up to the Supreme Court. Can you just briefly explain the process that you had to go through to try to vindicate your rights?

Ms. KELO. Well, Scott took the case. We started really just as grassroots and trying to fight it just with the neighborhood, and then the Institute for Justice got involved, and then we had to go to the Connecticut court, the New London Superior Court, and then to the state Supreme Court, and then to the United States Supreme Court.

Mr. DESANTIS. And you had mentioned that the Institute for Justice took your case. Had they not been willing to do that, would you have had the resources or the time——

Ms. KELO. Oh, absolutely not.

Mr. DESANTIS [continuing]. To take it all the way up there?

Ms. KELO. Absolutely not. Absolutely not. Absolutely not. No, no.

Mr. DESANTIS. Now, I guess you mentioned it in your opening statement, but you had your house taken. It was taken not for a traditional public use, like a road or a bridge, but to transfer to a private company who they thought would generate more tax revenue, essentially, and you mentioned that it has all kind of gone kaput. Can you just elaborate on that a little bit? Because I just find that amazing that you had gone through all of this, and now what they were promising didn't even happen.

Ms. KELO. That is correct. Nothing has been built or even developed there. As a matter of fact, as they took the properties by eminent domain, or as people, the elderly gave in and moved, they destroyed the houses one by one. So there was actually nothing even left in the neighborhood to save because they had tore down the houses.

They tore down the house right next to me, and the houses were very close to each other, maybe only 15 or 20 feet apart, and with the threat of the neighbor's house being collapsed on my house that I was living in. So they systematically destroyed the neighborhood to make it so we were fighting for—there was nothing left to fight for.

Mr. DESANTIS. And you support this particular piece of legislation, and have you been involved in some of the efforts in some of the states to curb eminent domain abuse that has occurred since your case was decided at the Supreme Court?

Ms. KELO. Yes, I have. Yes.

Mr. DESANTIS. Okay. And I would just say, again, thank you for what you have done. I think that your case has brought this issue to the forefront, and a lot of folks, their rights are at stake too. So you have done a great bit of good.

And I would also say, even though I disagreed with the decision, at least if a court fails to enforce a limitation on government, or fails to enforce a right, at least it allows states and Members of Congress to legislate protections for people. When the Court strikes down things and they are activists in that direction, that kind of freezes that and you need a constitutional amendment. So even though I thought it was a bad decision, I am happy that states have taken the lead in reforming this, and I think that I am certainly very favorably disposed to this piece of legislation, and I think it is common sense. I think it is consistent with the freedoms that the Founding Fathers intended, and I yield back, Mr. Chairman.

Ms. KELO. Thank you.

Mr. FRANKS. And I thank the gentleman.

Now I recognize the gentleman from Michigan, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

Dr. Beito, isn't it correct that there was objection to the Supreme Court decision in this matter because they added this new concept of economic development to expand the tax base was now a new reason to use eminent domain?

Mr. BEITO. Yes. I am not an expert in the legal history, but that was certainly one of the justifications. You could say that the door had really been opened in 1954 by *Berman v. Parker*, which used this doctrine of public purpose to say, well, you can—loosely inter-

preted the doctrine of public use. But I think that *Kelo* was sort of more notorious for focusing on that aspect of it.

Mr. CONYERS. And coming to you, Attorney Bullock, do you think that they also expanded the public purpose concept as an additional reason for eminent domain, which hadn't existed as clearly before?

Mr. BULLOCK. That is correct, Representative Conyers. For the past 50 years, as Professor Beito pointed out, the Supreme Court had given a broad interpretation to the public use clause. I think wrongly, they have really turned it into a public purpose clause or a public benefit clause.

But despite this broad language in previous decisions, the Supreme Court had never signed off on saying that merely using eminent domain simply to raise more tax revenue or to create more jobs to further economic development was a public use. That is what the majority opinion did in *Kelo*, and that is one of the real dangers of it, is because it is really a vision of eminent domain without any sort of limitation. Every home would produce more tax revenues and jobs if it were a business. Every small business, at least theoretically, would produce more jobs and tax revenue if it were a larger business. So that is the real danger of the *Kelo* decision. That is why there is the need for the reform at both the state level and then hopefully at the Federal level as well.

Mr. CONYERS. Thank you.

Mrs. Crawford, the irony of your situation that brings you here today is that, of all things, it was the Keystone Pipeline, of all the businesses that could ever be imagined. Here is an issue so controversial that the President still hasn't announced what he is going to do, and these are the same people that visited you. I think you said, in effect, they told you that you couldn't win anyway, that you ought to cooperate a little bit more. Isn't that the gist of your testimony?

Ms. CRAWFORD. Yes, sir. And in court transcripts, there were comments made by their attorneys that said she will have her day in court, but they are not going to win under this statute, or we are not going to let one landowner stand in the way of a multi-billion-dollar pipeline that is for the public good.

Our position is that until you prove it is for the public good, and if you are unwilling to provide any documents, then the only assumption I can make is that it is for private gain. So it is a foreign corporation using Texas to push a product through to export it for someone else, and that, sir, is not for the public good.

I am not against eminent domain if someone is bringing water to a community or building a road or building a hospital. But they are taking my land because they need a way to get product from Canada to probably foreign markets. That is not benefitting me.

Mr. CONYERS. Well, I am glad to hear you say that, because this is a question of how far should eminent domain be allowed to go. And here, we are not talking about a clean American product. Here we are talking about a product that is so controversial, with sands and detriment and debris—I can't adequately describe what the scientific issue is with the XL Pipeline, but for them of all companies in this country to tell you that we can take it anyway because we are going to extend economic development and we are going to

claim it is for a public purpose, I just think you are to be commended for continuing this battle, and I am glad that the Chairman has had another hearing on this. Would you make your final comment?

Ms. CRAWFORD. Well, I am just a farmer, so all this legalese is very difficult for me. But from my perspective, it seems a bit—it is hypocrisy to have a bill that claims to be so concerned about the property rights of individuals but then provides an exclusion for the guy with the biggest hammer, and he is beating us over the head with it. That seems to be a little one-sided.

Mr. CONYERS. Thank you very much.

Mr. FRANKS. And I thank the gentleman, and I now recognize the gentleman from Virginia, Mr. Scott, for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Bullock, just a couple of questions on the technical aspects of the bill. If you are in violation, what are the sanctions to be applied? Is it just loss of economic development funds? Is there any cloud over the title of the land?

Mr. BULLOCK. Not from my understanding of the bill, my reading of it.

Mr. FRANKS. Sir, can you pull your microphone?

Mr. BULLOCK. Sorry. I am a litigator, so I have not litigated that. But from my understanding, it would be simply a loss of Federal economic development funds.

Mr. SCOTT. There is no cloud over the title of the land?

Mr. BULLOCK. I don't see how that could be. As I mentioned before, the property owners that are fighting this or are in dispute with local governments and so forth would still have the ability to raise whatever the claims they might within the state court litigation in which this has been taking place.

Mr. SCOTT. Well, if it is public good but for economic development, if you can take it, this bill would just say if it is for economic development, you have to give up some Federal funds. It doesn't stop the proceedings from going forward.

Mr. BULLOCK. Correct, and that is why I think it is a balanced approach. It is not the Federal Government coming in and overriding decisions made in the state courts or providing some type of substantive rights to it. It is simply saying these are scarce Federal economic development funds; we don't want these funds to be used to facilitate economic——

Mr. SCOTT. Okay. And if you are in violation but don't do anything for 7 years, you just let it stay there before you develop it, are there any sanctions?

Mr. BULLOCK. No, I think it is a 7-year limit. So I think that that is something that is——

Mr. SCOTT. So if you haven't done anything for 7 years, you are home free?

Mr. BULLOCK. Well, I think, from my reading of it, that is a way to balance it so you do not have a situation where property is taken for a supposed public purpose and then turned around and given to private development interests. The 7 years allows, I think, for a bit of a compromise, where if you wait for 8 or 9 years, perhaps you could do that and sell it for private development purposes; or, as I was responding to Representative Nadler before, is that even

if it is taken for a school and the government decides that they don't need a school anymore, they can still use it for another public project, whether it is a public park or——

Mr. SCOTT. Or they could wait 7 years and give it to a private developer.

Mr. BULLOCK. Yes, I think that is right. Again, it is a way to try to balance not locking the government in perpetuity to having these restrictions on it, but still would prevent a situation where the government——

Mr. SCOTT. Okay. I am not arguing that fact. I am just trying to get some facts. If the city were to take the property and, rather than give it to a private entity, gave it to a public-owned redevelopment authority, would that be okay?

Mr. BULLOCK. Well, it would depend on what the public redevelopment authority did with it.

Mr. SCOTT. Economic development.

Mr. BULLOCK. Yes. I think if they transferred it to, then, private parties, which is typically what redevelopment agencies do, then the restrictions would still kick in.

Mr. SCOTT. So if the redevelopment authority didn't give it to private people for the first 7 years, then they would be home free.

Mr. BULLOCK. I think that that is right.

Mr. SCOTT. What if they gave it to a non-profit, not a for-profit?

Mr. BULLOCK. For a non-profit?

Mr. SCOTT. Right. Does the language in the bill say you can't give it to a for-profit private agency, for profit?

Mr. BULLOCK. I would have to look at the particular provisions of it. I can't remember exactly what it would be.

It would be important, though, to prevent a situation like what was happening in New London, and I think the bill does do this by preventing these leasehold agreements, where I think the bill is quite careful to try to prevent the government from doing like what happened in New London, where the property was originally given to a non-profit development corporation called the New London Development Corporation, but then they were going to lease that land for $1 a year for the next 99 years to private developers. That bill addresses something like that and prevents that situation from occurring.

Mr. SCOTT. Dr. Beito, are you a lawyer? Dr. Beito?

Mr. BEITO. Me?

Mr. SCOTT. Yes.

Mr. BEITO. No, no.

Mr. SCOTT. Does anybody know what effect this part of the bill says that essentially waives the 11th Amendment to the Constitution, what effect that would have on the application of the 11th Amendment? It seems to me you just can't say the Constitution doesn't apply to this bill. I don't think that has much effect at all. Does anybody disagree with that?

Mr. BULLOCK. I don't think it would. You know, the one thing it would do and that might be in there to allow for a private cause of action against folks, which I think is important to do to make sure it is enforced. However, it would not be for money damages. I mean, the property owner would not have the ability under this

bill to enforce the provisions of it to gain any type of monetary damages, which would implicate——

Mr. SCOTT. A statute cannot waive the application of a part of the United States Constitution; is that right?

Mr. BULLOCK. Absolutely. The Constitution is paramount. That is true.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. FRANKS. And thank you, Mr. Scott.

This concludes today's hearing. So I want to thank the witnesses again for being here, thank the Members for their attendance, and those that were in the audience.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

I do thank the witnesses again, and I thank the Members and the audience, and this hearing is adjourned.

[Whereupon, at 11:25 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Testimony of Andrew W. Schwartz Concerning
The "Private Property Rights Protection Act of 2013"
Before the House Judiciary Subcommittee on the Constitution
May 6, 2013

Thank you for the opportunity to provide written testimony about legislation that would withhold federal funding from local governments that use their constitutional power of eminent domain for economic revitalization. My name is Andrew W. Schwartz and I am an attorney practicing for more than 30 years in the areas of regulatory takings, eminent domain, real estate transactions, and redevelopment. I was the lead attorney in *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), where the United States Supreme Court unanimously upheld a local regulation of land use against a regulatory takings challenge, expressly recognizing that land use matters are quintessentially local and should be resolved by local, rather than federal, courts. In 1998, I co-founded the Community Land Use Project of California to assist local government agencies in preserving an appropriate balance between individual property rights and community interests. I regularly consult with the California League of Cities and California State Association of Counties on amicus participation in regulatory takings and eminent domain appellate litigation. I have also written and spoken widely on eminent domain and regulatory takings. I have been the lead counsel in more than 100 eminent domain cases.

If passed, this legislation would have dire consequences for the economic health of communities around our country. It would undermine local governments' ability to use the legal and financial tools of economic redevelopment, particularly eminent domain and tax-increment financing, to revive local economies and create affordable housing and jobs. It is crucial that the historic role of economic redevelopment and the potential effect of this legislation be understood.

Redevelopment Revitalizes Local Economies and Provides Social and Environmental Benefits

Redevelopment is a process authorized under state law that enables local government entities to revitalize deteriorated and blighted areas in their jurisdictions. Redevelopment agencies develop plans and provide the initial funding to launch revitalization of identified areas. In doing so, redevelopment encourages and attracts private sector investment that otherwise would not occur. (*See* California Redevelopment Association website, http://www.calredevelop.org.)

Redevelopment activities, which often rely on the use of eminent domain, generate jobs and economic activity that provide tremendous benefits to state and local economies. Before its redevelopment agencies were shut down,[1] California provided a prime example of the power of redevelopment to revitalize local economies. Every dollar of redevelopment spending in California created nearly $14 in total economic activity. In 2003, redevelopment construction

[1] Redevelopment in California has an excellent track record in remediating blight and creating jobs and affordable housing. The State eliminated redevelopment not because redevelopment had not been successful or due to perceived eminent domain abuse, but rather because the state had urgent need of funds historically allocated to redevelopment to address a persistent, structural budget deficit. *See* AB1x 26 (Blumenfield, 2011) (finding that state's longstanding recession required reallocation of revenues to other agencies).

activities helped generate more than $2 billion in additional state and local revenues. In 2006 and 2007, redevelopment agencies in California generated $40.8 billion in economic activity. Redevelopment supported nearly 304,000 new full-time and part-time jobs in just one year, from 2006 to 2007. (http://www.calredevelop.org/.)

Additionally, redevelopment agencies have been a leading funder of affordable housing in California, second only to the federal government. "Redevelopment is now a primary device for the economic redevelopment of our center cities and produces much of the new housing in center cities, especially low-income housing." (Mark Mihaly, "Living in the Past: The *Kelo* court and Public-Private Economic Redevelopment," *Ecology Law Quarterly* Vol. 34, No. 1, p. 7 (2007).) Beginning in 1976, 20 percent of tax increments generated from redevelopment project areas were required to be set aside to fund affordable housing. (Steven R. Meyers et al., "Will Eminent Domain for Redevelopment Purposes Survive Legislative Challenges After *Kelo*?," *California Real Property Journal* Vol. 24, No. 2, p. 4 (2006).) Since 1995, California redevelopment agencies helped build or rehabilitate 78,750 affordable housing units, according to the California Department of Housing and Community Development.

Eminent domain is essential to economic redevelopment. If eminent domain cannot function, much of the economic redevelopment in the country, with its benefits to center cities and the poor, would cease. (Mihaly, 26.)

Contrary to the belief of some that redevelopment agencies "take" rural land from private landowners, redevelopment agencies in fact focus the vast majority of their efforts in already-developed areas, thus aiding states' and cities' efforts to combat climate change, suburban sprawl, and other environmental threats. "By promoting urban-centered growth, redevelopment activities help preserve the environment and open space, reduce sprawl and commute times and improve the quality of life." (http://www.calredevelop.org/.) By concentrating development within existing city boundaries, redevelopment actually preserves and sometimes *increases* the rural land available for farming.

Transit-oriented development ("TOD"), which focuses new, often affordable housing development alongside public transit corridors, is frequently the product of redevelopment. TOD has a proven record of increasing transit use and reducing vehicle miles traveled. Local governments also frequently rely on their eminent domain power to remediate brownfields, as Emeryville, California did in the 1990s (see case study, below).

Redevelopment Fills a Need Where Tax Revenues Have Failed to Pay for Infrastructure

Many states' and local governments' inability to raise sufficient taxes to pay for infrastructure and economic revitalization makes redevelopment even more important for state and local economies. Public agencies in California, for instance, have confronted the challenge of building and maintaining infrastructure and providing public services. By 1995, California's Proposition 13, combined with the loss of federal transfer payments and a sluggish economy, had caused total public revenue in California to decrease to 85 percent of pre-Proposition 13 levels after adjustment for inflation. (Shires, Ellwood & Sprague, Has Proposition 13 Delivered? The Changing Tax Burden in California, Public Policy Institute of California 57 (1998).) During the 1960s and early 1970s, California spent 15 percent of its general revenues on infrastructure; by

2003, that figure had dropped to 1 percent. (Richman & Canciamilla, *Legislature's Neglect Requires "Yes" on Proposition 53*, San Francisco Chronicle, Oct. 6, 2003, p A-21, col 1.)

Proposition 13 and subsequent propositions to further restrict taxation have forced California to look elsewhere, including to redevelopment, for ways to build new infrastructure, preserve aging infrastructure, and revive local economies. We no longer live in a world where public and private roles are "crisply separate," where government "built roads and parks with general-fund money derived from property taxes, and the private market built the houses, factories and shops." (Mihaly, 60.) Instead, California and other states must keep pace with past infrastructure spending levels by methods such as exactions and development fees, bonds, and tax increment—the financing tools of redevelopment.

Redevelopment Brings Together Public and Private Investors to Reverse Market Failures

By bringing together the unique strengths of the public and private sectors, redevelopment aims to "correct the failure of the market alone" to bring an area back to life after a substantial period of economic decline or inactivity. (Mihaly, 8.) While there is no longer a clear line between the roles of cities and the private sector in economic development, each entity has different and specific abilities to contribute to this partnership.

Cities, for instance, can provide a "conduit" for grants, issue public debt, and hold land for long periods without actual cash outlays for the debt service that developers would incur. (Mihaly, 54.) Cities can also exercise their power of eminent domain to maximize the benefits of public and private investment. Economic decline and social impoverishment in large areas in central cities, for instance, are often accompanied by "over-subdivision," where multiple small lots have remained for decades under different ownerships. Over-subdivision, a form of market failure, creates a major obstacle to economic revitalization of urban cores, since the unassisted market cannot assemble these lots into shapes and sizes that would accommodate contemporary land uses. (Mihaly, 26.) The power of eminent domain helps cities acquire these lots from owners who would otherwise prevent their use for the greater public good.

Unlike private developers, however, cities are less adept at taking on development and market risk, and are ill-suited to perform the vertical development of uses on the site. To attract private investment, cities must locate developers sufficiently motivated to risk funds in areas that have not previously supported successful enterprise. (Mihaly, 48.) Private developers are "primary risk bearers" because they put up their own equity and sometimes also guarantee investors or lenders. (Mihaly, 40 fn. 187.) Developers also have certain project or building-specific planning expertise, development, construction, leasing and sometimes maintenance expertise; relatively high tolerance for and understanding of market risk and interest rate risk; access to private equity markets and lines of credit; institutional flexibility and responsiveness with respect to contractual relationships with other private entities; and the ability to segregate project funds free from the claim of other public needs. (Mihaly, 40.)

The proposed legislation implicitly acknowledges the private sector's important role in infrastructure development by excepting the use of eminent domain for utilities and pipeline development from the bill's sweeping prohibition. Clearly the drafters recognized that the private sector is better than the public sector at providing certain goods and services—among them, the construction of public utilities that provide energy and water to the public. The drafters

recognized that the construction and provision of affordable utility services is a "public purpose" that justifies the use of eminent domain, and which should not be stymied by landowner holdouts. It is illogical, then, that the proposed legislation appears to deem economic redevelopment *not* a public purpose deserving of the same powers of eminent domain. Surely, the proponents of this legislation would find it abhorrent for the government to assume the role typically filled by developers of building and operating commercial, retail, and residential development that is at the core of any successful urban economic revitalization. Accordingly, without the formation of a public private partnership—which could require eminent domain and the transfer of private property to private developers—economic revitalization in areas where the market has already failed to generate growth would be out of the question.

A Clear Case of Market Failure: New London, Connecticut

Despite widespread, popular opposition to the Supreme Court's decision in *Kelo v. City of New London*, the facts of the case remain largely misunderstood. The opinion itself reveals little about the degree of economic depression in New London and the intended purpose of the redevelopment project that was challenged. In 1998, New London's unemployment rate was nearly double that of the state, and its population of just under 24,000 residents was at its lowest since 1920. (*Kelo v. City of New London*, 545 U.S. 469, 473 (2005).) The federal government closed the Naval Undersea Warfare Center in Fort Trumbull in 1996, which had employed over 1,500 people. (Id.) Despite the area's "attractive waterfront location," no market existed for uses in the area, banks would not lend, and developers would not develop. The human cost of this stagnation was high: "existing businesses ha[d] fallen into patterns of substandard performance due to lack of customers and inability to finance the purchase of machinery, make building repairs, or undergo improvements." Houses were abandoned and apartment buildings stood half empty. The redevelopment area suffered from an astonishing 82 percent vacancy rate for nonresidential structures, sixty-six percent of which were in fair or poor condition. Residents were either unemployed or had to travel long distances outside the area to find work. "In sum, the unassisted market failed to function in New London." (Mihaly, 47-48.)

The redevelopment plan, of which the Pfizer campus was merely one component, was a "well-developed approach to economic revival in the face of decades of decline." (Mihaly, 7.) The use of a "corporate pioneer" was an essential and typical element of the strategy to bring a moribund area back to life. The new project would actually have added more housing than it condemned. Without the exercise of eminent domain, the plaintiffs would have frustrated a program of economic revitalization that promised to benefit the entire New London community. (Id.)

The fact that the redevelopment plan was never realized and Pfizer withdrew from the city is not, as the plan's opponents seize upon, proof that "redevelopment failed" in New London. Rather, it shows how entrenched economic stagnation had become, and how much *more* investment—both public and private—was necessary to revitalize the area. *Kelo* is thus not a case study in redevelopment's failure, but evidence that greater investment through public-private partnership, the *modus operandi* of redevelopment agencies, is exactly what New London and our other communities in decline need.

Kelo is also misunderstood as authorizing the replacement of "any Motel 6 with a Ritz–Carlton, any home with a shopping mall, or any farm with a factory." 545 U.S. at 503. To the contrary,

eminent domain has a public purpose for redevelopment only where the market has failed and will continue to fail to stimulate investment in a blighted and/or economically depressed community, such as in localities like New London. There is no question that the "public use" clauses of the U.S. Constitution and the state constitutions do not encompass the use of eminent domain merely to increase tax revenue or to gain an advantage for one private market competitor over another where blight or economic distress does not exist.

Examples of Successful Redevelopment

Examples abound of neighborhoods and cities whose declines have been arrested and fortunes reversed by redevelopment and the power of eminent domain. Here are just a representative few of the successful uses of eminent domain where the market had failed, sometimes for decades, to produce investment left to its own devices:

Bay Street, Emeryville (CA)

Emeryville suffered from industrial decline through the 1980s, leaving the Bay Street area plagued by physical and economic blight and contaminated land. The prior industrial users were unwilling to proceed with redevelopment due to the costs of cleanup, so the redevelopment agency was forced to use its power of eminent domain to acquire the properties. Now Bay Street is an urban, interactive village that provides live, work, and entertainment space. The project created 940 new jobs, provided 375 mixed-use new residential units above retail—20 percent of which are affordable to very low-income residents—and provided 400,000 square feet of new retail and entertainment. (http://www.calredevelop.org.)

Downtown Arlington Heights (IL)

About 24 miles northwest of central Chicago, Arlington Heights' downtown was plagued in the 1980s with vacant storefronts, rundown buildings, and parking lots. To revitalize the neighborhood, public and private organizations relied on eminent domain to assemble developable sites. In addition to property acquisition, the city used tools such as financing districts, grants and loans, and business relocation assistance to encourage mixed-use, high-density development. Private developers were selected to build a variety of public-private projects, including a major in-town, neotraditional shopping center, three condominium buildings, and a performing arts center. Today, downtown Arlington Heights has a walkable, attractive, busy town center. (Urban Land Institute, "Eminent Domain: An Important Tool for Community Revitalization," 2007.)

Dudley Street, Boston

The Neighborhood Initiative, a coalition of residents of the Dudley Street neighborhood, opposed the city's plan for large-scale redevelopment of the 1.5-square-mile area. Instead, the coalition requested authorization from the city to use eminent domain to consolidate vacant, intermingled public and private properties to provide a foundation for development sufficient to change the neighborhood's economic development. The coalition created a community land trust and, using eminent domain, assembled 132 parcels with enough land to allow construction of more than 400 homes. The organization also refurbished 740 houses and constructed several different community centers. (Urban Land Institute.)

Ferry Building, San Francisco

Before redevelopment, the Ferry Building and most of the San Francisco Bay waterfront (the "Embarcadero") was in disrepair, the result of changing transportation and shipping needs over the preceding decades. Divided from the immediately adjacent downtown office core by an elevated freeway, the Embarcadero and Ferry Building languished for more than two decades, presenting a classic case of real estate free market failure. Despite its ideal waterfront views and transportation facilities, the piers lay vacant or underused, offered for lease at lower and lower prices. In the 1990s, the city's Port Authority and Redevelopment Agency, leveraging its power of eminent domain and substantial private, state, and federal funding, acquired necessary properties and rebuilt the dilapidated waterfront. Now the Ferry Building houses ferry passenger facilities and an urban marketplace and restaurants, and the waterfront is one of the most heavily used public spaces in the Bay Area, with on-site market-rate and low-income housing. (Mihaly, 28-30.)

Freetown, Greenville (SC)

Originally developed as a haven for freed slaves, Greenville's Freetown neighborhood declined over the decades. In the late 1990s, the redevelopment authority—at the request of area residents—acquired blighted properties to assemble buildable sites for new, affordable homes. Today the neighborhood has 80 new, affordable homes and 10 rehabilitated residences, and utilities infrastructure was also renovated. The authority also constructed a $600,000 community center with a gymnasium. Only two holdout properties required acquisition by eminent domain, and residents of both were provided with relocation grants between $10,000 and $20,000. (Urban Land Institute.)

The Gap Headquarters, San Francisco

Wishing to attract a new corporate headquarters to an economically depressed area—the San Francisco waterfront neighborhood described above—the Redevelopment Agency used its power of eminent domain to acquire a parking lot from a "holdout" landowner who would otherwise have prevented the accrual of economic benefits to the neighborhood, in the form of new jobs and greater patronage of neighborhood businesses by employees. "The Gap workers would also join the area residents in contributing the critical market mass necessary to the success of restaurants and other small retail shops along the waterfront. These retail facilities, rendered economically viable by local clientele, would in turn make the area more attractive to visitors, including tourists arriving on the planned downtown cruise terminal." (Mihaly, 31-32.)

Skyland Shopping Center, Washington, DC

Originally developed in the 1940s, the Skyland Shopping Center had by the end of the century deteriorated into a hodgepodge of disconnected, rundown storefronts and parking lots. Responding to the frustration of residents, the city proposed a major $125 million redevelopment of the center that would replace the existing stores with a contiguous street-front mall featuring restaurants and shops. The project, which is still in development, received immediate and strong community support, winning endorsements from local neighborhood advisory commissions and residents alike. Six of the more than 40 existing properties required the use of eminent domain,

without which the modern, urban retail center would be impossible. (Robert G. Dreher & John D. Echeverria, "*Kelo*'s Unanswered Questions: The Policy Debate Over the Use of Eminent Domain for Economic Development," Georgetown University Law Center, 2006)

University Village, Riverside (CA)

Situated on a 16-acre site at the entryway to the University of California, Riverside, the area was dominated by a standalone auto dealership and an abandoned gas station, both magnets for criminal activity. The University Village Redevelopment Project acquired the sites and constructed a mixed-use development that catalyzed the rebirth of University Avenue, attracting UCR students and community residents. The project created 600 jobs, generated more than $75 million in private investment, and attracted more than $100 million in neighboring private investment. (http://www.calredevelop.org/.)

Village West, Kansas City

The city and county jointly initiated creation of this successful entertainment, shopping, and tourism district. Only two of the 146 properties on the site required the use of eminent domain; the rest were acquired through negotiated price agreements. Once assembled and made available for development in 2001, the properties quickly attracted retail and entertainment businesses. In 2006, Village West had 38 businesses employing nearly 3,500 people and drawing nearly 9 million visitors a year. (Urban Land Institute.)

Claims of Eminent Domain "Abuse" Rest on Outdated Perceptions, Misunderstanding of the Facts and the Law, and Anecdotal Information

Claims of eminent domain "abuse" by the Institute for Justice, its subsidiary the Castle Coalition, and other anti-eminent domain groups are largely spurious. They mischaracterize eminent domain's use in general, and highlight specific instances where it has underperformed as the norm, rather than the exception, to an otherwise economically beneficial and necessary public function. For example, testimony before this Subcommittee in 2011 from the MTOTSA resident supporting HR 1433 failed to mention that Long Branch, New Jersey's downtown and waterfront had been economically depressed for *decades* and that the proposed redevelopment would create far more housing of the same tenure and type than that destroyed. (Mihaly, 12.)

Opponents exaggerate the taking of private homes by eminent domain, thereby "convey[ing] an unrepresentative picture of modern American public-private economic redevelopment. Condemnation, infrequent in the modern context, is rarely directed against residential uses and is even more rarely used against functional single-family homes." (Mihaly, 7; *see also* N.S. Garnett, "The Neglected Political Economy of Eminent Domain," 105 Mich. L. Rev. 101, 142-43.) Indeed, a 2005 survey by the California Redevelopment Association indicated that statewide, only 3 owner-occupied homes were acquired via formal eminent domain proceedings over the preceding five years. In 2006, 30 percent of the 771 project areas in California had limited authority to acquire owner-occupied houses by eminent domain. (Meyers, 4.)

Moreover, redevelopment agencies wish to avoid the public opprobrium that would follow the acquisition of private residences, as well as the high cost of acquisition, including legal fees and relocation costs, that usually exceeds a property's fair market value by roughly a third. Thus,

local governments frequently opt to settle with homeowners for above-market prices rather than engage in litigation. "Recent scholarship shows that condemnees receive payment in excess of market value in large part because of relocation payments made to ensure they acquire subsequent housing of comparable size, value and location." (Mihaly, 7; *see also* 105 Mich. L. Rev. at 142-43.)

For more than 30 years, I have represented public agencies in more than a hundred eminent domain actions. I settled the vast majority of those cases for a premium over the fair market value of the property to avoid the cost of litigation and the risk that a jury, out of a natural sympathy for the property owner and/or hostility to eminent domain, would award a windfall to the property owner. Of those eminent domain actions that have gone to trial, it is only the rare case where the jury limits the award of just compensation to the public agency's value.

Eminent domain opponents also misleadingly label eminent domain as a means of "slum clearance," failing to acknowledge that this aspect of eminent domain has disappeared over the past several decades. Indeed, "complex political and social forces, some created by the reaction to past abuses of the power of eminent domain, have successfully altered the face of redevelopment through changes in federal and state redevelopment laws." (Mihaly, 7.) Due in part to reductions in federal funding for redevelopment and eminent domain since the 1980s, today it is far more common for local governments to use eminent domain to acquire undeveloped land, land in "holding uses," such as underutilized parking lots and dilapidated, often-empty warehouses, or land held for industrial use that no longer conforms to the current zoning. (Mihaly, 11.)

The *Kelo* case itself reveals that the dissenting justices—whose opinions were long on rhetoric but short on facts or law—share in the outdated views of eminent domain. They failed to recognize that redevelopment in America has evolved since the 1960s (Mihaly, 20-21), and mischaracterized the majority as allowing redevelopment even where markets have not failed. In reality, the majority deferred to the city's well-founded determination that the area was "sufficiently distressed to justify a program of economic rejuvenation." (545 U.S. at 483.) The majority noted that the city "carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue." (Id.) Far from allowing rampant use of eminent domain where the conditions on the ground do not justify its use, *Kelo* instead recognizes that local governments—not the Supreme Court or Congress—are in the best position to determine when their economies are in crisis and in need of revitalization.

The Proposed Legislation's "One Size Fits All" Approach Is Contrary to Basic Principles of Federalism

It is well established in our system of laws that land use issues are quintessentially local and best addressed by local government, including local courts. See, e.g., *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) ("The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards.'"); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828 (4th Cir. 1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts."); *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985) ("[F]ederal courts do not sit as a super zoning board or a zoning board of appeals."). In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), the Supreme Court reaffirmed the primacy of local courts in adjudicating local land use disputes: "State courts . . . undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." 545 U.S. at 347. See also, *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1389 (11th Cir. 1993) (quoting *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1579 (11th Cir. 1989) (quoting *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (quoting *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 832 (1st Cir. 1982)))) ("The fact 'that town officials are motivated by parochial views of local interests which work against [a developer's] plan and which may contravene state subdivision laws' . . . does not state a claim of denial of [federal] substantive due process.").

Professor John Echeverria of Vermont Law School, who testified before this Subcommittee in opposition to HR 1433, demonstrated that national legislation limiting eminent domain is unnecessary and would in fact undermine states' efforts to address distinct local conditions. Moreover, because all real estate is unique (*see Milens of Cal. v. Richmond Redevelopment Agency*, 665 F.2d 906, 908 (9th Cir. 1982) ("It is a safe generalization that each parcel of real estate in a city is unique.")), land-use planning is a quintessentially local function. Local governments are in the best position to determine the path for their communities' economic and social vitality.

State legislation passed in the wake of the *Kelo* decision amply illustrates that the proposed legislation would be contrary to principles of federalism and that states have the ability to address perceived problems with redevelopment, independent of federal action. Alabama provides one such example.

The Republican Majority of this Subcommittee scheduled Dr. David Beito of the University of Alabama to testify at a hearing on April 18, 2013 in support of this legislation. Dr. Beito testified that the legislation is necessary to prevent the "abuse" of eminent domain by the taking of homes solely for purposes of economic development. He invoked examples of government use of eminent domain to acquire the houses of poor minorities in Alabama for the benefit of private real estate developers. Not only did Dr. Beito's testimony ignore the fact that Alabama has been recognized as a leader among states that have "reformed" their eminent domain codes, but it also ignored that any additional reform needed to prevent so-called "abuse" is best addressed by the states themselves, not the federal government.

Before *Kelo*, Alabama's Housing Code authorized cities to use eminent domain for redevelopment. *See* Ala. Code secs. 24-2-1 *et seq*. Alabama law defined blight to include conditions such as dilapidation, deterioration, overcrowding, fire hazards, disconnected utilities, excessive vacant land, overgrowth, vectors, public or attractive nuisance with refusal to remedy, health and safety code violations, tax delinquency, environmental contamination, and other unsafe/unsanitary conditions. *See* Ala. Code sec. 24-2-2. A separate chapter of the Housing Code gave housing authorities and municipalities the power to undertake urban renewal projects applying the same definition of blight. *See* Ala. Code sec. 24-3-1 *et seq*. State law also authorized downtown redevelopment authorities. *See* Ala. Code sec. 11-54A.

In the aftermath of the U.S. Supreme Court's decision in *Kelo*, Alabama was one of the first states to take legislative action to restrict the use of eminent domain for redevelopment. SB 68 (2005) prohibited the use of eminent domain for private retail, office, commercial, industrial or residential development; where the taking is primarily for the enhancement of tax revenue; and for land transfers to persons, nongovernmental entities, public-private partnerships, corporations or other business entities. HB 654 (2006) significantly narrowed the definition of blight to characteristics detrimental to public health and safety and required that blight designations be made on a *property-by-property* basis, thereby ensuring that only unsafe or neglected properties can be acquired for redevelopment. Requiring blight findings to be made on a property-by-property basis is among the most restrictive conditions that can be imposed on the use of eminent domain, since "market failure and economic blight are *area* concepts. The market does not fail parcel by parcel." (Mihaly, 45 (emphasis added).) The combined effect of SB 68 and HB 654 was to prohibit property from being taken by eminent domain where the primary purpose is economic development.

The anti eminent domain Institute for Justice has recognized Alabama as a "national leader in eminent domain reform." (http://castlecoalition.org.) Given the definition of "economic development" and the exceptions to that that definition in the proposed legislation, the legislation would not go as far as the restrictions on eminent domain in Alabama described above.

Adequate Protections Exist at the State Level Against "Abuse" of Eminent Domain

Alabama also provides an example of how states already possess the procedural and legislative tools to ensure that the eminent domain power is properly used.

Despite Alabama's leadership on eminent domain "reform," Dr. Beito has alleged that Alabama's nuisance abatement statute, Ala. Code sec. 11-53B-1 *et seq*., leaves open a "back door" for eminent domain "abuse." Alabama Code sections 11-53B-1 *et seq*. provide standard nuisance abatement authority common to most American states and cities under their police power, necessary for the preservation of health and safety by, for instance, requiring repair or demolition of unsafe structures or remediation of contaminated soil that threaten injury to persons or property.

In Alabama, property owners confronted with a publicly issued order to repair or demolish structures on their property or remediate hazardous waste have a variety of remedies and fora in which to establish that the order does not effect a legitimate public purpose; i.e., that the property

is not a genuine nuisance and the order is merely a pretext for transfer of the property to a private developer.

To abate a nuisance under Alabama law, a city must make a written finding that a structure is "unsafe to the extent of being a public nuisance," sec. 11-53B-2, and then give notice to the owner and mortgagee that they must repair or demolish the structure within 45 days, with a possibility of extension for good cause. Sec. 11-53B-3. The notice must include the city's written findings to support its notice and state that if the owner does not comply, the city may repair or demolish the structure and assess costs to the owner through a lien, with any proceeds from salvage deducted. *Id.* Within 30 days after the notice, the owner may file a written request for a public hearing before the governing body and object to the city's findings, which automatically suspends city action pending a public hearing. Sec. 11-53B-4. A property owner may present evidence at the hearing that the abatement order is pretextual. If no request is filed, the city may order repair or demolition 30 days after giving notice.

Any person aggrieved by the city's determination at the public hearing may appeal to the local trial court within 10 days. *Id.* The court proceeding provides a second opportunity for the owner to assert and demonstrate that the abatement order is illegitimate. If the court affirms the city's ruling after a trial, the city may order the owner to pay the costs of repairs or demolition within 30 days after the final assessment. If such costs exceed $10,000, however, the owner may pay in installments. Sec. 11-53B-7. If the owner fails to pay, the city must give the owner notice for three consecutive weeks before selling the property to the highest bidder. Sec. 11-53B-8. The owner may pay the lien and all costs before the sale, sec. 11-53B-9, or redeem within two years after the sale, sec. 11-53B-10, or redeem up to 60 days after issuance of a certificate of warning, not to exceed six years after the date of sale. Sec. 11-53B-11. Notwithstanding these provisions, a city may initiate immediate repair or demolition of a structure where emergency action is required to prevent imminent injury to property or person, with costs paid by the owner as provided by the chapter. Sec. 11-53B-15.

Whether a particular land use constitutes a threat to life and property that requires abatement is quintessentially a question for local health and building officials. Any Alabama public agency's use of the state's nuisance abatement statute as a pretext for economic development would violate state statute and could be established by the property owner at the public hearing on the order or at the court trial.

If indeed Alabama nuisance abatement law is being applied where there is no credible finding of endangerment of health and safety, procedures already exist enabling the aggrieved property owner the opportunity to demonstrate that the abatement order is without merit. Moreover, if such procedures are not effective, the state could reasonably address the problem by retooling its law of nuisance abatement, much like the Alabama legislature's refinement and narrowing of permissible uses of eminent domain for redevelopment in HB 654, rather than throwing the baby out with the bathwater and depriving government of one of its crucial tools to protect life and property.

For example, the state could tighten the criteria for finding a nuisance, such as requiring that it constitute an immediate threat, allow owners seeking relief from abatement additional procedural due process, or, where the exercise of the nuisance abatement power results from invidious

discrimination, enforce state and federal civil rights laws. The exception the drafters of the proposed legislation inserted in section 9 for nuisances that pose an "immediate threat to public health and safety" underscores the point that the power to abate genuine nuisances must be preserved. To use a familiar analogy, police are authorized to use force where a person poses a threat to life or property. Because that power is sometimes abused, however, it would not be prudent to eliminate the power of the police to use force. Instead, the most effective approach would be to impose reasonable controls on the use of force to minimize abuse.

The Courts Are Already Equipped to Enjoin and Redress Improper Uses of Eminent Domain

Judicial safeguards are already available in all states to prevent or remedy instances of improper use of eminent domain. When challenges are brought against the use of eminent domain, state courts have authority to determine whether agencies properly exercised their right to acquire property for public use. Courts' jurisdiction over such matters is adequate to protect property owners from so-called eminent domain "abuse." The question is not one that Congress is suited, or was ever intended, to decide. Indeed, our Supreme Court has held that "[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions [and] undoubtedly have more experience than federal courts do in resolving the complex federal, technical and legal questions related to . . . land use regulations." *San Remo Hotel v. City & County of San Francisco*, 545 U.S. at 347.

The following cases illustrate that state governments regularly protect property owners from the use of eminent domain for the transfer of property to another private party where the transfer is deemed not for public use under the policies of that state:

Michigan
County of Wayne v. Hathcock, 471 Mich. 445 (2004) – Overruling its 1981 *Poletown* decision, in which the court upheld the use of eminent domain to assist General Motors' expansion of an auto plant, the Michigan Supreme Court ruled that the use of eminent domain to create a business and technology park projected to generate tens of thousands of jobs and hundreds of millions in tax revenue was not a taking for "public use" because the individual properties within the park would eventually be converted to private ownership. The court ruled that eminent domain may be used to transfer property to private parties only (1) in cases of "public necessity of the extreme sort" such as highways and railroads, (2) where the public retains continuing oversight authority over the use of the land, or (3) the property is selected based on "facts of independent public significance," such as slum clearance.

New Jersey
Gallenthin Realty Ded., Inc. v. Borough of Paulsboro, 924 A.2d 447 (2007) – The court rejected a blight determination based on a finding that the property was "stagnant and not fully productive," on the ground that the finding was too vague to demonstrate need for redevelopment.

California
Boelts v. City of Lake Forest, 127 Cal.App.4th 116 (2005) – The court disallowed the use of eminent domain for a redevelopment plan where the agency, in updating the plan and attempting

to renew the use of eminent domain, failed to make a finding that blight currently existed in the plan area.

99 Cents Stores v. City of Lancaster, 237 F.Supp.2d 1123 (C.D. Cal. 2001) – Costco, the largest employer and taxpayer in the city, sought to expand by negotiating a buyout of a neighbor's lease. Costco requested the city to condemn the lease, but before the city exercised eminent domain, the federal district court in Los Angeles enjoined the city from ever condemning the leasehold. The economic benefit of expansion was not a public purpose. Here, the federal district court exercised jurisdiction over the determination of public use, although adequate procedures existed under state law to determine public use.

The Proposed Legislation Would Impair Local Communities' Ability to Finance Infrastructure

By withholding two years of federal economic development funding from cities that use their eminent domain power for economic redevelopment, the legislation before this Subcommittee would undermine local governments' bond authority, among the most frequently used financing methods for local infrastructure and economic redevelopment. The legislation would greatly impair local governments' ability to finance public infrastructure and improvements, putting in jeopardy local governments' credit ratings and taxpayers' investment in their communities.

Without any significant amount of liquid capital for infrastructure and other improvements, local governments rely on their ability to float low-interest, tax-free bonds to generate revenue. Governments use the immediate infusion of capital to fund major development projects, then pay back the bonds within a specified timeframe using the revenues generated by the project. This is the principle behind tax-increment financing, or TIF, the "bootstrapping" finance authority that many legislatures grant to their redevelopment agencies.

When a local government decides (often with authorization from its voters) to issue bonds for a particular public undertaking, a credit rating agency, such as Standard and Poor's, gives the bonds a credit rating based upon various criteria intended to assess the local government's ability to pay back the bond by the end of its lifespan. Frequently among these criteria is whether the planned project has additional funding, for example, from the state or federal government. The more funding a project has, the more likely it is to be built, and the more likely it is that bond holders will be paid a return on the date the bonds become due. Bonds with good ratings will be purchased by underwriters who then sell them to the public.

The likelihood of imminent commercial development of a redevelopment area is key to the success of TIF bond issuances. When the *sole* source of debt service is the incremental increase in tax revenues resulting from redevelopment, cities must make a convincing case that the development will occur and that property values and taxes will increase as expected. Even after issuing bonds and securing state and federal funding, redevelopment projects often face funding shortfalls. (Mihaly, 54.)

If a project does not receive adequate funding—for example, if federal funding is withheld from a project that relied upon eminent domain to acquire property—then credit rating agencies may downgrade the local government's bond rating commensurate with the decreased likelihood that

the project will succeed. As a result, underwriters would be less likely to buy bonds to sell to the public at their characteristically low interest rates. Issuing bonds would therefore become more expensive for local governments if they are forced to increase interest rates to compensate for low bond ratings. In effect, withholding federal funding for public redevelopment projects would make redevelopment much more expensive for local governments, which, in states like California, already have scarce funds to undertake important public projects.

Even worse, the mere threat of withholding federal funding from local projects that *might* use eminent domain in the future could put a "cloud" on local governments' bond ratings, thus making *all* public economic development and infrastructure projects more expensive and difficult for cash-strapped cities and counties. Redevelopment is already an often risk-laden venture for local governments, "involv[ing] the major development risk that the costly changes will not provide anticipated revenue necessary to support the public expenditures involved." (Mihaly, 54.) The proposed legislation would make this essential government function even more risky and expensive.

Conclusion

This legislation would undermine the efforts of communities across the nation that are struggling with market failure to create jobs, reverse economic decline and loss of investment, remediate brownfields, and slow climate change. The proponents of the bill rely on anecdotal information of eminent domain abuse, but ignore the vast majority of cases where eminent domain has been used for successful redevelopment of blighted communities. These few instances of abuse of eminent domain do not justify throwing the baby out with the bath water. This is a case where cities should be permitted the freedom to address local problems without federal intervention, because local government has a far better understanding of unique and distinctively local economic and social problems than the federal government in Washington, D.C. Thank you for giving me the opportunity to express my views on this crucial issue for local community interests.[2]

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[2] Matthew Zinn and Joseph Petta, attorneys with Shute, Mihaly & Weinberger LLP, helped prepare this testimony.

I

113TH CONGRESS
1ST SESSION

H. R. 1944

To protect private property rights.

IN THE HOUSE OF REPRESENTATIVES

MAY 9, 2013

Mr. SENSENBRENNER 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 2013".

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 used for economic development within 7 years after that exercise, if that State or political subdivision receives Federal economic development funds during any fiscal year in which the property is so used or intended to be used.

(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. In

addition, the State or political subdivision must pay any applicable penalties and interest to reattain eligibility.

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 (1) owner of private property whose property is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, or (2) any tenant of property that is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, may bring an action to enforce any provision of this Act in the appropriate Federal or State court. A State shall not be immune under the 11th Amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. In such action, the defendant has the burden to show by clear and convincing evidence that the taking is not for economic development. Any such property owner or tenant may also seek an appropriate relief through a preliminary injunction or a temporary restraining order.

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

(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. REPORTING OF VIOLATIONS TO ATTORNEY GENERAL.

(a) SUBMISSION OF REPORT TO ATTORNEY GENERAL.—Any (1) owner of private property whose property is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, or (2) any tenant of property that is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, may report a violation by the Federal Government, any authority of the Federal Government, State, or political subdivision of a State to the Attorney General.

(b) INVESTIGATION BY ATTORNEY GENERAL.—Upon receiving a report of an alleged violation, the Attorney General shall conduct an investigation to determine whether a violation exists.

(c) NOTIFICATION OF VIOLATION.—If the Attorney General concludes that a violation does exist, then the Attorney General shall notify the Federal Government, authority of the Federal Government, State, or political subdivision of a State that the Attorney General has determined that it is in violation of the Act. The notification shall further provide that the Federal Government, State, or political subdivision of a State has 90 days from the date of the notification to demonstrate to the Attorney General either that (1) it is not in violation of the Act or (2) that it has cured its violation by returning all real property the taking of which the Attorney General finds to have constituted a violation of the Act and replacing any other property destroyed and repairing any other property damaged as a result of such violation.

(d) ATTORNEY GENERAL'S BRINGING OF ACTION TO ENFORCE ACT.—If, at the end of the 90-day period described in subsection (c), the Attorney General determines that the Federal Government, authority of the Federal Government, State, or political subdivision of a State is still violating the Act or has not cured its violation as de-

scribed in subsection (c), then the Attorney General will bring an action to enforce the Act unless the property owner or tenant who reported the violation has already brought an action to enforce the Act. In such a case, the Attorney General shall intervene if it determines that intervention is necessary in order to enforce the Act. The Attorney General may file its lawsuit to enforce the Act in the appropriate Federal or State court. A State shall not be immune under the 11th Amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. In such action, the defendant has the burden to show by clear and convincing evidence that the taking is not for economic development. The Attorney General may seek any appropriate relief through a preliminary injunction or a temporary restraining order.

(e) LIMITATION ON BRINGING ACTION.—An action brought by the Attorney General under this Act may be brought if the property is used for economic development following the conclusion of any condemnation proceedings condemning the property of an owner or tenant who reports a violation of the Act to the Attorney General, but shall not be brought later than seven years following the conclusion of any such proceedings.

(f) ATTORNEYS' FEE AND OTHER COSTS.—In any action or proceeding under this Act brought by the Attorney General, the court shall, if the Attorney General is a prevailing plaintiff, award the Attorney General a reasonable attorneys' fee as part of the costs, and include expert fees as part of the attorneys' fee.

SEC. 6. 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 and tenants under this Act.

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

thorities 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 AND TENANTS.—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 and tenants under this Act.

SEC. 7. REPORTS.

(a) BY ATTORNEY GENERAL.—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 violations reported by property owners and tenants under section 5(c) of this Act;

(3) identify the percentage of minority residents compared to the surrounding nonminority residents and the median incomes of those impacted by a violation of this Act;

(4) identify all lawsuits brought by the Attorney General under section 5(d) of this Act;

(5) 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

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

(b) DUTY OF STATES.—Each State and local authority that is subject to a private right of action under this Act shall have the duty to report to the Attorney General such information with respect to such State and local authorities as the Attorney General needs to make the report required under subsection (a).

SEC. 8. 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. The taking of farmland and rural property will have a direct impact on existing irrigation and reclamation projects. Furthermore, the use of eminent domain to take rural private property for private commercial uses will force increasing numbers of activities from private property onto this Nation's public lands, including its National forests, National parks and wildlife refuges. This increase can overburden the infrastructure of these lands, reducing the enjoyment of such lands for all citizens. 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. 9. 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. 10. RELIGIOUS AND NONPROFIT ORGANIZATIONS.

(a) PROHIBITION ON STATES.—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 of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto 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) PROHIBITION ON FEDERAL GOVERNMENT.—The Federal Government or any authority of the Federal Government shall not exercise its power of eminent domain over property of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto.

SEC. 11. REPORT BY FEDERAL AGENCIES ON REGULATIONS AND PROCEDURES RELATING TO EMINENT DOMAIN.

Not later than 180 days after the date of the enactment of this Act, the head of each Executive department and agency shall review all rules, regulations, and procedures and report to the Attorney General on the activities of that department or agency to bring its rules, regulations and procedures into compliance with this Act.

SEC. 12. SENSE OF CONGRESS.

It is the sense of Congress that any and all precautions shall be taken by the government to avoid the unfair or unreasonable taking of property away from survivors of Hurricane Katrina who own, were bequeathed, or assigned such property, for economic development purposes or for the private use of others.

SEC. 13. DISPROPORTIONATE IMPACT.

If the court determines that a violation of this Act has occurred, and that the violation has a disproportionately high impact on the poor or minorities, the Attorney General shall use reasonable efforts to locate former owners and tenants and inform them of the violation and any remedies they may have.

SEC. 14. 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—

(i) to public ownership, such as for a road, hospital, airport, or military base;

(ii) to an entity, such as a common carrier, that makes the property available to the general public as of right, such as a railroad or public facility;

(iii) for use as a road or other right of way or means, open to the public for transportation, whether free or by toll; and

(iv) for use as an aqueduct, flood control facility, 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;

(F) taking private property for use by a utility providing electric, natural gas, telecommunication, water, wastewater, or other utility services either directly to the public or indirectly through provision of such services at the wholesale level for resale to the public; and

(G) redeveloping of a brownfield site as defined in the Small Business Liability Relief and Brownfields Revitalization Act (42 U.S.C. 9601(39)).

(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. 15. LIMITATION ON STATUTORY CONSTRUCTION.

Nothing in this Act may be construed to supersede, limit, or otherwise affect any provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.).

SEC. 16. 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.

SEC. 17. 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.

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