

KELO V. CITY OF NEW LONDON U.S. SUPREME COURT DECISION AND STRENGTHENING THE OWNERSHIP OF PRIVATE PROPERTY ACT OF 2005

HEARING

BEFORE THE

**COMMITTEE ON AGRICULTURE
HOUSE OF REPRESENTATIVES**

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

H.R. 3405

SEPTEMBER 7, 2005

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KELO V. CITY OF NEW LONDON U.S. SUPREME COURT DECISION AND STRENGTHENING THE OWNERSHIP OF PRIVATE PROPERTY ACT OF 2005

WEDNESDAY, SEPTEMBER 7, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON AGRICULTURE,
Washington, DC.

The committee met, pursuant to call, at 10:00 a.m., in room 1300 of the Longworth House Office Building, Hon. Bob Goodlatte (chairman of the committee) presiding.

Members present: Representatives Pombo, Lucas, Moran, Jenkins, Gutknecht, Hayes, Johnson, Osborne, King, Musgrave, Neugebauer, Schwarz, Kuhl, Foxx, Fortenberry, Peterson, Holden, Etheridge, Baca, Cardoza, Scott, Herseth, Cuellar, Costa, Salazar, Barrow, Pomeroy, Boswell, Larsen, and Chandler.

Staff present: Ben Anderson, Bill Imbergamo, Kevin Kramp, Pamilyn Miller, Tyler Wegmeyer, Callista Gingrich, clerk; and Andy Baker.

OPENING STATEMENT OF HON. BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF VIRGINIA

The CHAIRMAN. Good morning. This hearing of the House Committee on Agriculture to review the *Kelo v. City of New London* decision of the U.S. Supreme Court and H.R. 3405, the Strengthening of Ownership of Private Property Act of 2005 will come to order.

Today we will examine the potential effects that the recent Supreme Court decision will have for private property owners. Private ownership of property is vital to our freedom and our prosperity and is one of the most fundamental principles embedded in our Constitution. One need only look so far as the aftermath of Hurricane Katrina to see the importance of private property rights to the American people.

Not only will the protection of private property rights be crucial to the reconstruction of New Orleans, but also these rights are so central to our core values, that citizens are battling harsh conditions and even the risk of disease, to return to their homes to survey the damage and begin the rebuilding process. The Founders realized the fundamental importance of property rights when they codified the takings clause of the fifth amendment to the Constitution which require 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 property is for the public and that the Government give the property owners just compensation. However, the Supreme Court's recent 5 to 4 decision in *Kelo v. City of New London* is a step in the opposite direction. This controversial ruling expands the ability of State and local governments to exercise eminent domain powers to seize property under the guise of "economic development" when the "public use" is as incidental as generating tax revenues or creating jobs, even in situations where the government takes property from one private individual and gives it to another private entity.

By defining public use so expansively, the Court essentially erased any protection for private property as understood by the founders of our Nation. Justice O'Connor, in her dissent wrote,

Today the Court abandons this long held basic limitation on Government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner so long as it might be upgraded.

To reason as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property and thereby effectively to delete the words "for public use" from the takings clause of the fifth amendment. 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, hotels or other developments.

In order to create a strong disincentive to prevent State and local governments from using these broad eminent domain powers, I am pleased to be a chief cosponsor of H.R. 3405, The STOPP Act. This legislation mandates that if a State or local government uses eminent domain for economic development and takes land from one private entity to give to another, then that State or locality will not be eligible to receive Federal funding for any projects receiving Federal economic development assistance. This legislation would also eliminate Federal economic development funding for a government if it fails to provide the relocation costs of persons displaced by the use of eminent domain power for economic development purposes.

The STOPP Act contains a very powerful economic disincentive and while the goal of the legislation is to prevent abusive exercises of eminent domain powers, we must also be careful that it does not discourage appropriate uses of that power which can be acceptable when truly used for public uses, such as new roads, schools and similar uses. During our third panel today, we will examine, among other topics, how best to ensure that we do not discourage these appropriate uses. No one should have to live in fear of the government snatching up their home, farm or business and I am committed to ensuring that our rights are protected as the founders intended. Thank you and I look forward to hearing from our expert witnesses today.

At this point I would ask unanimous consent to include a copy of H.R. 3405 into the record.

109TH CONGRESS
1ST SESSION

H. R. 3405

To prohibit the provision of Federal economic development assistance for any State or locality that uses the power of eminent domain power to obtain property for private commercial development or that fails to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 22, 2005

Mr. BONILLA (for himself, Ms. HERSETH, Mr. GOODLATTE, Ms. WATERS, Mr. POMBO, Mr. SMITH of Texas, Mr. DEFazio, Mr. OTTER, Mrs. DRAKE, Mr. BOYD, Mr. CALVERT, Mr. PEARCE, Mr. KUCINICH, Mr. DUNCAN, Mr. THORNBERRY, Mr. NEUGEBAUER, and Mr. McKEON) introduced the following bill; which was referred to the Committee on Agriculture, and in addition to the Committees on Transportation and Infrastructure, Financial Services, Resources, and Education and the Workforce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To prohibit the provision of Federal economic development assistance for any State or locality that uses the power of eminent domain power to obtain property for private commercial development or that fails to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Strengthening the
3 Ownership of Private Property Act of 2005” or the
4 “STOPP Act of 2005”.

5 **SEC. 2. CONDITIONS OF FINANCIAL ASSISTANCE UNDER**
6 **FEDERAL ECONOMIC DEVELOPMENT PRO-**
7 **GRAMS.**

8 (a) PROHIBITION OF ASSISTANCE.—If, after the date
9 of the enactment of this Act, any State (or any agency
10 thereof) or any unit of general local government (or any
11 agency thereof) engages in any act described in subsection
12 (b), Federal financial assistance under any Federal eco-
13 nomic development program may not be provided to such
14 State (including any agency thereof) or unit of general
15 local government (including any agency thereof), respec-
16 tively, at any time after such act.

17 (b) LIMITATIONS ON USE OF EMINENT DOMAIN.—
18 The acts described in this subsection are as follows:

19 (1) USE OF EMINENT DOMAIN FOR PRIVATE
20 COMMERCIAL DEVELOPMENT.—Any use of the power
21 of eminent domain to take property from one private
22 individual or entity for any economic development
23 purpose and transfer ownership of such property (or
24 a portion thereof) to another private individual or
25 entity.

1 (2) FAILURE TO PROVIDE RELOCATION ASSIST-
2 ANCE FOR PERSONS DISPLACED BY USE OF EMI-
3 NENT DOMAIN FOR ECONOMIC DEVELOPMENT.—
4 Failing to provide, to any person displaced by the
5 use of the power of eminent domain for any eco-
6 nomic development purpose, relocation assistance
7 under the Uniform Relocation Assistance and Real
8 Property Acquisitions Policies Act of 1970 (42
9 U.S.C. 4601 et seq.) in the same manner and to the
10 same extent as relocation assistance is required
11 under such Act to be provided by a Federal agency
12 that undertakes a program or project that results in
13 displacement of such person.

14 (e) CERTIFICATION OF COMPLIANCE.—If the head of
15 a Federal agency does not have actual knowledge that a
16 particular State or unit of general government has en-
17 gaged in an act described subsection (b) after the date
18 of the enactment of this Act, a certification made to such
19 Federal agency head by the chief executive officer of the
20 State or unit of general government that such State or
21 unit has not engaged in any such act shall be sufficient
22 for such Federal agency head to determine that the State
23 or unit is not ineligible, by reason of subsection (a), for
24 Federal financial assistance under a Federal economic de-

1 velopment program administered by such Federal agency
2 head.

3 **SEC. 3. DEFINITIONS.**

4 For purposes of this Act, the following definitions
5 shall apply:

6 (1) FEDERAL ECONOMIC DEVELOPMENT PRO-
7 GRAM.—The term “Federal economic development
8 program” means any of the following programs:

9 (A) DEPARTMENT OF AGRICULTURE.—

10 (i) FOREST SERVICE.—

11 (I) The National Forest-depend-
12 ent rural communities program for as-
13 sistance for economic recovery under
14 the National Forest-Dependent Rural
15 Communities Economic Diversification
16 Act of 1990 (7 U.S.C. 6611 et seq.).

17 (II) The rural development
18 through forestry program pursuant to
19 the Department of the Interior and
20 Related Agencies Appropriations Act,
21 2001 (Public Law 106–291; 114 Stat.
22 972) and the Department of the Inte-
23 rior and Related Agencies Appropria-
24 tions Act, 2005 (Public Law 108–447,
25 Division E; 118 Stat. 3080).

1 (ii) RURAL BUSINESS—COOPERATIVE
2 SERVICE.—

3 (I) The intermediary relending
4 program under section 1323 of the
5 Food Security Act of 1985 (7 U.S.C.
6 1932 note).

7 (II) The rural business opportu-
8 nities grant program under section
9 306(a)(11) of the Consolidated Farm
10 and Rural Development Act (7 U.S.C.
11 1926(a)(11)).

12 (III) The program for assistance
13 to cooperatives for economic develop-
14 ment under the Act of July 2, 1926
15 (7 U.S.C. 451 et seq.) and subtitle A
16 of the Agricultural Marketing Act of
17 1946 (7 U.S.C. 1621 et seq.).

18 (IV) The rural business enter-
19 prise grants program under section
20 310B(c) of the Consolidated Farm
21 and Rural Development Act (7 U.S.C.
22 1932(c)).

23 (V) The rural economic develop-
24 ment loans and grants program under

1 title III of the Rural Electrification
2 Act of 1936 (7 U.S.C. 930 et seq.).

3 (iii) RURAL UTILITIES SERVICE.—

4 (I) The program for grants, di-
5 rect loans, and guaranteed loans for
6 water and waste disposal systems for
7 rural communities under paragraphs
8 (1) and (2) of section 306(a) of the
9 Consolidated Farm and Rural Devel-
10 opment Act (7 U.S.C. 1926(a)).

11 (II) The Rural Utilities Service
12 program for grants and loans to the
13 Denali Commission under section
14 19(a)(2) of the Rural Electrification
15 Act of 1936 (7 U.S.C. 918a(a)(2)).

16 (iv) RURAL HOUSING SERVICE.—

17 (I) The rural community develop-
18 ment initiative pursuant to the Agri-
19 culture, Rural Development, Food and
20 Drug Administration, and Related
21 Agencies Appropriations Act, 2001
22 (Public Law 106-387; 114 Stat.
23 1549A-17) and the Agriculture, Rural
24 Development, Food and Drug Admin-
25 istration, and Related Agencies Ap-

1 appropriations Act, 2005 (Public Law
2 108–447; 118 Stat. 2826).

3 (II) The program for loans and
4 grants for essential community facili-
5 ties under section 306(a)(1) of the
6 Consolidated Farm and Rural Devel-
7 opment Act (7 U.S.C. 1926(a)(1)).

8 (v) FARM SERVICE AGENCY.—The
9 program for loans to Indian tribes and
10 tribal corporations under the Consolidated
11 Farm and Rural Development Act (7
12 U.S.C. 1921 et seq.).

13 (vi) RURAL BUSINESS INVESTMENT
14 PROGRAM.—The rural business investment
15 program under subtitle H of the Consoli-
16 dated Farm and Rural Development Act (7
17 U.S.C. 2009ee et seq.).

18 (B) DEPARTMENT OF COMMERCE—ECO-
19 NOMIC DEVELOPMENT ADMINISTRATION.—Any
20 program for financial assistance under the Pub-
21 lic Works and Economic Development Act of
22 1965 (42 U.S.C. 3121 et seq.).

23 (C) DEPARTMENT OF HOUSING AND
24 URBAN DEVELOPMENT.—

1 (i) The community development block
2 grant programs under title I of the Hous-
3 ing and Community Development Act of
4 1974 (42 U.S.C. 5301 et seq.), including
5 the entitlement grants, small cities, special
6 purpose and insular areas grants, States,
7 Indian tribe grants, and loan guarantee
8 programs.

9 (ii) The brownfields economic develop-
10 ment initiative under section 108(q) of the
11 Housing and Community Development Act
12 of 1974 (42 U.S.C. 5308(q)).

13 (iii) The rural housing and economic
14 development program of the Department of
15 Housing and Urban Development pursuant
16 to title II of the Departments of Veterans
17 Affairs and Housing and Urban Develop-
18 ment, and Independent Agencies Approp-
19 riations Act, 2005 (Public Law 108-447;
20 118 Stat. 3300) and title II of the Depart-
21 ments of Veterans Affairs and Housing
22 and Urban Development, and Independent
23 Agencies Appropriations Act, 1999 (Public
24 Law 105-276; 112 Stat. 2475).

1 (iv) The Indian housing block grant
2 program under the Native American Hous-
3 ing Assistance and Self-Determination Act
4 of 1996 (25 U.S.C. 4101 et seq.).

5 (D) EMPOWERMENT ZONES PROGRAM.—
6 The empowerment zones, enterprise commu-
7 nities, and rural development investment areas
8 programs under subchapter U of chapter 1 of
9 the Internal Revenue Code of 1986 (26 U.S.C.
10 1391 et seq.).

11 (E) DEPARTMENT OF THE INTERIOR—
12 BUREAU OF INDIAN AFFAIRS.—The programs
13 for grants, loans, and loan guarantys for Indian
14 economic development of the Office of Eco-
15 nomic Development, Bureau of Indian Affairs
16 of the Department of the Interior.

17 (F) DEPARTMENT OF THE TREASURY.—
18 The community development financial institu-
19 tions fund program under subtitle A of title I
20 of the Riegle Community Development and
21 Regulatory Improvement Act of 1994 (12
22 U.S.C. 4701 et seq.).

23 (G) APPALACHIAN REGIONAL COMMIS-
24 SION.—Any program for assistance for Appa-

1 lachian regional development under subtitle IV
2 of title 40, United States Code.

3 (H) NATIONAL CREDIT UNION ADMINIS-
4 TRATION.—The community development revolv-
5 ing loan fund program for credit unions under
6 the Community Development Credit Union Re-
7 volving Loan Fund Transfer Act (42 U.S.C.
8 9822 note).

9 (I) DENALI COMMISSION.—The Denali
10 Commission program under the Denali Com-
11 mission Act of 1998 (42 U.S.C. 2131 et seq.).

12 (J) DELTA REGIONAL AUTHORITY.—The
13 program for Delta regional development under
14 subtitle F of the Consolidated Farm and Rural
15 Development Act (7 U.S.C. 2009aa et seq.).

16 (K) DEPARTMENT OF HEALTH AND
17 HUMAN SERVICES.—The discretionary award
18 program for community economic development
19 under section 680 of the Community Services
20 Block Grant Act (42 U.S.C. 9921).

21 (2) FEDERAL FINANCIAL ASSISTANCE.—The
22 term “Federal financial assistance” has the meaning
23 given such term in section 101 of the Uniform Relo-
24 cation Assistance and Real Property Acquisitions
25 Policies Act of 1970 (42 U.S.C. 4601).

1 (3) STATE.—The term “State” means any of
2 the States of the United States, the District of Co-
3 lumbia, the Commonwealth of Puerto Rico, the Com-
4 monwealth of the Northern Mariana Islands, Guam,
5 the Virgin Islands, American Samoa, and any other
6 territory or possession of the United States.

7 (4) UNIT OF LOCAL GOVERNMENT.—The term
8 “unit of local government” means any city, county,
9 town, township, parish, village, or other general pur-
10 pose political subdivision of a State or any commu-
11 nity redevelopment agency, housing authority, spe-
12 cial district, or other special purpose political sub-
13 division of a State.

14 **SEC. 4. APPLICABILITY.**

15 at any time after the date of the enactment of this
16 Act, has engaged in either of the following acts

The CHAIRMAN. It is my pleasure to recognize the ranking member of the committee, the gentleman from Minnesota, Mr. Peterson.

OPENING STATEMENT OF HON. COLLIN C. PETERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. PETERSON. Thank you, Mr. Chairman, and I would like to thank you and Congressman Bonilla and Congresswoman Stephanie Herseth and others for their leadership on this issue and for holding the briefing yesterday and the hearing today to address the very timely and pressing issue of eminent domain.

This hearing comes at a time when people living in New Orleans, rural Louisiana, Mississippi and Alabama, we have been seeing on television, have been staying with their flooded or destroyed property rather than evacuate and I understand now they are trying to have a mandatory evacuation of people and I think they are going to find out that people don't want to leave and I think it just shows how strongly people feel about their property, their houses, their businesses. In my area, we went through this in 1997. I had three towns that were under water, just like New Orleans has been and we had a heck of a time getting people to leave, even though they were sometimes in imminent danger.

So I think this demonstrates why this issue is such a strongly felt issue in a lot of the country and why it is, I think, a timely and pressing issue. In the *Kelo* case, the Supreme Court decided that the use of eminent domain could be upheld when a State or local government was acting only to increase its tax base. This Court's decision, as I understand it, was a departure from the previous Supreme Court decision in *Berman v. Parker* that limited the transfer of private property to another private entity only if the property was part of a blighted area that presented a public safety hazard. Neither of these cases is perfect and neither assures a fair outcome for property owners. I think it is important for the government, at all levels, to ensure that property rights are respected as the Constitution requires.

House bill 3405, which I am proud to cosponsor, encourages State and local governments to make better decisions and if they don't make the right kind of decisions, they are going to be put in a lot of jeopardy in terms of not being able to get any kind of help from the programs that have been established by the Federal Government. And although this bill is, I think, not perfect, either, because we have some definitional issues, I think, to work through, I think we will work through those as we move to the mark up of this bill and hopefully, we can pass this bill into law so that we make sure that the jurisdictions out there make the right kind of decisions as far as private property owners are concerned and I again commend you and everybody else that has been involved in this effort and look forward to the hearing and also to the mark up of this bill. Thank you.

The CHAIRMAN. I thank the gentleman and I thank him for his support of this legislation and for his interest in, and I look forward to working with him on this definitional issues that he raised as we move the legislation toward a mark up. And now it is my pleasure to recognize the gentleman from California, Mr. Pombo,

chairman of the House Resources Committee and chairman of the Private Property Owners Caucus. Mr. Pombo.

OPENING STATEMENT OF HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. POMBO. Thank you, Mr. Chairman. First of all, I would like to thank you and the ranking member for holding this hearing in a timely manner. I thank the gentleman from Texas, Mr. Bonilla, and Ms. Herseth for taking the lead on this legislation. Congress has an inherent responsibility to not only uphold the Constitution, but also to interpret the Constitution and to look at what our responsibility is as Members of Congress.

What this legislation does is it reflects what was an extremely broad bipartisan response to a decision that came from the Supreme Court. You saw Members of Congress who joined together to support this legislation unlike anything I have seen on a broad policy issue. About the only time you see this diversity in Members of Congress supporting legislation is usually on something that is congratulating someone or naming a post office. It is not normal that you have this broad of support for a policy bill that has been drafted by these two individuals and I think the response that you got out of Congress was because we believe that this was the wrong decision to make.

Private property is the backbone of our economic system. If you take away the right of an individual to own and use and enjoy their private property, you take away any incentive that exists in a free market system for people to achieve and to work and to do more than what they normally would to survive day to day. That is the purpose that private ownership serves in our economic system.

When the Supreme Court made the decision that it was OK for a city or a county or a municipality to take private property from one individual and give it to another, they are, in essence, destroying that protection in our Constitution. It is Congress's responsibility to ensure that that protection is there. The Bill of Rights of the Constitution was designed to protect the individual. Our Founding Fathers knew that once people figured out that they could vote to take away from someone else to benefit themselves, that people would react in that way and begin to do it, so they came up with the Bill of Rights, the first 10 amendments to the Constitution, which was designed to protect the individual, designed to protect each and every one of us from what may be in the public interest or public good as this decision came down.

As the chairman said, I think all of us support the idea of using eminent domain for legitimate public purposes; roads and bridges and schools and libraries and parks and things that eminent domain has been used for, for years. When our Founding Fathers drafted the Bill of Rights, the only real public use of land was for military bases, roads and post offices. Outside of that, there was no legitimate public use for land. No one imagined that we would be taking homes and businesses away from people and turning them into other private uses. What this legislation is designed to do is to protect those individuals.

I am glad that Mr. Bonilla jumped out extremely early on this right after the decision came out and began to work on legislation, worked it extremely hard with Ms. Herseth to get a number of Members on here. I believe this is timely, it is something that we should move to mark up very quickly and get to the House floor. This is a practice that is expanding since the Supreme Court decision has come down. We have seen a number of cases throughout the country where municipalities are beginning to use eminent domain in this way because they see the opportunity because of the Supreme Court decision. I would encourage the chairman to, after this hearing, to schedule mark-up on this and move it as quickly as we possibly can. I yield back.

The CHAIRMAN. I thank the gentleman for that support and encouragement, and it is now my pleasure to recognize the lead Democratic cosponsor of the legislation, the congresswoman from South Dakota, Ms. Herseth.

OPENING STATEMENT OF HON. STEPHANIE HERSETH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH DAKOTA

Ms. HERSETH. Thank you and let me thank you, Mr. Chairman and Ranking Member Peterson for holding this hearing today, as well as Agriculture Appropriations Subcommittee Chairman, Henry Bonilla, for his important and esteemed leadership on this important issue. I would also like to thank all of my colleagues, most notably, Congressman Pombo, chairman of the House Resources Committee, on which I also serve, who, as you know, has been a leader on the issue of protecting private property rights for many years, and others who have joined together in a truly bipartisan way to address the potentially disastrous consequences of the Supreme Court's *Kelo* decision through their support of this good, common-sense legislation. In the short time since its introduction, the STOPP Act has garnered broad bipartisan support exactly for that reason, its common sense.

The Supreme Court decision in *Kelo v. New London* dealt a serious blow to the fundamental rights of property owners. This ruling allows governments to take private property from one landowner and give it to another private individual, so long as some economic development justification is given. In short, it means that governments can take your property and give it to someone else. I think this is a dangerous precedent that requires congressional action and thankfully, I am not alone. I have heard outrage about the Supreme Court's *Kelo* decision from a broad spectrum of South Dakotans, from our largest communities to countless family farms and ranchers for good reason.

The use of eminent domain by the city of New London was "unwise as a matter of policy." Those aren't my words, they are the words of Justice John Paul Stevens, the author of the *Kelo* decision. In a speech before the Clark County Bar Association in Las Vegas last month, which I will submit for the record, Justice Stevens confessed that he thought the decision in *Kelo* was wrong as a matter of policy, although correct as a matter of law. In that speech, Justice Stevens indicated the *Kelo* decision "compelled the result that he would have opposed if he were a legislator," and importantly,

signaled his expectation that the political process is up to the task of addressing such policy concerns.

So here we are today. As demanded by our constituents and anticipated by the decision's author, we have introduced a piece of legislation that addresses these policy concerns by discouraging State and local governments from arbitrarily taking land from private land owners and giving it to another private party. I am pleased to be able to help craft a bipartisan solution. I felt compelled to take a lead in the process and was thankful for the opportunity to work closely with Chairman Bonilla because of the people I represent and my roots on my family's farm in South Dakota. In South Dakota, our rural population's livelihood is deeply tied to the land. Whether on the farm or in town, their economic livelihoods are also tied to land and they should not be at the whim of a government that decides to take that livelihood away just to give it to someone else who the government decides would deliver more in tax revenues.

While the *Kelo* decision is now the law of the land, this piece of legislation sends a strong message that many of us here today and hopefully, the entire Congress, agree that we must do what is constitutionally permissible to prevent the most egregious use of the takings power to enrich one private party at the expense of another. While Congress can't overturn the Supreme Court, we can provide carrots on sticks to prevent local governments from unfairly taking private property from land owners.

The bills diverse supporters are Republicans and Democrats from across the country. I am proud to be the lead Democrat on this bill, joining my colleagues from around the country in fighting for the rights of private property owners. I want to thank Chairman Goodlatte, in particular, for his work in ensuring a quick hearing on the bill and on the Supreme Court decision. As we all know, due to recent events, and as Mr. Peterson noted, we have new and evolving challenges before us in the Congress, but this remains a priority as we work together to meet other challenges, as well. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. I thank the gentlewoman. Without objection, all additional opening statements will be made a part of the record.

[The speech of Justice Stevens appears at the conclusion of the hearing. The prepared statements of Mr. Salazar and Mr. Davis follow:]

PREPARED STATEMENT OF HON. LINCOLN DAVIS, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF TENNESSEE

I'd like to thank Chairman Goodlatte and Ranking Member Peterson for having this hearing today on the *Kelo v. City of New London* U.S. Supreme Court decision and H.R. 3405, the Strengthening the Ownership or Private Property (STOPP) Act of 2005.

Like many of my constituents in Tennessee's Fourth Congressional District, I was extremely disappointed in the Supreme Court's 5-4 ruling that State and local governments can use eminent domain for revitalization projects. I believe that forcibly shifting land from one private owner to another, even with fair compensation, favors the most powerful and influential in society and leaves the poorest amongst us with little protection. Now, a major corporation could take a family farm or house away from its rightful owners if the local government believes the new business will create greater tax revenues, and thus be more beneficial for the public. I feel this is an extremely broad interpretation of the fifth amendment to the Constitution, which prohibits the taking of property by the Government except for "public use."

That being said, I do not think Congress should make the mistake of trying to prevent the enforcement of a broad, sweeping Supreme Court decision with broad, sweeping Federal legislation until we put that legislation under proper scrutiny. While we must ensure the rights of private property owners, we also must ensure the ability of State and local governments to use Federal programs to improve the infrastructure of their communities and the livelihood of their constituents. I look forward to hearing the testimony of our distinguished witnesses and learning more about Representative Bonilla's legislation.

PREPARED STATEMENT OF HON. JOHN T. SALAZAR, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF COLORADO

- Good morning and thank you Mr. Chairman for the opportunity to speak briefly this morning.
- In my district, private property rights are sacred.
- I was very upset with the Supreme Court ruling that local governments can abuse their powers of eminent domain.
- No one can deny that economic development is critical, but I can think of few instances where it should be done at the expense of private property rights.
- My constituents do not want the government telling them they have to move out of their house so a strip mall can be built.
- Now I understand there are legitimate uses of eminent dominant, uses that are in the public's best interest.
- Examples include building roads and schools, but I am tired of hearing about people losing their homes in the interest of so-called economic development.
- The *Kelo* decision, in my view, is a gross misinterpretation of the takings clause of the fifth amendment.
- I agree with Mr. Pombo, if government will not stand up for the rights of property owners, who will?
- I fear this is the beginning of a dangerous trend towards more and more government intervention in the lives of citizens and their individual rights and liberties.
- I support efforts to take back the rights of property owners in this country.
- Again, I thank the chairman for the time to speak.

The CHAIRMAN. We will turn now to our first panel. Before we do that, I would like to recognize another Member of Congress, who is in the hearing room, and that is Congresswoman Thelma Drake of Virginia. Congresswoman Drake has been a leader on this issue and has been very supportive of this legislative effort, as well, and she had legislation in the Virginia House of Delegates when she served there, very recently, and you will be glad to know that one of our witnesses today is Speaker Howell, just a few feet down from you. And I will turn to our first panel of witnesses and I think we will be joined shortly by Congresswoman Waters.

But first I would like to recognize the author of the legislation, and our colleague from Texas, Congressman Henry Bonilla, who has, as it has been noted, is the chairman of the House Agriculture Appropriations Subcommittee. Congressman Bonilla, your leadership on this issue is much appreciated and we welcome your comments.

**STATEMENT OF HON. HENRY BONILLA, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF TEXAS**

Mr. BONILLA. Thank you, Mr. Chairman. I ask unanimous consent to enter my written statement into the record.

Mr. Chairman, this could be the most important piece of legislation that the Congress passes this year and I thank you from the bottom of my heart for your leadership or for the leadership of members of this committee for taking an aggressive approach as the members of the committee with jurisdiction over this bill.

As has been outlined here, I am not going to get into a lot of the specifics, because I think the history of what got us to this point

and what we are trying to do has been outlined very clearly in some of the opening statements; but this is something that resulted, as mentioned, due to the Supreme Court ruling, the *Kelo* decision. It created an outrage across this country, whether you live in a rural community or in an urban area. The fear has now put, is now in the hearts of many Americans that they could lose their property if a government decides that for private gain, they want to take it.

This is a ruling that again, I think, would not only shock, but surprise a lot of Americans, because of the great history we have on property rights in this country. When you travel to other parts of the world, you don't hear stories about people who grow up in a neighborhood and try to attain the European Dream or the Asian Dream or the Russian Dream. The American Dream is unique in this world and part of the American Dream is to own your own property, something that no one can take from you, no matter what. Mr. Peterson makes a good point, that during this crisis in Louisiana, the symbolism of people who do not want to leave their property is a strong message that I think is part of the undercurrent of what we are seeing as a result of this crisis.

Ms. Herseth is correct about the outrage and the concern that people are expressing across the country as a result of the *Kelo* decision, and Mr. Pombo has been a leader since the first day he stepped into the Capitol here, back in January 1993 as a new Member of Congress, knows the significance of property rights to all Americans, again, regardless of where they live and regardless of their socio-economic status.

So I am thrilled that we have, again, as Mr. Pombo pointed out, an unprecedented number of cosponsors on this bill that come from every corner of this country politically. Stark liberals and hard-core conservatives standing shoulder to shoulder to protect property rights, of values in this country. Mr. Chairman, we may not be able to control the Supreme Court, but this Congress controls the money, and this bill is about shutting off the money for any local community that undertakes a private property taking for private gain and it also deals with States if they become involved in it, as well. But, of course, protecting, as you outlined, the right of local governments and State governments to take property for public gain, for airports, for bridges, roads, schools, has been outlined by members of this committee.

So we don't touch the traditional eminent domain clauses that have been used in this country for generations that have been, indeed, for the greater good, what we are simply saying is that you can't do it for private gain and if you choose to do it anyway, you lose all Federal money. There are competing bills out there dealing with this issue, that deal with Federal funds. We feel, I feel very strongly, the cosponsors of this bill feel very strongly that this bill eliminates any possibility of a local government using a shell game to hide certain funds in one bank account and saying that they are using it for completely separate projects and then going ahead and proceeding to take property for private gain using another fund. So this shuts it down, period, and I would think that if this law were implemented, that there would not be, that we would put an end,

once and for all, to any government with any idea of taking property for private gain.

Again, I want to be brief in my opening remarks and leave plenty of time for the witnesses who are going to follow, very important witnesses, Mr. Chairman, that you have lined up today that will lend some expertise and perspective to this piece of legislation.

PREPARED STATEMENT OF HON. HENRY BONILLA, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF TEXAS

In July 2004, the Supreme Court was petitioned to hear one of the most important property rights cases ever.

Earlier that year the Connecticut Supreme Court ruled that even if there is nothing wrong with your home or business, church or synagogue, or even your whole neighborhood or community, that government can still use eminent domain to take your property and transfer it to someone else for their private gain.

This ruling placed in jeopardy the very essence of the American way of life: that someone can start with nothing, build a family, a home, a business, and work to make his community better. This dream is directly threatened by the fear that while you work to create the American Dream, it may be taken away should government decide that another individual could create greater tax revenue. This fear is real and every individual who owns real property knows that homes generate less tax revenue than businesses and small businesses generate less tax revenue than larger ones.

The issue before the Court was brutally simple: does government enjoy protection under the Constitution to take property from one private party in order to give it to another private party for the purpose of increasing tax revenue and income? *Kelo v. New London* presented this question to the Court in no uncertain terms. The constitution of every State, as well as that of the United States, requires that private property only be taken for "public use," such as transportation or public functions, not for private or commercial economic gain. The use of eminent domain authority to increase tax revenue is an abuse of the intent of "public use." Such takings are arguably the most outrageous and broad action possible by government against its own citizens.

Not only does this decision put in jeopardy the ownership of property in our Nation, it places ethical government in the crosshairs of those which who would seek to manipulate the system for their personal gain. Those with deep pockets and questionable intentions now have both the legal means and profit motive to sway local officials to do their bidding.

The Court's ruling in favor of New London creates a precedent that will hang like a stone around the neck of the average citizen, the small businessman, the common man. This stone will weigh down the rights of Americans trying to make a success of themselves through the sweat of their own brow.

Many feel that their voices can not, and will not, be heard on this issue. As Members of Congress, it is our job to make sure that this stone is shattered and those voices are not only heard, but pushed to the forefront.

Several of our colleagues have answered this call and introduced pieces of legislation which we think could make a positive impact on the situation. However, these measures apply only to specific projects which have Federal funding attached to their completion. While this is a great effort the fact is it does not go far enough. These measures have a loophole which localities may try to exploit. Each of these pieces of legislation take actions against specific projects in which the power of eminent domain is abused. The funding "shell-game" that would follow any Federal action would see localities moving local and private funds into projects which are questionable all the while continuing to receive Federal funding for other projects related to other economic development.

In order to address this issue, I, along with several of my colleagues here today, introduced the Strengthening the Ownership of Private Property, or STOPP Act. This bill confronts this issue head on with legislation to stop this practice in its tracks. This legislation would take a two-fold approach in preventing State and local entities from wrongly taking private property.

The first step is to make local governments follow the same guidelines imposed upon the Federal Government by the Uniform Relocation Act in instances where eminent domain powers are abused. This measure provides that the Federal Government must not only provide fair compensation for the property taken, but also cover the costs of relocation for any business or home which must move.

Currently, local entities don't have this restriction and are only subject to this law if there are Federal funds used for the project. The second, and more substantial step, would be to withhold any Federal economic development funds to localities which choose to take property for private commercial development. This measure would not make it illegal for entities to continue their practices, but would make them think twice by forgoing any Federal funding for any project should they proceed. Under the other measures which have been introduced, local entities could use private or local funding when pursuing eminent domain of this type, however, under our bill they would have to think twice before pursuing this practice.

We think this bill strongly discourages governmental entities from moving forward with trading citizens dreams for taxes. The STOPP Act is the least we can do, a measure with teeth, a measure for average citizens, a bill to correct a far reaching decision with horrific consequences. I commend Chairman Goodlatte and Ranking Member Peterson for their interest in moving forward quickly on this important legislation. I also commend Chairman Pombo for his never-ending fight for the private property owners of our great Nation. I would also like to thank my lead cosponsor Representative Herse for her strong advocacy on behalf of those who may be adversely impacted by this decision. Last I would like to thank my colleagues from every end of the political and ideological spectrum who have come together to endorse and support this piece of legislation to protect the American property owner.

The CHAIRMAN. Thank you, Chairman Bonilla. We very much appreciate your comments and we will look forward to the hearing today on your legislation and moving it through this committee as quickly as possible. We do not traditionally ask questions of Members of Congress and since Congresswoman Waters is not yet here, we will move on to the next panel and we will make a place at the table for her, so when she does arrive, we will give her an opportunity to make her statement, but thank you, Chairman, very much, for your contribution today.

We would now like to invite our second panel to the witness table. I would like to welcome our second panel of witnesses. Mr. Bob Stallman, president of the American Farm Bureau of Washington, DC; Mr. Christopher Bartolomucci, who is a partner of Hogan and Hartson law firm here in Washington, DC, and Mr. Alva Hopkins, chairman of the Government Affairs Committee of the Forest Landowners Association. I would like to welcome all of you, remind you that your full statement will be made a part of the record and ask you to limit your comments to 5 minutes. And we will start with Mr. Stallman. Welcome.

**STATEMENT OF BOB STALLMAN, PRESIDENT, AMERICAN
FARM BUREAU**

Mr. STALLMAN. Thank you, Mr. Chairman. I am a licensed cattle producer from Texas, as well as president of the American Farm Bureau Federation. I appreciate the opportunity to be here before this committee today to discuss the potentially devastating effect on agriculture of the recent *Kelo* decision. We commend this committee for holding hearings on this matter so promptly. The *Kelo* decision has struck a raw nerve around the country. We are gratified that so many Members of Congress have introduced and cosponsored bills in such a short time.

We fully support the efforts that have been taken thus far and we will work diligently with this committee and others to pass legislation to encourage States to limit their use of eminent domain to truly public uses. Farmers and ranchers understand that circumstances can arise in which their land could be acquired for a legitimate public use. We cannot support the rationale of *Kelo*,

however, in which private property can effectively be taken for the profit of other private parties.

The difference between legitimate uses of eminent domain and what is so objectionable in *Kelo* is the difference between building firehouses or factories, or the difference between courthouses or condominiums. After *Kelo*, no property is secure. Any property can be seized and transferred to the highest bidder. Mr. Chairman, I appreciate your reference to Justice O'Connor's dissent. I would like to add one other part in her dissent in which she said, "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."

Agricultural lands are particularly vulnerable. The fair market value of agricultural land is less than residential or commercial property, making a condemnation of agricultural land less costly. While agricultural lands are vital to the Nation because they feed our people, they do not generate as much property tax revenue as homes or offices. As a result, they become very susceptible to being taken for any of these other uses. Finally, municipalities generally grow outward, into farming and rural areas. There is nothing to stop farms that have been in families for generations from being taken for industrial developments, shopping malls or housing developments.

Reaction from our members to *Kelo* has been swift and overwhelming. Farmers and ranchers from across the country are asking us to help them keep their property. The American Farm Bureau Federation has initiated the "Stop Taking Our Property Campaign," or STOP, for short. This campaign is designed to educate our members and the public about the impacts of the *Kelo* decision and to provide materials to help State Farm Bureaus address the issue in their respective States. As part of the campaign, we have developed an education brochure, model State legislation and a Web page for interested people.

One key element to our campaign is to promote passage of H.R. 3405 or similar legislation. Since eminent domain is a creature of State law, substantive changes must be made at that level. Getting 50 State legislatures to act, however, is an uncertain and lengthy process. That is why Federal legislation is also necessary. Congress has the authority and the responsibility to determine how our tax dollars are spent. Using Federal funds to help municipalities take from one private party and give to another adds insult to injury to those who work hard for themselves and their families.

You can, by passing this kind of legislation, ensure that State and local governments do not use a person's own tax dollars to dispossess them or other private interests. All of the Federal bills introduced thus far take this approach. The differences among them are the degree to which such funding is withheld. While we support all the approaches taken in these bills, H.R. 3405 seems to offer the most effective deterrent to abuses of eminent domain.

In closing, Mr. Chairman, the American Farm Bureau Federation strongly supports swift congressional action or legislation to withhold Federal funding to States and local governments that use eminent domain to take property from one private entity and transfer it to another for economic development purposes. Thank

you for the opportunity to be here today and I will be pleased to answer any questions you and other members of the committee may have.

[The prepared statement of Mr. Stallman appears at the conclusion of the hearing.]

The CHAIRMAN. Thank you, Mr. Stallman, and we are now pleased to welcome Mr. Bartolomucci.

**STATEMENT OF CHRISTOPHER BARTOLOMUCCI, PARTNER,
HOGAN & HARTSON, L.L.P.**

Mr. BARTOLOMUCCI. Well, thank you for inviting me to testify on the STOPP Act. I represented the Property Rights Foundation of America in connection with the filing of a friend of the court brief in the *Kelo* case and I believe this committed should be commended for giving its attention to the very important matter of economic development taking. The takings clause of the Constitution permits the taking of private property for public use so long as just compensation is paid. In *Kelo*, the Supreme Court held that the use of eminent domain power by the city of New London, Connecticut for a planned economic development was a permissible taking for public use. *Kelo* raises a very important principle of takings law. The Supreme Court has always described as both unjust and unconstitutional the Government's transfer of property from one private party to another private party for the latter's personal benefit. "It is against all reason and justice," wrote Justice Chase in his famous opinion in *Calder v. Bull*, "for the Government to take the property of Person A and give it to Person B for B's personal benefit."

Justice Story said this about the "no A to B" principle, "We know of no case in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

For its part, the *Kelo* court did not reject the "no A to B" principle. On the contrary, the Court said that it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party, B, even though A is paid just compensation. But the *Kelo* court saw no violation of the "no A to B" principle. The Court cited the fact that when the city adopted its development plan, the city did know the identity of the private developer who would get the land in question, thus the Court said that it is "difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown."

That may be true, but it is also difficult to deny that what the city of New London is doing comes uncomfortably close to violating the "no A to B" principle. The city's plan involves taking private property from its current owners and giving that property to a for-profit private developer, essentially free of charge. The city is not planning to open the condemned land to be used by the general public. Furthermore, no direct, immediate and certain public benefit will be realized by the city's plan. Instead, the city's plan is based on a forecast or prediction that developing the property will

produce economic benefits that will trickle down to the public at large over the long term.

Before I conclude, I would like to offer a few comments on the drafting of the bill. The bill's prohibition on Federal assistance is triggered when a State or a unit of local government pursues a forbidden taking, but eminent domain power is sometimes delegated to non-governmental bodies. For example, in *Kelo*, the condemnation proceedings were initiated by the New London Development Corporation, a private nonprofit entity, thus the committee may want to clarify whether the bill applies in the case of eminent domain power delegated to private corporations.

Also, Federal assistance is prohibited under the bill only when ownership of property is transferred. It is not clear whether the bill would apply to transfers of property interests stopping just short of fee title. In *Kelo*, negotiations were underway to lease parcels for 99 years to a private developer who would pay only \$1 per year in rent.

Third, the committee may wish to clarify whether the bill would encompass a taking for the purpose of ameliorating blighted areas. In the case of *Berman v. Parker*, the Supreme Court upheld a redevelopment plan with respect to a blighted area of Washington, DC. If the committee wants to continue to permit the use of eminent domain as a response to blight, it may want to say so expressly in the bill. Mr. Chairman, thank you again for inviting me to testify.

[The prepared statement of Mr. Bartolomucci appears at the conclusion of the hearing.]

The CHAIRMAN. I thank you. We have now been joined by Congresswoman Maxine Waters, who is another principal cosponsor of the legislation and we will interrupt this panel to allow Ms. Waters to offer her testimony. We are very appreciative of your participation today and of your leadership on this issue. Welcome, Ms. Waters.

**STATEMENT OF HON. MAXINE WATERS, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF CALIFORNIA**

Ms. WATERS. Thank you very much, Mr. Chairman and the rest of my colleagues who have taken the time to focus the Congress on this very important issue, eminent domain and its new expanded definition. I really do appreciate the fact that we are taking this issue head-on. I am Congresswoman Maxine Waters representing the 35th Congressional District, which encompasses parts of Los Angeles and the cities of Hawthorne, Inglewood, Lawndale and Westchester in California.

I am here today not as a new opponent of the taking of private property for private use, rather, I see this hearing as a continuation of the work that some dedicated public policy makers on the local, State and Federal level have been engaged in for a very long time.

Upon each reading I become increasingly more shocked and dismayed when considering the potential impact of the ill conceived decision in *Kelo v. New London*.

This decision, which defies the intent of eminent domain and logic, concludes that the Constitution grants no protections for private property owners against developers and development plans.

This expansion of the definition of eminent domain is a slap in the face to private property owners and private property advocates all throughout the country. Never in all of my years of public policy making and advocacy would I have believed that the Supreme Court of the United States would condone the taking of private property for the purposes of so-called "economic development."

I have always been cautious of the use of eminent domain for public purposes and adamantly opposed to the taking of private property for private use. Even in cases when it was done under the guise of the public good, we have realized that public good sometimes is circumstantial, at best.

Those of us who stand with private property owners understand that there is a delicate balance within communities that is often disturbed or destroyed in eminent domain cases. For years I have been involved in the fight against municipalities and developers and so-called community reinvestment corporations that seek to abuse eminent domain by taking private land for public use and even for private use.

On one occasion in my district, the Los Angeles Unified School District threatened to use eminent domain to build a new school. And although I recognized the need for more schools in the area, I could not stand by and watch both a public park and many homes be taken, homes with historic value, be taken and destroyed and hundreds of lives altered. I was compelled to heed the call of the community, which stood in clear and concise opposition to this project. I was particularly struck, in this instance, because I thought that the public park was dedicated for park use and perpetuity and I discovered that nothing is sacred when those determined to use eminent domain for whatever purposes and to talk about the use of it, to build the school, certainly sounded like motherhood and apple pie.

But when I took a very close look at that community, I really could identify other areas where they could build schools, areas that they were not attempting to package, areas that they had not sought, but rather, they decided where they wanted to put the school, they were going to take this open space and there wasn't much open space in this community, and the houses along what we call South Park Walk that were really historic properties.

And as we anticipated, LAUSD, the Los Angeles Unified School District, was certainly able to find an alternative location to build a school, therefore satisfying both the needs of the community and their own. We organized. We organized the people in the community, we went to the school board, we went on two occasions. We opened up the park and canvassed the whole area, brought people together and we made a tremendous impact on that decision and this is but one of the occasions where I have been involved in opposing the use of eminent domain and even then, it was supposedly for public use.

I could describe some other instances where I have been involved with the expansion of freeways, et cetera, et cetera, but bottom line is this; to me, private property is sacred. To those people who work very hard, who save money or even have inherited property, I think that the government should protect the right to property ownership and protect against that being taken away by the gov-

ernment. And to have the Supreme Court decision literally fly in the face of the kind of values that I think we all hold about the ownership of our homes and our land is quite unsettling.

I have been working with several people from various jurisdictions; one is from Orange County, a supervisor in the Orange County area and people are looking at us and saying what is it that brings liberal Maxine Waters together with this conservative supervisor out of Orange County? Well, you are right. You don't see that very often, but on this issue I think that you are going to see a lot of it because I don't care what your political orientation is, I think that we all basically share a basic value of the right to ownership of our land and our homes.

I wanted to just share with you a couple of cases that are being tracked by one of the groups that we are working with. In Cypress, parishioners in the racially diverse Cottonwood Christian Church raised \$2.5 million to purchase nearby vacant property to facilitate the expansion of their new sanctuary, education and childcare facility. In 2002, the City of Cypress Redevelopment Agency used eminent domain to take the property to turn it over to Costco. And this was a church.

In Oakland, John Revelli owned an independent auto repair shop that had been in the family for 55 years. In 2005, the City of Oakland Redevelopment Agency used eminent domain to take his business property for transfer to a private developer.

In Garden Grove, California, Bel-isle's was a local 24-hour independent one-of-a-kind family-owned restaurant, established in 1958. In 1998, it was taken by eminent domain to transfer to a private developer. An Outback Steakhouse now stands on the site.

Long Beach, private property was taken by eminent domain to benefit Wells Fargo Bank's new site at the Los Alto Shopping Center. On and on and on. I could just cite many of these cases that are documented, but I am not going to take up your time. I appreciate the ability to be here with you today to share this testimony and I think it is very important for me to say that not only have I introduced legislation, but I am supporting all legislation that would stop any entity from the taking of private property. And I think that we can join hands in a way that perhaps we don't often do and I look forward to the work that we are going to have to do and I want you to know that I am very, very appreciative of Congressman Bonilla and H.R. 3405 and I stand behind it with everything that I can muster. Thank you very much.

The CHAIRMAN. Thank you, Congresswoman Waters. Congresswoman Waters and I are both members of the House Judiciary Committee, which will also be addressing this issue, but you are very welcome here in the very bipartisan House Agriculture committee today. And we welcome your comments with open arms and hearts and thank you for your support of Congressman Bonilla and Congresswoman Herseth's legislation.

I also very much appreciate your noting that this does cover the political spectrum, but it also covers the economic spectrum and quite frankly, you are correct in noting that it is smaller businesses and lower income people whose property may be most at risk because it is the property that may be taken and increase the tax value the most, but that person's home is their castle, just like any-

body else finds their home to be precious and so we join you in that observation.

It is not the practice of the committee to direct questions to Members of Congress, so at this time we will thank and excuse you, but we do very much appreciate your contribution.

Ms. WATERS. Thank you very much.

The CHAIRMAN. We will now return to panel II with the final witness on the panel, Mr. Alva Hopkins. Mr. Hopkins, welcome.

STATEMENT OF ALVA HOPKINS, CHAIRMAN, GOVERNMENT AFFAIRS COMMITTEE, FOREST LANDOWNERS ASSOCIATION

Mr. HOPKINS. Thank you. Chairman Goodlatte, Ranking Member Peterson, members of the committee, I want to thank you for the opportunity to appear before you today to speak on the implications of the *Kelo* decision. More specifically, the implications and opportunities non-industrial private forest landowners see for statute refinement and clarification in the wake of that decision.

I am Alva Hopkins, III. I am a forest landowner from Folkston, Georgia and a board member and chair of the Governmental Affairs Committee of the Forest Landowners Associations. In the *Kelo* decision, the Supreme Court has taken the words "public use" and replaced it with their language "public purpose." As forest landowners, the management of our forest land confers numerous benefits on the public. Some of these benefits include producing millions of tons of oxygen, sequestering carbon, filtering air and water, providing fish and wildlife habitat, including that for threatened and endangered species, improving the aesthetic beauty of the natural landscape and providing the opportunity for recreation, just to name a few.

Under the *Kelo* case, a government entity can condemn thousands of acres of forest land, not only to convey it to another private landowner who will put it to a higher use, but to one who wishes to create a park. Perhaps this park even joins a residential development of this same private landowner. And perhaps this new park would enhance the residential development and meet the public purpose requirement while providing the above listed benefits to the public.

Forest and farmland is considered low-end use property as compared to commercial property with regard to the creation of tax revenue and jobs. Therefore, farm and timberland would never withstand an eminent domain attack by any governmental entity, wherein the new private landowner will create a new job or build a structure on the property that will increase the tax base.

As a forest landowner, the ability to manage a long-term investment strategy is vital to the future of our industry. This long-term investment for landowners has up front cost, up front investment cost, together with annual taxes and other management costs, with the first return on the property often occurring some 12 to 18 years later with possible final return in 25 to 35 years. For a landowner to make this type of investment and commitment, private property rights must be fully protected.

When the Constitution was framed by our Founding Fathers, it was their intent to protect private property except when absolutely necessary for public use. Public use was intended for such things

as roads, hospitals and the furtherance of government functions. We have seen in this country the cost and erosion of private property rights through a number of sources. Property is not a singular concept. It is not a matter of title, but whole bundle of rights. Property law recognizes these bundle rights, such as you can sell property, you can lease it, you can hunt, hunting rights. And however our taking law is based on the idea that the entire bundle must be taken before you get any compensation. But take away any one of these rights and you reduce the value of the property to the owner. This all or nothing view enables the government, through the use of regulation that can actually squeeze the value out of property a little at a time and allows for them to escape from any compensation to be paid the owner.

Many laws whose intentions are good, such as the Clean Water Act, Endangered Species Act, and the unintended consequences of the magnificent success we have had with the Conservation Reserve Program, include disincentives for forest investment. As these disincentives build, many forest landowners are changing their investment strategy and selling their properties to place their capital in other types of investment. As can be seen by the some of the examples above, these partial takings can be as serious a problem as a full taking, especially when the partial taking first occurs. The owner may subsequently be paid jus compensation for the full taking, however, that just compensation is considerably less than it would have been had it not been for the previously occurring partial taking.

As previously mentioned, well-intended legislation can have unintended consequences. Private landowners and the businesses associated with them are in favor of saving at-risk species, preserving clean water and conserving our natural heritage. We know that societal goals and private property rights can be compatible. When the society, as a whole, benefits, then society, as a whole, must pay the bill.

As a result of the *Kelo* decision, almost any piece of property is now subject to condemnation. Most government entities view forestland as one of the lowest uses of property and almost any other use would be considered a higher and better use, producing more taxes and potential jobs. The takings clause of the fifth amendment of the Constitution was intended to reflect a limitation on eminent domain, not an unrestricted grant of power, virtually any and every piece of property subject to eminent domain.

The intent of my testimony to you here today has been to try to focus on the adverse impact of the *Kelo* decision of forest landowners, as well as briefly touch on several other private property issues. These problems have been collectively labeled the South's invisible forest health problem. I hope that this committee will address the private property rights issues that I focused upon today and restore private property rights back to their constitutionally intended place. Mr. Chairman, this concludes my remarks. Thank you.

[The prepared statement of Mr. Hopkins appears at the conclusion of the hearing.]

The CHAIRMAN. Thank you, Mr. Hopkins. I would like to begin the questioning by asking all three members of this panel if they

believe that it is appropriate for the Federal Government to act to preserve these basic private property rights. Many of the State legislatures are undertaking action now to reexamine their State laws with regard to this issue, but many here in the Congress, including myself, believe that we have a sworn duty to uphold the U.S. Constitution and we think the Supreme Court decision may be contrary to the language on the face of the fifth amendment, and I would like to know what each of you think about the involvement of the Federal Government in attempting to curtail what we regard as an abuse. Mr. Stallman, we will start with you.

Mr. STALLMAN. Well, Mr. Chairman, we certainly concur with your assessment. The Congress does hold the power of the purse strings, even though you don't get to interpret the Constitution as the Supreme Court does, you certainly are charged with upholding, I think, what Americans believe our Constitution says and using, moving forward with legislation to restrict the use of public funds in these instances seems to me a very effective way of going about that.

The CHAIRMAN. Mr. Bartolomucci.

Mr. BARTOLOMUCCI. I believe that Federal action is also entirely appropriate. The Congress has rightly defended other sorts of individual rights and liberties, including civil rights and property rights are a species of rights protected by the Constitution and it is appropriate for this body to take action to protect them. With regard to the mechanism used in the bill, I think that it is a lawful means to attach conditions to the spending of Federal monies. So I think the committee has chosen a legally permissible avenue for pursuing its objective.

The CHAIRMAN. Thank you. Mr. Hopkins.

Mr. HOPKINS. Yes, I think it is very appropriate. We are going to need some definition that we all can understand and not wind up with 50 potential different definitions of public use for public purpose and I think that that is what this bill does, it intends to put a definition and try to get this definition back to where it was originally intended some 200 and plus years ago.

The CHAIRMAN. Thank you. Let me ask you all, in addition to that, now that we are in agreement on some Federal Government involvement, do you agree with the general approach of the STOPP Act? Congressman Bonilla has noted that this legislation has teeth, it cuts off virtually all Federal funds to a community that abuses the eminent domain power as defined in the legislation, so it has some very severe consequences. I think it will be very effective. I wonder what you think, Mr. Stallman?

Mr. STALLMAN. Well, absolutely. As I referenced, there has been a lot of other bills passed attempting to do the same thing, but 3405 really, we believe, has the most teeth and does stop the ability of governments to do this fund shifting of, a game that could be played with less effective legislation, so we think H.R. 3405 is the best vehicle to move forward with to help stop this kind of abuse.

The CHAIRMAN. Thank you. Mr. Bartolomucci.

Mr. BARTOLOMUCCI. I would agree with the likely effectiveness of the bill and I would also add that the bill is fair because it puts States to a choice. If they want to receive the Federal funds, they

will have to accept these conditions and if the conditions are unacceptable to them, they will simply not receive the money.

The CHAIRMAN. Thank you. Mr. Hopkins.

Mr. HOPKINS. Yes, I just basically concur with both of the other gentlemen.

The CHAIRMAN. Thank you. Mr. Stallman, have you seen an increasing willingness on the part of State and local governments to expand the use of eminent domain powers to obtain agricultural lands for private economic development purposes?

Mr. STALLMAN. We see that tension at the urban, kind of, rule interface all the time. To us, this *Kelo* ruling really opened that door and made it a lot more likely that local governmental entities would use the ruling in *Kelo* to even more aggressively take over agricultural land in that interface. We have anecdotal stories from all across the country of instance where there has been eminent domain proceedings. We have heard, although I don't know that they actually implemented it, that local governments were waiting on the *Kelo* decision in the hopes that it would come down as it did before moving forward.

I am proud of the State of Texas, I guess, being a resident there, but trying to address this issue quickly so their State legislature was in session and we certainly hope that other State legislatures, really move forward to fundamentally restrict the use of eminent domain. What Congress is doing is extremely important, though, in the interim, to have a universal national kind of policy in place to prohibit use of funds for implementing the *Kelo* decision. We think that will be effective in stopping these local entities from taking agricultural land.

The CHAIRMAN. Mr. Hopkins, I assume that forestlands are also similarly at risk. Would you care to comment on that?

Mr. HOPKINS. Yes, Mr. Chairman, I know right now in California, I think it is called the Onaway Ranch, some 17,000 acres, they are trying to acquire that now. That is, I don't think that is for a business or that is for a new Costco. That would be a great deal of farmland being usurped by, in that case, a county. We are seeing this at the urban interface, as was just previously mentioned. In the rural part of our State, we don't have very much development going on, so it is not as critical as there, but around, at least in Georgia, around the Atlanta area, we are losing 54 acres a day of forestland in the metropolitan Atlanta area and it is a very, very serious issue with regard to our forest land up there.

The CHAIRMAN. Thank you very much. My time is expired. I now recognize the gentleman from Minnesota.

Mr. PETERSON. Thank you, Mr. Chairman. I want to get down in the weeds a little bit here and as I mentioned earlier, back in 1997 I had three towns under water. Mr. Pomeroy shared in that unpleasant experience and we had a lot of experience with the fallout of all of that, which is going to come now in these areas that have been affected by the hurricane. It is a very difficult situation, it is very controversial. You are seeing some of that already, with people not wanting to evacuate.

It gets worse when you have to make the kind of decisions that, frankly, FEMA requires and other people, in order for you to get money to rebuild. We were forced to move a lot of houses that were

some of the prime real estate. People didn't want to move. We need to start thinking if the experience that we went through is any indication, I am not sure, under the rules that they operate in FEMA in the core, that they can even rebuild New Orleans without some of kind of waiver because it is in the flood plain.

But all of that aside, what I am concerned about is you think there is anything in this bill that would get in the way of rebuilding that area? I think that is one of the things we have to be concerned about because my staff has looked at this and there is, I don't know, I am not a lawyer, but it just looks to me like we may, we might get ourselves in a situation where we tie the hands of the State and local officials in those communities so that they can't rebuild and I don't know if anybody wants to do that. Do you have any thoughts Mr. Bartolomucci.

Mr. BARTOLOMUCCI. Well, it seems to me that the New Orleans relief effort will entail, in very large part, the giving of funds and resources to individual property owners so that they can rebuild their property. That is different than taking their lands from them.

Mr. PETERSON. Well, but the problem is that there are going to be property owners that are going to be required to move. Not only Louisiana, but in Mississippi. There is going to be an issue of whether they can rebuild those houses on the coast and people are going to, I am going to tell you, people are going to want to rebuild. They are going to fight their local governments. You are going to have some people that are wealthy that are involved in this, you are going to have some people that are poor. In New Orleans, I have been to those projects down there, and they are going to hire lawyers and sue people over this and what I am concerned is that we be careful here that we don't give them another tool to stop what maybe needs to be done. Now, this is very controversial, it is very complicated and it is going to be a hell of a mess, let me tell you. I have been through this. And I am just concerned that we don't do something here that is going to make it more difficult. We have already got enough problems down there the way it is.

Mr. BARTOLOMUCCI. Well, the bill would apply to a taking for a particular purpose, a taking for economic development. But the Supreme Court has recognized that some government actions with respect to property don't constitute a taking, at all. For example, if the property, as it is currently, is a public nuisance, that land can be taken to abate the nuisance and that kind of an action is not even a taking for which just compensation would be required. So if you are talking about property where it is in a serious nuisance condition or there is a risk of disease, I think you could analyze whether this bill would come into play at all in the case of such a nuisance-type property.

Mr. PETERSON. So you don't think it will be a problem, is that what I am hearing?

Mr. BARTOLOMUCCI. No, I think it is legitimate to ask that question. It deserves further study, but my sense would be that this bill would not pose an obstacle or that certainly not insurmountable obstacles.

Mr. PETERSON. I think I just would encourage all of us working on this to be careful here because under these rules, if you build up your house high enough, you can rebuild it. If you don't, you

can't. You could get into a situation where somebody might have the means to be able to spend the extra money to build this thing higher, somebody else might not. I just think this is a thorny thicket and I just would like us to try to work through that with people that are experienced in this, including people on my staff, Mr. Pomeroy's staff that have gone through this because it is a lot more complicated and controversial than people realize and in about a year or two, they are going to find out, unfortunately, the problems, so thank you.

The CHAIRMAN. I thank the gentleman and we certainly will be examining the legislation and with some careful draftsmanship make sure we avoid those types of problems. The chair now recognizes the gentleman from California, Mr. Pombo.

Mr. POMBO. Thank you and following-up on Mr. Peterson's comments and his question. There are public nuisance laws, public health and safety laws that are designed to protect the public, as a whole, that are outside of eminent domain powers, but when you deal with eminent domain, I think that the purpose of the legislation is to stop them from being able to take it. That is what this is all about.

If someone does not want to sell their home, we, as Members of Congress, should be protecting them and protecting those private property rights so that they don't have to sell their home. That is the purpose of doing this. One of the issues that we deal with is that well, they are compensated. They are paid the fair market value for their home, their ranch, their business. The fair market value of my home is what I am willing to sell it for and what somebody is willing to pay me for it. It is not what some appraiser who works for the city decides my home is worth. And I would like to direct that to Mr. Stallman in that in dealing with eminent domain powers and being able to take someone's farm, what is someone's farm really worth?

Mr. STALLMAN. Well, you have highlighted probably one of the biggest issues we have with eminent domain. Even if it is for public use, as we would define it, fair market value, in the minds of the landowner whose land is being taken under eminent domain, I don't know of a single case where it has been reached in the mind of that landowner.

And it does get down to a lot of, and I am going to characterize them as games that are played by entities that want to use eminent domain, public entities, in terms of what they can, they know what the legal costs are in terms of going to court and trying to fight eminent domain proceeding. They use appraisal techniques, which I think are suspect in terms of coming up with that fair market value that you have talked about that is far from the fair market value in the eyes of the landowner.

So that is sort of administration of eminent domain, if it is being used for, I guess, what we would construe as a legitimate public purpose as opposed to this legislation, which is just trying to restrict the use of eminent domain to take the property to be used for some other private purpose. But eminent domain and how it is implemented by the States and the processes and the laws that go with that, it varies from State to State, but in general, it rarely, if ever, gets true fair market value in the mind of the landowner

to that landowner when he is subject to it, so that is a problem. That is probably a little separate problem because it really is the administration of eminent domain, but it is definitely a problem.

Mr. POMBO. Mr. Bartolomucci, the Constitution allows eminent domain for a public use and in that the process has been established that a fair market value would be established to protect the public and to protect the individual, that appraisal system that we deal with at the local level. But when you are dealing with taking land for a road or for a school or a park or what has been determined to be a legitimate public use, that process is put in place to protect both sides of the equation there.

When you are taking land to be used by another private individual, then you have a completely different set of circumstances that should come to play. Mr. Hopkins pointed out the case in California, a 17,000 acre ranch that is being taken by eminent domain. That landowner, the price of that land, if you can't do what you want to do on that land based on that price, then you should look somewhere else and that is how the private free market system works. When you start taking land by eminent domain from private individual to give it to another, then the government comes in and sets the price. Isn't that one of the big problems with using it for private economic development?

Mr. BARTOLOMUCCI. Well, whenever property is taken for public use, the Constitution requires that just compensation be paid and you are absolutely correct that the standard is fair market value. A court or other body will sit and try to figure out what the price would be in the open market, but fair market value can never capture emotional and sentimental value. For example, in the *Kelo* case, one of the landowners had lived in her house and has lived in her house her entire life. She will be paid fair market value, they will pull out the calculator to decide how much money she should get for her house, but she won't be compensated for a lifetime of memories and experience in that house.

So I think fair market value, in this context doesn't represent complete value and certainly, if the economic development project in the New London area turns out to be very successful, she won't capture any of that upside, so perhaps one thing that the Congress should look into going forward is what the proper measure of just compensation ought to be in various categories in takings cases.

Mr. POMBO. Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman. The congresswoman from South Dakota, Ms. Herseth, is recognized.

Ms. HERSETH. Thank you, Mr. Chairman. Mr. Hopkins, there is substantial amount of privately owned land in the Black Hills of South Dakota and Wyoming and as more affluent people become interested in the beauty of our forest lands, we sometimes see conflicts between the longtime landowners in that area, many of whom aren't particularly affluent, and the developers. And tourism is certainly a big part of the Black Hills of South Dakota, but while important to the economy, so are the rights who have been there for years and feel tied to the mountains and the forests.

In your opinion, and you have addressed this some in your opening statement, do you anticipate instances in which private developers may seek to convince local governments to seize private land

so they can subdivide it or put into higher cost use and what pressures do you see on local governments and States when it comes to forest landowners in light of this decision? And then I guess what I am asking is how do you think the *Kelo* decision, I mean, do you think that it is going usher in a new era of development in private forest land?

Mr. HOPKINS. I think it certainly opens the door for that. It allows any governmental entity to decide where they want to place a subdivision and work with a developer in placing it there regardless of the rights of the prior owner. In our area of the country, our forestland is still valued somewhat low in terms of dollars per acre. In areas where it is developing more rapidly, as the price is going up, forced conversion is taking place and of course, that is not, we are not here to address that, but that is an issue that is going on there.

But we are concerned, one of our biggest concerns is that without some known right, some protected right that we have to go out and make an investment that is required now to get land back in forestation and then sit for 15 or 20 years before you get one dime out of it, although annually, you have cost; you have the taxes, you have management cost and not know in 10 or 15 years down the road if I am even going to get my value out of that, because it may get condemned before it gets worth more in value, and now it has little to no value from a fair market value standpoint, and I have lost it all. To make that commitment from a forest landowner, it is imperative that we know we can't have our property taken and handed to other developers.

Ms. HERSETH. Thank you. Mr. Stallman, as you know, South Dakota is a rural district and South Dakota has been lucky not to have a serious and egregious eminent domain incident like the one in the *Kelo* decision, but farmers are rightfully concerned about what the decision means for them and you have addressed that in some of the answers to other questions, but I was hoping you could talk a little bit about what you see is the most serious threat facing agricultural landowners.

I have heard Mr. Peterson and you address the rural/urban interface in light of suburban sprawl, but I want to hear your assessment on the threat facing rural landowners and farmers who live miles from metropolitan areas. And you may or may not address this, but one of my particular concerns in the increasing amount of land in South Dakota that is being purchased by out of State residents for purposes of hunting.

Mr. STALLMAN. Well, we have that on the Gulf Coast of Texas, too, for duck and goose hunting, as a matter of fact, and we see a lot of that. Our focus is on private property rights and so if you truly believe in private property rights, those individuals that are fortunate enough to maybe have more money that come out to the countryside and who a willing buyer/willing seller negotiation decide that they can pay to buy land for whatever purpose they want to use it for and that seller is willing to do it that is a private property transaction between two willing parties.

Are there impacts of that depending on how they use the land to the agricultural infrastructure, maybe reduction in agricultural production, maybe changing in property values, in some instances,

if they come out and build a fine hunting lodge that ups the local property values? All those kind of things are secondary effects on the other, say, traditional landowners have lived in the area, but if you truly believe in private property rights, I don't see that we can really sit back and restrict those willing buyer/willing seller transactions.

Ms. HERSETH. Absolutely. I mention that only because of the concern here, for example, in South Dakota, we, in my opinion, underfund education. We don't have personal income tax, which I think is a good thing, but with property taxes in these sparsely populated areas, there is increasingly a desire to find more revenue, and my concern is one that when you have agricultural land far removed from metropolitan areas, but yet that are seeing the kind of development that is between two willing parties, buyers/sellers, which I have no problem with, because I do think that you get fair market value there in terms of the buyer is willing to buy at a price some that reflects what he or she wants out of that land, and we all recognize what some of the secondary effects are on that.

But my concern is local governmental bodies that recognize that kind of development taking place, seeing that raise the value of that particular piece of land and what that means, I mean, we have to get at the heart of the concern of some of your members in the Farm Bureau and the folks in South Dakota that are miles away from a metropolitan area and explain to folks why it is that they are so concerned about the Supreme Court's *Kelo* decision.

Mr. STALLMAN. I was in Oklahoma talking to a legislative task force about this issue a couple weeks ago and one of the questions that was asked was, is similar to this in that what do you do with a community if their only recourse is once they see the potential for development and raising a tax base and the community would go away otherwise if they didn't take some action, say, under *Kelo*, i.e. should you take some property to be sure you can maintain the local economic infrastructure of that town to help promote these other kinds of, increasing the tax base, if you will.

My response is the community should be cautious of this because if they are going to implement a *Kelo* decision at the hopes of grabbing future tax revenues and use property for development for other purposes, say, than agriculture and take property, why would an investor want to come in and invest money in a community that showed a propensity to take property to start with?

And yes, I think there will be a temptation under *Kelo* for these local communities in these areas to look at all other possibilities of trying to increase tax revenues and that is the real danger in the *Kelo* decision and that is why absent any Government funding issues which this Congress hopes we will address, it is going to be up to State legislatures to put boundaries around the use of that eminent domain, and that is what we are encouraging our States to do.

The CHAIRMAN. Thank you. The gentleman from Michigan, Mr. Schwarz, is recognized.

Mr. SCHWARZ. As a mayor of a pretty good size midwestern city a few years ago, I was involved in some takings which I believe were beneficial for the city, had to do with enlarging the airport, a pretty good size taking, so I am not unfamiliar with what goes

on and unfamiliar with the consternation it causes with property owners, all of whom, in this case were well compensated.

My question that I would ask this counselor, to Mr. Bartolomucci, within the context of H.R. 3405, what is a legal or a proper or a just or a beneficial taking and as in appurtenance to that, is there language in the bill or does the bill provide, specifically, that takings can be made, or assume that takings can be made by quasi-governmental organizations? You talked about economic development authorities. In the State of Michigan we have things called tax incremental finance authorities, which are essentially the same thing, but could you address a legal standpoint, what is a legal taking within the context of H.R. 3405 and do you believe that it is appropriate for nonprofits, which are affiliated with, but not actually Government organizations, to engage in takings?

Mr. BARTOLOMUCCI. H.R. 3405 would apply to takings for the purpose of economic development. I do not read that as applying to traditional types of takings, for example, to take property in order to build a road or a school or a hospital or to extend an airport. I think, as I read it, the scope of the legislation is designed for the *Kelo* situation, in which property is being taken with the idea that we will give it to another private entity who will hopefully employ more people and there will be additional tax revenues and that will trickle down and benefit the public, as a whole. I think that is the kind of taking that is being targeted here.

As to the second part of your question about quasi-governmental organizations, I believe the bill would apply to a State or a local government or an agency thereof, the question I have, in my mind, is whether it would apply to a corporation that, or a public utility that is delegated the power of eminent domain. I can see that a court might decide that a development corporation, which is incorporated as a private entity, would not be considered an agency, so I think some attention ought to be paid to the definition and clarify exactly what entities would come under the bill.

Mr. SCHWARZ. Are there instances—I am not aware of any, but just one State and one city that I am familiar with, are there instances where private entities have been delegated the authority to do a taking, to make a taking?

Mr. BARTOLOMUCCI. That was true in the *Kelo* case, itself. The taking was affected by something called the New London Development Corporation.

Mr. SCHWARZ. Is that not quasi-governmental?

Mr. BARTOLOMUCCI. Well, it is established by the government, but the Supreme Court opinion described it as a private corporation, so I don't know whether you would call that a government agency or not. That is the kind of question that a court would have to ponder. If you wanted to capture those sorts of takings, I think the definition could be tweaked to say any corporation to which government eminent domain power is delegated.

Mr. SCHWARZ. Should that point of law not be spelled out specifically in the legislation?

Mr. BARTOLOMUCCI. I think it would be beneficial to clarify it, yes.

Mr. SCHWARZ. Thank you, sir. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. The gentleman from North Dakota, Mr. Pomeroy, is recognized.

Mr. POMEROY. Mr. Chairman, thank you for this very interesting hearing. I am concerned about the *Kelo* case. I am also, as we talk about it, a little worried about the prospect for inadvertent consequence by legislation that might be undoing more than the *Kelo* case. One of my first assignments after the first year of law school was looking up fee owners for a rural water line.

In the end we were able to get, I think, almost every easement we were seeking on a voluntary basis, but there was the prospect of eminent domain for gaps that were critically needed for purposes of the line for the benefit of the greater rural community. The ultimate easement is to the benefit of the rural water association, I suppose. Would this, in any way, Mr. Bartolomucci, be swept up in this?

Mr. BARTOLOMUCCI. I think, if you are talking about a governmental need in order to take property to put down, say a gas line or some sort of power line that benefits the public, as a whole, I don't think that kind of taking would be affected by this bill.

Mr. POMEROY. Couldn't argue that that was, in the end, something about developing the economic base of the area, therefore illegal under the act?

Mr. BARTOLOMUCCI. Well, I think a taking like that certainly may have an economic development effect, but I wouldn't call that a taking for the purpose of economic development. I would call that a taking for the purpose of bringing power or water or whatever is being carried to the public.

Mr. POMEROY. I am also interested in the concluding portion of your testimony where you note that we ought to think about clarifying the application of this to the *Berman* case. Now, I can see a situation where on the edge of town in a commercial zone you have a fallen shopping mall with the one thriving entity being the city's porn shop, not city owned porn shop, private porn shop, and the desire to knock this whole thing down, build a Sennex station. Now, as I understand the act, you couldn't use USDA rural development money in that instance, in any eminent domain way that might involve a reluctant porn shop owner and the effort of the community to get control of that property, is that correct?

Mr. BARTOLOMUCCI. Here is where I was driving at in those comments. The *Berman v. Parker* case dealt with the development of an area that was deemed to be blighted.

Mr. POMEROY. OK, let us not, because my time is short, under the hypothetical I just spun you, what would be the implication of the law you are proposing?

Mr. BARTOLOMUCCI. If the purpose is to alleviate a blight or something like that, it is not clear to me that the bill would cover it because that would not be economic development, per se, it is more targeted at a social problem. The point in my testimony was if the community wishes to permit takings to alleviate blight, perhaps they would want to make that express. I don't believe the *Berman* decision is controversial in the way that *Kelo* is.

Mr. POMEROY. *Berman* has, apparently since 1954, although blight seems to be a very fine line. Obviously, we don't want, in addressing the legitimate concern raised by the *Kelo* case, we don't

want to give a loophole you can drive a truck through saying well, if you say it is not about economic development, but it is about blight eradication, fine. So how do you come up with language like——

Mr. BARTOLOMUCCI. It is a line drawing problem.

Mr. POMEROY. Has there been case law supporting a finding of a porn shop as blight?

Mr. BARTOLOMUCCI. I am not aware of any, but I haven't researched it.

Mr. POMEROY. I am not, either. I mean, my problem is I want to protect the kind of rural land taking on the edge of these growing urban areas that has been under discussion, no question about it, but I don't want this to be the porn shop owners' relief act and I don't really understand how, under the hypothetical I spun out, you could use rural development monies for purposes of getting that Sennex station up there in place of the porn shop.

Mr. BARTOLOMUCCI. It is not clear to me, either, that you could do that.

Mr. POMEROY. I yield back.

The CHAIRMAN. I thank the gentleman. The gentlewoman from Colorado, Mrs. Musgrave, is recognized.

Mrs. MUSGRAVE. Thank you, Mr. Chairman.

The beautiful fourth district in Colorado has mountains, has Estes Park, Colorado. It has some of the prime agricultural land in the United States that is very close to the front range where there is a great deal of growth. In one of my counties, Weld County, we have the highest growth rate in the Nation and there is some farmland right in there. So this issue is of great interest to me.

There is also a group of wealthy individuals in Colorado that would like to build a toll road, a private road, and have a mile wide strip along with the road going through some rather distressed rural community. So boy, if this doesn't hit home, I don't know what does and I would like to echo my colleague's comments on quasi-government entities and private entities abusing the eminent domain powers. What is for the public good? That is just the question we always have when eminent domain comes up.

But this is huge in Colorado. It is very encouraging to me when the liberals and the conservatives sit down at the table and come together and call something an outrage that is truly an outrage. And I just would like to, again, stress the fact. Some of our rural folks have land along the South Platte River. Can't you just see a beautiful hunting lodge come and boy, there they go. And again, the agricultural land along the front range, it is so vulnerable. And I am all for private property rights, always have been. That is the basis of capitalism. Mr. Stallman, a willing seller, a willing buyer, we know all those things. But when you have these pressures that people face, it is a whole different deal.

What would you encourage, Mr. Stallman, are farmers and ranchers to do? There are 5,000 people in a county out there sometimes. What would you encourage them to do with their local government, with their county commissioners, to address this issue with their State legislators?

Mr. STALLMAN. Well, we have, as a reference, have developed model legislation for State legislatures to look at to basically restrict the definition of public use. Now, specifically restricted, and specifically state that it cannot be used for economic development or for tax revenue purpose, those kind of things, to really put some tight boundaries around it.

The larger issue of, let us call it farmland preservation, if you will, is really beyond the scope of this narrow discussion about eminent domain and how it can be used to take property and then use, again, that property be given to another private entity for use other than what we normally construe as public use.

But in areas that are subject to a lot of growth pressure and development, I mean, we have seen over the country development of voluntary farmland preservation efforts, where development rights can be sold that allow farmland, and this is, once again, between willing buyer and willing seller, where farm families are willing to sell their development rights to meet the needs of society, where they want to maintain the farm viewscape or farming on that urban/rural, urban interface, where there is a lot of development pressure. So there are ways to handle that if that desire for society is to preserve that farmland and not have it developed. But once again, that really needs to be on a willing seller/willing buyer basis, and generally it has to have some kind of program where funds are used and transferred from the public to that individual to protect it from development.

So those kind of efforts are out there and they are being done, but the key for this hearing and this legislation is just to be sure that local governments don't have the authority under eminent domain to take that property from an unwilling landowner and then give it to another entity to do things outside what we construe as public use.

Mrs. MUSGRAVE. Thank you. Just one other comment. When I think about these quasi-government entities, people have been appointed to these boards and commissions, but they operate on our tax dollars. So here you have a situation where citizens are funding these boards and commissions, and then they might have the authority to take their property. That is especially offense to me.

And, Mr. Chairman, I want to thank you for conducting this hearing today. There are many hot issues out there such as immigration and of course, now the hurricane and the devastation, but the private property rights issue has struck a cord with citizens all across the political spectrum, and I applaud you for holding this hearing.

The CHAIRMAN. I thank the gentlewoman.

The gentleman from California, Mr. Costa, is recognized.

Mr. COSTA. Thank you very much, Mr. Chairman. I too join with those Members who have this morning stated their support, historically, for private property rights. It is, I think, a fundamental part of our U.S. Constitution, and certainly I think is a critical aspect of what we do here to ensure that we can continue to protect those rights. I have also, over the years, when I was in the California legislature, carried legislation that has protected, offered opportunities to protect California farmland from urban sprawl.

So having said that, I would like to follow specifically, and I don't know, maybe Mr. Bartolomucci may be the gentleman who might best respond to this, or those with, maybe, previous experience in these kinds of transactions. It is kind of a follow-up of Congress Member Schwarz question earlier.

I have worked with entities, nonprofits, that have been engaged in efforts, or parkways and others, where there have been efforts throughout the community to provide public improvements, in which there was broad support, and where the term of art that was used, where there was a friendly condemnation effort that took place, in essence, there was negotiations, there was willingness to work on it, there was an agreement on the price, but nonetheless there are tax benefits, I am told, under a number of those circumstances, when there is, in essence, an agreement, but they still want to proceed with the condemnation process.

How would you legislation specifically impact those instances, if you could tell me? And maybe this is better a question for the third panel.

Mr. BARTOLOMUCCI. Yes. I haven't had any personal experience with that kind of a situation where, in effect, you have a willing buyer and seller, but yet they want it to go through the eminent domain mechanism. As I read the bill, there would be no carve out for that kind of situation. If it is a use of eminent domain "for economic development," the bill would apply. Perhaps Mr. Stallman or Mr. Hopkins would have—

Mr. STALLMAN. I am not aware of those kind of situations. I haven't seen examples of them, particularly. This legislation would prevent those local entities from using eminent domain, and it doesn't really specify whether it is voluntary. I have a little trouble understanding the tax implications, as to what those might be. I suppose there could be some that could cause people to want to go through that process, but it has been my experience that agricultural landowners generally don't want any part of the process.

Mr. COSTA. No. I think, generally speaking, this is in cases where the area has been encroached over a period of time, and it has made past farming practices difficult at best, and they have reached a point where they have decided that they want to take the value of their land because of its increased value, and retire and use the money for other purposes, or to maybe farm in other areas. But there have been tax benefits that have been associated with that process, and I am interested in obviously seeing what impact that would have.

Mr. Chairman, I would like to reserve that time to ask that question to the next panel, where we might get the legal interpretations.

The CHAIRMAN. Yes, we would definitely recognize you for questions of the next panel as well.

Mr. COSTA. Thank you.

The CHAIRMAN. I thank the gentleman.

The gentleman from Minnesota, Mr. Gutknecht, is recognized.

Mr. GUTKNECHT. Thank you, Mr. Chairman, and I want to thank Chairman Bonilla and you and Representative Herseeth and others for cosponsoring this bill. I really don't have a question so much to

the panel. I want to thank them for coming today, and I am really happy that we are having this hearing.

I am pleased to be a cosponsor of this bill. The *Kelo* decision, in my opinion, was one of the worse rulings by the Supreme Court, in my memory, for a whole variety of reasons. And I think the testimony today has made even clearer that Congress can use the power of the purse to reinforce what I believe to be the clear meaning of the takings clause embodied in the fifth amendment. Eminent domain should be used only rarely and only for public purpose. And let me just say, as a former real estate broker and auctioneer, this is, when you think about the implications of the *Kelo* ruling, it is in some respects a bonanza for developers, because it opens all kinds of doors, and it is a way that you can leverage land that you can acquire now through eminent domain for \$3,000 an acre and immediately turn it into land that is worth at least \$10,000 an acre. That is just in my immediate area, and I think those numbers are probably conservative.

The thing that I know about the auction business is this: there is a buyer for almost everything at a price. I think President Reagan said best, that markets are more powerful than armies. Ultimately, markets will work much better. Ultimately, there is a buyer at a price for anything. There is a seller at a price for anything. What this does is it artificially substitutes the wisdom of some local officials for the wisdom of the marketplace and the wisdom of that buyer and seller, and it is a huge miscarriage of justice. Congress doesn't do a very good job at recovering the fumbles of our courts, but this is one where it seems to me we have a moral responsibility to do all we can to recover this fumble, because it opens up a Pandora's Box that I don't think anyone can really imagine at this time.

So again, thank you to Chairman Bonilla and to the other sponsors of this bill. This is something that Congress needs to move ahead posthaste.

The CHAIRMAN. I thank the gentleman.

The gentleman from Iowa, Mr. King, is recognized.

Mr. KING. Thank you, Mr. Chairman. I very much appreciate this hearing, too, and my history in politics got started on property rights issues. But as I sit here and I look at this bill and I listen to the testimony that is here, and you are aware there are a couple of other bills out there that address this situation.

The thing that is absent in our National discussion is, and I am not proposing this, but I suggest this for discussion purposes. The thing that is absent is a suggestion on amending our Constitution to restrain the Supreme Court from diminishing our property rights that we have this protection of for over 200 years. And I think the reason that that has not been part of our discussion, one is the level of difficulty, and the other one is the near impossibility of contriving language that could speak more clearly to this property rights issue than the fifth amendment actually does or did.

And I notice, Mr. Hopkins, in your testimony, your written testimony, you reflect actually the dissenting opinion of Justice O'Connor, whom I gratefully agreed with on this case, finally agreed with on a case, that she said that had struck the language for public use

from the fifth amendment. And in fact, I made that same statement on the floor before I was aware that that wasn't her opinion.

Can you suggest language, at least for the intellectual exercise, that might be tight enough that the Supreme Court can't find a way around it to get to their desired result?

Mr. HOPKINS. I don't know that I could do it today. I would be glad to get back with you with some language. I don't know whether we need to put governmental use. I don't know what terms we need to put in. What frightens our forest landowners is that so much of what we do for free is for the public, is public purpose, or public use, but not public purpose. I mean, public purpose, not public use. We produce oxygen, we produce recreation, wildlife. All the things that we do, all it takes is one entity to come in and say, we decided we are going to take that 2,000 acres because we are going to provide that, and here is a better caretaker of that property than you have been doing. They are going to manage it different than you have been doing it so these things will be even better, and we have lost the right to have it. And that is what I think is what really concerns us, is that we just opened Pandora's Box. But the actual language, I agree with you. To me it was very simple. I don't know how it ever got so convoluted, to go from public use to public purpose to public policy or whatever the next term they wish to use.

Mr. KING. Well, Mr. Hopkins, then I would suggest this follow-up question to this, that I think we also should be examining is, if we can't conceivably write an amendment to the Constitution that would restrain an activist court, how can we ensure that anything that we pass that is designed to restrain an activist court will be upheld as constitutional when it should go before the Supreme Court?

Mr. HOPKINS. The constitutional amendment, although, as difficult as it may be, may in fact be the mechanism that we have to ultimately resort to, particularly if this law gets interpreted, very public purpose oriented, as they have the Constitution.

Mr. KING. I am looking Mr. Stallman. Do you have a response you would like to add?

Mr. STALLMAN. I guess the words in the Constitution, to me, are fairly plain. I don't have language that would probably be better than that. Our problem obviously has been the interpretation process over the years. What we have done with our model legislation, and this is statutory language, it is not constitutional language, to encourage the States to put these boundaries around eminent domain on public use, and we are very specific in our model language. I won't read it all, but basically it says what public use is and should be and what it is not. And the is not includes economic development and raising tax revenue. So that is one way of addressing it, but your challenge of finding better words for our Constitution I think is a big one to overcome. It is not so much the words, it is the way they have been interpreted.

Mr. KING. I thank you and I thank all the panelists for their testimony, and the chairman, I would yield back.

The CHAIRMAN. I thank the gentleman from Iowa for his questions, and I want to thank all the members of this panel for an excellent presentation. We have gotten to some of the core issues. Mr.

Bartolomucci, in particular, I want to hold the record open for an opportunity for Members to submit additional questions to you, particularly on the issue raised by the gentleman from North Dakota, with regard to blight. We are going to make absolutely sure that we carefully address drawing the line as clearly as possible between public and private eminent domain powers, and we want to get that right. So we are going to address that question with the next panel. So at this time I will thank all of you and we will now go to the third panel.

I am going to have to step out in just a moment, and I will ask Chairman Pombo to take the chair. But before we do so, I would like to welcome our third panel: Ms. Dana Berliner, who is a senior attorney with the Institute for Justice of Washington, DC; the Honorable Bill Howell, speaker of the Virginia House of Delegates, on behalf of the American Legislative Exchange Council; Dr. Roger Pilon, founder and director of the Center for Constitutional Studies, with the CATO Institute of Washington, DC; and Mr. Jonathan Turley, professor of public interest law, with the George Washington University School of Law here in Washington.

We will begin with Ms. Berliner. I will remind all the members of the panel that their full statement will be made a part of the record, and ask you to limit your comments to 5 minutes. Ms. Berliner, I know of your deep involvement in this issue, including the arguments before the U.S. Supreme Court, so we are particularly interested in hearing your testimony, and you may begin.

**STATEMENT OF DANA BERLINER, SENIOR ATTORNEY,
INSTITUTE FOR JUSTICE**

Ms. BERLINER. Thank you. Thank you, Mr. Chairman, and thank you for inviting me to be on this committee.

I represented the owners in the *Kelo* case and have represented owners across the country in fighting the use of eminent domain to take their homes or businesses for private development projects. I got into this originally when we represented a homeowner whose house was being taken in Atlantic City for Donald Trump. And at the time, I thought that this was a very unusual event and something peculiar. What I discovered over the course of several years is that, unfortunately, it is extremely common for eminent domain to be used to take property for private development.

The *Kelo* case was the culmination of years of litigation on this issue. And what happened was that 15 homes are being taken for a private development project, and they are being taken by a purely private non-profit development corporation. The idea is that they will put in something or another, probably some office buildings, and office buildings produce more taxes than homes and more jobs than homes, and that is a good enough reason to take these homes away from the owners that are living there.

After the decision, as you all know, there was a wave of outrage across the United States, and I think surprised many people just how angry the citizenry was about what had happened. At the same time, we are seeing condemnation actions being filed and city officials saying, great, now that this has been decided, we can start proceeding forward in taking property for private development. And this is only going to continue unless legislative action is taken.

One thing I also discovered is that Federal, many of these projects do, in fact, use Federal funds. The *Kelo* case itself had \$2 million of Federal funding from the Economic Development Authority. There was a case in St. Louis, Missouri, where affordable housing was condemned for expensive housing, using in part Housing and Urban Development money. There are cases, there is a case where a church was condemned for a private development project, again using Federal money. And these are happening all over the country.

It is well within the power of this Congress to restrict the use of Federal money for economic development, and I would urge this body to take a look at that. The approach being used by this bill I think is a very good one, because it restricts, not just the funds for that particular project, which, of course, they could make up some way, but it restricts economic development funding, if eminent domain is used improperly, and that is definitely the way to go.

I have a number of specific suggestions about the language of the bill, which I am happy to talk about more. The most important of these is that there needs to be a better definition of economic development, I think, in order to make the statute hold. I agree with Mr. Bartolomucci, that the language needs to be changed to ownership or control by private parties. There is a way to address the issue that Mr. Costa was asking about, about when people want to be condemned, and there a couple of other things.

But what I just want to finish with is, this is an enormous problem all across the country, and people are justifiably very concerned about it. Eminent domain is being used to take prime real estate for private development projects. That is one of the main ways that it is being used now. And Justice O'Connor pointed out that this puts the specter of condemnation over all property; it does and it is within the power of this body to stop that or to substantially reduce it, and I very much hope that you will. Thank you.

[The prepared statement of Ms. Berliner appears at the conclusion of the hearing.]

Mr. POMBO [presiding]. Thank you. Mr. Howell.

STATEMENT OF HON. WILLIAM HOWELL, SPEAKER, HOUSE OF DELEGATES, VIRGINIA GENERAL ASSEMBLY

Mr. HOWELL. Thank you, Mr. Chairman. My name is Bill Howell. I am speaker of the Virginia House of Delegates, and I am also a member of the board of directors of the American Legislative Exchange Council. The American Legislative Exchange Council is the Nation's largest bipartisan individual membership organization of State legislators, with over 2,400 legislator members from all 50 States, as well as 97 members who are serving in Congress. It is my pleasure to appear before you today and to present testimony regarding H.R. 3405 and the eminent domain issue.

The Supreme Court's decision in the *Kelo v. New London* case was very disappointing to those of us who believe in the value of private property. By expansively defining public use to mean any legislative purpose that is legitimate and not irrational, the Supreme Court has effectively written the public use limitation out of the fifth amendment. To quote once again from Justice O'Connor's

dissent: “To reason as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings for public use, is to wash out any distinction between private and public use of property, and thereby effectively to delete the words ‘for public use’ from the takings clause of the fifth amendment.”

While the Supreme Court failed to protect private property rights, they did acknowledge the proper role of the States. The Court stated that nothing in our opinion precludes any State from placing further restrictions on its exercise of the taking power. The American Legislative Exchange Council applauds the Supreme Court for recognizing that States do have the authority to further protect private property rights in the States.

As a result of the *Kelo* decision, many States are acting to better protect private property rights. Alabama and Texas have passed laws that will help limit eminent domain abuse, and dozens of States will take up legislation to protect their citizens from eminent domain abuse, once the new legislative sessions begin in January. It is heartening to see that when one branch of government fails to protect the rights of citizens, another level of government can step in to help protect important rights.

Without a doubt, the most important function of the government at any level is to protect the lives, liberty, and property of its citizens. This was a fundamental reason for the adoption of the Constitution, and should remain a fundamental purpose of government today. The Federal Government was created to play a special role in the protection of Americans. It protects Americans from foreign threats, and helps State and local police protect Americans against criminals inside the country. The Federal Government is also empowered to protect Americans from overzealous State and local governments.

The Founding Fathers realized the checks and balances were needed to restrain the excesses of overzealous governments. As James Madison explained in the Federalist 51,

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments,

the State and Federal Governments,

and then the portion allotted to each subdivided among distinct and separate departments, executive, legislative, and judicial. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

These distinct levels of government and division within State and Federal Government allow for multiple opportunities to protect the rights of people.

With eminent domain and the recent Supreme Court decision in *Kelo*, the Supreme Court has not adequately protected individual property rights. In light of this decision, States around the country are moving to protect property rights. However, there remains a Federal role in providing increased protection for the people. The goal of the STOPP Act is commendable, in that it seeks to restrict Federal money from being spent on projects that use eminent domain to take property from one private party and transfer it to another private party. There is no reason the Federal Government should engage or promote such transfers. State and local govern-

ments may have the prerogatives to conduct such transfers, but the Federal Government should not encourage and finance them.

Last month, the American Legislative Exchange Council approved a resolution on eminent domain. The State legislators felt it was important to make a strong statement against eminent domain abuse. As noted earlier, in the *Kelo* decision, the Supreme Court stated, nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings powers. ALEC's resolutions calls on the State and Federal Governments to protect private property rights against unreasonable use of eminent domain. In addition, it calls on each State to enact protections to protect private property. ALEC does not support the taking of property from private parties and transferring it to other private parties as part of our economic development schemes.

The members of ALEC at both the State and Federal levels share a common commitment to the Jeffersonian principles of individual liberty, limited government, and free markets. Thomas Jefferson wrote, on April 6, 1816, that the protection of private property rights is the first principle of association to guarantee to everyone of a free exercise of its industry and the fruits acquired by it. He also stated that the true foundation of republican government is the equal right of every citizen in his person and property and in their management. As Thomas Jefferson understood, although some politicians at the local level have forgotten, nothing is ours which another may deprive us of.

The fight to protect individual property rights needs to happen at every level of government. In Virginia we will closely examine this issue in the upcoming legislative session. In other States, State legislators will work hard to curb the potential for eminent domain abuses in their States. We thank the committee for holding this hearing and urge Congress to continue its efforts in fighting the abuses of eminent domain.

Chairman Goodlatte and members of the committee, I am honored to testify here. ALEC and I look forward to working with you in the days and months ahead to curb eminent domain abuse and protect private property rights. Thank you and I would be pleased to answer questions that you might have.

[The prepared statement of Mr. Howell appears at the conclusion of the hearing.]

The CHAIRMAN [presiding]. Thank you, Speaker Howell. I apologize for being out of the room when you began your testimony, so I will take the opportunity now to welcome you. You do an outstanding job for our Commonwealth of Virginia, and it is a pleasure to work with you on this issue as well. And now we will hear from Dr. Pilon.

**STATEMENT OF ROGER PILON, FOUNDER AND DIRECTOR,
CENTER FOR CONSTITUTIONAL STUDIES, CATO INSTITUTE**

Mr. PILON. Thank you very much, Mr. Chairman, and I want to begin by joining the other witnesses in condemning the Court's decision in the *Kelo* case. But rather than just say more about that, because a lot has already been said, I want to focus on what I take to be the reason why the Courts have failed over the past 100 years or so to give us a properly worked out theory of property, and it

is because they have not grasped the theory of the matter. So I want to concentrate my remarks on the theory of the matter, because it is something that this committee is going to have to come to grips with, if it is going to craft the legislation that will do the job that it wants to do.

And I would begin that by noting that there are two great powers of government, the police power and the eminent domain power, and it is crucial to relate those powers in such a way that they are related as the framers understood them to be related when they drafted the Constitution. The police power is the basic power of government to secure our rights, to put it in Lockean terms, which the Declaration of Independence is rooted in, and it is the power we all have in the state of nature to secure our rights, which we give up to government when we create government in the first place. The eminent domain power by contrast was known as the despotic power, because no one had it in the state of nature, no one could take someone else's property no matter how worthy his ends, even if he did give him just compensation.

And so what you have got is an essentially illegitimate power, this power of eminent domain, which enjoys whatever legitimacy it does simply from the fact that the founding generation gave it to government in the beginning, and secondly it is what economists call Pareto, superior, that is to say, at least one person is made better off by its exercise, namely, the public, and no one is made worse off, provided the owner is given just compensation, which, of course, is something that this committee really ought to attend to as well.

Now let me put the two powers together in the following way, and I will do it in four steps. First of all, when government condemns a use that is illegitimate to begin with as, say, preventing a nuisance, then no compensation is due the owner because the owner had no right to do that to begin with. That is done under the police power. However, if you exercise eminent domain to condemn a use, while keeping the property in the hands of the owner, then you have what is called a regulatory taking, and here is where so much of the abuse is taking place across the country today. Governments condemn uses, often stripping the land of a great deal of its value, but because the title remains in the hands of the owner, the government gets out from under having to pay compensation. The public gets its goods free because they are off the books, so to speak. This regulatory takings issue is not before the committee today, but I would urge the committee, Mr. Chairman, to look into this because it is crying out for redress; the courts have not done so.

The third area is where the government through a regulation reduces the value of property but takes nothing. If it closes a military base, for example, and the values of property decline, the owner is not entitled to compensation because nothing that was owned by the owner was taken. The value is not something he owns. He owns the property.

Finally we come to eminent domain in its fullest sense, where the property is condemned, transferred to another owner and the compensation is paid, provided the transfer is done for a public use. And so let me now list four areas in which the effort to use emi-

ment domain in its fuller sense is rationalized. The first is where transfer is from private to public, and that is the kind that is usually unobjectionable, when you want to build a road, a school, a fort, what have you.

The second category is when transfer takes place from private to private, as in the case of network industries or such things as railroads, common carriers and the like, and this is rationalized under the eminent domain public use standard, because the use that the property is subsequently put to is enjoyed by all members of the public, and it is often in a situation in which you have rates of return regulated as you do in railroads and the like. So this, even though it involves a transfer from private to private, is justified under the eminent domain power because of the holdout problems, the difficulties of assembling large parcels and so on and so forth.

A third category and a fourth category, however, is where the problems arise. These are the third category, being blight reduction under something like the *Berman* decision, and the fourth category, the economic development condemnations that we see as in the New London case. These are straight-out transfers from private to private and not done with the idea of being rationalized as the second category is under the public use standard. And this is where all the problems arise.

Now, what can you do to address this? Well, you can stop doing it to begin with. I mean, it is a little ironic that this is being conducted in the legislative branch because it is in the legislative, the political branches that this problem begins at the outset, by your authorizing, you and States authorizing agencies to do the very taking that you are now here condemning. So the STOPP bill could be reduced to a simple word, stop doing what you are doing.

Let me now just very quickly address some of the provisions of the bill. The first thing that strikes me about the bill is, it is addressed to States and localities. How about starting by cleaning up your own house? The Federal Government is involved in a fair measure of condemnations for development purposes itself, not to the extent remotely that the States and localities are, but it seems to me that the bill ought to be addressed to Federal agencies as well.

Secondly, it seems to me that it is unclear as to who this is directed to. If I were to write this bill, I would start out by addressing this to the heads of Federal agencies, and I would recast it by saying, heads of Federal agencies shall not disperse funds to State and local programs, unless those programs certify that they are acting consistent with the provisions of the takings clause.

The third thing I would note is that there seems to be some concern of this 2(b)(2) section, as to whether it is even necessary. It seems to me that everything that is addressed under 2(b)(1) will be addressed under 2(b)(2), and so it is redundant.

The next point I would make, and this is the most crucial point, it is one that Dana raised as well, the definition of economic development needs much greater work. You have got to spell that out in detail, invoking, for example, the four categories that I spoke of just a moment ago, because otherwise you will capture too much. You will capture the kinds of transfers for common carriers, net-

work industries and so forth, for which we want eminent domain to be available.

Finally, I would note, there is a further irony here, in that you are trying to restore constitutional protections in a bill which deals with programs which are themselves inherently unconstitutional under the spending power, but that is an issue for another day. It pertains to the rise of the welfare state in the post-New Deal 37–38 court. I would conclude simply by saying, the South Dakota, the Dole issue, it seems to me not to be a pressing one for this committee. I think the decision was wrongly decided, but under the four criteria that are set forth in *South Dakota v. Dole*, perhaps only one is problematic and that is the one where the second category, where you have got to make clear what the requirements are upon the States, and it seems to me that in addressing the definition of economic development, you can address that problem. But as the bill currently stands, it would not satisfy that prong of the *Dole v. South Dakota* test. And with that I will conclude.

[The prepared statement of Mr. Pilon appears at the conclusion of the hearing.]

The CHAIRMAN. Thank you, Dr. Pilon. Very interesting and we will come back with questions in a moment, but first we want to hear from Professor Turley. Welcome.

STATEMENT OF JONATHAN TURLEY, PROFESSOR OF PUBLIC INTEREST LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. TURLEY. Thank you very much, Mr. Chairman. It is an honor to appear here before the members of this committee.

As we all know, there is a firestorm of controversy of the Supreme Court case, which I also believe was wrongly decided, even though I have argued in the past, in academic pieces, for the expansion of public use. In some context, I thought this decision was facially wrong, and I don't see how the Court came to its conclusion, which required it to negate portions of the takings clause, to effectively make them nonexistent. The clause makes a reference to public use. We interpret constitutional amendments so that words mean something. And in this case, the public use reference didn't even amount to a speed bump for the Court on its way of effectively negating the protections of the clause.

What is ironic, the Supreme Court in some ways did what it often wants to do, it united the country. The country seems entirely united in opposition to its decision. Over 90 percent of Americans oppose it. And this is a circumstance where the plain meaning of this amendment, which was so lost on the Supreme Court, is well understood by citizens. But this is more than just a case of the opportunistic use of eminent domain by a small town. The takings clause means more than that. It is a self-defining moment. It defines not just our Government, it defines us.

When we formed this republic, the framers spoke clearly as to the connection between private property rights and individual rights. This is not a question of property rights alone. The framers were clear. They took these ideas from Locke and from Blackstone, that I put into my written testimony, that you cannot protect rights

without protecting property. Indeed, Blackstone said not even the general good is enough to deprive people of property.

What is involved in the takings clause was the main concern of James Madison, and that is the dysfunctional effect of factions. The entire constitutional system is designed to resist the effect of factions. This is the scourge of every prior system of government. It was indeed the greatest vulnerability identified by James Madison in developing our system of government. The takings clause is one of the critical protections against factional interests, and the decision in *Kelo* strips it of that necessary protection.

The takings clause itself I will not get into because, quite frankly, I consider it to be abundantly clear. You might debate what public use means, but it is clear what it does not mean. It does not mean private use. And ultimately this decision read it in a way, that reduces the amendment simply to a guarantee of compensation. When you do that, when you adopt that permissive interpretation, you get the abuses that we are seeing across the country. I have listed many of those abuses from actual cases in my testimony. My favorite moment in constitutional sports was the condemnation of a Walgreens in Cincinnati to build a Nordstrom department store, and then they turned around and condemned a CVS to relocate the Walgreens, and then condemned other businesses to relocate the CVS. If that isn't a bloody nightmare for someone like James Madison, I don't know what would be.

The clear indication here is that the Constitution is to give barriers, to give lines, for politicians who frankly cannot be left to their own devices. When you give someone the authority to use eminent domain, with only a requirement of compensation, it will be used. This is the type of power that followed the theory of gas in a closed space. If you expand the space, the gas will fill it. And I promise you, after this decision, there is going to be an absolute rush to use eminent domain and simply compete people at market value, which is often significantly less than what they turn down from private developers.

How did we get to this point? I am not too sure. We started out pretty darn well. If you read the thoughts of the framers and read the early cases of the Supreme Court. In cases like *Calder v. Bull*, they clearly got it. They knew what public use meant, and they insisted that it cannot involve the transfer of private property to another private individual. Things started to go wrong in the early 1900's, when the Supreme Court started to loosen up the definition. And the minute it did, the minute it abandoned that bright line rule, it was inevitable that we would find ourselves here today. Gradually the Court adopted, as it affirmed in its last decision, that public use can mean public purpose. And once you are there, there is really no going back.

Now, in terms of how we rectify this situation, this bill is a good start, but it dramatically needs to be rewritten. There are various areas of this bill that needs attention. I will name just a few. One is the obvious meaning of economic development in section 2, which we all agree needs to be rewritten, and you have to deal with the issue of blight and whether you will allow for condemnations for blight or negative externalities, such as increased crime, drug use, et cetera, that might come from abandoned houses. It also seems

to suggest that economic development will be self-defined by the municipality. They are not going to call it economic development the minute you pass this bill. They are going to call it something else and you need to have a definition that would encompass that.

It is not clear what unit of Government means in section 2, other than the State. That needs to be closely defined. It is not clear what the time line is under 2(b)(1). If they have ever used eminent domain, does that mean they are barred from Federal contracts? Is there a year designation or requirement that you want to put in? It is also not clear why you have section 2(b)(2), since 2(b)(1) would effectively guarantee compensation.

Two broader notes, before I realize I am out of time, that I wish to note. One is whether the committee members want to consider the use of private attorneys general. In a case like this, I have no faith in government. I have more faith in citizens bringing these issues vigorously to the government. And so there is a question of whether you want a provision for private attorney generals so that they don't have to convince the government agencies to do the right thing.

Finally, you may want to consider a debarment section analogy, that instead of waiting for the Federal agency to go to the city on an issue of development, to allow citizens to go to a designated agency to get a municipality classified as abusing this provision. That would effectively, to use an analogous term, debar the jurisdiction from development funds. That would be a much more effective means, because it would put the issue before the State starts to move around projects and get around a definition. It would allow an agency to make a decision that this municipality is in clear violation of the law.

I am way over my time, and so I will thank you again, and I would be more than willing to answer any questions you may have.

[The prepared statement of Mr. Turley appears at the conclusion of the hearing.]

The CHAIRMAN. Thank you, Professor Turley.

As has been made very clear, the goal of this legislation is to discourage inappropriate uses of eminent domain powers, while not discouraging appropriate uses of that power for the more traditional public uses, like the construction of highways, public schools, power lines, other utility projects, et cetera.

I think both Professor Turley and Dr. Pilon have made it clear that they think we need to further define the term economic development purpose. There are, however, different ways to go about it, and I think I heard two different ways from the two of you. Dr. Pilon seemed to suggest a list of the appropriate uses, and that that might be a basis for excluding all other uses. Professor Turley noted that we could carefully define out economic, private economic development purpose that are not appropriate and leave those out. We do want to get this right, so I am going to ask each of you to tell me where you would draw that line. And, Ms. Berliner, we will start with you. Who is right or neither one of them?

Ms. BERLINER. Well actually, honestly, I think it can be done either way. I think that you can outline what you mean by economic development and say it is private commercial development, with a couple exceptions, and I would use, like, common carriers or pri-

vate, I mean, really common carriers, which include railroads and other types of things. I mean, that would work and you could make any other necessary exceptions, but I think that is probably the easiest way to do it. It is probably easier to simply say, can't condemn for private commercial development than it is to define public use. But I think either one would work and would be doable, but the most important thing is just to have it be clear that eminent domain cannot be used for private commercial development, rather than using the vaguer term, economic development.

The CHAIRMAN. Thank you. Speaker Howell?

Mr. HOWELL. Mr. Chairman, that is probably a little beyond my pay grade, the specific language. We have a commission in Virginia that is looking at the Virginia law right now. As you probably remember, the Virginia Constitution states that the general assembly has the right to define public use, and we are in the process of coming up with a definition now and we will introduce legislation in January to accomplish that.

The CHAIRMAN. Well, if you made some progress in that regard, we would welcome any insights that that commission might share with you. If you would share them with us, it might be helpful to us as well.

Dr. Pilon, do you want to elaborate on your comments any further? How would you guide us? How would you respond to Professor Turley's?

Mr. PILON. Well, I would respond to your question first, by reminding the committee of how difficult their task is. The courts have a relatively easier job, and they have botched it. You have a harder job, and so the odds of your botching it are greater. The reason the courts have an easier job is because they have a case or controversy before them with the facts spelled out. You are trying to draft this in the abstract, aren't you? And you are trying to cover all and only those cases that should be covered. That is a Herculean task to do through legislation. The most you are going to be able to do is give some broad guidelines, and once again it is going to fall to the Court to have to apply this statute that you eventually pass to the cases or controversies before it, in light of the facts that are at issue in that case or controversy.

So with that caveat and that reminder of how difficult it is going to be, I would suggest that you start out by saying in your language that the, excuse me, the eminent domain power was known for a good reason as the despotic power, because that gets it right from the start, and it allows you to establish a presumption against its use. One always wants to have transfers of property to be done voluntarily, if possible. Eminent domain is the last resort, and so the presumption is against its use. And then you spell out why it can be used.

First of all, private to public, nobody has any problem with that, the road, the school kind of case. The problem comes up when it is private to private. That is where you raise the question, is this for a public use? Then you want to spell out what the public use is that is going to justify transferring the property from one private person to another. And you can spell it out with respect to the suggestions I made, common carrier, network industry, such as a telephone line, a cable line and so on and so forth. These are the clas-

sic kinds of cases. There will be a few other odd cases that came up in the 19th and 20th centuries, early on, the grist mill cases, the mining cases and so forth. But by and large, that should end it right there.

When you get into blight reduction, now you are dealing with the question of whether you are dealing with the police power or with the eminent domain power. If it is a nuisance, that falls under the police power. The municipality can condemn that nuisance and use, and it doesn't have to pay the owner anything. It doesn't have to resort to transferring title to end blight from the owner to some other owner. That is a misuse of the eminent domain power. Just end the blight by condemning it, by getting an order doing so, and leave the title where it rests.

And then, finally, we have got this general catchall category, economic development, and it seems to me, that should never be justified. And of course, you folks have been behind all of that, because where does most of this come from, urban renewal projects throughout the last half-century. This is the source of so much of this eminent domain abuse. And so what you need to do is stop funding these kinds of things.

The CHAIRMAN. Professor Turley, I agree with the assessment of Dr. Pilon, in terms of the difficulty of coming up with the bright line test that we need to have here, but it is very important that we do so, because, as has been noted by many people here, two things, one, this bill really does have teeth. If you are going to see all of your transportation dollars, education dollars, agricultural development farm program dollars, housing dollars cut off for your community, that is a pretty strong hammer. On the other hand, we do not want to discourage communities from using the eminent domain power for those truly legitimate public purposes that we have all described here. And so getting that line right for those who are going to come up close to it but not want to go over it so that they do not stunt economic development for truly public purposes, sets the task, I think, pretty clearly for us in terms of how we want to draw this line. So I wondered if you would respond to Dr. Pilon's comments.

Mr. PILON. Could I make one quick point?

The CHAIRMAN. Sure.

Mr. PILON. You have already used the term public purpose several times. The Constitution says public use, and it is not slip over from public use to public purpose, because all of these have a "public purpose." I mean, the *Kelo* case involved public purposes and that was just the problem.

The CHAIRMAN. Point well taken.

Mr. TURLEY. I actually think you could come up with a definition. Congress is forced continually to draw such lines. This, I think, is not necessarily more difficult than many other lines that Congress has drawn in the past. It is just that it has to be done very, very carefully, and I think everyone appreciates that.

I actually believe that you want to do both. You want to first try to define what is being prohibited as clearly as possible, and then to specifically exclude certain things that you are not trying to prohibit. And so if you look at the more successful congressional defi-

nitions, they have both affirmative definitions and then negative exclusions to help hone that definition down.

Now, it seems to me that you want to start out by saying it is not your intent to deal with property that sometimes is put under the general rubric of blight by mistake. I think blight condemnations have in the past been problematic. If you take a look at *Berman*, you can pretty much declare whole parts of a city to be blighted, and that is exactly what cities have done, and so you want to avoid that. You want to allow cities to condemn property that has been abandoned, and I think that is the type of property that we see in terms of the classic nuisance definitions. So you want to have in your definition the exclusion of classic nuisance condemnations and actions. I don't think the committee should go too far in the blight area, because the way this would normally work is that if you have property that is truly a blight issue, truly exposing negative externalities to the city, the city should hit the property with a series of sanctions. Either the property owner will be forced to sell the property, or if they don't pay the sanctions, then it goes to a sheriff's sale. So the city has lots of ways to do it, without using this type of eminent domain as the hammer. So I don't believe that blight has to be a major provision here, because I truly believe it handled in other ways. So you want to exclude classic nuisance issues and abandoned property issues. You want to clearly define it, however, that you cannot use eminent domain for the purposes of the expansion of a tax base or expansion of employment.

Now, of course, officials will act like rational actors and come up with other rationales, but it is not as easy as it may seem to come up with other rationales. If you have got someone like Ms. Kelo, you can't exactly analogize her to a shooting done in the urban city. You have to come up with some rational reason why her home is being taken, and that is not as easy as it seems. So you want to specifically say it cannot be used for expansion of tax revenue or employment, and then you hone it down by excluding certain things, like utilities, like city service condemnations that are needed across property and those types of issues. I think it can be done, but you will use both techniques, I think, in terms of the definition.

The CHAIRMAN. Thank you. I welcome that.

The gentlewoman from South Dakota is recognized.

Ms. HERSETH. Thank you, Mr. Chairman, and I appreciate all of the testimony today, and some of your comments already on the issue of blight that has caused urban common concern or question raised by some of my colleagues as we have discussed this bill, and most likely we will be submitting additional questions to all of you as we continue to find ways to craft this language, utilizing, most likely, both techniques as you have described, Professor Turley.

Ms. Berliner, if I could start with you. I know you have had disagreements with individuals such as Professor Jonathan Adler from Case Western Reserve, and frequent commentator on property rights issues over the propriety of the decision in *Kelo*. So I am curious as to what you would say to someone who, like Professor Adler or Justice Stevens, for that matter, who believes the decision was right on the merits but wrong on the policy. And just so you know my opinion, I think our legislation is perfectly consistent with

individuals who feel the case was decided correctly as well as those who agree with you and think otherwise. But can you comment a little on how a legislative response to the situation presented by *Kelo* is not simply trying to overrule the Supreme Court's decision, but more an effort to discourage States and local governments from exercising their powers?

Ms. BERLINER. Thank you. Yes. Well, the Supreme Court said that taking property for private development does not violate the Federal Constitution. Any kind of statute that this body creates is not going to say, under the U.S. Constitution, you may no longer do this. What it is going to say, is it is going, as this bill does, using the spending power to limit how much it is done. So I mean, there are many things which one might be able to do but ought not to do, and this is that kind of situation. The Supreme Court has said, hey, we aren't going to stop you, but that doesn't mean that any local government has to do eminent domain for private development, and it certainly doesn't mean that Congress has to fund eminent domain for private development. I am also happy to address blight, if that is something you are interested in, or I can do it later.

Ms. HERSETH. And Speaker Howell is going to share with us, as Chairman Goodlatte requested, some of the findings of the commission of the State of Virginia, but why don't we get your thoughts on that and then I will pose one additional question to the panel.

Ms. BERLINER. I think that blight is in certain ways a red herring, because there is not some kind of really rigid barrier between economic development condemnations and blight condemnations. In fact, many State blight statutes define an area as blighted if it is not living up to its economic potential. So they actually incorporate economic development technically into their blight statute. We had a case in Ohio where a beautiful single-family neighborhood was designated as blighted because the single-family homes didn't have three bedrooms, two full bathrooms, and a two-car attached garage.

So I think it is, I am not joking, I think it is important that the kind of definition that you use does not allow anything that any municipality calls blighted to become a valid condemnation that can receive Federal funding. It is important to have a definition that doesn't rely on the terms, economic development and blight, but instead limits the use of eminent domain for private commercial development unless, as Professor Turley said, a couple different things are happening and some of them could be abandoned property. I actually have a list of what those sorts of things might be, where a property really is in such bad shape that it could be harmful to the public. But I urge this committee not to allow blight to become a backdoor to exactly the kind of condemnations you are trying to prohibit.

Ms. HERSETH. So do you agree with Professor Turley, that blight doesn't have to be a major provision of the bill, or am I understanding what you are saying is that we need to more aggressively address this issue in how municipalities are using eminent domain in areas of what they perceive to be blight? I mean, I do think we need some clarification here on how we go about addressing it. Do we leave it to other laws or do we go a step further in what we are trying to stop here, based on what communities, whether they

be in California, and it sounds like it happens quite frequently, or other areas of the country where they are using blight in a way that is unfair to private property owners?

Ms. BERLINER. Well, I guess I agree with Professor Turley. What I would do is define economic development in a more general way, the use of eminent domain for private commercial development that increases the tax base or something like that. Have a couple exceptions for things like common carriers and network carriers, transportation networks, things like that, and perhaps also an exception for abandoned property and property unfit for human habitation or us, and leave it at that so that it is not necessary to start talking a great deal about blight, but just when you are creating your list of exceptions have whatever exception you want to make. But I would urge that the exception not say any property that's been designated blighted under any statute.

Ms. HERSETH. I will yield back.

The CHAIRMAN. The gentleman from California.

Mr. POMBO. Thank you. Ms. Berliner, you are talking about the definition of blight and the way that that has been used, I think, really gets to the heart of the matter. And in terms of should eminent domain be used at any time for a private to private sale, and using the power of government to step in and take land away from, or a home away from, an individual in order to give that to, sell that to another individual. I happen to believe that it should not be used, and there is no overriding public purpose that that would come in. Dr. Pilon talks about the Constitution says public use, and that is what we need to get back to in terms of eminent domain, is the only purpose of eminent domain is for a public use. It is not for a public purpose, and that is a decision that Congress and this committee has to decide in coming up with definitions as to what exactly we mean with this legislation, because the chairman is correct, in that this does have teeth to it. There is definitely consequences that will come out of this. And I think that the question I have for you and for the other members of this panel is, is there really any purpose, public use, where eminent domain could be used to take land away from a private individual and sell it to another private individual? That should be a private sale. There is no reason for the government to step in and use its power to take land away from a private individual. There is no economic development, there is no blight, there is nothing that I see that would make that a legitimate use of eminent domain power and quite frankly, I don't believe it is in the Constitution to allow eminent domain to be used for that purpose anywhere in the Constitution.

Ms. BERLINER. Well, in the case of something like a railroad or a public utility, you are dealing with something that actually is used by the public. Although it is owned by a private body, it is used by the public and it is used by the public, what is called as of right, meaning that the public utility has to provide electricity to everyone. It can't just say I am only providing it to, those guys. So that is how those kinds of uses were originally held to be public uses, because they really literally were used by the public as of right.

When you get into some of these other categories, like blight, I think that is debatable, but one thing that could be done is there

might be a circumstance where the government is condemning property, not for transfer, but for some other reason, like it is uninhabitable, and after it has been condemned, they have to do something with it. But I totally agree with you.

Mr. POMBO. I think Dr. Pilon, I believe it was him that addressed that, or maybe it was Professor Turley. They had talked about, when it comes to health and safety issues, there are other laws. You can step in and make improvements to that piece of property to bring it up in terms of public health and safety, and if the person who owns it, if it is an abandoned piece of property and they don't pay, it can go to a sheriff's sale or a sale, in order to pay for that. I mean, that is something completely different than what they do in California in terms of what is called blighted. I have a neighborhood just outside of my district that has just been declared blighted. It is a neighborhood of \$700,000-plus homes, and the city declared them blighted in order to take that and do economic development and do a strip mall, and they are anything but blighted. But under the California code, under our section of California, they are not at their best, highest public, or best and highest use of that land as determined by five people who sit on the city council, and that is the way blighted is being used. I don't see any reason that we should step in and make that possible under Federal law. I think we should be able to do everything we can.

And I am going to turn to Dr. Pilon in a minute, but I would just say that when it comes to restricting money, there is nothing in the Constitution that says you have to wear a helmet when you ride a motorcycle. There is nothing in the Constitution that says that you have to wear a seatbelt when you drive your car. There is nothing in the Constitution that says you have to have a blood alcohol content at a certain point in order to enforce drunk driving laws. And yet we tie transportation dollars to all of those things, just because we decided we thought it was a good idea and we wanted to force States to do it. In this case, what we are saying is, we don't want you to use eminent domain to take private property away from somebody and give it to somebody else, so we are going to take away your money if you do it, and if you want to do it anyway, fine, but you are not going to get the Federal money. We do this all the time. And for people to try to interject that this is somehow different because we are talking about private property, they are wrong. Dr. Pilon?

Mr. PILON. Yes, this is the carrot approach, of course, and it is perfectly within your power to do so. Now, you have raised two discreet issues here and let me take them one at a time. The most recent one was the blight issue, once again, and you are right, there are other powers. There is the police power. You can enjoy the use that creates the blight. What goes on in the blight cases so often, and probably in this case that you have talked about in your own district, is that, either a municipality has a lot of Federal money on its hands that it needs to spend or wants to spend, or some developer sees an opportunity, goes to the municipality, and rather than try to buy the property voluntarily from the owners, instead tries to get it on the cheap by having the municipality condemn it, and therefore he only has to pay fair market value rather

than what the owner would be willing to give up the property for. So that is what is really going on with these kinds of blight areas.

Indeed, in the case that Dana mentioned, 60 Minutes did a spot on it and lo and behold, the mayor of this town, who was promoting this eminent domain use, found that her own home fell under the criteria for blighted and she was quite struck by that when it was brought to her attention. It was one of those delicious 60 Minutes got you moments.

In any event, to go back to the other point that you are raising, because this, it seems to me it needs to be clarified, and that is the issue of transfer. You suggested it should never be anything but transfer from private to public under the public use. That is going too far and I will tell you why. It would deprive us of an opportunity of the following sort. The eminent domain power is meant to strike a balance. So on the one hand, the person forced to give up his property is not made worse off, provided he gets just compensation. We can't use him for the public good. But on the other hand, so the public isn't taken advantage of by the holdout problem, that is to say, you are trying to assemble the parcels for the railroad and the one person who hasn't sold yet demands a million times what the property would fetch on the market, and there you are. You are left either paying a million more than it is worth, a million times more than it is worth, or you go without the railroad. This is the classic holdout problem, and it is to address that that we have this second category I have referred to.

Now, you are absolutely right. One should not resort to eminent domain unless it is absolutely necessary. To give you an example, when Disney assembled parcels of land to create Disney World in Florida, they did it very quietly by buying up property here and there with dummy corporations and so on and so forth, until they had assembled enough land. They didn't do it by invoking local use of eminent domain by a private party. The railroads are different. The Southern Pacific used eminent domain as given by the government. The Northern Pacific did not. They bought it fair and square the right way, so to speak, without eminent domain. Maybe it was because there were fewer people in the north to buy the land from than there were in the South, but I won't get into the history of that.

But the problem you face, if you limit it simply to private to public transfers, is that you rob yourself of the ability to take advantage of the efficiencies of the market. Do you want your electricity and power, and even water in the west, and other kinds, railroads and so forth, delivered only by public entities? Oftentimes we want this to be in the hands of private entities who can deliver this service far much more efficiently, but they can't get off the ground with laying the cable or whatever the case may be, unless they are given, they are authorized to exercise private eminent domain for that purpose. And so it is for that reason that this second category exists, private to private, but open to the public in a nondiscriminatory way and often with rates of return regulated.

Mr. TURLEY. Could I make one comment? On the blight issue, I want to make one sort of cautionary note. On the blight issue, and when I said that the Federal law should not spend much time on blight, what I meant is that I don't believe that you should be wor-

ried about excluding blight from those prohibited acts; that I would not adopt a very broad definition of a blight exception, if you were going to give any exception of blight, because I do not believe that eminent domain is needed to deal with blight issues on the State of local level.

But I also want to note, this law would be easier, from a constitutional standpoint, if you were simply barring funds for specific Federal projects; that is, if the law said you cannot have money for project A if any of the land has been subject to eminent domain, and here is our prohibitions. Clearly you want to go beyond that and I understand that, because that will allow municipalities to essentially hide the ball, get your money in project A while they are engaging in eminent domain in project B, and in reality they are shifting money so the money that they get from you, they can actually use by displacement, the money they have, to condemn property in project B.

But as you broaden it, as you say, look, we just want you to stop using eminent domain. We want to force you to change your conduct. Then you get into States rights issues. And so part of the need to define this narrowly is that even in *South Dakota v. Dole*, the Court said you can't engage in things that would be coercive. You are not going to be allowed to micromanage a State. The Supreme Court just said that a State can use eminent domain in this way. What we have to be cautious is in our zeal to try to make this cat walk backwards after the decision. We have to be cautious that we are not micromanaging by simply saying we are to try to make sure you can't use eminent domain, because we can trigger one of the conditions under *Dole* that the Court has decided previously.

The CHAIRMAN. Thank you very much. We will do a second round of questions, because I think you have got all of us very interested in what you have to say here. And I want to follow up directly on what you just mentioned, Professor Turley. Do you think the bill, as it is drafted, complies with *South Dakota v. Dole*, which sets the standard for the circumstances under which some of the examples that Congressman Pombo cited for the Federal Government threatening and in some instances actually cutting off funds to States or localities that do not take certain actions that the Federal Government wants them to? Is it in compliance or do we need to tighten up the economic development purpose or economic development definition that is in the bill?

Mr. TURLEY. Well, this is a good start. We are just not there yet in terms of language. This is a natural point to start your legislation as we try to narrow it down. The clear purpose of the law, I think, is a worthy one and with some tweaking we can get by *Dole*. As I mentioned in my testimony, the first condition of *South Dakota v. Dole*, I think, that you meet are the general welfare requirement. The Court gives great deference to that point, that the Court has even said, of its own rule, that it is virtually impossible for Congress to violate.

The second requirement is the one that I am most concerned with and that is, whatever you do, the Supreme Court has said you have to make sure that the States know what it is that they are getting into, because the analogy here is to a contract. You are going to the State and saying, if you want Federal funds, you are

going to have to do X. The Supreme Court has said, you better be clear what X is, if you are going to hold them to that contract, and that requires clarity. And in that second condition, I think we need to do some tweaking and some changes to add clarity and get rid of these ambiguities.

The third condition is that it has to be related to a specific articulated Federal interest. That I don't see as a major problem. The fourth is that there can't be a constitutional bar to the grant of Federal funds. Here you would be telling the State, you can't use eminent domain power that the Court has said you have. But I still don't believe that would be a constitutional bar. As the Congressman noted, if you look at the other things that you have conditioned, I don't see the distinction with what has already been approved as conditional funding.

The final point is that issue of coercion. As we broaden this out to say we are here to stop the abuse of eminent domain, you do get into a question of coercion and a slight question of federalism. To what extent are you telling the States what they can do to their citizens? Because you are going to have State officials who come forward and say, look, if we want to be the Pirates of Penzance and run through the streets taking property, they can throw us out of office, but it is not for you to stop it. I personally think that you can get over that barrier as well, but it is there where this narrow crafting is going to be necessary. So the end result is yes, I think you can draft this to get around *South Dakota v. Dole*, or I should say to comply with it. It is just that we have to be careful in some of our language.

The CHAIRMAN. Dr. Pilon?

Mr. PILON. Yes, on just this last point. The coercion in *South Dakota v. Dole* had to do with a portion of the funds that were denied and that was, I think, 3 percent or 5 percent. And I don't think you are going to be anywhere near close to that. What the Court did say in *South Dakota v. Dole* is that you cannot compel the State to do something that is unconstitutional. There we have, like, to create a State religion, for example. So besides that, this is not coercion, this is just saying to the State, look, if you want the money, here is what you can't do. You are free to do it, it is just that you won't get the money. So that is not coercion.

The CHAIRMAN. Speaker Howell, I am sure you have confronted that issue as a State legislator, where the Federal Government wants to compel you to do something. And I know, in Virginia, we have some negative reactions to that sometime. Here, as Dr. Pilon said, we are not compelling you to do something, we are simply saying, if you do it, I am going to take the money away. It is a lot of money. What do you think?

Mr. HOWELL. I think you will get their attention. We have had several attempts to pass legislation that would require, or make the open containers in automobiles illegal under our DUI statute, and they have the threat of losing Federal transportation money by not doing that. We still haven't seen fit to enact that law. We think we have very good DUI laws in Virginia and we think that the open container feature is flawed. And so we have made that conscious decision. We will let the Federal Government keep \$8 or \$10 million, whatever it is. And actually they still give us the money.

They just call it public safety and we just have to shift money around.

But I think what you are talking about under this act, the money is pretty significant. We probably wouldn't be able to shift it around as easily, and you will get the States' attention. What I would hope is that, and I know, again, the American Legislative Exchange Council is very involved in this, that the States will take action. And I know, in Virginia, we are going to pass legislation, and we will probably try and put it in our State constitution, to prohibit these types of *Kelo* decisions, and the challenge is going to be to get in the language so that we don't throw the baby out with the bath water, but we accomplish what we are trying to do.

The CHAIRMAN. That momentum seems to have come from this very Supreme Court decision, because I know, in previous sessions of the general assembly, there have been efforts to address this, as I mentioned earlier, with former Delegate Drake and her efforts and so on, there is a lot more momentum behind that at the State level now.

Mr. HOWELL. That is exactly right. We had legislation in the 2005 session that would have continued what Congresswoman Drake had introduced when she was in the House of Delegates, and we carried it over because of the pending Supreme Court decision. We are reluctant to enact legislation if there is a major court case on that issue being decided. Now that the decision has been announced and it is probably contrary to what we would have thought they would have ruled, we will be able to take—we will be able to address the situation.

The CHAIRMAN. Thank you. Ms. Berliner, are we OK with *South Dakota v. Dole* or do you have some suggestions for us as well?

Ms. BERLINER. You are OK on coercion; they are basically, as long as they can do it with their own funds or with private funds. It is not going to be consider coercion. There have even been cases where a State was going to lose 75 percent of its education budget if it didn't do something or another, 60 percent, 75 percent. There is another that is 95 percent of Federal highway funds they were going to lose. If that significant a threat is held to be noncoercive, I think you are not going to have a problem on that. What you will have a problem with, as Professor Turley talked about, is the requirement that it be unambiguous. The way that it is written now, because there is no definition of economic development, a city is not going to know what it is and is not allowed to do. And that is the only part of *South Dakota v. Dole* that any court has ever used to strike something down under the Spending Clause. There has been no program that failed anything else except for the unambiguous requirement. So that is something that you do have to outline so that a city can look at it and say, hey, we can't do this or we are going to lose our economic development funding. We better stop. That does need to be satisfied and I think, by defining economic development, you can do that.

The CHAIRMAN. And to add to that, do you agree with Professor Turley's approach, that we should both carefully define what public use is, in terms of the affirmative steps outlined by Dr. Pilon, as well as the things that are disallowed as being private economic development purposes?

Ms. BERLINER. I think it will help to do that.

The CHAIRMAN. Help with eliminate the ambiguity.

Ms. BERLINER. You are not going, yes, you are not going to be able to actually list every single type of thing, so it is going to have to be conceptual, like common carrier as opposed to listing every type of common carrier in existence. But I think the more information that is there, the clearer it is going to be. If it indicates that Congress' intention is to allow condemnations for these kind of public utilities and transportation networks and information networks, but not to allow these other things, the more of that you have, the clearer it is going to be and the stronger it is going to be, frankly.

The CHAIRMAN. Thank you.

I believe Congresswoman Herseth has some additional questions as well.

Ms. HERSETH. Well, let us just follow up here quickly. I think, if you could clarify, both Ms. Berliner and Professor Turley, under *South Dakota v. Dole*, have we ever had a case in which the non-coercive requirement has been met, or has it always been on the ambiguity, a lack of ambiguity requirement? Has there ever been, have we found anything that has been coercive and therefore in violation of *South Dakota v. Dole*?

Mr. TURLEY. Shall I go first? No, the coercion factor is sort of a live torpedo in the water. The Court mentioned it. It has never hit anything significant. Of course, this is the pre-Roberts court. You never know what is going to happen, but I would agree absolutely with Ms. Berliner, that the primary issue that you have to be concerned with is the definitional stuff.

Ms. HERSETH. OK. So if that is our primary concern, I agree with you that it is. I think we all recognize the need to fine tune how we have drafted this. Let me pose the question to all of you. Do you think it would be useful to use the Court's own language, as they have basically adopted a broader and more natural interpretation of public use to mean to mean public purpose, to say what we deem not to be covered by this bill is traditional public use, and we have talked about some of those, the common carriers, the utilities, versus, and use the terminology of public purpose to include economic? I mean, should we break it down that way? So do you think that would take us a step closer under the constitutional scrutiny here, what the Supreme Court may ultimately scrutinize in our legislation, to have made that same divide between public use and a public purpose, or essentially, us make the divide rather than them taking public use and drawing it out to public purpose?

Mr. PILON. If it were me, I would not use the language of the Court, which has gotten us here today. I would rather start from scratch. And what you are trying to do is get yourself out from under the Court. If you craft this correctly, you will never get to court, because you will just be in a position whereby you will withhold funds if they don't meet your criteria, the States. What are they going to do? What are grounds, what grounds would be available to them to bring you into court? I can think of none. We are not in a New York case, 1992, or a Prince case, 1996, or that Congress ordered a State to take title to nuclear material in a New York case, or dragooned Federal officials in Montana and Arizona,

or State officials, to carry out portions of the Brady bill. We are just in a case where carrots are involved, not sticks. And so if you draft this correctly, the State will have no ground on which to raise a case or a controversy.

Ms. BERLINER. My response would be that if you were drafting a constitutional amendment, that that would work very well; that one, for example, could add to the fifth amendment, public purpose and public benefit are not public use, and that would work probably pretty nicely in a constitutional amendment. I think it is going to be harder to use that in a statute, because then there will be a way to do it. If it is something you really want to do, there has got to be a way to do it. But it is going to come closer to the line of trying to make a constitutional definition that contradicts what the Supreme Court said, and obviously you can't do that, although you can withhold the money. So I think, if you really wanted in there, it is possible, but it raises problems to try to contradict the Court's interpretation of public use.

Mr. TURLEY. Well, I think that ultimately we will end up in the same place. I think there may indeed be some slight overlap in terms of what the Court was talking about. The most important thing for your purposes is, as you narrow the definition through exclusions, that you just have to deal circumstances that are not infinite. I mean, this is not in my view that difficult of a drafting problem. But you just want to avoid issues, for example, as you say, if you use economic development and you are prohibiting, for example, the economic development and use of condemnation for expansion of employment or a tax base, you want to make sure that cities can still use condemnation to get access to those areas.

So for example, if your district was developing—the municipality was developing an industrial park, and that is a perfectly good use and they were doing it the right way, they were buying the property, bringing in partners from the corporate world, but they had to get services there, electricity, utilities and roads, you want to make sure that no one can say, well, hold it. You are condemning my property so that you can facilitate bad economic development. And so that is art under the law. And those are things that we can deal with, I think, pretty easily by just tweaking the language to make it clear that those access issues are not part of economic development bars.

The CHAIRMAN. The gentleman from California is recognized.

Mr. POMBO. Thank you, Mr. Chairman. And I have a number of additional questions, and I will just submit those in writing.

One question I do want to ask Professor Turley, though, is, when you talk about States rights and whether or not this is a States rights issue, the Constitution lays out the protection of private property, and no person shall be deprived of life, liberty, and property, nor shall property be taken for public use, without just compensation. That is our protection on private property. If a State were to adopt a law that was contradictory to that protection that is in the Constitution, then it is not a States rights issue, they are adopting a law in that State which contradicts the Constitution, which is the overriding law of the land, is that not accurate?

Mr. TURLEY. Well, it is accurate to a point. If you and I were on the Court, and god knows, it would be a better world if we were.

Mr. POMBO. It may be to you. I don't know.

Mr. TURLEY. But if we were on the Court, then we would clearly establish what you just said. The problem is, the United States Supreme Court has just said that that is not what the Constitution means. And so the U.S. Supreme Court has said that, indeed, States have the authority to do this, and that is where the problem lies. You are going to have States come and say, look, the Court said that this is part of our inherent powers. And what you are saying is that we can't use the full panoply of our powers as defined by the Constitution as interpreted by the Supreme Court. And we both agree that the Supreme Court was wrong in that interpretation, but that is where the States right issue can be raised.

Mr. POMBO. All right. Well, I appreciate you clearing that up, and the additional questions I have I will submit in writing. I would say, Mr. Chairman, that I think a lot of the information that we got from this hearing will be very helpful in moving forward with a markup of this bill, because I think we got some good, some real good ideas for what we need to do. So thank you.

The CHAIRMAN. Well, I thank everyone on this panel. This has been a very, very, very helpful discussion. We had already concluded amongst ourselves that there were some additional definitional issues that need to be addressed in the legislation. Your guidance today will definitely be utilized by the committee staff and the members staffs who will contribute towards making some additional changes to the legislation, which we intend to do and to move the legislation forward quickly, because we think that this cries out for a response, particularly while the public is as focused on this issue and quite frankly, demanding a response from our State legislatures and from the Congress.

So I thank you all again, and we will be in contact with you as we move forward with the legislation, and we will, as Congressman Pombo suggested, submit some questions to you in writing to further pick your brains on the issue. Thank you again.

Mr. TURLEY. Thank you.

The CHAIRMAN. Without objection, the record of today's hearing will remain open for 10 days to receive additional material and supplementary written responses from witnesses to any question posed by a member of the panel.

This hearing of the House Committee on Agriculture is adjourned.

[Whereupon, at 1:06 p.m., the committee was adjourned.]

[Material submitted inclusion follows:]

Written Testimony of
H. Christopher Bartolomucci
Partner, Hogan & Hartson L.L.P.

Hearing on H.R. 3405
Strengthening the Ownership of
Private Property Act of 2005

Committee on Agriculture
U.S. House of Representatives

September 7, 2005

Mr. Chairman, Ranking Member, and Members of the Committee:

Thank you very much for inviting me to testify on H.R. 3405, the Strengthening the Ownership of Private Property Act of 2005. This Committee should be commended for giving its attention to the matter of economic development takings.

As the Committee is aware, I prepared and filed, with the assistance of other lawyers at my firm, a brief amicus curiae in the United States Supreme Court, on behalf of the Property Rights Foundation of America, in the case of Kelo v. City of New London, 125 S. Ct. 2655 (2005). In that case, of course, the Supreme Court upheld an economic development taking.

In my testimony I will discuss the Kelo decision as it relates to the fundamental constitutional principle that government may not take the property of one private party in order to transfer that property to another private party for the latter's personal benefit. I will also offer some comments on the drafting of the bill.

I.

The Takings Clause of the Fifth Amendment to the United States Constitution permits the taking of private property for "public use" so long as just compensation is provided. ^{1/} In Kelo, the Supreme Court held that the exercise of the power of eminent domain by the City of New London, Connecticut, in furtherance of a plan of economic development, constituted a constitutionally-permissible taking for "public use."

The taking of property in Kelo implicates an important principle of takings jurisprudence. The Supreme Court and Justices thereof have always condemned the taking of property from one private party for the benefit of another private party. Case law describes the transfer of private property from person A to person B for B's private benefit as both unjust and unconstitutional. I call this the "no A to B" principle.

In Vanhorne's Lessee v. Dorrance, 2 U.S. 304 (C.C.D. Pa. 1795), Justice Paterson declared unconstitutional a Pennsylvania statute that attempted to resolve a dispute over the ownership of land by vesting settlers from Connecticut with title and providing compensation to the competing Pennsylvania claimants. In so doing, Justice Paterson (who had been a member of the

^{1/} The Takings Clause is made applicable to the States by the Due Process Clause of the Fourteenth Amendment. See Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

constitutional convention) specifically considered "whether the Legislature had authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation." Id. at 310.

While acknowledging that "the despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government," Justice Paterson opined that it is "difficult to form a case in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen." Id. at 310-311. See also id. at 318 ("When the Legislature * * * attempt[s] to take the property of one man, which he fairly acquired, and the general law of the land protects, in order to give it to another, even upon complete indemnification, it will naturally be considered as an extraordinary act of legislation * * *").

Three years after Vanhorne's Lessee, Justice Chase wrote in his now-famous opinion in Calder v. Bull, 3 U.S. 386 (1798), that "[i]t is against all reason and justice, for a people to entrust a Legislature with" the power to enact "a law that takes property from A. and gives it to B," and therefore the legislature cannot be presumed to have such a power. Id. at 388 (opinion of Chase, J.) (emphasis in original).

Three decades after Justice Chase's discussion of the "no A to B" principle, Justice Story was able to declare in Wilkinson v. Leland, 27 U.S. 627 (1829), that

We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. [*Id.* at 658.]

See also Citizen's Sav. & Loan Ass'n v. Topeka, 87 U.S. 655, 663 (1874) (no court "would hesitate to declare void a statute * * * which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B."); Olcott v. The Supervisors, 83 U.S. 678, 694 (1872) ("The right of eminent domain nowhere justifies taking property for a private use."); Wilson v. New, 243 U.S. 332, 370 (1917) (Day, J., dissenting) (calling "the taking of the property of A and giving it to B by legislative fiat" as "that method which has always been deemed to be the plainest illustration of arbitrary action").

In Missouri Pacific Railway Co. v. State of Nebraska, 164 U.S. 403 (1896), the Supreme Court held that a state court order requiring a railroad corporation to permit petitioners, an association of farmers, to build a storage elevator upon the railroad's property adjacent to its track "was, in essence and

effect, a taking of private property of the railroad corporation for the private use of the petitioners." Id. at 417. The Court explained that "[t]he taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." Id.

Similarly, in another case, a state railway commission order directing a railroad to construct an underground pass so that cattle belonging to the owner of adjacent land could pass under the railroad's tracks was held by the Supreme Court to "deprive plaintiff of property for the private use and benefit of defendant." Chicago, St. P., M. & O. Ry Co. v. Holmberg, 282 U.S. 162, 167 (1930).

The Supreme Court has reaffirmed the "no A to B" principle in its more recent cases. In Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984), the Court stated that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." See also Thompson v. Consolidated Gas Utils. Corp., 300 U.S. 55, 80 (1937) ("[T]his Court has many times warned that one person's private property may not be taken for the benefit of another private

person without a justifying public purpose, even though compensation be paid.").

The majority opinion in Kelo did not repudiate the "no A to B" principle, although it did not find the principle applicable on the facts on that case. ^{2/} The Kelo Court observed that "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." 125 S. Ct. at 2661. And the Court stated that "the City [of New London] would no doubt be forbidden from taking [the property owner's] land for the purpose of conferring a private benefit on a particular private party." Id. (emphasis added). The operative word in the Court's statement is "particular." The Court went on to say in a footnote that

while the City intends to transfer certain of the parcels to a private developer in a long-term lease -- which developer, in turn, is expected to lease the office space and so forth to other private tenants -- the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown. [Id. at 2661 n.6.]

^{2/} In a dissenting opinion, Justice O'Connor described the prohibition against purely private takings as "a bedrock principle without which our public use jurisprudence would collapse." Kelo, 125 S. Ct. at 2674 (O'Connor, J., dissenting).

Thus, the Court in Kelo seemed to say the government's transfer of property from one private party to another does not run afoul of the "no A to B" principle so long as the government does not know beforehand the identity of the particular party, B, to which A's property will be transferred. ^{3/}

The Kelo majority concluded that it would be difficult to accuse the government of taking the property of A for B's private benefit. Yet it is also difficult to deny that what the City of New London is doing comes uncomfortably close to violating the "no A to B" principle. Cf. County of Wayne v. Hathcock, 684 N.W.2d 765, 796 (Mich. 2004) (Weaver, J., concurring in part and dissenting in part) (concluding on facts similar to the facts of Kelo that "[t]his case is indeed a very straightforward example of government taking one person's property for the sole benefit of another.").

The City's plan involves taking private property from its current owners -- property that no one contends is blighted, economically unproductive, or being put to a harmful or inappropriate use -- and giving that property to a for-profit private developer essentially free of charge. And as the Kelo Court observed, "this is not a case in which the City is

^{3/} The Court also said that "a one to one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case." Kelo, 125 S. Ct. at 2667.

planning to open the condemned land -- and least not in its entirety -- to use by the general public." Id. at 2662. "Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers." Id. Furthermore, no direct, immediate, and certain public benefit will be realized by the City's plan. Instead, the City's plan is based on a forecast or prediction that developing the property will produce economic benefits that will trickle down to the public at large over the long term. Finally, whether any public benefit will materialize under the City's plan is ultimately dependent upon the actions of a private party, not the government.

Kelo was a case decided by the barest of margins. In Justice O'Connor's dissenting opinion, which three of her colleagues joined, she declared that "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded * * * in the process." Id. at 2671 (O'Connor, J., dissenting). She went on to say that "[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." Id. at 2676.

II.

Having discussed both Kelo and the "no A to B" principle, I would like to offer a few comments on the drafting of H.R. 3405, comments that I hope may assist the Committee.

To begin with, the prohibition on federal assistance provided for in Section 2(a) of the bill is triggered when a "State" or "unit of local government" ^{4/} engages in an act described in Section 2(b). The Committee should be aware, however, that the eminent domain power is sometimes delegated to and exercised by non-governmental bodies. The condemnation proceedings at issue in Kelo were initiated by the New London Development Corporation ("NLDC"), a private nonprofit entity. The NLDC did so, however, in the name of the City. See Kelo, 125 S. Ct. at 2659-60.

I would also point out that federal assistance is prohibited under the bill only when "ownership" of property taken for an economic development purpose is transferred to a private individual or entity. Because the term "ownership" is not defined, it is not clear whether the bill would apply to transfers of property interests stopping short of fee title. In Kelo, for example, negotiations were underway to lease certain

^{4/} It should be noted that, although Section 2(a) uses the term "unit of general local government" (emphasis added), Section 3(1) defines the term "unit of local government."

parcels for 99 years to a private developer who would pay \$1 per year in rent. See Kelo, 125 S. Ct. at 2660 n.4.

The Committee may also wish to clarify whether or not the bill's applicability to a taking for an "economic development purpose" encompasses a taking for the purpose of ameliorating blighted areas. In the case of Berman v. Parker, 348 U.S. 26 (1954), the Supreme Court upheld a redevelopment plan with respect to a blighted area of Washington, D.C.

Finally, the bill does not indicate whether it would apply to a taking that was for the purpose of economic development combined with other purposes. Cf. Kelo, 125 S. Ct. at 2665 (in response argument that the Court should adopt a rule that economic development is not a sufficient purpose for the use of eminent domain power, the majority termed "unpersuasive" the "suggestion that the City's plan will provide only purely economic benefits"). The Committee may wish to clarify whether the bill applies to a taking that is intended, in whole or in substantial part, to promote economic development.

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INSTITUTE FOR JUSTICE

**Testimony of Dana Berliner
Senior Attorney, Institute for Justice
U.S. House Committee on Agriculture
September 7, 2005**

Thank you for the opportunity to testify regarding eminent domain abuse, an issue that's finally getting significant national attention as a result of the U.S. Supreme Court's dreadful decision in *Kelo v. City of New London*. This committee and the sponsors of H.B. 3405, which this committee is currently considering, are to be commended for taking action to end this misuse of government power.

My name is Dana Berliner, and I am a senior attorney at the Institute for Justice, a nonprofit public interest law firm in Washington D.C. that represents people whose rights are being violated by government. One of the main areas in which we litigate is property rights, particularly in cases where homes or small businesses are taken by 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 am one of the lawyers at the Institute who represents the homeowners in the *Kelo v. City of New London* case, in which the U.S. Supreme Court decided that eminent domain could be used to transfer property to a private developer simply to generate higher taxes, as long as the project is pursuant to a plan. I also authored a report about the use of eminent domain for private development throughout the United States (available at www.castlecoalition.org/report).

In the *Kelo* decision, a narrow majority of the Court decided that, under the U.S. Constitution, property could indeed be taken for another use that would generate more taxes and more jobs, as long as the project was pursuant to a development plan. The *Kelo* case was the final signal that the U.S. Constitution provides no protection for the private property rights of Americans. Indeed, the Court ruled that it's okay to use the power of eminent domain when there's the mere *possibility* that something else could make more money than the homes 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."

In response to the decision, there has been an outpouring of public outcry against this closely divided decision. Overwhelming majorities in every major poll taken after the *Kelo* decision have condemned the result. Several bills have been introduced in both the House and Senate, with significant bipartisan support, including H.B. 3405, which this committee is considering now.

The use of eminent domain for private development has become a nationwide problem,
and the Court's decision is already encouraging further abuse

Eminent domain, called the “despotic power” in the early days of this country, is the power to kick citizens out of their homes and small businesses. 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 and used—schools, courthouses, post offices and the like. Over the past 50 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. This “solution,” which has been 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 to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened a Pandora’s box, and now properties are routinely taken pursuant to redevelopment statutes when there’s absolutely nothing wrong with them, except that some well-heeled developer covets them and the government hopes to increase its tax revenue.

The use of eminent domain for private development has become widespread. We documented more than 10,000 properties either taken or threatened with condemnation for private development in the five-year period between 1998 through 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. In Connecticut, the only state that keeps separate track of redevelopment condemnations, we found 31, while the true number was 543. Now that the Supreme Court has actually sanctioned this abuse in *Kelo*, the floodgates to further abuse have been thrown open. Home and business owners have every reason to be very, very worried.

Since the *Kelo* decision, local governments have become 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).

- Sunset Hills, Mo. On July 12, 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.
- Oakland, Calif. A week after the Supreme Court's ruling, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family has 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 my last chance."
- Ridgefield, Conn. The city of Ridgefield is proceeding with a plan to take 154 acres of vacant land through eminent domain. The property owner plans to build apartments on the land, but the city has decided it prefers corporate office space. The case is currently before a federal court, where the property owner has asked for an injunction to halt the eminent domain proceedings. Ridgefield officials directly cite the *Kelo* decision in support of their actions.

Courts are already using the decision to reject challenges by owners to the taking of their property for other private parties. On July 26, 2005, a court in Missouri relied on *Kelo* in reluctantly upholding the taking of a home for a shopping mall. As the judge commented, "The United States Supreme Court has denied the Alamo reinforcements." On August 19, 2005, a court in Florida, with no reluctance, relied on *Kelo* in upholding the condemnation of several boardwalk businesses for newer, more expensive boardwalk development.

Federal funds currently support eminent domain for private use

Federal agencies of course continue to take property for public uses, like military installations, federal parks, and federal buildings, and that is legitimate under the public use requirement of the Fifth Amendment. The agencies themselves generally do not take property and transfer it to private parties. However, many projects using eminent domain for economic development receive some federal funding. Thus, federal money does currently support the use of eminent domain for private commercial development. A few recent examples include:

- New London, Conn. This was the case that was the subject of the Supreme Court's *Kelo* decision. Fifteen homes are being taken for a private development project that is planned to include a hotel, upscale condominiums, and office space. The project received \$2 million in funds from the federal Economic Development Authority.
- St. Louis, Mo. In 2003 and 2004, the Garden District Commission and the McRee Town Redevelopment Corp. demolished six square blocks of buildings, including approximately 200 units of housing, including some run by local non-profits. The older housing will be replaced by luxury housing. The project

received at least \$3 million in HUD funds, and may have received another \$3 million in block grant funds as well.

- New Cassel, NY. St. Luke's Pentecostal Church had been saving for more than a decade to purchase property and move out of the rented basement where it holds 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 Housing and Urban Development, for the purpose of private retail development. As of 2005, nothing has been built on the property, and St. Luke's is still operating out of a rented basement.
- Toledo, OH. In 1999, Toledo condemned 83 homes and 16 businesses to make room for expansion of a DaimlerChrysler Jeep manufacturing plant. Even though the homes were well maintained, Toledo declared the area to be blighted. A \$28.8 million loan from HUD was secured to pay for some part of the project. The plant ultimately employed far fewer people than the number Toledo expected.
- Ardmore, PA. The Ardmore Transit Center Project has some actual transportation purposes. However, Lower Merion Township officials are also planning to remove several historic local businesses, many with apartments on the upper floors so that it can be replaced with mall stores and upscale apartments. The project receives \$6 million in federal funding, which went to the Southeastern Pennsylvania Transit Authority. This is an ongoing project in 2005.

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

The *Kelo* decision cries out for Congressional action. Even Justice Stevens, the author of the opinion, stated in a recent speech that he believes eminent domain for economic development is bad policy and hopes that the country would find a political solution. Congress, this committee, and the sponsors of H.B. 3405 are all to be commended for their efforts to provide protections that the Court has denied.

Congress has the power to deny federal funding to projects that use eminent domain for private commercial development and to deny federal economic development funding to government entities that use eminent domain in this way.

Congress may restrict federal funding under the Spending Clause. The Supreme Court has laid out the test for any conditions that Congress places on the receipt of federal money in *South Dakota v. Dole*. The most important requirements are that there be a relationship between the federal interest and the funded program and that Congress be clear about the conditions under which federal funds will be restricted. The conditions laid out in H.B. 3405 are well within the bounds that courts have articulated regarding the relationship of the funding restrictions to the federal interest. The purpose of the federal funds is to aid states and cities in various development projects. If Congress chooses to

only fund projects or agencies that conduct development without using eminent domain to transfer property to private developers, it may certainly do so.

H.B. 3405 takes a good approach to curbing the abuse of eminent domain nationwide

H.B. 3405 achieves a vitally important goal. Americans throughout the country have expressed their dismay at the *Kelo* ruling, and this bill would provide desperately needed reform. First and foremost, it states in no uncertain terms that state and local governments will lose economic development funding if they take someone's home or business for private commercial development. This is an appropriate response. Congress provides significant funding throughout the country for economic development. Currently that money is being used in projects that take property from one person and give it to another. Or it is being used in a way that gives a locality more money to spend on projects that take people's homes and businesses for economic development. If Congress wishes to ensure that federal money will not support the misuse of eminent domain, terminating economic development funds is the best approach.

Moreover, like H. Res. 340, passed shortly after the *Kelo* decision and condemning the result, the bill represents a strong statement that this awesome government power should not be abused. The states are currently studying the issue and considering legislative language, and they will certainly look to any bill passed by Congress as an example. The bill also specifically tells state and local government entities what funds they risk losing. I suggest, however, that it be amended to spell out even more explicitly under what conditions local government will forfeit federal economic development funding. Specificity and clarity are the most important requirements of any law that potentially restricts federal funding.

Conclusion

Eminent domain sounds like an abstract issue, but it affects real people. Real people lose the homes or businesses they love and watch as they are replaced with the condos and shopping malls that many localities find preferable 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 nationwide. Using eminent domain so that another, richer, 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 committee.

STATEMENT OF
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BEFORE
THE HOUSE COMMITTEE ON AGRICULTURE

*“EMINENT DOMAIN AND THE SUPREME COURT’S PUBLIC USE
DOCTRINE”*

SEPTEMBER 7, 2005

Thank you, Mr. Chairman, it is an honor to appear before the Committee and its distinguished members.

**I.
INTRODUCTION**

Chairman Goodlatte, given the limited time of the Committee members today, I would like to submit a longer written statement to augment my oral testimony.

The recent decision in *Kelo v. City of New London*¹ has created a firestorm of controversy across the country. Indeed, as disappointing as the 5-4 decision was for many of us, the reaction of Americans is reassuring evidence that the public remains committed to principles of both private property and individual rights. After the decision, ninety percent of polled Americans condemned the taking of

¹ 125 S. Ct. 2655, 2005 U.S. LEXIS 5011 (2005).

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private property for private development.² Indeed, in our fractured times of red and blue states, the Supreme Court appears to have done the impossible: unite the country in the common cause of opposing its decision. While I have previously called for an expansion of public use theories in the area of presidential papers,³ I share in the dismay of many Americans at the Supreme Court's decision and its disregard of the original and natural meaning of the Takings Clause of the Fifth Amendment of the Constitution.

The *Kelo* decision represents more than the mere opportunistic use of eminent domain power by a small Connecticut town. It represents a critical self-defining moment for the country. The Supreme Court essentially ruled that these controversies are merely political disputes best left to the political process. In doing so, the Court abdicated any responsibility to protect citizens from the insidious work of factional interests. As I will address below, this is an issue that was first articulated at the founding of our Republic and tied to the very foundation of our system of laws.

² *Hands Off Our Homes*, The Economist, August 20, 2005, at 1.

³ See Jonathan Turley, *Presidential Records and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Control and Ownership of Presidential Records*, 88 Cornell Law Review 651-732 (2003); see also Testimony of Jonathan Turley, United States House of Representatives, Committee on Government Reform, Subcommittee on Government Management, Information, and Technology, "H.R. 4187: The Presidential Records Act Amendments of 2002," April 24, 2002.

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**II.
THE ROLE OF FACTIONS AND PRIVATE PROPERTY IN THE
MADISONIAN SYSTEM**

Law professors often speak for people like James Madison as if they are originalist mediums channeling the thoughts of the Framers. However, I truly believe that the Framers would have been horrified by the decision in *Kelo* and what it represents about our protection of private property against governmental intrusion. One of the most influential philosophers for the Framers was John Locke, particularly with respect to the primacy of private ownership.⁴ Locke believed that “[t]he great and chief end . . . of men’s uniting into common-wealths, and putting themselves under government, is the preservation of their property.”⁵ It was the preservation and protection of private ownership that Locke identified as the central purpose of people emerging from the “state of nature” and forming collective governmental systems.⁶ The views of Locke and other contemporary philosophers regarding private property were captured in the influential Virginia Constitution, which declared that “All men are created equally free and independent and have certain inherent and natural rights . . . among which are the enjoyment of life and liberty, with the means of acquiring and possessing

⁴ See generally Turley, *Presidential Records and Popular Government*, *supra* note 3.

⁵ John Locke, *Second Treatise of Government* 66 (1690) (C.B. Macpherson ed., 1980)

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property.”⁷ William Blackstone articulated a similar principle of private ownership as an individual right against the state. Blackstone argued that “the law of the land . . . postpones even public necessity to the sacred and inviolable rights of private property.”⁸

These views resonated particularly with the Framers who saw the British crown as usurping their private property interests. It is clear that the Framers tied property and liberty together as the core guarantees of the American Republic. Indeed, John Adams insisted that “[p]roperty must be secured or liberty cannot exist.”⁹ Likewise, Madison stressed the importance of protecting private ownership vis-à-vis the state:

As a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power

⁶ *Id.*

⁷ VA. DEC. OF RIGHTS OF 1776, prov. 1.

⁸ William Blackstone, 1 Commentaries on the Laws of England 134-35 (1765) (“So great . . . is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community.”).

⁹ 6 The Works of John Adams 280 (Charles Francis Adams ed. 1850). Notably, the modern Supreme Court has reaffirmed this view. *Lynch v. household Fin. Corp.*, 405 U.S. 538, 552 (1972) (“The right to enjoy property without unlawful deprivation . . . is in truth a ‘personal’ right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.”).

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prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.¹⁰

Guaranteeing that citizens are “safe in [their] possessions” was at the heart of a number of provisions of the Constitution, including but not limited to the guarantee of due process and the Takings Clause. Obviously, the latter is most at issue in this case.

One aspect of the Takings Clause that is often overlooked is its relation to the central purpose of the Madisonian system: resisting the dysfunctional aspects of factional interests.¹¹ Madison viewed the effects of factions as one of the chief causes for the failure of prior governments. Such insular and concentrated interests could “convulse the society.”¹² Yet, the brilliance of Madison was that his vision of government was based on a deep understanding of human flaws as well as human virtues. Madison believed “the latent causes of faction are . . . sown in the

¹⁰ James Madison, Property, National Gazette (Mar. 27, 1792), reprinted in 14 The Papers of James Madison 266 (Robert Rutland et al. eds., 1983)

¹¹ See generally Jonathan Turley, A Crisis of Faith: Tobacco and the Madisonian Democracy, 37 Harv. J. on Legis. 433 (2000) (discussing the role of factional interests in government). Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 Hastings L.J. 185 (1992).

¹² The Federalist No. 10 at 80 (James Madison) (Clinton Rossiter ed., 1961).

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nature of man"¹³ and that, when left to their own devices in a free society, people are inclined naturally to serve their own insular factional interests.

Madison defined factional interests in a way that should seem familiar with cases like *Kelo*:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.¹⁴

Particularly during his tenure in state politics, Madison saw how quickly such factional interests formed to use legislative power to secure financial benefits.

However, Madison was the ultimate realist. He believed that "the causes of faction cannot be removed and that relief is only to be sought in the means of controlling its adverse."¹⁵ Thus, Madison sought "to secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and

¹³ The Federalist No. 10, *supra*, at 79.

¹⁴ The Federalist No. 10, *supra*, at 78.

¹⁵ The Federalist No. 10, *supra*, at 80. Madison explained this delicate balancing in government: "liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency." *Id.* at 78.

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the form of popular government, is then the great object to which our inquiries are directed."¹⁶

Various parts of the Constitution work to blunt the worst effects of factions by directing their interests to the center of the legislative process. Other parts prohibit the most dangerous forms of factional impulse. One such provision is the Takings Clause that protects the property of citizens from majoritarian abuses. In economic terms, such takings are a form of rent-seeking.¹⁷ Rent seeking is generally defined as the use of the political or legislative process to secure privileges or monopolies from the government.¹⁸ Left to their own devices, factional groups or individuals will use their power in the political process to “rent seek” and secure benefits that they would not secure in a competitive market. Rent-seeking produces the economic inefficiencies of this form of abuse; inefficiencies that add to the political cost of abusive takings.

The situation in New London is an example of rent-seeking gone amuck. New London yielded to the temptation to condemn the homes of their neighbors to secure benefits for the rest of the town. In some ways, this is the worst form of

¹⁶ *Id.* at 80.

¹⁷ Jonathan Macey has discussed such classic rent-seeking conduct in the eminent domain context of *Missouri Pacific Co. v. Nebraska*. Jonathan R. Macey, *Public Choice, Public Opinion, and the Fuller Court*, 49 Vand. L. Rev. 373, 388 (1996).

¹⁸ Robert D. Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575, 587 (1982).

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factional impulse where neighbors set upon neighbors. It is precisely the type of conduct that the Takings Clause should prevent.

**III.
INTERPRETING THE TAKINGS CLAUSE**

A. The Takings Clause and the Meaning of Public Use.

The Fifth Amendment states in part that “nor shall private property be taken for public use, without just compensation.”¹⁹ Few words have been the subject of more academic and judicial debate as the words of the Takings Clause. Much of this debate has concerned an issue not particularly relevant to this controversy: whether takings involve not just physical but also regulatory takings. In the current context, two interpretive questions are most material. First, is the question of whether the intent behind this language was to prohibit some forms of takings or simply to require that, when such takings occur, there is compensation. Second, and more narrowly, is the meaning of the term “public use.”

1. *The Purpose of the Takings Clause*

One interpretation of the Takings Clause is that it merely requires compensation in some circumstances and is not a prohibition on takings – leaving such matters to the political process so long as compensation and due process rights are protected. The Framers clearly did not and would not prohibit the taking

¹⁹ U.S. Const. amend. V.

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of property for public use. They understood that eminent domain was required for government to function. Thus, it could be argued, they prohibited only uncompensated takings.

However, the Framers also believed in the “inviolability of property”²⁰ and attempted to protect citizens from the tyranny of the majorities as well as factional interests. The Fifth Amendment only identifies a “public use” as a circumstance where property can be taken. *Cf. Marbury v. Madison*, 5 U.S. 137 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect.”). The drafters could hardly have meant that takings for private use do not require compensation. They seemed to presuppose that any takings had to first serve a public use and then guarantee compensation to be constitutional. The Supreme Court has long endorsed the view that the Takings Clause prohibits not just uncompensated takings, but takings that are not based on legitimate claims of

²⁰ Madison wrote:
If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which indirectly violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.
James Madison, Property, Nat'l Gazette, Mar. 27, 1792, in 14 The Papers of James Madison 267-68 (Robert A. Rutland et al., eds. 1983).

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“public use.” Thus, even in the highly deferential case of *Hawaii Housing Authority v. Midriff*,²¹ the Court maintained that “[t]here is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use.” While the scope of that judicial review has been radically narrowed with *Kelo*, the Court has accepted (as it must) that the intent of the Takings Clause is to bar non-public uses and not just uncompensated takings.

As a result of the Takings Clause, the Framers clearly assigned property the constitutional protections afforded other core rights. These protections were augmented by the common law protections found in nuisance and other doctrines. As historian Forrest McDonald has written, constitutional and common law “[t]ogether . . . placed life, liberty, and property morally beyond the caprice of kings, lords, or popular majorities.”²² If the Court does not invite such caprice with its *Kelo* decision, it certainly removes barriers to capricious condemnation of private property.

2. *The Meaning of Public Use.*

For most Americans, the term “public use” seems perfectly clear and confined. In the very least, it is a term that is clear as to what it is not: it is not private use. Historically, the use of eminent domain has been largely confined to

²¹ 467 U.S. 229, 239 (1984)

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obvious public uses such as highways, parks, military installations and the like. Indeed, until *Kelo*, most Americans were unaware that eminent domain has been used to take property from one citizen and give it to another. Many states already have laws barring such use of eminent domain and state supreme courts have often interpreted their constitutions as excluding such takings from public use definitions. Most recently, the Michigan Supreme Court overturned an earlier ruling in *Poletown Neighborhood Council v. City of Detroit*²³ that had allowed for a more expansive interpretation of public use that included reducing unemployment and expanding an economic base. In *County of Wayne v. Hathcock*,²⁴ the court held that public use does not include the condemnation of private land to build a technological park despite the considerable economic benefits to the community.

However, other courts have allowed the concept of public use to expand to encompass virtually any governmental claim of indirect benefits. This has included the following extensions of the public use concepts:

²² Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic 1776-1790*, 310 (1979).

²³ 410 Mich. 616, 304 N.W.2d 455 (1981).

²⁴ 471 Mich. 445, 684 N.W.2d 765 (2004).

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-- condemning the property of six different private owners in extremely valuable lots in Manhattan to allow the New York Times to expand and construct a more valuable array of condos and galleries.²⁵

--condemning private property next to Donald Trump's casino so that he could have a waiting station for limousines.²⁶

-- condemning a lease of a company in a shopping center in Syracuse to allow the owner to redevelop the property free of its obligations under the leasehold.²⁷

--condemning property in Kansas for the sole purpose of attracting a new and more promising business to the area.²⁸

-- condemning private property from one business to give to another to develop an area in Minneapolis despite the interest of the original owner to develop the property in a similar fashion.²⁹

²⁵ *In re West Street Realty LCC v. New York State Urban Development Corp.*, 298 A.D.2d 1, 744 N.Y.S.2d 121 (2002).

²⁶ In this case, Trump had offered the property owner, Vera Coking, four times the price that the Casino Reinvestment Development Authority ultimately forced her to accept under eminent domain. John Curran, *State May Run Woman Out of Home to Benefit Casino*, Record, Jan. 12, 1997, at A6.

²⁷ *J.C. Penney Corp. v. Carousel Center Co.*, 306 F. Supp.2d 274 (N.D.N.Y. 2004).

²⁸ *General Building Contractors, L.L.C. v. Board of Shawnee County Commissioners of Shawnee County*, 275 Kan. 525, 66 P.3d 873 (2003).

²⁹ *Minneapolis Community Development Agency v. OPUS Northwest*, 582 N.W.2d 596 (Minn. 1998).

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--condemning a Walgreens in Cincinnati to build a Nordstrom department store, then condemning a CVS pharmacy to relocate the Walgreens, then condemning other businesses to relocate the CVS.³⁰

--condemning a parking lot in Shreveport to give it to another business for use as a parking lot.³¹

These are but a few examples of powerful economic and political interests using eminent domain to favor one business interest over another. Such cases should not simply reaffirm the need for a more narrow and natural definition of public use, but demonstrate the more fundamental costs of allowing a more permissive definition. When we debate the meaning of public use, we do so in the context of a broader understanding of the public good. If the benefits of the public use of a highway are relevant to taking property, so must be the costs of such use on the countervailing public good embodied by private rights of ownership. This point was once driven home by Blackstone who noted that “[t]he public good is nothing more essentially interested, than the protection of every individual’s private rights.”³² The home is perhaps the most protected place in the American Constitution. Yet, while we heavily restrict the ability to search or to enter a home

³⁰ See Dana Berliner, Institute of Justice, *Public Power, Private Gain: A Five-Year, State by State Report Examining the Abuse of Eminent Domain* 160-61 (2003).

³¹ *City of Shreveport v. Shreve Town Corp.*, 314 F.3d 229 (5th Cir. 2002).

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under the Fourth Amendment, the Court has now made it relatively easy to condemn and bulldoze the entire home under the Fifth Amendment. It is for this reason that eminent domain should be considered not a matter of property rights alone but individual rights. As noted below, the language of the Takings Clause has not changed but the courts have gradually changed their view of the clause and its singular importance to the rights of property owners.

**III.
THE TAKINGS CLAUSE AND THE EVOLUTION OF THE
MEANING OF PUBLIC USE.**

A. The Road to Kelo: From Public Use to Public Purpose

The early Supreme Court justices often spoke in a strikingly Lockean voice about the protection of private property. For example, soon after the Constitution was ratified, Supreme Court Justice William Paterson wrote:

It is evident, that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact.³³

³² William Blackstone, Commentaries on the Laws of England 139 (1783 ed.)

³³ *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795).

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Three years later, the Court again reaffirmed the natural and narrow reading of public use in *Calder v. Bull*,³⁴ when it observed:

An ACT of the Legislature (for I cannot call it law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . A few instances will suffice to explain what I mean . . . [A] law that takes property from A and give it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.

Thus, the meaning of eminent domain began with the same common sense meaning that most Americans ascribe it today. Indeed, judges tied the narrow meaning of the public use criteria to the very liberties that defined the nation. In *Wilkinson v. Leland*, Justice Story noted that “government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.”³⁵

In *Missouri Pacific Railway Co. v. Nebraska*,³⁶ the Court imposed the narrow definition of public use to protect such private property rights. Various

³⁴ 3 U.S. 386, 3 Dallas 386 (1798).

³⁵ *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829).

³⁶ 164 U.S. 403 (1896).

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powerful grain interests in Nebraska sought to secure land from the Missouri Pacific after the latter refused to sell. The Court rejected such use of eminent domain as “in essence and effect, a taking of private property . . . for private use.”³⁷ Likewise, in 1848, justices denounced the concept of taking property to give to other private owners as “too broad, too open to abuse.”³⁸

The Court began in the early 1900s to loosen its definition of public use with greater and greater deference accorded government views of what served the public good in the use of eminent domain.³⁹ In 1916, the Court moved away from the classic definition of public use in *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*⁴⁰ Then, in 1923, the Court held in *Rindge Co. v. Los Angeles* that “it is not essential that the entire community, nor even any considerable portion . . . directly enjoy or participate in any improvement in order

³⁷ *Id.* at 417.

³⁸ *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 545 (1848) (Woodbury, J., concurring); *see also id.* (stating that it would be manifestly improper to “tak[e] the property from A to convey to B.”) (McLean, J., concurring).

³⁹ Notably, even as the Court began to adopt a more deferential rule, it distinguished the type of taking in *Kelo*. *United States v. Gettysburg Electric Railroad Co.*, 160 U.S. 688, 680 (1896) (“It is quite a different view which courts will take when this power is delegated to a private corporation. In that case the presumption that the intended use for which the corporation proposes to take the land is public is not so strong as where the government intends to use the land itself.”).

⁴⁰ 240 U.S. 30, 32 (1916).

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to constitute a public use.”⁴¹ By 1925, the Court took the view that the government’s “decision is entitled to deference until it is shown to involve an impossibility.”⁴²

However, this gradual abandonment of a bright-line rule for the use of eminent domain power was accelerated with the Court’s decisions in *Berman v. Parker*⁴³ and *Hawaii Housing Authority v. Midriff*.⁴⁴ In *Berman*, the Court upheld the condemnation of land in Washington, D.C. for redevelopment. The Court upheld the condemnation despite the fact that it was effectively the transfer of private property from one private citizen or company to another.⁴⁵ In *Midriff*, the Court upheld the condemnation of a large amount of private property to redistribute land from the concentrated ownership of a land oligopoly.”⁴⁶

These cases laid the foundation for *Kelo* with their sweeping language. In *Berman*, the Court noted that “the role of the judiciary in determining whether [eminent domain] power is being exercised for a public purpose is an extremely

⁴¹ 262 U.S. 700, 707 (1923); *but see Brown v. United States*, 263 U.S. 78, 83-84 (1923) (“neither the development of the private commerce of [a] city nor the incidental profit which might enure to [a] city out of such a procedure could constitute a public use authorizing condemnation.”).

⁴² *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925).

⁴³ 348 U.S. 26 (1954).

⁴⁴ 467 U.S. 229 (1984).

⁴⁵ 348 U.S. at 33.

⁴⁶ 467 U.S. at 242.

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narrow one.”⁴⁷ That narrow role seemed perfectly nonexistent when coupled with the sweeping deference afforded to government officials:

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.⁴⁸

Notably, the Court in these decisions did not abandon the pretence of barring takings for private interests. Indeed, *Midkiff* observed that “[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”⁴⁹ Yet, the Court then defined public use so broadly as to defy any suggestion that a government condemnation is purely private. The result was an ever-expanding interpretation of public use as virtually any condemnation where the government could point to a cognizable benefit in the form of employment or tax revenues. Under the rubric of economic development, the Takings Clause was reduced to its

⁴⁷ 348 U.S. at 33.

⁴⁸ *Id.*

⁴⁹ 467 U.S. at 245.

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compensation component – compensation that is often far less than prior offers declined by the owners.

One of the reasons for the expansion of the meaning of public use is the adoption of a rational basis test by the Supreme Court. The Court interpreted eminent domain as virtually synonymous with traditional police powers,⁵⁰ the “least limitable” powers of government.⁵¹ In so doing, it embraced the highly deferential rational basis test for determining when a public use claim was legitimate. The effect was to negate the very purpose of the clause. As my former law professor Thomas Merrill wrote two decades ago:

This pronouncement has dismayed commentators because the outer limit of the police power has traditionally marked the line between *noncompensable* regulation and compensable takings of property Legitimately exercised, the police power requires no compensation. Thus, if public use is truly coterminous with the police power, a state could freely choose between compensation and noncompensation anytime its actions served a ‘public use.’ This approach would seemingly overrule the entire takings doctrine in a single stroke.⁵²

The *Kelo* decision shows the natural result of the gradual loosening of the meaning of public use and the extreme deference given to the government’s view of benefits to the public good.

⁵⁰ *Midkiff*, 467 U.S. at 240 (“The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”). *see also Berman*, 348 U.S. at 31.

⁵¹ *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

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B. Kelo: A Question of Judicial Deference or Judicial Acquiescence.

The 5-4 decision in *Kelo* represents the final abandonment of public use as a meaningful restriction on the use of eminent domain. The majority in *Kelo* reaffirmed that “it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”⁵³ However, the key is the word “sole,” the Court accepted such private redistributions if they had public purposes. The distinction is made meaningless by the holding. Since any condemnation like that in *Kelo* is ostensibly for economic development, the Court has created a test that is virtually impossible to fail since the Court will generally defer to the government on its judgment as to benefits.

The Court’s decision effectively negates the meaning of the public use language in the text of the Takings Clause. This is particularly strange since, as Justice Thomas noted, the drafters referred to “general welfare” when they wanted to embrace a broader concept of public purpose.⁵⁴ By substituting public purpose for public use, the Court effectively reduces the clause to merely imposing a compensation requirement. Indeed, the Court notes that “the Takings Clause

⁵² Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 70 (1986).

⁵³ *Kelo*, 125 S.Ct. at 2661.

⁵⁴ *Id.* at 2679-80 (Thomas, J., dissenting).

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largely ‘operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge.’⁵⁵

The Court lessened its load by simply dismissing the possibility that it could return to a bright-line rule. It insisted that “[t]here is . . . no principled way of distinguishing economic development from the other public purposes that we have recognized.”⁵⁶ Yet, this is precisely what state supreme courts have done. The alternative embraced by the Court is hardly acceptable: allowing any marginally plausible claim of public purpose to suffice. The broad deference relieves the Court of any meaningful role in reviewing eminent domain decisions: “Just as we decline to second-guess the City’s considered judgments about the efficacy of its development plan, we also decline to second-guess the City’s determination as to what lands it needs to acquire in order to effectuate the project.”⁵⁷

Despite the implications of its conversion of public use into public purpose, the Court dismisses these concerns as a “parade of horrors” and “hypothetical cases [that] can be confronted if and when they arise.”⁵⁸ The Court further notes that many are fearful that powerful interests like Pfizer in New London will

⁵⁵ *Id.* at 2667 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part)).

⁵⁶ *Id.* at 2665.

⁵⁷ *Id.* at 2668.

⁵⁸ *Id.* at 2667.

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pressure transfers from other less powerful businesses or residents.⁵⁹ However, the Court insists that the condemnation in New London was commenced before Pfizer was a known beneficiary. Thus, according to the Court, “it is . . . difficult to accuse the government of having taken A’s property to benefit the private interests of B when the identity of B was unknown.”⁶⁰ However, this misses the point. Rent-seeking behavior can begin with politicians in search of corporate partners. Politicians do not need to know which company will benefit from a condemnation if they know that the condemned property will bring a variety of likely partners or benefits. The point is not that the ultimate beneficiary was publicly identified but rather whether the targets were obvious. Condemnations follow the identification of pockets of vulnerable and low-valued businesses or residents for exploitation.

The Court’s blind reliance on the political process ignores the dangers of factions that motivated many of the protections in the Constitution. The Takings Clause is invariably triggered by a majoritarian abuse. In these cases, it is the majority that acts to condemn the property of a small number of citizens. If the political process was a cure-all for such opportunistic behavior, no Takings Clause would be necessary beyond the guarantee of compensation. New London shows that the promise of jobs and lower taxes is enough to set neighbors upon neighbors.

⁵⁹ *Id.* at 2662 n.6.

⁶⁰ *Id.*

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Even the torrent of criticism did not overcome the political support for the condemnation. Redistribution of property is often popular except among those who are the targets of the redistribution.

Kelo effectively leaves citizens bare and vulnerable to the dominant factional interests of localities. It harkens back to the lessons of Locke that liberty cannot exist where the exercise of power is “inconsistent, uncertain, unknown, [or] arbitrary.”⁶¹ “This freedom,” Locke wrote, “from absolute, arbitrary power, is so necessary to, and closely joined with a man’s preservation, that he cannot part with it, but by what forfeits his preservation and life together.”⁶²

It is a mistake to treat this as merely the loss of property because the loss is far more profound. Indeed, it brings a new modern meaning to the warning of Arthur Lee to the people of Great Britain as to their failure to protect private property: “The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.”⁶³ Ironically, 230 years later, it appears that state and local governments are developing a taste for the very trappings of power that first led to our grievances with Great Britain.

⁶¹ Locke, Second Treatise, *supra* at 17.

⁶² *Id.*

⁶³ James Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights 26 (1992) (quoting Arthur Lee, An Appeal to the Justice and Interests of Great Britain, in the Present Dispute with America 14 (4th Ed., New York 1775)).

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IV.
REESTABLISHING THE PRIMACY OF PRIVATE PROPERTY
THROUGH LEGISLATIVE ACTION

The *Kelo* decision obviously cries out for correction. It is important, however, to stress that a legislative correction will still leave the decision as a major precedent in narrowly defining the rights and legitimate expectations of citizens vis-à-vis their property. Until the decision is overturned or significantly curtailed, one of the most fundamental guarantees of the Constitution will be left as a privilege enjoyed at the pleasure of the government. Thus, while legislative responses can and should negate the effects of the decisions, the case itself will remain and undermine the expectations of citizens that the “inviolability”⁶⁴ of property rights remains a touchstone of our system.

In the aftermath of *Kelo*, states are considering changes in state laws and constitutions to create a state protection to replace the federal protection of private property. The most stringent state legislation requires actual public use or occupation for the use of eminent domain.⁶⁵ Other jurisdictions reject the notion of economic development as a public use.⁶⁶ Hopefully, states will move to close this gap in constitutional protections and blunt the effect of the ruling. However, it is

⁶⁴ James Madison, Property, Nat'l Gazette, Mar. 27, 1792, in 14 The Papers of James Madison 267-68 (Robert A. Rutland et al., eds. 1983).

⁶⁵ *Karesh v. City Council*, 247 S.E.2d 342, 345 (S.C. 1978).

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unlikely that all states will move to offer such protection. The question becomes the possible role of Congress in responding to the ruling.

As an advocate of federalism, I am generally opposed to federal legislation that uses federal funds to dictate state conduct. However, while the states should play the dominant role in negating the effects of *Kelo*, the Congress clearly has some role in legislatively closing the hole judicially created by the Court. The most obvious role of Congress is to bar development funds to any project or program that engages in this form of abuse of eminent domain authority.

Congress is entitled to condition its support on the respect of private property rights. The Court has allowed Congress to condition federal funds on purposes that extend beyond the enumerated legislative areas in Article I.⁶⁷ A reasonable and tailored limitation should satisfy the conditions contained in *South Dakota v. Dole*.⁶⁸ First, such a condition would further the general welfare.⁶⁹ Absent such a condition, the federal government would be facilitating the practice of eminent domain abuse by co-financing projects. Such purposes are granted considerable deference by the Court⁷⁰ – a level equal to that afforded in *Kelo* to

⁶⁶ See, e.g., *Merrill v. City of Manchester*, 499 A.2d 216, 218 (N.H. 1985); *Opinion of the Justices*, 131 A.2d 904, 908 (Me. 1957).

⁶⁷ *United States v. Butler*, 297 U.S. 1, 65 (1936).

⁶⁸ 483 U.S. 203, 207 (1987).

⁶⁹ *Id.*

⁷⁰ See, e.g., *Helvering v. Davis*, 301 U.S. 619, 645 (1937).

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eminent domain decisions. Indeed, the Court has noted that "the level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all."⁷¹ Second, the condition must be sufficiently clear that states can make a knowing and informed decision on whether to accept federal funds.⁷² This second requirement demands clarity in drafting and effect. Third, the condition must be related to the specific articulated federal interest.⁷³ This nexus would be obvious in barring federal development funds to abuses of condemnation for economic development. Fourth, there must not be a constitutional bar to the conditional grant of federal funds⁷⁴ – which should not be a barrier in this case if the law is crafted with care. Finally, "the financial inducement offered by Congress [cannot] be so coercive as to pass the point at which 'pressure turns into compulsion.'"⁷⁵ It is hard to see how withholding federal funds on economic development is any more a form of compulsion than prior conditions on federal funds.

Obviously, much of the effort will depend on careful drafting to be successful. Of course, for many states, such a law would be easily satisfied by existing or proposed state laws barring such abuses. In those states without such

⁷¹ *Id.*
⁷² *Dole*, 483 U.S. at 207.
⁷³ *Id.*
⁷⁴ *Id.* at 209.

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protections, they will have to certify that they have not engaged in this type of eminent domain abuse. This will require a clear definition of economic development, particularly in whether it includes or excludes the type of urban blight addressed in *Berman v. Parker*. The current definitions in the Strengthening the Ownership of Private Property Act (STOPP) of 2005 may need to be tweaked to clarify a variety of issues and the overall scope of the Act. In addition to the scope of the economic development definition, there is also the meaning of such terms as “private commercial development” or even “private individual or entity.” With the downsizing of government, it is increasingly common to have former governmental functions carried out by private contractors or partners. It is important both for *Dole* and for the practical application of the STOPP Act that such ambiguities be eliminated in new drafts of the legislation. I would be happy to address such areas of concern with the Committee. Nevertheless, there is no reason why a federal statute cannot be crafted to pass muster under *Dole*.

**V.
CONCLUSION**

*The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England may not enter; all his force dare not cross the threshold of the ruined tenement.*⁷⁶

⁷⁵ Id. at 211.

⁷⁶ William Pitt the Elder, Address before the House of Commons in 1766 (quoted in Nelson B. Lasson, *The History and Development of the Fourth*

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--William Pitt the Elder

The principle articulated by William Pitt has long been cited in this country as one of the most noble and necessary guarantees of a free society. In light of *Kelo*, it seems like little more than a pretense today. However, the reason that this principle has so often been cited is that it defines not a government but its people. We remain a nation of intensely individualistic people. Homes like that of Ms. Kelo represent more than a simple structure with some ascertainable market value. They are extensions of their owners. Many citizens today feel lost in the global economy of outsourcing and downsizing. They feel threatened by international events that seem to worsen each year. While a citizen may feel increasingly at risk in this economy and in this dangerous world, there remains a place of their making that can afford a unique and personal space to exist and flourish. However, this space only exists when its expectations of ownership and privacy are guaranteed. *Kelo* robs citizens of the confidence that they alone control who enters this private space. It is a profound and indescribable loss. This decision now threatens the one place where a sense of control and sanity can be maintained for citizens. Citizens have a legitimate feeling of betrayal after the *Kelo* decision and they have a right to

Amendment of the United States Constitution 49-50 (1970)).

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expect their legislators to act to protect their property rights. I commend this Committee in taking the lead in starting this process and I look forward to assisting the Committee and its members in crafting legislation that will both pass judicial review and remedy the judicial error of the *Kelo* decision.

Once again, I greatly appreciate the opportunity to submit my own views on the Supreme Court's public use doctrine and the role of legislature in reaffirming the primacy of private property.

I would be happy to answer any questions that the Committee may have on this testimony.

STATEMENT

of

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Vice President for Legal Affairs
B. Kenneth Simon Chair in Constitutional Studies
Director, Center for Constitutional Studies
Cato Institute

before the

Committee on Agriculture
United States House of Representatives

September 7, 2005

Re: Strengthening the Ownership of Private Property Act of 2005

Mr. Chairman, distinguished members of the committee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and the director of Cato's Center for Constitutional Studies. I thank you, Mr. Chairman, for inviting me to testify today on the Supreme Court's recent decision in the case of *Kelo v. City of New London*¹ and to offer members of the committee my thoughts on H.R. 3405, the Strengthening the Ownership of Private Property Act of 2005 (STOPP).

I. Introduction

Let me say at the start that I'm delighted, but not surprised, that both houses of Congress as well as state legislatures across the country have responded to the Supreme Court's *Kelo* decision as they have. The public outcry against the decision has been loud and sustained—and rightly so.² For the Court, in effect, removed what little remained of the "public use" limitation on government's eminent domain power, its power to take private property for "public use" provided just compensation is paid to the owner. As a result, except where states limit their own power through state law, federal, state, and local governments are free today to take property from one private party and transfer title to another for virtually any reason they wish. Not surprisingly, it is usually the poor and powerless who are at greatest risk of losing their homes or businesses under this regime, while the well-connected profit handsomely by obtaining title to property "on the cheap." Exploiting those connections, they ask government officials to exercise their "despotic

¹ 125 S. Ct. 2655 (2005).

² See, e.g., "Missouri Condemnation No Longer So Imminent: Supreme Court Ruling Ignites Political Backlash," *Washington Post*, Sept. 6, 2005, at A2.

power,” as eminent domain was known in the 17th and 18th centuries,³ so that they might be spared from having to offer prices a willing seller might accept. It is a rank abuse of that power, and the Court’s complicity in the abuse makes it only worse.

People are turning to their legislatures, therefore, including to the United States Congress. Since the purpose of these hearings is twofold—to review the *Kelo* decision and to consider whether and how the STOPP Act addresses the problems raised by it—I will discuss both, at least in summary form.⁴ I should note here, however, that the problem rests rather more with the Court than with the political branches, although it starts with those branches. Had the Court done its job over the years, that is, these hearings would not be necessary. And let me be clear about that. This is not exactly a case of “judicial activism,” at least as that term is often used today, although it is “activism” of a kind. What we have here, rather, is political bodies exercising eminent domain and the courts failing to police their use of that power to ensure that it is exercised consistent with the limits imposed by the Fifth Amendment’s Takings Clause.

Thus, although the problem begins with the political branches, it is the failure of judicial review—the Court’s “restraint,” if you will, its *deference* to those branches—that brings us together here. That deference amounts to “activism” insofar as the term refers to judges failing to apply the law: whether that failure arises because they are too active or too passive, it comes to the same thing—they are not doing their job. It is not a little ironic, however, that people are turning to their legislatures to address this problem since the problem could be addressed quite simply by the political branches themselves, merely by restraining their own power in the first place. Thus, the STOPP Act might usefully be recast to legislatures, including this one, as follows: Stop abusing eminent domain in the first place; then we wouldn’t need to turn to the courts.

But as the Founders understood, it is in the nature of political power that it will inevitably be abused, which is why they provided for an independent judiciary—to check that power.⁵ The courts have failed in that, however, so H.R. 3405 has been proposed. To see whether it will address the problem, let me first review very briefly the principles of the matter, distinguishing the regulatory takings issue, which is not before the committee today, from eminent domain in its fuller sense, which is before us. I will then look even more briefly at how the Court has failed to police abuses in both of those areas.

II. The Court and Eminent Domain

There are two great powers that belong to government, the police power and the power of eminent domain. As the Declaration of Independence says, the reason we create government in the first instance is to secure our rights. That’s what the police power is all

³ “The despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires . . .” *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304 (Dall.) (C.C. Pa. 1795).

⁴ I have discussed these issues more fully in “Property Rights and Regulatory Takings,” *Cato Handbook on Policy*, chap. 22 (2005); and Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 *Harv. J.L. & Pub. Pol’y.* 165 (1983).

⁵ For a thorough recent treatment of that subject, see Saikrishna B. Prakash and John Yoo, *The Origins of Judicial Review*, 70 *U. Chi. L. Rev.* 887 (2003); available at <http://ssrn.com/abstract=426860>.

about: it's what John Locke called the "Executive Power" that each of us enjoys in the state of nature,⁶ which we yield up to government to exercise on our behalf once we leave that state, enter civil society, and create government. Although the Executive Power, now the police power, is nowhere mentioned in the Constitution, implicit in the document's structure and in the Tenth Amendment in particular is the idea that we left that power with the states, delegating to the federal government only certain enumerated powers—to tax, to borrow, to regulate interstate commerce, and so forth.

Like the police power, the eminent domain power too is nowhere found in the Constitution. It is said to be an "inherent" power of government, yet unlike the police power, no one enjoys the power of eminent domain in the state of nature and hence no one has it to yield up to government when government is created. Indeed, there could hardly be any such inherent power in the state of nature, for it is a power to take what belongs to another, albeit with just compensation, but against his will and hence in violation of his inherent right to be left alone in his life, liberty, and property.⁷ For that reason it was known as the "despotic power." Thus, unlike the police power, the eminent domain power is inherently illegitimate.

Such legitimacy as the power enjoys stems, therefore, from two sources. First, although none of us had the eminent domain power to yield up to government, we agreed all the same, through the social contract we drafted in the original position (the Constitution), to let government exercise that power so that it might provide us with "public goods" at a reasonable cost. Yet even then the power was recognized only implicitly, in the Fifth Amendment, in connection with the explicit limits on its exercise that are set forth in the Takings Clause: "nor shall private property be taken for public use without just compensation." By implication, government may take private property, but only for a public purpose, and only with just compensation. (Note too that eminent domain is merely an instrumental power, exercised in service of some other power—the power to build roads, forts, schools, and the like.) Second, as a practical matter, the power exists to enable public projects to go forward without being held hostage to holdouts seeking to exploit the situation by extracting far more than just compensation. When properly used, therefore, eminent domain protects the individual from being exploited for the public good, but it protects the public from being exploited as well.

Thus, the best that can be said for eminent domain is this: the power was ratified by those who were in the original position, the founding generation; and it is "Pareto superior," as economists say, which means that at least one party (the public) is made better off by its use while no one is made worse off—provided the owner does indeed receive just compensation. In virtue of its inherent illegitimacy, however, there must be a strong presumption against its use. Thus, if property can be acquired through voluntary means, our principles as a nation urge us to take that course. Only if necessary should governments resort to this despotic power.

⁶ John Locke, *Two Treatises of Government*, *The Second Treatise of Government* ¶ 13 (Peter Laslett ed., 1965) (1690).

⁷ As the old common law judges understood, all rights can be reduced to property. Locke put it simply: "Lives, Liberties and Estates, which I call by the general Name, *Property*." *Id.* at ¶ 123.

Here, then, is how the police power and the power of eminent domain are related. First, when government acts to secure rights—when it stops someone from polluting on his neighbor or on the public, for example—it is acting under its police power, not its power of eminent domain, and the owner thus regulated is entitled to no compensation, whatever his financial losses, because the use prohibited or “taken” was wrong to begin with. Since there is no right to pollute, we do not have to pay polluters not to pollute. Thus, the question is not whether value was taken by a regulation but whether a *right* was taken. Proper uses of the police power take no rights. To the contrary, they protect rights.

Second, when government acts not to secure rights but to provide the public with some good—wildlife habitat, for example, or a lovely view, or historic preservation—and in doing so prohibits or “takes” some otherwise *legitimate* use, then it is acting, in part, under the eminent domain power and it does have to compensate the owner for any financial losses he may suffer. The principle here is quite simple: the public has to pay for the goods it wants, just like any private person would have to. Bad enough that the public can take what it wants by condemnation; at least it should pay rather than ask the owner to bear the full cost of its appetite. This is your classic regulatory takings case, of course: the government takes uses, thereby reducing the value of the property, sometimes drastically, but refuses to pay the owner for his losses because the title, reduced in value, remains with the owner. Such abuses today are rampant as governments at all levels try to provide the public with all manner of amenities, especially environmental amenities, “off budget.” There is an old-fashioned word for that practice: it is “theft,” and no amount of rationalization about “good reasons” will change the practice’s essential character. Even thieves, after all, have “good reasons” for what they do.

Third, when government acts to provide the public with some good and that act results in financial loss to an owner but takes no right of the owner, no compensation is due because nothing the owner holds free and clear is taken. If the government closes a military base, for example, and neighboring property values decline as a result, no compensation is due those owners because the government’s action took nothing they owned. They own their property and all the uses that go with it that are consistent with their neighbors’ equal rights. They do not own the value in their property.

Finally, we come not to takings of illegitimate uses, requiring no compensation, nor to takings of legitimate uses, requiring compensation, nor to takings of mere value, requiring no compensation, but to takings in the full sense—takings of the entire estate. Here, compensation is not the issue—although *just* compensation often is an issue, for rarely does an owner receive the full value of his losses. Setting that problem aside, the main question here, as in the *Kelo* case, is whether the taking is for a “public use.” That the term does not enjoy a precise definition does not mean that it cannot be defined at all, of course, yet that is the implication, in effect, of *Kelo*. The Court stripped the term of its very purpose—to limit condemnations to those that are for a public use. It read that limit on power out of the Constitution, leaving every owner in America exposed.

In the amicus brief the Cato Institute filed in *Kelo*, written by the University of Chicago’s Richard Epstein, one of the nation’s preeminent experts on property rights law,

we distinguished four categories of “public use” that can be found in the case law.⁸ The first is straightforward and unproblematic: when government condemns private property and takes title itself for some public use like a public road, park, military facility, or the like, we have a clear public use. The second category is ordinarily unobjectionable as well: this involves condemnations and transfers of title from one private party to another, whether undertaken by government or by the party under government authorization, when the subsequent use will be available to the public at large. Common carriers like railroads, utilities, and network industries, facing holdout and assembly problems, come to mind here. As Cato’s brief states:

It would be a major mistake to insist that all railroads, canals, and utilities be publicly owned in order to invoke the state’s eminent domain power to overcome the holdout problems that block the formation of a unified network. Why risk inefficient operations when a better system is available—namely, private operation, where the property taken is open to the public at large on a reasonable and nondiscriminatory basis?⁹

There are a few other odd cases as well in which the “public use” limit might be satisfied. These involve situations in which the use of eminent domain promises large social gains without disadvantaging the individuals who are thus forced to surrender their property for the public good. Professor Epstein cites certain older grist mill and mining cases that satisfy this narrow extension of the public use limit. But in general, it is use by the public, often accompanied by regulated rates-of-return, that justifies the use of eminent domain for such private-to-private transfers.

The third and fourth categories, however, stretch “public use” beyond recognition. The blight cases, for example, often involve labeling whole neighborhoods as “blighted,” thereby enabling government to condemn the properties and transfer titles to others—large developers, ordinarily—all under the guise of “urban renewal.” As our brief notes, these cases often involve the court’s conflating the police power and the eminent domain power:

But while the police power would allow the state to enjoin the nuisance, without compensation, it would *not* allow it to take title to the property once the nuisance had been eliminated. Thus, the police power is at once stronger than the eminent domain power (in that it proceeds without compensation) and weaker (in that it does not justify taking title and transferring the property to another private owner for private use).¹⁰

These blight cases tend also to substitute “public benefit” for “public use,” which opens the door for much greater scope for eminent domain.

⁸ Brief of the Cato Institute as amicus curiae in support of petitioner, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005)(no. 04-1080); available at <http://www.cato.org/pubs/legalbriefs/kelovcityofnewlondon.pdf>.

⁹ *Id.* at 13.

¹⁰ *Id.* at 17-18.

That substitution is most evident, however, in the fourth category, which involves the use of eminent domain to promote “economic development.” Here again we often find states and municipalities condemning whole neighborhoods. The infamous *Poletown* case of 1981 is Exhibit A of this rationale for eminent domain.¹¹ That case arose after the City of Detroit condemned the homes and small businesses of some 4,200 people to make way for a Cadillac plant—all to promote jobs, a greater tax base, and other economic benefits that in fact never did live up to expectations. Fortunately, the Michigan Supreme Court overturned that decision just last year, but it remains the textbook example of what is wrong with economic development condemnations. To be sure, such condemnations *may* generate “public benefits,” although the evidence very often suggests a net loss. From a consideration of constitutional principle, however, the main problem is not with the difficulty of calculating benefits and losses, but with the Supreme Court’s refusal, as in *Kelo*, to read “public use” as a serious limit on the power of eminent domain. If the Framers had wanted that power to be used to generate “public benefits,” they could have written it in a way that would have enabled that. They didn’t. “Public use” was employed to *limit* power, not to facilitate it.

As this brief outline of the issues suggests, the Court has failed, especially over the course of the 20th century, to develop anything like a well-worked-out theory of property rights of a kind the Framers had in mind. In the area of regulatory takings, we have had what Justice Antonin Scalia in 1992 called 70-odd years of “essentially ad-hoc” jurisprudence, even as he was adding yet another year to the string.¹² Thus, owners today can get compensation when title is actually taken, as in the outright condemnations just discussed; when their property is physically invaded by government order, either permanently or temporarily; when regulation for other than health or safety reasons takes all or nearly all of the value of the property; and when government attaches conditions that are unreasonable or disproportionate when it grants a permit to use property. Even if that final category of takings were clear, however, those categories would not constitute anything like a comprehensive theory of the matter, much less a comprehensive solution to the problem of regulatory takings. In particular, in the overwhelming number of cases, regulations take perfectly legitimate uses, thus substantially reducing the value of the property, but the owner must bear that loss entirely, while the public benefits from the “free goods” thus produced. Again, this issue is beyond the scope of today’s hearings, but it is one the committee should put on its agenda if it is serious about “strengthening the ownership of private property.”

Turning to the kinds of eminent domain cases that are before the committee, here too, as the above analysis suggests, the Court has made a mess of things by essentially eviscerating the public use restraint on the exercise of eminent domain. To rectify that problem, however, there is just so much that Congress or state legislatures can do since a court, in any case involving federal law, will be applying the Supreme Court’s current “public use” standard, which is essentially vacuous, to the facts of the case before it. Still,

¹¹ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), overruled *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). For a fuller discussion, see Ilya Somin, *Robin Hood in Reverse: The Case against Economic Development Takings*, *Cato Policy Analysis* No. 535, Feb. 22, 2005.

¹² *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

Congress and state legislatures, although unable to change the Court's errant reading of the Constitution, can address the problem most fundamentally by simply not authorizing or underwriting exercises of eminent domain that are not for a genuine public use. More than anything else, that alone would go far toward correcting the problem of judicial indifference to constitutional limits and judicial deference to the political branches. Let us see whether H.R. 3405 takes that tack.

III. H.R. 3405

As I read the STOPP Act, it moves in just that direction. It's aim, that is, is to cut off federal funding for programs run by state and local governments that use "the power of eminent domain to obtain property for private commercial development or that fail[] to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes." Section 2(a) of the Act provides that federal financial assistance under any federal economic development program "may not be provided" to any state or local government that engages in any of the acts described in Section 2(b). Those acts are (1) transferring property by eminent domain from one private owner to another "for any economic development purpose"; and (2) failing to provide relocation assistance that is equivalent to that provided under the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 "to any person displaced by the use of the power of eminent domain for any economic development purpose." Section 2(c) provides for state or local officials to give notice of compliance to heads of federal agencies. Section 3 defines "federal economic development program" and lists such programs; it also defines "federal financial assistance," "state," and "unit of local government." Section 4, "Applicability," has yet to be drafted, I understand.

The first thing to be noticed about this bill is that it is addressed to state and local abuses of eminent domain. Although that is where most eminent domain abuses take place, one would like to see a federal bill addressing federal abuses as well. In other words, Congress should clean its own house first, insofar as it needs doing.

Second, there is a certain lack of clarity in this bill concerning just whom it is addressing. The bill purports to limit federal funding for abusive state and local projects. One would expect it to be addressed, therefore, to those federal agency heads charged with administering such federal programs, directing them not to fund abusive projects. Sections 2(a) and (b), however, constitute general descriptions of the bill. Only in Section 2(c), "Certification of Compliance," are officials referenced, and obliquely at that. Rather than directing federal officials—e.g., "Heads of federal agencies shall not disburse federal funds until heads of state and local programs certify . . ."—this Section begins with a case in which the federal head does not have actual knowledge of a violation, then places the burden on the *state* official to notify the federal official that he is *not* engaged in an abusive act, and so forth. This Section needs to be substantially redrafted.

Third, the "may not be provided" language of Section 2(a) is ambiguous. The more natural reading is "shall not be provided," but a weaker, discretionary reading of "may" is possible as well. Replace "may" with "shall."

Fourth, it is unclear what Section (2)(b)(2) adds to Section (2)(b)(1). If funds will be withheld when states use eminent domain for private-to-private transfers “for any economic development purpose,” ((2)(b)(1)), why threaten to withhold funds if states fail to provide relocation assistance after using eminent domain for private-to-private transfers “for any economic development purpose” ((2)(b)(2))? Won’t (2)(b)(1) do the job? Isn’t it sufficient?

Fifth, and now I move to more serious concerns, “for any economic development purpose” is the operative language in this bill, but what does it mean or include? Would states be penalized if they used eminent domain for network industries as discussed under category two above? At the very least, this crucial term needs to be fully defined in light of the analysis sketched above.

Sixth, I would note a glaring irony in this bill. It seeks to restore constitutional guarantees by restricting federal funding of state programs, funding that, under a proper reading of the Constitution’s doctrine of enumerated powers, is unauthorized to begin with. Most of the programs listed in Section 3(1) are beyond the authority of Congress to enact and hence are unconstitutional.¹³ But that is the subject for another day.

Finally, in this same vein, a question arises as to the authority of Congress to enact this bill. The modern view is that Congress finds its authority under the so-called General Welfare Clause or the so-called Spending Clause, neither of which exists, but both of which are said to be found at Article I, Section 8, Clause 1 of the Constitution, which in truth is the Taxing Clause. That clause authorizes Congress to tax, just as the next clause authorizes Congress to borrow. Appropriations and spending, which are different, must be carried out under the Necessary and Proper Clause. Thus, properly read, Congress has no authority to spend “for the general welfare,” yet that is the modern reading under which this bill proceeds.¹⁴

And that brings us to *South Dakota v. Dole*¹⁵ and to the question of whether Congress may restrict states as this bill proposes to do. I believe *Dole* was wrongly decided, but given that decision, I see nothing in the opinion that would restrict Congress from conditioning states’ receipt of federal funding on their refraining from exercising a power the Supreme Court claims they have, namely, to condemn private property for economic development purposes. But the legal morass here is so tangled that it is not likely to be untangled in these hearings, so I will say nothing further about it.

Nevertheless, this bill needs more work if it to accomplish the worthy ends it has in view.

¹³ For a trenchant discussion of this issue, see this aptly titled book, written by a Harvard Law professor in 1932, just before the birth of the modern American welfare state: Charles Warren, *Congress as Santa Claus* (1932).

¹⁴ See *id.* See also Gary Lawson and Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 *Duke Law Journal* 267 (1993); Spending Clause Symposium, 4 *Chapman Law Review* (2001).

¹⁵ 483 U.S. 203 (1987).

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HESETH

"Judicial Predilections"

By

Justice John Paul Stevens

Address to the Clark County Bar Association
Luncheon Meeting - Thursday, August 18, 2005
Wynn Hotel, Las Vegas, Nevada

An issue that often produces a debate among mediocre golfers before they tee off on the first hole is whether to allow a poor drive to be replaced by a "Mulligan". For the most part, second chances are forbidden fare in golf. If your ball goes in the water or you shank an approach into a sand trap, you just have to grin and bear it.

Today, however, you have given me a second chance to address the Clark County Bar Association. Your President has assured me that your motivation was not merely a charitable interest in allowing me to try to improve on my first shot. Nevertheless, you have provided me with a welcome opportunity to try to do better this time.

When I was here in 2002, I took advantage of a gracious captive audience by commenting on some then-recent Supreme Court opinions with which I strongly disagreed. For a dissenting judge, addressing bar associations sometimes serves the same therapeutic purposes as the petition for rehearing serves for the lawyer for a defeated litigant. As a substitute for more aggressive forms of civil disobedience, it is a futile but non-violent form of protest that seldom does any harm.

Today I propose to take a different tack. I will again comment on a few recent Supreme Court opinions that produced—or in the case of dissenting opinions, would have produced—results that I consider unwise. But unlike those I discussed on my last visit, these are all opinions that I either wrote or joined. In each I was convinced that the law compelled a result that I would have opposed if I were a legislator.

Two of those cases involved questions of federal procedure of greater interest to lawyers than to members of the general public. In one - *Exxon Mobil v. Allapattah* - the Court decided that a rather poorly drafted statute - §1367 of the Judicial Code which was enacted to overrule a narrow interpretation of our jurisdiction under the Federal Tort Claims Act - had also dramatically expanded federal supplemental jurisdiction over class actions. While, as a matter of policy I believe federal courts are better equipped than state courts to process nation-wide class actions, and therefore favored the result that the majority reached in its 25 page opinion, I dissented for two reasons. As Justice Ginsburg explained in her dissent, a narrower reading of the text was more consistent with the entire statutory scheme; moreover, the legislative history flatly rejected the result that the majority reached.

As it often does in statutory construction cases, the Court solemnly declared that legislative history has a role to play only when the statutory text is ambiguous, and despite the contrary opinion of Justice Ginsburg, this statute was not even ambiguous. Because ambiguity, like beauty, is in the eye of the beholder, I remain convinced that it is unwise to treat ambiguity as a necessary precondition to the consultation of legislative history. Indeed, I believe judges are more, rather than less, constrained when we make ourselves accountable to all reliable evidence of legislative intent.

The second procedural case involved the federal sentencing guidelines. Five years ago in *Apprendi v. New Jersey*, the Court held that, except for the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. We subsequently

held that the *Apprendi* rule applies to sentences imposed pursuant to mandatory guidelines in both state and federal courts. In the *Booker* case, decided this Term, the jury's finding that the defendant had possessed 92 grams of cocaine base authorized a maximum sentence of 21 years and 10 months in prison, but in a post-trial sentencing proceeding the judge found by a preponderance of the evidence that he had possessed an additional 566 grams and imposed a 30-year sentence.

After we held that this sentence had been imposed pursuant to an unconstitutional procedure, we had to decide on the proper remedy. In my opinion we had a duty to prescribe the same remedy that state courts had applied in similar situations, namely set aside the portion of the sentence that exceeded the limit authorized by the jury's finding, and make it clear that in future sentencing proceedings, unless the defendant had waived his jury trial rights, or the facts were

admitted, the maximum sentence must be based on facts found by a jury beyond a reasonable doubt. The majority, however, adopted a system-wide remedy that transformed the entire sentencing guidelines from a set of prescribed mandatory maximum and mandatory minimum sentences into a discretionary system. In my judgment that wholesale remedy represents much wiser policy than the retail remedy that I thought the law required. For I have long been firmly convinced that the exercise of judicial discretion in sentencing, based on the particular facts of each individual case, is far more likely to produce results that are fair to both the prosecutor and the defendant than the rather mechanical application of broad categorical rules. Moreover, since it costs over \$10,000 a year to incarcerate a federal prisoner, an unnecessarily long sentence may impose a significant burden on taxpayers.

Accordingly, even though I used up 33 pages of the United States reports with a dissenting opinion explaining why I was convinced that the law did not authorize that remedy, as a matter of sound policy, I enthusiastically agree with what I regard as the "activist" decision to replace the mandatory guidelines system prescribed by Congress with a system that allows for more discretion.

The third case in which my opinion of what the law authorized is entirely divorced from my judgment concerning the wisdom of the program that was attacked on constitutional grounds is our much criticized decision in *Kelo v. City of New London*. After several years of deliberation and planning by state and local agencies, the City of New London decided to respond to the depressed conditions that had followed the closing of a major naval facility that had provided jobs for over 1,500 employees, by adopting an elaborate plan to revitalize the community. With the aid of funding from the State,

the City decided to acquire some 90 acres of land and to construct new commercial and residential buildings, as well as a park and a museum, for the purpose of transforming a depressed area into a more vibrant community. Included within the targeted area were a few homeowners unwilling to sell. To carry out the City's plan it was therefore necessary to use the City's power of condemnation to acquire their property in exchange for the payment of just compensation. The homeowners challenged those takings on various grounds, including a claim that they violated the Fifth Amendment to the federal Constitution. That Amendment provides that private property shall not "be taken for public use, without just compensation."

As originally enacted, the Fifth Amendment imposed limits only on the federal Government, and simply did not apply to State action. It was only at the end of the 19th Century that the Court

decided that the so-called "takings clause" applies to the States as well. Read literally, however, the Clause does not limit the government's power to take property, but merely requires that it pay just compensation whenever it exercises that power. Nevertheless, our cases have consistently construed the clause as implicitly limiting the power to condemn to acquisitions that are for a "public use". On the other hand, with equal consistency, since 1896 our cases (including an opinion by Justice Holmes) have interpreted the term "public use" to mean "public purpose", and we have upheld takings that served a valid public purpose even though the property was either initially or ultimately transferred to private owners. Moreover, in evaluating the validity of comprehensive programs, we have focused on the purpose of the entire project, rather than its impact on individuals who happen to own property in the targeted area. For example, in 1954 the Court

unanimously upheld the condemnation of a large blighted area in Washington, D.C. even though the department store owned by the individual who challenged the taking was in good condition. In short, while our cases have repeatedly stated that private property may not be taken from individual A in order to transfer it to individual B, we have always allowed local policy makers wide latitude in determining how best to achieve legitimate public goals.

My own view is that the allocation of economic resources that result from the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials. But, as Justice Holmes famously observed in his dissent in the *Lochner* case, the Constitution did not enact Mr. Herbert Spencer's "Social Statics". Time and again judges who truly believe in judicial restraint have avoided the powerful temptation to impose their views of sound

economic theory on the policy choices of local legislators. Notably most of the highly vocal critics of our decision in *Kelo* have argued that New London's decision was unwise as a matter of policy. Be that as it may, I believe that the public outcry that greeted *Kelo* is some evidence that the political process is up to the task of addressing such policy concerns.

The fourth case in which I was unhappy about the consequences of an opinion that I authored presented the question whether the use of locally grown marijuana for medicinal purposes pursuant to the advice of a competent physician may be punished as a federal crime. The uncontradicted evidence in the record indicated that marijuana did provide important therapeutic benefits to the two petitioners, that no other medicine was effective, and that without access to that drug one of the petitioners may not survive. Moreover, their cultivation and use of marijuana for health reasons

was perfectly lawful as a matter of California law. I have no hesitation in telling you that I agree with the policy choice made by the millions of California voters, as well as the voters in at least nine other States (including Nevada), that such use of the drug should be permitted, and that I disagree with executive decisions to invoke criminal sanctions to punish such use. Moreover, as I noted in a footnote to our opinion, Judge Kozinski has chronicled medical studies that cast serious doubt on Congress' assessment that marijuana has no accepted medical uses. Nevertheless, those policy preferences obviously could not play any part in the analysis of the constitutional issue that the case raised. Unless we were to revert to a narrow interpretation of Congress' power to regulate commerce among the States that has been consistently rejected since the Great Depression of the 1930's, in my judgment

our duty to uphold the application of the federal statute was pellucidly clear.

In the fifth opinion that I shall mention the Court's decision also rested on an interpretation of the Commerce Clause. Rather than involving the extent of Congress' power to enact federal legislation, however, it involved what is referred to as the "negative" or "dormant" Commerce Clause. In what was unquestionably a popular decision with both consumers of wine and economists who believe in the value of free competition in a free market, the Court held that the Michigan and New York state statutes that prohibited out-of-state wineries from making direct sales to local consumers - while permitting such sales by local wineries - were unconstitutional because they discriminated against interstate commerce.

If alcoholic beverages were ordinary articles of commerce, as most people view them today, the invalidity of the New York and Michigan statutes

would be perfectly obvious. Those statutes had, however, been enacted in reliance on the 21st Amendment to the Constitution which was ratified in 1933. Section 1 of that Amendment repealed the 18th Amendment which had imposed a nationwide total prohibition on commerce in alcoholic beverages for the preceding 15 years; section 2 replaced the national prohibition with a grant to each State of optional authority to maintain an equally comprehensive state-wide prohibition; it expressly gave each State plenary power to regulate the importation of intoxicating liquors for local delivery or use. If anything has seemed clear to me during my tenure on the Court, it is the fact that in the early part of the 20th Century - in dramatic contrast to today - alcoholic beverages were not an ordinary article of commerce.

In a sense the issue before the Court was whether the intent of the Framers of the 18th and 21st Amendments should be given controlling weight,

or, since the Constitution is often described as a living document, the views that prevail today should be decisive. There are unquestionably cases in which today's perspective must be controlling. Those are cases in which the scope of the principle enacted into law was either not fully recognized at the time of the enactment, or contemplated changing responses to changes in society. The most obvious example of the former is the prohibition of racial discrimination embodied in the Equal Protection Clause of the 14th Amendment. The fact that the Framers of that Amendment did not view segregated schools as an evil should not, and has not, provided a justification for limiting the reach of the constitutional principle that they introduced into our law. Examples of the latter are the regulatory power that the Commerce Clause has vested in the Congress, which must take account of changes in the commercial world since the 18th century, and the Eighth Amendment's ban on the

infliction of cruel and unusual punishments, which takes account of the evolving standards of decency in a civilized society.

In my judgment, the changes in the public's evaluation of the harmful consequences of consuming alcoholic beverages do not provide a principled justification for limiting the States' power to regulate a commodity that they are expressly authorized to exclude from the market entirely. The 21st Amendment did not enact a rule of law embodying any principle whose scope was unforeseen when it was ratified. Nor did it create either an authority or a prohibition that contemplated change in response to changing conditions. Rather, as the opinions of Justice Brandeis - and others who were in office in the 1930's - have made clear, it was intended to return absolute control of liquor traffic to the States free of all restrictions which the negative Commerce Clause would otherwise impose.

Whether or not the four of us who came to that conclusion correctly interpreted the 21st Amendment, I have no hesitation in assuring you that our analysis of the legal issue was not influenced in the slightest by our so-called policy predilections. Indeed, the distinction between a judge's understanding of the law and his or her views about sound policy characterizes, not only the wine case and the other four cases that I have discussed today, but the cases that I discussed with you three years ago, and indeed, the entire workload of the typical federal judge. While the desire for popularity is a matter that poses a threat to the independence of every elected judge, thanks to the foresight of men like Alexander Hamilton who provided us with life-tenure, our job is vastly simplified by our duty to allow legislatures and executives to fashion policy in response to their understanding of the popular will.

STATEMENT OF BOB STALLMAN

My name is Bob Stallman, and I am a cattle and rice producer from Texas. I also serve as president of the American Farm Bureau Federation. I appreciate the opportunity to be here today to discuss the potentially devastating effect on agriculture of the recent *Kelo* decision. We commend the committee for holding hearings on this important matter so promptly.

The *Kelo* decision has struck a raw nerve around the country. Through the hearing you are having today and through the introduction of H.R. 3405 and similar bills, Members of Congress are reacting to this decision, evaluating its impact and assessing the most appropriate legislative response. We are gratified by the number of cosponsors who have signed on to various bills in such a short time. We fully support the efforts that have been taken thus far, and we will work diligently with this committee and others to pass legislation to encourage States to limit their use of eminent domain to truly public uses.

Like all citizens, farmers and ranchers understand that circumstances can sometimes arise in which their land can be acquired for a legitimate public use. We cannot support the underlying philosophy of *Kelo*, however, in which private property can effectively be taken by the public for the profit of other private parties. The difference between legitimate uses of eminent domain and what is so objectionable in *Kelo* is the difference between building firehouses or factories, between courthouses or condominiums.

After *Kelo*, no property is secure. Any property can be seized and transferred to the highest bidder. As Justice O'Connor said in her stinging 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."

Agricultural lands are particularly vulnerable to these types of actions. The fair market value of agricultural land is less than residential or commercial property, making a condemnation of agricultural land less costly. While agricultural lands are vital to the Nation because they feed our people, they do not generate as much property tax revenue as homes or offices or nearly any other use. As a result, they become very susceptible to being taken for any of these other uses. Finally, municipalities generally grow outward, into farms and rural areas. There is nothing to stop farms that have been in families for generations from being taken for industrial developments, shopping malls or housing developments.

It is already happening. In one such case, Bristol, Connecticut, has condemned a Christmas tree farm and two homes for a future industrial park.

We are understandably concerned about the possible effects of *Kelo* on farm and ranchlands across the country. Reaction from our members has been swift and overwhelming. Farmers and ranchers from across the country are asking us to help them keep their property.

American Farm Bureau Federation has initiated the "Stop Taking Our Property Campaign" or STOP. This campaign is designed to educate the public about the impacts of the *Kelo* decision and to provide materials to help State Farm Bureaus address the issue. As part of the campaign, we have developed an educational brochure and web page for those interested in the issue.

There are several components to our campaign. One element focuses on encouraging State Farm Bureaus to seek changes to State laws to prohibit the use of eminent domain for private economic development. We have developed model State legislation and supporting documents to help effectuate those changes.

Another key element to our campaign is to encourage and promote passage of H.R. 3405 or similar legislation. Since eminent domain is a creature of State law, substantive statutory change must be made at that level. Getting 50 State legislatures to act, however, is an uncertain and lengthy process. In addition, states interested in maximizing revenues may be reluctant to take action that might deny their municipalities the opportunity for increased property taxes. We believe, however, that most Americans fundamentally disagree with the proposition that increased property taxes provide an excuse for taking one person's property and giving it to another.

That is why Federal legislation is necessary. Eminent domain is defined by State law, not Congress. But Congress has the authority and the responsibility to determine how our tax dollars are spent and not spent. Using Federal funds to help municipalities take from the poor and give to the rich adds insult to injury to those who work hard for themselves and their families. As elected officials, you can heed the outrage of your constituents to the *Kelo* decision by ensuring that States and local governments cannot use a person's own Federal tax dollars to dispossess them for the benefit of another private entity.

All of the Federal bills introduced thus far take this approach. The difference among them is the degree to which such funding is withheld. H.R. 3083, introduced by Rep. Rehberg and H.R. 3087, introduced by Rep. Gingrey, prohibit any exercise of eminent domain for economic development that uses Federal funds. H.R. 3135, introduced by Chairman Sensenbrenner, prohibits a State or municipality from using eminent domain for economic development if Federal funds would in any way be used for the project. H.R. 3405, introduced by Reps. Bonilla and Herseth and which is the subject of this hearing, would deny all Federal economic development assistance to a State if there was any use of eminent domain for economic development that transferred private property from one private entity to another.

While we support all these approaches, the provisions of H.R. 3405 seem to offer the most effective deterrent to abuses of the right of eminent domain. By withholding all Federal economic development funding from States where *Kelo*-type eminent domain is being used, regardless of whether it is used in a project that uses those funds or not, H.R. 3405 offers the greatest disincentive for States to continue using eminent domain for private economic development. By not tying the funds to any particular project, H.R. 3405 also closes a potential loophole in which Federal funds might merely be replaced by other funds in projects that use eminent domain for private economic development.

Even though a slim majority of the Supreme Court upheld the Connecticut law in question, that does not mean it is good policy—nor that all the justices who upheld it think so. Justice Stevens, who wrote the majority opinion in *Kelo*, seems to disagree with the State law he upheld. In a recent address to the Clark County (Nevada) Bar Association, he said, “I was convinced that the law compelled a result that I would have opposed if I were a legislator.”

Mr. Chairman, the American Farm Bureau Federation strongly supports swift congressional action on legislation to withhold Federal funding to States and local governments that use eminent domain to take property from one private entity and transfer it to another for economic development purposes. We support H.R. 3405. We applaud the work that you and other Members of Congress are doing to address this critical issue, and we want to work with you to assure expeditious consideration of this matter by the full House of Representatives.

Thank you for the opportunity to be here today. I will be pleased to answer any questions you and other members of the committee might have.

STATEMENT OF ALVA J. HOPKINS, III

“The rights of persons, and the rights of property, are the objects, for the protection of which Government was instituted.”

—James Madison, speech at the Virginia Convention, 1829

Chairman Goodlatte, Ranking Member Peterson, members of the committee, thank you for the opportunity to appear before you today to speak on the implications of the Supreme Court decision, *Kelo v. New London*. More specifically, the implications and opportunities non-industrial private forest landowners see for statute refinement and clarification in the wake of that decision. Many of you have spent a lot of time on this issue and we in the forestry community appreciate it.

I am Alva J. Hopkins, III, a forest landowner from Folkston, GA, and a board member and Chair of the Governmental Affairs Committee of the Forest Landowners Association. I received a Juris Doctorate Degree from Mercer University and practiced law for 11 years, closing my practice in 1989 to manage timberlands owned by several families, including my own.

I don't know of any U.S. Supreme Court decision that had a more devastating effect on private property rights than *Kelo v. City of New London*. The fifth amendment of the United States Constitution provides in part “nor shall private property be taken for public use without just compensation.” The Supreme Court has taken the words “public use” and replaced it with their new language “public purpose.” What's next? Public benefit? Justice O'Connor states in the dissenting opinion that the court is expanding the meaning of the word public use. She states the decision “holds that the sovereign may take private property currently put to ordinary private use and give it over for new, ordinary private use, so that new use is predicated to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public thus if predicated (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not

realistically exclude any takings, and thus do not exert any constraint on imminent domain power.” Dissenting opinion, *Kelo v. City of New London*.

As forest landowners, the management of our forestland confers numerous benefits on the public. Some of these benefits include producing millions of tons of oxygen; sequestering carbon; filtering air and water; providing fish and wildlife habitat, including that for threatened and endangered species; improving the aesthetic beauty of the natural landscape; and providing opportunities for recreation and solitude, just to name a few. Under the *Kelo* case, a governmental entity can come in and condemn thousands of acres of forestland, not only to convey it to another private landowner who will put it to a “higher use,” but to one who wishes to create a park. Perhaps this park even joins a residential development of this same private landowner, and perhaps the new park would enhance the residential development, and meet the public purpose requirement by providing many of the above-listed benefits to the public. Legislation is desperately needed to strengthen private property rights back to the originally intended constitutional level and put a halt to their continued deterioration.

Forest and farmland would be considered low-end use property as compared to commercial property with regard to the creation of tax revenue and jobs. Therefore, farm and timberland would never withstand an eminent domain attack by any governmental entity wherein the new private landowner will create a new job or build a structure on the property that will increase the tax base.

At the time our country was founded, the inalienable right for individual citizens to own and manage property was set with the cornerstone of our new democracy. Without a commitment to this fundamental freedom, the United States of America would have simply accepted the tradition of powerful landowners and continued indentured servitude in this new nation, or a socialist government such as Russia or China, and we would now live and work under a set of rules of law from which our ancestors sought freedom. Are the freedoms that this country was founded on and so many brave men and women have died to protect in real danger? If so what can be done to protect our rights?

For a forest landowner, the ability to manage on a long-term investment strategy is vital to the future of the industry. This long-term investment for landowners has up-front investment costs, together with annual taxes and other management costs, with the first return on the property occurring usually in 12 to 18 years with possible liquidation of the initial investment in 25 to 35 years. For landowners to make this type of commitment, private property rights must be fully protected.

When the constitution was framed by our Founding Fathers, it was their intent to protect private property, except when absolutely necessary for public use. Public use was intended for such things as roads, hospitals, and furtherance of government functions. It was never intended to provide a system for preference of one private landowner over another. Unfortunately, with the urbanization of America and the corresponding disconnect many citizens and their delegates have with the land, we see a reduction in respect and understanding that this basic right holds in the structural essence of our nation. Most persons don’t understand the commitment that a forest landowner makes when he/she plants a tree, knowing full well that he/she may not live long enough to see it harvested.

We have seen in this country the constant erosion of private property rights through a number of sources. Property is not a singular concept. It is not just a matter of title, but of a whole “bundle of rights.” Property law recognizes these bundle rights and likens property to a bundle of sticks, any one of which could be bought, sold, rendered, or bequeathed other than through a taking. Our rights include the right to acquire property, dispose of property, exclude others the right against trespass, the right to quiet enjoyment, use rental, and most importantly, the right to active use so long as it does not hinder the rights of others in turn to enjoy the use of their property. In contrast, our “taking laws” are based on the idea that the entire bundle must be taken before the government must pay compensation. But, take away any one of these rights and you reduce the value of the property to the owner. This all or nothing view enables government to curtail land uses through regulation that can actually squeeze the value out of the property a little at a time, and allows an escape from any compensation to be paid to the owner.

Many laws whose intentions are good, such as the Clean Water Act, the Endangered Species Act, and the unintended consequences of the magnificent success of tree-planting through the Conservation Reserve Program, include disincentives for forestland investment. As these disincentives build, many forest landowners are changing their investment strategy and selling their properties to place their capital in other types of investments. We have learned that the currently over 10 million forest landowners in the United States who own property for a number of different reasons (i.e., recreational investment, annual income production, hunting and fish-

ing), the vast majority will sooner or later harvest some of the timber on their property. As can be seen by some of the examples above, these partial takings can be as serious a problem as a full taking, especially when the partial taking first occurs. The owner may subsequently be paid “just compensation” for the full taking, however, that just compensation is considerably less than it would have been had it not been for the previously occurring partial taking.

The members of this committee have shown in the recent past, with the passage of the Healthy Forest Restoration Act, and are showing here today, by having hearings with regard to the impact of the *Kelo* decision, that private property rights are vital to the continued freedom of this country. Soon you will also have the opportunity to address this issue with the reauthorization of the Endangered Species Act. Here today, we have the opportunity to re-establish the primacy of private property rights in the United States. The *Kelo* decision has brought front and center the issue of private property rights. Now is the time to include in this legislation language that will truly strengthen the ownership of private property. If a governmental entity prevented an individual from using a portion of their home and even further required them to maintain that portion of the home they could no longer use, would this constitute a taking? Of course, it would only be a partial taking and as such the individual would receive no compensation since they would be allowed to use the remainder of their home. As is easily seen, in this little example, this simply is wrong. Compensation should be required whether the government makes a full or partial taking.

As previously mentioned, well-intended legislation—such as the Endangered Species Act, the Clean Water Act, and others—can have unintended consequences, examples of which restrict the use of property deemed critical to survival of listed plants and animals, or to promote and protect clean water or similar high-minded endeavors. All of these are well-intended laws that seek to remedy serious problems facing our country. Private landowners and the businesses associated with them are in favor of saving at-risk species, preserving clean water, and conserving our natural heritage. We know that societal goals and private property rights can certainly be compatible, but if society as a whole benefits, then society as a whole must pay the bill. Sadly, Congress and the Courts have eroded private property rights in a misguided approach to secure public benefits. However, during this same time, little attention has been given to the cost/benefit of these actions, and those most affected by the subject regulations have seldom been a part of the process. In the future, regulations that are not cost-beneficial must be rethought, and the fundamental rule of law that rights cannot be taken without compensation reaffirmed. In the *Kelo* case we have a narrow-majority opinion (5–4) that has simply gone too far. As Justice O’Connor so aptly stated, “Nothing is to prevent the state from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory. As a result of the *Kelo* decision, almost any piece of property is now subject to condemnation.” Most governmental entities view forestland as one of the lowest uses of property, and almost any other use would be considered a higher and better use producing more taxes and potential jobs. The taking clause of the fifth amendment of the Constitution was intended to reflect a limitation on eminent domain, not a carte blanc grant of power rendering virtually any and every piece of private property subject to eminent domain.

The intent of my testimony to you here today has been to try to focus on the adverse impact of the *Kelo* decision on forest landowners as well as briefly touch on several other private property issues. These problems have been collectively labeled the South’s invisible forest health problem. There can be no better time than the present to enact the Strengthening the Ownership of Private Property Act of 2005. I hope that this committee will address the private property rights issues that I have focused upon today and restore private property rights back to their constitutionally-intended place. Mr. Chairman, this concludes my remarks. I would be glad to respond to any questions that any member of the committee may have.

STATEMENT OF WILLIAM J. HOWELL

Good morning Chairman Goodlatte, Ranking Member Peterson and members of the committee:

My name is Bill Howell, I am speaker of the Virginia House of Delegates and a member of the board of directors of the American Legislative Exchange Council.

The American Legislative Exchange Council (ALEC) is the Nation’s largest bipartisan, individual membership organization of State legislators with over 2,400 legislator members from all 50 States and 97 members in the Congress. It is my pleas-

ure to appear before you to present testimony regarding H.R. 3405 and eminent domain issues.

Kelo v. New London

The Supreme Court's decision in *Kelo v. New London* was very disappointing to those of us who believe in the value of private property. The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." By expansively defining "public use" to mean any legislative purpose that is legitimate and not irrational,¹

The Supreme Court has effectively written the "public use" limitation out of the fifth amendment. As Justice O'Connor eloquently wrote in her dissent:

Under the banner of economic development, all private property is now vulnerable to being 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. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the takings clause of the fifth amendment.²

The Supreme Court could have limited the definition of "public use" instead of defining "public use" to mean anything "rationally related to a conceivable public purpose."³

For example, the Supreme Court could have limited "public use" to public ownership and control by the State, a unit of local government, a school district. Or the Supreme Court could have limited "public use" to uses that are the more traditional functions of government such as construction or maintenance of public buildings, roads, schools, hospitals, railroads, reservoirs, or utilities. While the Supreme Court failed to protect private property rights, they acknowledged the proper role of the States. The Court stated, "that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."⁴

The American Legislative Exchange Council applauds the Supreme Court for recognizing that States have the authority to further protect private property rights in the States. As a result of the *Kelo* decision, many States are acting to better protect private property rights. Alabama and Texas have passed laws that will help limit eminent domain abuse and dozens of States will take up legislation to protect their citizens from eminent domain abuse once the new legislative sessions start in January. It is heartening to see that when one branch of government fails to protect the rights of citizens, another level of government can step in to help protect important rights.

FEDERAL ROLE IN THE PROTECTION OF PRIVATE PROPERTY RIGHTS

Without doubt, the most important function of government at any level is to protect the lives, liberty, and property of its citizens. This was a fundamental reason for the adoption of the Constitution and should remain a fundamental purpose of government today.

The Federal Government was created to play a special role in the protection of Americans. It protects Americans from foreign threats and helps State and local police forces protect Americans against criminals inside the country. The Federal Government is also empowered to protect Americans from overzealous State and local governments.

The Founding Fathers realized that checks and balances were needed to restrain the excesses of overzealous government. As James Madison explained in *Federalist* 51:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [the State and Federal Governments], and then the portion allotted to each subdivided among distinct and separate departments [the executive, legislative, and judicial]. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

¹ *Kelo v. New London*, 125 S.Ct. 2655, 2667 (2005).

² *Id.* at 2671.

³ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (2005).

⁴ *Kelo.* at 2668.

These distinct levels of governments and divisions within State and Federal Government allow for multiple opportunities to protect the rights of the people. With eminent domain, (and the recent Supreme Court decision in *Kelo v. New London*), the Supreme Court has not adequately protected individual property rights. In light of this decision, States around the country are moving to protect property rights. However, there remains a Federal role in providing increased protection for the people.

H.R. 3405, STRENGTHENING THE OWNERSHIP OF PRIVATE PROPERTY (STOPP) ACT

The goal of the STOPP Act is commendable in that it seeks to restrict Federal money from being spent on projects that use eminent domain to take property from one private party and transfer it to another private party. There is no reason the Federal Government should engage or promote such transfers. States and local governments may have the prerogative to conduct such transfers, but the Federal Government should not encourage and finance them.

Congress has broad authority under its spending power to provide for the “general welfare of the United States.” U.S. Constitution, article I section 8 clause 1. As the Supreme Court held in *South Dakota v. Dole*, 483 U.S. 203 (1987), States have the power to attach conditions to the receipt of Federal funds. The STOPP Act does not regulate State and local governments’ eminent domain authority, it merely conditions the receipt of Federal funds on States not abusing eminent domain authority. This is well within Congress’ powers and is laudable because it helps protect the rights of private citizens from the excesses of State and local governments.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL RESOLUTION ON EMINENT DOMAIN

Last month, the American Legislative Exchange Council (ALEC) approved a resolution on eminent domain. The State legislators felt it was important to make a strong statement against eminent domain abuse. As noted earlier, in the *Kelo* decision, the Supreme Court stated, “nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.” ALEC’s resolution calls for State and Federal Governments to protect private property rights against unreasonable use of eminent domain. In addition, it calls on each State to enact protections to protect private property. ALEC does not support the taking of property from private parties and transferring it to other private parties as part of economic development schemes. This is antithetical to our country’s foundational principles. As James Madison stated, “Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, which impartially secures to every man, whatever is his own.”

EMINENT DOMAIN IN VIRGINIA

In Virginia we will examine curbing eminent domain abuse in two ways. The first task for the General Assembly is to define “public uses.” article I, section 11 of the Constitution of Virginia states:

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation, the term “public uses” to be defined by the General Assembly.

The General Assembly will take a hard look at what should be considered a “public use.” While some may decide that a transfer of property through eminent domain from one private party to another is an appropriate “public use,” I disagree.

Upon defining “public uses,” we will seek to enshrine a definition of “public use” in the Commonwealth’s Constitution. Of course, this will take time, but it is critical to better protect the private property rights of the citizens of the Commonwealth.

The members of ALEC, at both the State and Federal levels, share a common commitment to the Jeffersonian principles of individual liberty, limited government, and free markets. Thomas Jefferson wrote on April 6, 1816 that the protection of private property rights is “the first principle of association, the guarantee to everyone of a free exercise of his industry, and the fruits acquired by it.” He also stated that “The true foundation of republican government is the equal right of every citizen in his person and property and in their management.”⁵

⁵ Thomas Jefferson to Samuel Kercheval (1816).

As Thomas Jefferson understood, although some politicians at the local level have forgotten, “Nothing is ours, which another may deprive us of.”⁶

The fight to protect individual property rights needs to happen at every level of government. In Virginia we will closely examine this issue in the upcoming legislative session. In other States, State legislators will work hard to curb the potential for eminent domain abuses in their States. We thank the committee for holding this hearing and urge Congress to continue its efforts in fighting the abuses of eminent domain.

Chairman Goodlatte, Representative Peterson, members of the committee, I am honored to testify here. ALEC and I look forward to working with you in the days and months ahead to curb eminent domain abuse and protect private property rights.

Thank you. I would be pleased to answer any questions you might have.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

A RESOLUTION

(1) Whereas; the protection of homes, small businesses, and other private property rights against Government seizures and other unreasonable Government interference is a fundamental principle and core commnimen1 of our Nation’s Founders; and

(2) Whereas; as Thomas Jefferson wrote on April] 6, 1816, the protection of such rights is “the first principle of association, the guarantee to every one of a free exercise of his industry, and the fruits acquired by it”; and

(3) Whereas; the fifth amendment of the U.S. Constitution specifically provides that “private property” shall not “be taken for public use without just compensation”; and

(4) Whereas; the fifth amendment thus provides an essential guarantee of liberty against the abuse of the power of eminent domain, by permitting Government to seize private property only “for public use”; and

(5) Whereas; on June 23, 2005, the U.S. Supreme Court issued its decision in *Kelo v. City of New London*, No. 04108; and

(6) Whereas; as the Court acknowledged, “it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B”, and that under the fifth amendment, the power of eminent domain may be used only “for public use”; and

(7) Whereas; the Court nevertheless held, by a 5-4 vote, that Government may seize the home, small business, or other private property of one owner, and transfer that same property to another private owner, simply by concluding that such a transfer would benefit the community through increased economic development; and

(8) Whereas; the Court’s decision in *Kelo* is alarming because, as Justice O’Connor accurately noted in her dissenting opinion, joined by the Chief Justice and Justices Scalia and Thomas, the Court has “effectively... delete[d] the words ‘for public use’ from the takings clause of the fifth amendment” and thereby “refus[ed] to enforce properly the Federal Constitution”; and

(9) Whereas; under the Court’s decision in *Kelo*, Justice O’Connor warns, “[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Canton, any home with a shopping mall, or any farm with a factory”; and

(10) Whereas; Justice O’Connor further warns that, under the Courts decision in *Kelo*, “[a]ny property may now be taken for the benefit of another private party”, and “the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the Government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result”; and

(11) Whereas; as an amicus brief filed by the NAACP, AARP, and other organizations noted, “[a]bsent a true public use requirement the takings power will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly”; and

(12) Whereas; it is appropriate for this State to take action, consistent with its powers under the Constitution, to restore the vital protections of the fifth amendment and to protect homes, small businesses, and other private property rights against unreasonable government use of the power of eminent domain; and

⁶ Thomas Jefferson to Maria Cosway (1786).

(13) Whereas; it is appropriate for States to take action to voluntarily limit their own power of eminent domain. As the Court in *Kelo* noted, “nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”

(14) Be it Resolved that the American Legislative Exchange Council recommends each State protect private property in accordance with the fifth amendment.

