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STATE OF PROPERTY RIGHTS IN AMERICA TEN YEARS AFTER KELO V. CITY OF NEW LONDON

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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STATE OF PROPERTY RIGHTS IN AMERICA TEN YEARS AFTER KELO V. CITY OF NEW LONDON

THURSDAY, JULY 9, 2015

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 2:26 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, DeSantis, King, Jordan, Cohen, and Conyers.

Staff Present: (Majority) Zachary Somers, Counsel; Tricia White, Clerk; (Minority) James J. Park, Minority Counsel; Veronica Eligan, Professional Staff Member; and Alayna James, Law Clerk.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order. And without objection, the Chair is authorized to declare recesses of the Committee at any time. And I'll begin with my opening statement. We welcome all of you here this afternoon.

Ten years ago last month, the Supreme Court handed down its now infamous decision *Kelo v. City of New London*. In that decision the Court held that the government may use its power of eminent domain to take property from homeowners and small businesses and to transfer it to other private entities for economic development purposes.

In Justice O'Connor's words, the *Kelo* decision pronounced that, "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." "Nothing is to prevent a State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

The *Kelo* decision was resoundingly criticized from across all quarters. In the aftermath of the decision, the House voted to express grave disapproval of the decision and overwhelmingly passed the Private Property Rights Protection Act to attempt to legislatively reverse the harmful effects of that decision.

Last Congress, the House once again passed this legislation with 353 Members voting in favor and only 65 Members voting against.

Hopefully, during this Congress the Private Property Rights Protection Act will finally become law.

Too many Americans have lost homes and small businesses to eminent domain abuse, forced to watch as private developers replace them with luxury condominiums and other upscale uses. Congress must act to restore Americans' faith in their ability to build, own, and keep their property without fear that the government will take it and give it to someone else.

Unfortunately, the Court's decision in *Kelo* is not the only threat to property rights in America today. In addition to eminent domain abuse, Americans' property rights are regularly threatened by regulatory actions and land use restrictions that deprive them of the use of their property, often without providing any compensation at all.

These so-called regulatory takings limit property owners' use of their property to such a degree that the regulation effectively takes away most of the value of the property. Yet, unlike in many eminent domain cases, in regulatory takings cases the government rarely volunteers to compensate for the full financial impact the regulatory taking has on the value of the property. Property owners are then forced, often at great expense, to go to court to attempt to vindicate their property rights.

Of additional concern is a series of Supreme Court decisions that have effectively barred the Federal courthouse doors to virtually all takings claims involving State and local governments. Because of these precedents, it is nearly impossible for property owners to file suit in Federal court alleging that a State or local government effected a taking of their property in violation of the Federal Constitution.

I can think of no other instance in which American citizens are denied access to the Federal courts to vindicate their Federal constitutional rights. It's disconcerting that property rights claims are singled out to be confined to State court.

These are but a few of the issues that property owners face in America today. Although there have been several property rights victories in the Supreme Court since *Kelo* was decided, including the Court's recent holding that the government must pay just compensation when it takes personal property, just as when it takes real property, property rights in America remain at risk despite the Constitution's clear protections for these important rights.

As Chief Justice Rehnquist observed over two decades ago, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First and Fourth Amendments, should be relegated to the status of a poor relation."

So we've called today's hearing to examine the current state of property rights in America 10 years after the *Kelo* decision. I hope the witnesses can help inform us of how property rights are faring in the courts and in the face of increasing government regulation.

The protection of property rights lies at the foundation of American government. John Adams wrote over 200 years ago that property must be secured or liberty cannot exist. Thus, if our children are to live truly in a free society, we must now work to substantially undergird and secure the critical property rights guaranteed to all Americans by the United States Constitution.

And with that, I will now yield to the Ranking Member for his opening statement.

Mr. COHEN. Thank you, Mr. Chair.

The Latin word for city is civitas. Civitas it also is also the root word for civilization, and there is good reason for that. Cities are where civilization happens. It is in cities that we have vibrant hubs of commerce, finance, and trade. It is in cities where people from different backgrounds, people from different regions of a country, immigrants from all over the world meet to do business and get to know each other. It is in cities where media, entertainment, creativity, and artistic expression meld to form both popular culture and high culture.

In our own country, city are where the supreme expressions of American ideals and optimism happen, the melting pot, John Winthrop's shining city upon a hill, which Ronald Reagan used on occasion.

Yet American cities have not fared well since the Second World War. For decades they suffered from White flight, where White residents fled as racial integration threatened exclusively White neighborhoods. Over time, White flight became wealth flight, as people of all backgrounds and races with the means to leave the city did so, leaving cities with financially poor populations, rising crime, and shrinking tax basis, which led to further flight by those who had the financial means to leave, which led to further disinvestment.

As a result of decades of this vicious cycle, our cities are hurting. Given the central role of cities as the engines of commerce and fonts of culture and ideas, it is important that we bring cities back, and the use of eminent domain for economic redevelopment is one potentially important tool for doing so.

While I do not necessary endorse or oppose eminent domain as the best means for revitalizing the cities, I also think it is appropriate for the Supreme Court in *Kelo v. City of New London* to leave it to States and localities to make that call for themselves. This is because States and local governments are in the best position to understand local conditions and local needs. This is also why in a vast continental-size country like ours we have a Federal system that leaves many policy judgments up to State and local governments.

In criticizing the *Kelo* decision many people have inappropriately and unhelpfully blurred the distinction between two different questions: Whether using eminent domain for economic development is a good idea or a bad idea on the one hand and whether courts or an elected legislature at the Federal, State, or local level should make the decision as to the first question on the other.

Relying on decades of precedent, *Kelo* appropriately held that a city could use eminent domain for the public purpose of economic redevelopment. I am sensitive to the fact that eminent domain can be abused. For instance, historically it had been used to target minority communities. So happens minority communities are often those in the cities where the development would be taking place.

But eminent domain for economic development can help some of the very same marginalized communities as urban ills fall disproportionately on those communities. And in *Kelo* itself, the Court

made clear that there are constitutional limits to the use of eminent domain. But eminent domain is a longstanding governmental power, and the Court appropriately reviews exercise of such power deferentially.

Finally, those that would deny the use of eminent domain for economic redevelopment have an obligation to support funding for measures that will help revitalize our cities. We need increased investment in mass transit, including new light rail and bus rapid transit system, and we need those improvements now. We need improvements to existing transportation infrastructure like bridges, tunnels, and roads, and we need them now.

We need stronger enforcement of fair housing laws to ensure equal housing opportunity for urban residents, and we need that now. We need more funding for our public schools so that children can get a good education without forcing families out of the cities, good public education now. To help cities improve their economies and to restore their central role in American life we must do all we can to ensure that revitalization.

And I yield back the balance of my time.

Mr. FRANKS. I thank the gentleman.

And I would now yield to the Chairman of the full Committee, Mr. Goodlatte from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Private ownership of property is vital to our freedom and our prosperity and is one of the most fundamental principles embedded in the Constitution. The Founders realized the importance of property rights by enshrining property rights protections throughout the Constitution, including in the Fifth Amendment, which provides that "private property" shall not "be taken for public use without just compensation."

However, despite the Constitution's robust protection for private property rights, today Federal, State, and local governments trample on Americans' property rights every day in countless ways. Local governments exact exorbitant fees from developers in exchange for permits, increasing Federal and State regulations prohibit Americans from using their property as they traditionally have, and after the *Kelo v. City of New London* case, the government is free to seize homes, small businesses, and family farms, and transfer the land to others for private economic development.

The *Kelo* decision in particular was met with widespread criticism across the political and socioeconomic spectrum. This controversial ruling expanded the ability of State and local governments to exercise eminent domain powers to seize property under the guise of economic development when the public use is as incidental as generating tax revenues or creating jobs.

As the dissenting justices observed, by defining public uses so expansively the result of the *Kelo* decision is "effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment . . . The specter of condemnation hangs over all property . . . The government now has license to transfer property from those with few resources to those with more. The Founders cannot have intended this perverse result."

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

nearly any reason. Cities may now bulldoze homes, farms, churches, and small businesses to make way for shopping malls or other developments.

Hopefully, in this Congress we will finally be able to enact legislation to reverse the harmful affects of the *Kelo* decision. No one should have to live in fear of the government snatching up their home, farm, or business so that another richer, better-connected person may live or work on the land they used to own.

Eminent domain abuse is not the only troubling aspect of the state of property rights in America today. Regulatory takings—takings in which rather than physically invading a property owner's land, the government accomplishes the equivalent by severely restricting the use of property—are also wrongfully depriving owners of their property. As Federal, State, and local regulations increase both in scope and number, regulatory takings will only become more of a problem for property owners.

Under current law it is exceedingly difficult for property owners to recover the losses that result from regulatory takings, and thus property owners must bear the full costs of any public benefits that these regulations may create. However, as the Supreme Court has observed, the Just Compensation Clause is designed to "bar government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole."

Unfortunately in the vast majority of regulatory takings cases, the property owner ends up receiving no compensation for the taking. In fact, according to one study, property owners prevailed in less than 10 percent of all regulatory takings cases. These are troubling statistics given the fundamental nature of property rights under our Constitution.

I look forward to the witnesses' testimony on this important subject. The Supreme Court observed in a 1795 opinion that "possessing property and having it protected is one of the natural, inherent, and unalienable rights of man . . . The preservation of property then is the primary object of the social compact."

I hope the witnesses can provide their insight into whether this primary object of the Constitution is being met in America today.

Thank you, Mr. Chairman.

Mr. FRANKS. And I thank the gentleman.

And I now yield to the Ranking Member of the Committee, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman.

And welcome to all of the witnesses.

In the wake of the Supreme Court's decision in *Kelo*, I expressed concern that States and municipalities could use this decision to use their power of eminent domain, intentionally or not, to the detriment of those who are the least politically powerful, namely, the poor, the elderly, and minority communities.

While the power of eminent domain can and historically has been abused, we should allow the States to craft their responses rather than impose potentially awkward and one-size-fits-all Federal legislative responses. Nonetheless, we should keep the following in mind as we consider property rights and the Constitution this afternoon.

To begin with, abuse of the eminent domain power has a long and shameful history of disproportionately impacting minority and other politically marginalized communities. Urban neighborhoods that lacked institutional and political power were often designated as blighted areas, slated for redevelopment through urban renewal programs.

And properties were condemned and land was turned over for private parties, sometimes for what seemed like primarily private benefit. In Detroit, for example, a vibrant working class neighborhood called Poletown was condemned in order to build an automobile plant that was later shut down only a few years after opening, demonstrating firsthand how eminent domain can lead to bad outcomes.

This underscores why it is important that we continue to monitor the facts on the ground to determine whether Federal action is warranted. If the States do not continue to act to protect citizens, Congress should remain ready, willing, and able to do so.

Having said this, it's important to respect principles of federalism before Congress intervenes in eminent domain decisions, an area traditionally reserved to States and localities.

In *Kelo*, the Supreme Court made clear that States are free to revise their laws accordingly to restrict the use of eminent domain and most have done so. I'm encouraged that at least 43 States have followed that advice and taken steps to limit their own powers of eminent domain to guard against potential abuse. For example, in 2006 Michigan voters approved an amendment to their State constitution to preclude takings for economic development or tax enhancement, among a number of other protections for property owners and tenants.

Given the fact that our system of federalism appears to be working and that most States, by and large, have acted to prevent potential abuse in response to *Kelo*, Federal intervention is unnecessary and inappropriate at this time. And it's also for this reason that I voted against legislation considered only in the last Congress that would have imposed draconian penalties on States and localities for exercising their eminent domain power for economic redevelopment.

And finally, with respect to the issue of regulatory takings, I note that courts have generally and appropriately made it very difficult for property owners to prevail in such types of cases, for any other result would make it exceptionally difficult for government to regulate. I suspect that's precisely the result that most who oppose government regulation generally and environmental regulation in particular might want. And perhaps they can take solace in the fact that the last four Takings Clause decisions by the Supreme Court came out in favor of the property owner.

We should, however, be very wary of courts undermining implementation of environmental laws and other public health, safety, and welfare regulations by giving an overly broad interpretation of the Takings Clause to require compensation in any but the most extreme and rare circumstances.

And so I welcome this discussion this afternoon. And I yield back the balance of my time.

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

So let me now introduce our witnesses. Our first witness is Dan Alban, an attorney at the Institute for Justice, a nonprofit public interest law firm that represents people whose rights are being violated by the government. In 2005, the Institute for Justice represented Susette Kelo in her Supreme Court challenge of the taking of her home in New London, Connecticut. Mr. Alban litigates cases protecting free speech, property rights, economic liberty, and other individual liberties in both Federal and State courts.

Glad you're here, sir.

Our second witness is John Groen, an attorney at the Pacific Legal Foundation, the country's oldest public interest legal organization that litigates for property rights, limited government, and free enterprise. Mr. Groen has extensive experience in public policy litigation before all levels of Federal and State courts. He has been directly involved in many of the leading appellate decisions that have shaped land use law in State of Washington and has significant experience before the U.S. Court of Federal Claims in takings cases against the Federal Government.

Welcome, sir.

Our third witness, John Echeverria, a professor of law at Vermont Law School, where he teaches property, public law, and a wide range of environmental and natural resource law courses. Prior to joining the Vermont Law School faculty in 2009, he was for 12 years the executive director of the Georgetown Environmental Law and Policy Institute at Georgetown University Law Center. Professor Echeverria has also served as general counsel of the National Audubon Society and general counsel and conservation director of American Rivers.

Welcome, sir.

Our final witness is Brian Seasholes, director of the Endangered Species Project at Reason Foundation, a nonprofit foundation that produces nonpartisan public policy research on a variety of issues and publishes the critically acclaimed Reason magazine. Mr. Seasholes worked deals with wildlife and land use issues, especially the Endangered Species Act, property rights, wildlife conservation, the effects of wind and energy on wildlife and oil sands. Mr. Seasholes' writing have appeared in Forbes, National Review, The Christian Science Monitor, and the Washington Times.

Each of the witnesses' written statements will be entered into the record in its entirety, and I would ask each witness to summarize his or her testimony in 5 minutes of less.

And to help you stay within that time there is a timing light in front of you. The light will switch from green to yellow indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

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

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole trust, and nothing but the truth, so help you God?

You may be seated.

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

So now I would recognize the our first witness, Mr. Alban. And, sir, if you'll make sure that microphone is turned on.

TESTIMONY OF DAN ALBAN, ATTORNEY, INSTITUTE FOR JUSTICE

Mr. ALBAN. Thank you, Chairman Franks and the Ranking Members. I appreciate the opportunity to testify regarding eminent domain abuse, an important issue that has received significant national attention as a result of the Supreme Court's infamous decision 10 years ago in *Kelo v. City of New London*.

My name is Dan Alban, and I'm attorney at the Institute for Justice, a nationwide, nonprofit public interest law firm that represents people whose constitutional rights are violated by the government. Among the cases we litigate are cases where homes or small businesses are taken by the government through the power of eminent domain and transferred to another private party who is usually wealthier or better connected.

I have represented property owners across the country, from a nonprofit youth boxing center in National City, California, to an elderly piano tuner in Atlantic City, New Jersey, all of whom are fighting this abuse of the eminent domain power.

Perhaps most notably, we represented the homeowners in *Kelo v. City of New London*, the notorious 2005 case in which the U.S. Supreme Court ruled 5-4 that eminent domain could be used to transfer perfectly fine private homes and businesses to a private developer based simply on the promise of increased tax revenue for the city.

But 10 years later, and after $80 million in taxpayer money was spent, the Fort Trumbull neighborhood where Susette Kelo's little pink house once stood is a barren field that is home to nothing but feral cats. The developer abandoned the project, while Pfizer, the intended beneficiary, closed its plant and left New London.

On *Kelo*'s 10th anniversary in late June, law professors and legal observers described the decision as "truly horrible," "one of the most destructive and appalling decisions of the modern era," and "the worst Supreme Court decision of the 21st century." Overwhelming majorities in every major poll taken after *Kelo* have condemned the result, and it continues to be wildly unpopular 10 years later.

In the wake of *Kelo*, 44 States reformed their eminent domain laws, but these State-level reforms vary greatly. Some States did little or nothing to reform their laws, and *Kelo* opened the flood gates for eminent domain abuse, which tripled in the year after the decision was issued. That's in part because Federal law still allows Federal funds to be spent for condemnations for the benefit of private developers, which continues to encourage widespread eminent domain abuse, as I detail in my written testimony.

The Federal Government should not be complicit in an abuse of power already deemed intolerable by most States. Congress should take action to prevent Federal tax dollars from funding projects

that abuse the power of eminent domain by taking private property from one person to give to another private party.

Unfortunately, Congress' previous efforts to restrict the use of Federal funds for eminent domain have been ineffective. Immediately after *Kelo* was decided in 2005, Senator Christopher Bond introduced an appropriations bill amendment which stated that Federal dollars could not be spent on any project where eminent domain is used for economic development that primarily benefits private entities. This language continues to appear in appropriations bills, including the currently pending bill.

But the Bond amendment has no enforcement mechanism, and thus relies on agencies and grant recipients to police themselves. There is no way for individuals to enforce the spending restriction, and it doesn't appear that any agency has ever investigated or enforced a violation of the spending limitation.

Funding restrictions like the Bond amendment will only work if they can be enforced. Any Federal reform must include an enforcement mechanism to halt Federal funding if the funds are used for a prohibited purpose, as well as a private method of enforcement so that homeowners, tenants, or small business owners who are threatened by the abuse of eminent domain can take action to prevent the misuse of Federal funds.

Reform at the Federal level would not only reduce funding for eminent domain abuse nationwide, but it also would send an important message to the American people. When the power of eminent domain is used so that a richer, better-connected person can live or work on the land you used to own, it tells everyday Americans that their hopes, dreams, and hard work do not matter as much as money and political influence.

Commercial developers everywhere need to be told that they can only obtain property through private negotiation, not government force, and that the Federal Government will not be a party to these forced private-to-private transfers of property.

This Committee is to be commended for continuing to examine this misuse of government power, which violates the property rights of many Americans. I encourage you to enact legislation that would put teeth in the funding restrictions to ensure that Federal funds are not used to support the abuse of the eminent domain power.

Again, thank you for the opportunity to testify on this important issue.

[The testimony of Mr. Alban follows:]

Testimony of Dan Alban
Attorney, Institute for Justice
www.ij.org

United States House Committee on the Judiciary
Subcommittee on the Constitution & Civil Justice

Hearing on "The State of Property Rights in America
Ten Years After *Kelo v. City of New London*"

July 9, 2015

Thank you for the opportunity to testify regarding eminent domain abuse, an important issue that has received significant national attention as a result of the United States Supreme Court's universally reviled decision in *Kelo v. City of New London*, which was handed down ten years ago in June. This committee is to be commended for responding to the American people by continuing to examine this misuse of government power to violate the property rights of many Americans.

My name is Dan Alban, and I am an attorney at the Institute for Justice, a nationwide, nonprofit public interest law firm headquartered in Arlington, Virginia that represents people whose rights are being violated by the government. One of the main areas in which we litigate is property rights, particularly in cases where homes or small businesses are taken by the government through the power of eminent domain and transferred to another private party. I have personally represented property owners across the country—from National City, California to Atlantic City, New Jersey—who are fighting eminent domain for private use.

Perhaps most notably, the Institute for Justice represented the homeowners in *Kelo v. City of New London,* the notorious 2005 case in which the U.S. Supreme Court ruled by a bare majority that eminent domain could be used to transfer perfectly fine private property to a private developer based simply on the mere promise of increased tax revenue. On its tenth anniversary in late June, law professors, legal commentators, and other observers described *Kelo* as "one of the Supreme Court's most controversial modern decisions…a grave error," "truly horrible," "one of the most destructive and appalling decisions of the modern era," and "the worst Supreme Court decision of the 21st Century."[1]

The *Kelo* case demonstrated that a majority of justices sitting on the Supreme Court believed the U.S. Constitution provides very little protection for the private property rights of Americans faced with eminent domain abuse. Indeed, the Court ruled that it is acceptable to use the power of eminent domain when there is a mere *possibility* that something else could make more money than the homes or small businesses that currently occupy the land. It's no wonder, then, that the decision caused Justice Sandra Day 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."

Justice O'Connor further warned in her dissent that "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."

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[1] Prof. Ilya Somin, *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain,* American Constitution Society ACSblog, June 23, 2015, http://www.acslaw.org/acsblog/the-grasping-hand-kelo-v-city-of-new-london-and-the-limits-of-eminent-domain; Prof. Richard Epstein, Kelo v. City of New London *Ten Years Later*, National Review, June 23, 2015, http://www.nationalreview.com/article/420144/kelo-v-city-new-london-ten-years-later-richard-epstein; Damon Root, *The* Kelo *Debacle Turns 10*, Reason Hit & Run Blog, June 23, 2015, http://reason.com/blog/2015/06/23/the-kelo-debacle-turns-10; David Burge, Iowa Hawk Blog Twitter Account, June 23, 2015, https://twitter.com/iowahawkblog/status/613340586653777920.

An Institute for Justice study confirmed Justice O'Connor's concerns, finding that eminent domain disproportionately impacts minorities, the less educated, and the less well-off.[2] As Justice O'Connor concluded her dissent in *Kelo*: "The Founders cannot have intended this perverse result."

In part because of the threat posed to the rights of everyday Americans—particularly those disadvantaged by a lack of financial resources and political influence—there has been a considerable public outcry against the closely divided *Kelo* decision. Organizations spanning the political spectrum have united in opposition to eminent domain abuse, including the National Association for the Advancement of Colored People, Mexican American Legal Defense and Education Fund, League of United Latin American Citizens, the Farm Bureau, and the National Federation of Independent Business. Overwhelming majorities in every major poll taken after the *Kelo* decision have condemned the result, and it continues to be wildly unpopular ten years after the case was decided. 44 states have reformed their eminent domain laws in the wake of the decision. Nine state supreme courts have made it more difficult for the government to engage in eminent domain abuse, and three of those have explicitly rejected *Kelo*.

Unfortunately, while several bills have been introduced in both the House and the Senate to combat the abuse of eminent domain with significant bipartisan support, Congress has yet to pass any legislation that enacts any meaningful reform. The federal government should not be complicit in an abuse of power already deemed intolerable by most states; Congress should take action to prevent federal dollars from being used to fund projects that abuse the power of eminent domain by taking property from one private person to give to another.

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

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

Historically, with very few limited exceptions, the power of eminent domain was used for things the public actually owned or used—schools, courthouses, post offices and the like. Over the past 60 years, however, the meaning of "public use" has been stretched past its breaking point by courts that have abdicated their role to enforce this important constitutional limitation on the power of eminent domain. Today, the courts have redefined "public use" to mean any "public purpose," which includes ordinary private uses like luxury 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

[2] *See* Dick M. Carpenter & John K. Ross, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse*, June 2007, http://www.ij.org/1621; *see also* Dick M. Carpenter & John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, Urban Studies, Oct. 2009, vol. 46, no. 11, at 2247-2461, http://www.theeyberhood.net/documents/papers/carpenter09.pdf.

eminent domain. Urban renewal wiped out entire communities, most typically African-American communities, earning eminent domain the nickname "negro removal."[3]

This "solution," which critics and proponents of urban renewal alike consider a dismal failure, was given ultimate approval by the U.S. Supreme Court in 1954 in *Berman v. Parker*. The Court ruled that the removal of blight was a public "purpose," despite the fact that the word "purpose" appears nowhere in the text of the Constitution and government already possessed the power—and still does—to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened up a Pandora's box, and in the wake of that decision properties were routinely taken pursuant to redevelopment statutes when there was absolutely nothing wrong with them, except that some well-heeled developer covets them and the government hoped to increase its tax revenue.

The use of eminent domain for private development was widespread. In the five-year period between 1998 and 2002, we documented more than 10,000 properties either seized or threatened with condemnation for private development.[4] Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnations and threatened condemnations. For example, in Connecticut, we found 31, while the true number of condemnations was 543.

After the Supreme Court actually sanctioned this abuse in *Kelo*, the floodgates opened; the rate of eminent domain abuse tripled in the one year after the decision was issued.[5] With the high court's blessing, local government became further emboldened to take property for private development. For example:

- Freeport, Texas: Hours after the *Kelo* decision, officials in Freeport began legal filings to seize some waterfront businesses (two seafood companies) to make way for others (an $8 million private boat marina).
- Oakland, Calif.: A week after the Supreme Court's ruling in 2005, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family had owned since 1949. Revelli and a neighboring business owner had refused to sell their property to make way for a new housing development. Said Revelli of his fight with the city, "We thought we'd win, but the Supreme Court took away our last chance."
- Hollywood, Fla.: Twice in one month, Hollywood officials used eminent domain to take private property and give it to a developer for private gain. Empowered by the *Kelo* ruling, City commissioners took a bank parking lot to make way for an exclusive condo tower. When asked what the public purpose of the taking was, City Attorney Dan Abbott didn't hesitate before answering, "Economic development, which is a legitimate public purpose according to the United States Supreme Court."

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[3] *See* Dr. Mindy Fullilove, *Eminent Domain & African Americans: What is the Price of the Commons?*, Feb. 14, 2007, http://castlecoalition.org/pdf/publications/Perspectives-Fullilove.pdf.

[4] *See* Dana Berliner, *Public Power, Private Gain: A Five-Year State By State Report Examining the Abuses of Eminent Domain*, April 2003, http://castlecoalition.org/public-power-private-gain.

[5] *See* Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse In the Post-*Kelo *World*, June 2006, http://castlecoalition.org/pdf/publications/floodgates-report.pdf.

- Arnold, Mo.: The *St. Louis Post-Dispatch* reported that Arnold Mayor Mark Powell "applauded the [*Kelo*] decision." The City of Arnold wanted to raze 30 homes and 15 small businesses, including the Arnold VFW, for a Lowe's Home Improvement store and a strip mall—a $55 million project for which developer THF Realty would receive $21 million in tax-increment financing. Powell said that for "cash-strapped" cities like Arnold, enticing commercial development is just as important as other public improvements.
- Sunset Hills, Mo.: Less than three weeks after the *Kelo* ruling, Sunset Hills officials voted to allow the condemnation of 85 homes and small businesses for a shopping center and office complex.
- Mount Holly, N.J.: For over a decade, township officials used the threat of eminent domain to systematically dismantle the Gardens, a lower-income, tight-knit neighborhood once home to over 300 row houses. Officials wanted to replace the well-kept and treasured homes with newer, fancier town homes.

More recent abuses include:

- New York, N.Y.: In 2010, the New York Court of Appeals—the state's highest court—allowed the condemnation of perfectly fine homes and businesses for two separate projects. First, a new basketball arena and residential and office towers in Brooklyn, and then for the expansion of Columbia University—an elite, private institution—into Harlem.
- Philadelphia, Penn.: Starting in 2012, the Philadelphia Redevelopment Authority (PRA) sought to condemn the art studio of world-renowned artist James Dupree to pave the way for a new grocery store. The city initially seized his deed just four days before a loophole in the state's post-*Kelo* eminent domain reform was closed, which would have protected the owner from the taking. After a long campaign of grassroots activism, the PRA finally relented and terminated the condemnation proceedings in early 2015.
- Atlantic City, N.J.: New Jersey's Casino Reinvestment Development Authority (CRDA) has long abused its eminent domain powers for the benefit of casinos and continues to do so in a large swath of Atlantic City designated as the Tourism District. In spring 2014, CRDA filed condemnation papers against 62 properties in the South Inlet neighborhood near the Boardwalk, including the well-kept longtime family home of Institute for Justice client Charlie Birnbaum, in what appears to be a "bulldoze first, plan later" scheme. Unlike in *Kelo*—where there was a development plan for the proposed taking—CRDA admits it has no specific development plans for the area and merely says it is for a "mixed-use development" that is intended to "complement the new Revel Casino and assist with the demands created by the resort." But the $2.4 billion Revel Casino has filed twice for bankruptcy and closed in early September 2014. Despite this turn of events, CRDA is still trying to seize the Birnbaum house for unspecified and unknown "Tourism District uses," even though the current residential use is a permitted use in the Tourism District. The case is still pending.
- Charlestown, Ind.: In 2014, the mayor of Charlestown was prepared to use eminent domain to seize 354 well-kept homes—an entire working-class neighborhood, called Pleasant Ridge—in order to transfer the land to a private developer for new homes and retail. Fortunately, grassroots activists ultimately brought those plans to a halt.

- Glendale, Colo.: In 2015, the city council authorized its urban renewal authority to condemn Authentic Persian Rugs, a popular, successful store on the busiest road in Denver. The mayor wants to hand this family business and surrounding property over to a private developer for an entertainment district.

As mentioned above, heeding a deafening public outcry against eminent domain abuse, 45 states have reformed their eminent domain laws in the wake of *Kelo*. These reforms varied greatly—indeed, no two states enacted the same legislative reforms. Eminent domain abuse has become virtually non-existent in some states, and in others there remains much room for improvement. Alabama recently passed legislation to roll back its eminent domain reform, after being the first state to react legislatively to give its citizens stronger protections against this abuse of power after *Kelo*. This demonstrates an ongoing need to remain vigilant in the fight against eminent domain abuse.

Congress should take this opportunity to stop being complicit in eminent domain abuse where it exists and where it may reappear in the future by restricting federal funds from being used where the power of eminent domain is abused for private development.

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

Federal agencies themselves rarely if ever take property for private projects, but federal funds support condemnations and support agencies that take property from one person to give it to another. There has been improvement from state legislative reform, but not enough. Although eminent domain for private development is less of a problem in nearly half of the states in the wake of *Kelo*, it remains a major problem in many other states. Unfortunately, some of the states that were the worst before *Kelo* in terms of eminent domain abuse did little or nothing to reform their laws. New York remains the worst state in the country on this issue, and it has gotten even worse since *Kelo*. Missouri, also a major abuser, passed only weak reform, as did Illinois. In other states, like Washington and Texas, the prospect of federal money for Transit Oriented Development has inspired municipalities to seek enormous areas for private development (areas not needed for the actual transportation). Eminent domain abuse is still a problem, and federal money continues to support the use of eminent domain for private commercial development. A few examples of how federal funds have been used to support private development include:

- New London, Conn.: This was the case that was the subject of the Supreme Court's *Kelo* decision. Fifteen homes were taken for a private development project that was planned to include a hotel, upscale condominiums, and office space. The project received $2 million in funds from the federal Economic Development Authority—and ultimately failed. The former neighborhood remains an empty lot, over a decade later.
- Brea, Calif.: The Brea Redevelopment Agency demolished the city's entire downtown residential area, using eminent domain to force out hundreds of lower-income residents. The Department of Housing and Urban Development (HUD) launched an investigation into the potential misappropriation of federal development grants totaling at least $400,000, which made their way to the city in the late 1980s and early 1990s. FBI agents

investigated the Redevelopment Agency based on evidence that the Agency used coercive tactics to acquire property.

- Garden Grove, Calif.: Garden Grove has used $17.7 million in federal housing funds to support its hotel development efforts—efforts that included, at least in part, the use of eminent domain. In 1998, the City Council declared 20 percent of the city "blighted," a move that allowed the city to use eminent domain for private development. Using that power—and federal money—the city acquired a number of properties, including a mobile-home park full of senior citizens, apartment renters and small businesses, in order to provide room for hotel development.
- National City, Calif.: In 2007, the National City Community Development Commission, which received significant federal funding, authorized the use of eminent domain over nearly 700 properties in its downtown area, calling the area "blighted." One of the planned projects was the replacement of the Community Youth Athletic Center, a boxing gym and mentoring program for at-risk youth, with an upscale condominium project. Fortunately after years of hard-fought litigation by the Institute for Justice, we prevailed in getting the blight designation struck down.
- Normal, Ill.: Normal officials condemned the properties of Orval and Bill Yarger and Alex Wade, including the Broadway Mall, for a Marriott Hotel and accompanying conference center being built by an out-of-town developer. The town secured at least $2 million in federal funding for downtown projects, and once the cost of the Marriott nearly doubled, approved giving the developer $400,000 in Community Development Block Grant money.
- Baltimore, Md.: In December 2002, the Baltimore City Council passed legislation that gave the city the power to condemn up to 3,000 properties for a redevelopment project anchored by a biotechnology research park. The development is supposed to contain space for biotech companies, retail, restaurants and a variety of housing options. HUD provided a $21.2 million loan to the city. Nearly thirteen years later, the project is still under construction and much of the seized land remains vacant. Many projects in Baltimore involving the use of eminent domain for private development are overseen by the Baltimore Development Corporation, which receives federal funding.
- Somerville, Mass.: In October 2012, Somerville authorized the use of eminent domain over a 117-acre neighborhood, identifying seven blocks with 35 properties to be acquired first. The Union Square Revitalization Plan is a transit-oriented development with residences, retail, restaurants and office space. The city has received at least $29 million in stimulus funds and around $35 million in other federal and state funding. The owner of a threatened gym said that he believes in the revitalization of Union Square through private means: "That's why I purchased the property." But he said it would be difficult to develop his business with "the threat of seizure hanging over our head." The project is currently moving forward.
- St. Louis, Mo.: In 2003 and 2004, the Garden District Commission and the McRee Town Redevelopment Corporation demolished six square blocks of buildings, including approximately 200 units of housing, some run by local non-profits. The older housing was to be replaced by luxury housing. The project received at least $3 million in Housing and Urban Development (HUD) funds, and may have received another $3 million in block grant funds as well.

- Elmira, N.Y.: Eight properties—including apartments, a garage, carriage house and the former Hygeia Refrigerating Co.—were condemned and six were purchased under the threat of eminent domain for Elmira's South Main Street Street Urban Development project. HUD funds were used to create a 6.38-acre lot for development.
- Mount Vernon, N.Y.: In October 2012, this suburb of New York City declared almost eight acres in a neighborhood that is 90 percent black "blighted" and subject to condemnation. The blight study was paid for by the developer who wants to build there. Threatened properties include homes, churches, and businesses including a daycare with a well-maintained playground, a nail salon, delis, a Jamaican restaurant, and small grocery stores. Mount Vernon received at least $1.7 million in CDBG and HOME funds in 2012.
- New Cassell, N.Y.: St. Luke's Pentecostal Church saved for more than a decade to purchase property and move out of the rented basement where it held services. It bought a piece of property to build a permanent home for the congregation. The property was condemned by the North Hempstead Community Development Agency, which administers funding from HUD, for the purpose of private retail development. The land remained vacant for at least six years.
- New York, N.Y.: Developer Douglas Durst and Bank of America enlisted the Empire State Development Corporation to clear a block of midtown Manhattan for their 55-story Bank of America Tower at One Bryant Park. The ESDC put at least 32 properties under threat of condemnation and initiated eminent domain proceedings. All of the owners eventually sold. Durst had abandoned the project prior to 9/11, but an infusion of public subsidies—including $650 million in the form of Liberty Bonds—and a $1 billion deal with Bank of America put plans back on track.
- Ardmore, Pa.: The Ardmore Transit Center Project had some actual transportation purposes, but Lower Merion Township officials also planned to remove several historic local businesses, many with apartments on the upper floors, so that they could be replaced with mall stores and upscale apartments. The project received $6 million in federal funding, which went to the Southeastern Pennsylvania Transit Authority. But for a tirelessly waged grassroots battle—which no American should have to wage to keep what is rightfully theirs—that ultimately stopped the project, the federal government would have been complicit in the destruction of successful, family-owned small businesses.
- Washington, D.C.: The National Capital Revitalization Corporation received $28 million in HUD funds to buy or seize up to 18 acres of land for a private developer to replace old retail with new retail. Over the course of seven years, affected business owners challenged the District in a dozen different eminent domain cases—but the city won or settled every dispute.

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

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

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

Congress's previous efforts to restrict the use of certain federal funds for eminent domain (from the Departments of Transportation, Treasury, Housing and Urban Development (HUD) and other agencies) have unfortunately been ineffective. In 2005, just after *Kelo* was decided, Senator Christopher Bond (R-Mo.) introduced an appropriations bill amendment that was intended to limit federal funding for eminent domain abuse.[6]

The Bond Amendment purported to restrict the use of funds by HUD and other agencies for projects involving eminent domain to only those projects where eminent domain is employed "only for a public use." The Bond Amendment lists a number of approved public uses, but provides that "public uses shall not be construed to include economic development that primarily benefits private entities."

However, the Bond Amendment has no enforcement mechanism and relies on agencies and grant recipients to police themselves. There does not seem to be any way for individuals to enforce this restriction. Nor does it appear that any of these agencies have ever investigated a violation of the spending limitation or enforced the limitation. Instead, the local governments that receive the funds are expected to understand and apply the prohibition. In other words, the same local governments that are planning to use eminent domain are also expected to limit their own funding, despite the fact that there is no prospect of enforcement. It is therefore not surprising that the funding restriction has not protected the rights of people faced with eminent domain.

The language of the Bond Amendment has reappeared in provisions of appropriations bills for fiscal years 2008, 2009, 2010, 2014, and 2015, and it also appears in the current draft of the bill for FY 2016, which was passed by the House in June and awaits approval by the Senate.[7] Putting teeth in the language of the Bond Amendment by adding an enforcement mechanism would be an important first step toward federal eminent domain reform.

Funding restrictions like the Bond Amendment will only be effective if there exists a procedure for enforcement, so any reform must also include a mechanism by which the economic development funding for the state or local government can be stopped. Part of this procedure should be a private method of enforcement, whether through an agency or court, so that the home owners, small business owners, or tenants who are threatened by the abuse of eminent domain (as well as other interested parties such as local taxpayers), can alert the proper entity and funding can be cut off as appropriate. The diligence of ordinary citizens in the communities where governments are using eminent domain for private development, together with the

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[6] The Bond Amendment first appeared as § 726 of the FY 2006 appropriations bill that was signed into law by President Bush on November 30, 2005. *See* Pub. L. No. 109-115, § 726, 119 Stat 2396 (2005).

[7] *See* Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, H. R. 2577, 114th Cong. § 407 (2015), https://www.congress.gov/bill/114th-congress/house-bill/2577/text.

potential sanction of lost federal funding, will most certainly serve to return some sense to state and local eminent domain policy.

Federal funding restrictions that prohibit eminent domain abuse can still allow cities and agencies to continue to receive federal funding when they acquire abandoned property and transfer it to private parties. When the public thinks about "redevelopment," it is most concerned with the ability to deal with abandoned property. With such legislation, cities can continue to clear title to abandoned property and then promote private development there without risking losing their federal funding. Similarly, it may also be useful to have a clear and strictly limited exception for the exercise of eminent domain to remove "harmful uses of land provided such uses constitute an immediate threat to public health and safety" in order to discourage local governments from taking perfectly fine homes and businesses as is common practice under some state's vague blight laws.

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

It should also be noted that development occurs every day across the country without eminent domain and will continue to do so should this committee act on this issue, which I recommend. Public works projects like flood control will not be affected by any legislation that properly restricts eminent domain to its traditional uses since those projects are plainly public uses. But commercial developers everywhere need to be told that they can only obtain property through private negotiation, not government force and that the federal government will not be a party to private-to-private transfers of property. As we demonstrated in a 2008 study, restricting eminent domain to its traditional public use in no ways harms economic growth.[8]

Conclusion

Congress should not be sending scarce economic development funds to projects that abuse eminent domain and strip hard-working, tax-paying home and small business owners of their constitutional rights, particularly when these projects may ultimately fail. Let New London be a lesson: After $80 million in taxpayer money spent, years tied up in litigation and ten years after the disastrous U.S. Supreme Court ruling, the Fort Trumbull neighborhood where Susette Kelo's little pink house once stood is now a barren field that is home to nothing but feral cats. The developer balked and abandoned the project. Pfizer—the intended beneficiary of the project—closed its plant and left New London.

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[8] *See* Institute for Justice, *Doomsday? No Way: Economic Trends and Post-*Kelo *Eminent Domain Reform*, Jan. 2008, http://ij.org/1618; *see also* Dick M. Carpenter & John K. Ross, *Do Restrictions on Eminent Domain Harm Economic Development?*, Economic Development Quarterly, Nov. 2010, Vol. 24, No,. 4, 337-351, http://edq.sagepub.com/content/24/4/337.short.

Eminent domain sounds like an abstract issue, but it affects real people. Real people lose the homes they love and watch as they are replaced with luxury condominiums. Real people lose the businesses they count on to put food on the table and watch as they are replaced with shopping malls. And all this happens because local governments prefer the taxes generated by condos and malls to modest homes and small businesses. Federal law currently allows expending federal funds to support condemnations for the benefit of private developers. By doing so, it encourages this abuse. Using eminent domain so that another richer, better-connected person may live or work on the land you used to own tells Americans that their hopes, dreams and hard work do not matter as much as money and political influence. The use of eminent domain for private development has no place in a country built on traditions of independence, hard work, and the protection of property rights.

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

Mr. FRANKS. Thank you, sir.

Mr. Groen, am I pronouncing your name correctly, sir.

Mr. GROEN. You have done it very well.

Mr. FRANKS. All right. Make sure that microphone is on, sir.

TESTIMONY OF JOHN M. GROEN, PRINCIPAL ATTORNEY, PACIFIC LEGAL FOUNDATION

Mr. GROEN. Chairman Franks, honorable Members, thank you for the opportunity to be here and to provide testimony to you on this important subject.

My name is John Groen. I am an attorney with Pacific Legal Foundation, as you know, a nonprofit public interest law firm, but my background really is as a litigator. I'm an attorney that works in the trenches, arguing these cases.

Justice Ginsburg wrote a few years ago in the Arkansas Fish and Game case that there is "nearly an infinite variety of ways" that government interference can result in a taking. Whether we're dealing with wetlands regulation under the Clean Water Act or spotted owl protection under the Endangered Species Act or conversion of abandoned rail lines into public hiking trails under Rails-to-Trails, all of those scenarios and so many more all impact thousands of property owners in an infinite variety of ways. And the result is that takings claims are not going away.

And this is not because those laws or other laws of local and State governments are bad policy, but it's because we cannot overlook what Justice Holmes reminded us, that we cannot achieve the public good through a shorter cut than the constitutional way of paying for the change. That's what it is about. That is why the Takings Clause is there, to provide that balance of protection between the power of government and the need to protect individual rights and property. And so the Takings Clause and your focus on it is critical.

I have been asked to address issues other than *Kelo*, and in my paper I get into a variety of issues dealing with regulatory takings. And I'm going to focus on one in particular, and that is what we call the relevant parcel issue.

In takings law, and I've given you a brief background in my materials, there's a number of tests that are applied by lawyers and courts, and ultimately we are primarily dealing with what we call the Penn Central multifactor takings analysis. Basically, the attorneys on both sides will marshal all of the facts that they can, all the relevant circumstances, the factors that are discussed by the U.S. Supreme Court, marshal those together and try to show how in fairness and justice the burden of that regulation should be borne by the public as a whole.

And I appreciated the quotation from Chairman Goodlatte from *Armstrong v. United States* that it is about this shift in the burden. That is what the Takings Clause is meant to protect. Who should bear that burden, the individual, or is it something that in fairness and justice ought to be borne by the public as a whole? That's the whole Penn Central claim. We also have the Lucas style claim, a categorical taking, where there is a denial of all economically viable use, and you go in a court, you try to prove that up.

Well, in both of those scenarios what is happening is you have to analyze the economic impact of the governmental interference. So the question is, well, what property interests do you measure the private loss against? And the answer that is always provided is, well, you measure it against the parcel as a whole. And that simply begs the question, what is the parcel as a whole?

The Supreme Court has not answered that question, and the lower courts are in disarray. The Supreme Court has made it clear that the rhetorical force of that language is less precise than its application.

So let me tell you about a family in Wisconsin. This is the Murr family. And I provide some detail in my materials. But basically, in 1960 the parents bought a parcel on the St. Croix River, and this was a subdivision, over an acre, they built a cabin. They liked it so much, the family had such a good time, they bought another parcel right next door and they hung onto it for investment purposes.

In the 1970's the regulations changed, and while all the other parcels have been developed, they still had their vacant parcel. But now, under the new regulations, that parcel is considered substandard. There is still a half-acre available for development, but under the new regulations there has to be a full acre available for development and that's not allowed under these regulations.

So what has happened? They applied for their permits, they were denied, brought their suit for a takings claim, and the Wisconsin Supreme Court has now ruled that because the Murrs own two parcels, side by side, they have common ownership, the parcel as a whole must be both parcels, rather than the two separate, discrete parcels, each bought as regular subdivision lots. The Wisconsin court said that there is a rule that a contiguous property owner under common ownership is considered as a whole, regardless of the number of parcels contained.

That strikes right at the concept of fairness and justice. And Pacific Legal Foundation is trying to get that case before the United States Supreme Court in a petition in August and to propose the rule that I provided in the materials from John Fee on how to address this parcel as a whole concept, which destroys many valid regulatory takings claims.

Thank you.

[The testimony of Mr. Groen follows:]

July 9, 2015
Hearing on
"The State of Property Rights In America Ten Years After *Kelo v. City of New London*"

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

Statement
by
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I. Introduction

Chairman Goodlatte, and honorable committee members, as an attorney with the Pacific Legal Foundation, a nonprofit, public interest organization dedicated to the protection of individual liberties and private property rights, I thank you for this opportunity to provide comments concerning property rights in America.

I have been asked to identify and discuss key legal issues concerning the regulatory takings doctrine of the Fifth Amendment. While there are numerous legal controversies that could be discussed, my focus here will be on two key issues that are high priority for Pacific Legal Foundation, and which have broad impact on the constitutional protection of citizens' private property rights.

At the outset, takings claims arise in a "nearly infinite variety of ways." *Arkansas Fish and Game Commission v. United States*, 133 S. Ct. 511, 518 (2012). Certainly the Clean Water Act and its regulation of wetlands on private land has produced many takings claims and is a prime source of conflict between landowners and the federal government. This is why the recent efforts to redefine "waters of the United States" so as to greatly expand regulatory jurisdiction is important to many Americans. On this subject, Pacific Legal Foundation attorney M. Reed Hopper provided testimony and substantial written comments on February 4, 2015 at the Joint Hearing on "Impacts of the Proposed Waters of the United States Rule on Local and State Governments," United States House of Representatives Committee on Transportation and Infrastructure, and the United States Senate Committee on Environment and Public Works.[1]

For purposes here, my role is to help identify how the rules in the takings analysis are applied by the courts. In the limited time, I will draw attention to several examples of American citizens who have experienced the tremendous difficulties and legal obstacles that often preclude realizing the constitutional protection of just compensation. Quite simply, pursuing and winning a takings claim is not easy.

> We have recognized, however, **no magic formula** enables a court to judge, in every case, whether a given governmental interference with property is a taking. In view of the **nearly infinite variety of ways** in which government actions or regulations can affect property interests, the Court has recognized **few invariable rules** in

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[1]In addition to development of Takings Clause jurisprudence, PLF has been heavily involved in litigation defining the scope of federal jurisdiction under the Clean Water Act, and its attorneys were counsel of record in *Rapanos v. United States*, 547 U.S. 715 (2006) and *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012). Although these comments will not directly address Clean Water Act issues, regulation of wetlands has been an arena that has resulted in severe impact on property owners and resulted in regulatory takings under the principles discussed here.

this area.

Arkansas Fish and Game Commission, 133 S. Ct. At 518 (emphasis added).

Pacific Legal Foundation has long been in the forefront of litigation defending private property rights, and has been involved in most of the Supreme Court land use cases addressing the Takings Clause since *Agins v. City of Tiburon*, 447 U.S. 255 (1980). PLF's attorneys were counsel of record in key precedent setting cases, including the landmark decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and subsequently, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (subsequent purchasers may bring takings claim resulting from already existing regulations); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) (takings claim ripe for judicial review), and *Koontz v. St. John's River Water Management District*, 133 S. Ct. 2586 (2013) (the *Nollan* unconstitutional conditions doctrine applies to monetary exactions as well as exactions of land).

These comments will first briefly identify the basic principles and analytical framework of a regulatory takings claim under the Supreme Court's precedents. The comments will then shift to specific areas of concern, using several examples to highlight how these difficult legal doctrines have very clear and direct impacts on the lives of everyday citizens.

II. A Very Brief Overview of the Regulatory Takings Analysis

The Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." While *Kelo v. City of New London* is concerned with the scope of government power to take private property through direct condemnation for "public use," takings of private property also result from regulatory actions of government. The regulatory takings doctrine is founded on the principle that the impact of an otherwise valid police power regulation may go "too far" so that fairness and justice require compensation to the landowner. The general rule was set in 1922 in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922) where Justice Holmes explained that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Id.* at 415.

A. *Penn Central* Multi-Factor Analysis of a Taking

Ever since *Pennsylvania Coal*, the struggle has been to determine when a regulation "goes too far" and triggers the command of just compensation. The United States Supreme has repeatedly recognized that there is no "set formula" for determining when a regulation goes too far, and instead the takings analysis turns on the "particular facts" of the case. *Penn Central Transporation Co. v. New York*, 438 U.S. 104, 123-24 (1978). This *ad hoc*, factual inquiry is guided by fairness and justice. As stated in *Armstrong v. United States*, 364 U.S. 40, 49 (1960),

> The Fifth Amendment's guarantee ... was designed to bar Government from forcing some people alone to bear public burdens which, in all

fairness and justice, should be borne by the public as a whole.

While there is no "set formula" for analyzing a *Penn Central* taking, the Supreme Court has recognized that factors of particular significance are (1) the extent of economic impact on the owner, (2) the degree of interference with reasonable investment backed expectations, and (3) the character of the government action. *Penn Central*, 438 U.S. at 124. These factors are not exclusive, but are the core considerations in the multi-factor analysis. Ultimately, what is required is a "careful examination and weighing of **all** the **relevant circumstances**." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) quoting *Palazzolo*, 533 U.S. at 636 (emphasis added) (O'Connor, J., concurring).

The *Penn Central* multi-factor analysis has emerged as the primary basis for determination of a taking. Obviously, this means it is very difficult for both landowners and government agencies to predict with certainty whether a taking will be found if a matter goes to litigation. Ultimately, the particular facts of the case must be considered in light of the guiding principle of fairness and justice for whether the individual alone, or the public as a whole, should bear the economic burden of the regulation.

B. Categorical Taking Based on Physical Invasion

While the *Penn Central* factual inquiry is the key analysis of a regulatory taking claim, there are two situations that the Supreme Court has established a definite rule for liability. One of these is a taking based on government authorized physical occupation. Although occurring much less frequently than a *Penn Central* claim, the Supreme Court has recognized that a *per se,* or categorical, taking occurs when a regulation authorizes an actual physical invasion or occupation of private property. *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982) (installation of cable equipment on the side of a private building); *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (physical invasion takings occur where government "requires the landowner to submit to the physical occupation").

In these cases, the degree of physical invasion has little bearing on whether a taking occurs. For example, in *Loretto*, the government authorized invasion was nothing more than installation of a thin cable and two boxes on a building. Regardless of the extent of invasion, an owner has a right to exclude others and, when abridged, is entitled to compensation.

The recent Supreme Court decision in *Horne v. Department of Agriculture*, decided June 22, 2015, is an example of such a categorical taking. In that case, the Agricultural Marketing Agreement Act of 1937 required that a percentage of raisin growers' crops be physically set aside and sold or otherwise disposed of by the Government, without any compensation to the private growers. The Court ruled this was a "clear physical taking." Slip op. at 8. Of particular significance, the Court ruled that the protection of the Takings Clause applies to both real and personal property. As stated by the Court: "It protects 'private property' without any distinction between different types." Slip op. at 5. Accordingly, the fact that the subject of the taking was

raisins, rather than land, was of no consequence.

C. Categorical Taking For Denial of All Economically Viable Use

Like government authorized physical invasions, a "categorical" taking also occurs where a regulation denies *all economically viable use* of private property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 103, 1015 (1992) (emphasis added). A landowner will often be tempted to pursue a taking based on "denial of all economically viable use," but this can be a difficult test to meet, especially in light of the "relevant parcel" issue that will be discussed below. Because of the high bar of showing a denial of all economic use, many litigants will ultimately pursue the taking claim under the *Penn Central* multi-factor analysis where the economic impact is but one fact, among many, that will be considered in the takings determination.

Although *Lucas* at times implies that this categorical test requires a complete elimination of value (*Lucas*, 505 U.S. at 1019 n.8), the decision otherwise emphasizes that a taking under the "economically viable use" test does not require the property to be rendered valueless. Rather, it involves an analysis of the uses allowed under the regulation and whether they are economically productive, economically beneficial, economically feasible, or viable. *Id.* at 1016-19. The Court stressed that its "prior takings cases evince an abiding concern for the productive use of, and economic investment in, land. *Id.* at 1019 n. 8.

> [W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property *economically idle*, he has suffered a taking.

Id. at 1019 (emphasis added). See also *Pennsylvania Coal*, 260 U.S. at 414 (coal mining rendered "commercially impracticable"); *Florida Rock Industries, Inc. v. United States*, 18 F. 3d 1560, 1571 (Fed. Cir. 1994) ("are alternative permitted activities economically realistic in light of the setting and circumstance, and are they realistically available").

Because the facts in *Lucas* included a complete elimination of all value, there has been disagreement as to whether the categorical rule is limited to situations where the regulation renders the property valueless. Of course, that would be a very narrow rule because virtually all property will retain some residual value, even where it has no viable economic use. A recent decision of the United States Court of Appeals for the Federal Circuit provides some clarification on this point In *Lost Tree Village Corporation v. United States*, __ F.3d __ (June 1, 2015) the Federal Circuit ruled that the existence of some residual land value that is derived from noneconomic uses does not preclude the *Lucas* categorical rule. Slip op. at 4 - 7.

> The government argues that this court's precedent characterizes *Lucas* as applying only in the narrow circumstance in which all value, regardless of source, has been lost. We disagree. ... When

> there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land. Typical economic uses enable a landowner to derive benefits from land ownership ... We affirm the trial court's holding that the government's permit denial constituted a per se regulatory taking under *Lucas* because Plat 57's residual value is not attributable to any economic uses.

Id. (emphasis by the court).

In summary, even where there might be some residual value in a parcel, the *Lucas* categorical rule applies if the regulation denies all economically viable uses, and any residual value is not derived from an economic use. If there is not a taking under this rule, the court may still find a taking under the *Penn Central* ad hoc, factual inquiry.

D. Unconstitutional conditions doctrine

In the land use context, the protection afforded by the unconstitutional conditions doctrine has been significantly clarified by the Supreme Court. The doctrine was applied in the seminal cases *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). More recently, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) and *Koontz v. St. John's River Water Management District*, 133 S.Ct. 2586 (2013) the role of the doctrine was more sharply defined. The Supreme Court has recognized that these decisions "provide important protection against the misuse of the power of land-use regulation." *Id.* at 2591. The Court recognized the reality that "land-use applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits." *Id.* at 2594.

Under this doctrine, government may not use the permitting authority to coerce applicants to give up constitutional rights in order to secure a permit.

> [T]he government may not require a person to give up a constitutional right–here the right to receive just compensation when property is taken for a public use–in exchange for a discretionary benefit conferred by government.

Lingle, 544 U.S. at 547 (quoting *Dolan*, 512 U.S. at 385). Accordingly, when government conditions its permit-approval on an exaction of some protected property interest, the exaction must bear an "essential nexus" to mitigating an adverse impact of the proposed project. *Nollan*, 483 U.S. at 837. In addition, the exaction must be "roughly proportional ... both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at. 391. See generally *Lingle*, 544 U.S. at 546-47 and *Koontz*, 133 S.Ct. at 2595.

III. Two Key Issues in Today's Regulatory Takings Jurisprudence

A. The Relevant Parcel Issue

In applying either the *Penn Central* multi-factor takings analysis, or the *Lucas* categorical taking for a denial of all economically viable use, the court is required to first determine the relevant parcel of land that is subject to the regulatory takings analysis. This is not always an easy task, and has been the source of much litigation. As stated in *Lucas*, "Regrettably, the rhetorical force of our 'deprivation of all economically feasible use rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Lucas*, 505 U.S. at 1016 n.7.

> When, for example, a regulation requires a developer to leave 90 % of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. ... Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

Id.

The general rule has long been stated that a court is to consider "the parcel as a whole." *Penn Central*, 438 U.S. at 130-31. But this begs the question. What is the whole parcel? And to this question, the Court has not provided an answer. See John E. Fee, Unearthing the Denominator in Regulatory Taking Claims, 61 U. Chi L. Rev. 1535, 1542 (1994) ("The Court has not articulated a method for defining the 'parcel as a whole.").

Of course, how the relevant parcel is defined is often the key to determining a taking. Landowners want to define the parcel narrowly, focusing on the portion or interest that is subject to the regulation. Government tends to define the parcel broadly to show that the landowner has not been denied all economic use of all of the private land.

The issue is best understood by considering two examples being litigated today.

1. *Murr v. State of Wisconsin and St. Croix County*, 359 Wis.2d 675 (2014)

The plaintiffs in this case are a typical American family. They are Donna Murr, and her siblings Joseph Murr, Michael Murr, and Peggy Heaver. In 1960, their parents purchased a 1.25 acre waterfront lot in a large subdivision on the St. Croix River and built a family recreation cabin. They placed title to the parcel in their private plumbing company.

In 1963, the parents purchased the adjacent Lot E. This was a separate purchase of a discrete and legal lot that was also created by the St. Croix Cove subdivision. That lot, also 1.25

acres, has remained vacant and was held for investment purposes.

In the mid-1970s, new land use regulations limited the development to the "net project area" that was remaining after subtracting slope preservation zones, floodplains, road rights of way and wetlands. The two lots contain approximately .48 and .50 acres of net project area.

Under the regulations, both of these lots purchased by the Murrs parents are now treated as "substandard" because they each have less than one acre of "net project area." However, the regulations also have a "grandfather clause" that allows development of substandard lots that existed as "lots of record" prior to adoption of the new regulations in 1976. This makes sense and has allowed almost all of the lots in the subdivision to be developed because they all pre-dated the new regulations.

Sounds fine so far. But here is the kicker. The grandfather clause allowing development is only allowed for lots that are in separate ownership from abutting lands. But the Murrs' parents in 1994 transferred title in Lot F from the plumbing company to their children, and in 1995 they transferred Lot E to their children. The adjoining lots were therefore under common ownership.

Because of the common ownership of the adjoining lots, the lots were forced to merge and neither can be sold or developed as a separate parcel. If the properties were not under common ownership, each would be able to be separately developed because they were pre-existing lots of record.

After being denied variances and special exceptions, the Murr siblings brought a claim for a regulatory taking of their property. On December 23, 2014, the Court of Appeals of Wisconsin held that the relevant parcel for applying the takings analysis was the "parcel as a whole" which the Court ruled was **both parcels combined together**, rather than each discrete and separate parcel. The Wisconsin court rejected the takings claim by proclaiming a "rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein."

Of course, once the "parcel as a whole" is defined to be both contiguous parcels, the Murrs clearly have substantial economic use remaining because they have an existing recreational cabin on one lot. This problem with defining the parcel as a whole to include adjoining lots in common ownership is recurring throughout the country. It arises in multiple contexts, from agricultural operations concerning multiple separate tracts, to the typical American family such as the Murrs.

Pacific Legal Foundation has agreed to represent the Murrs and in August 2015 will be filing a petition for writ of certiorari to the Supreme Court of the United States.

2. *Kinderace v. City of Sammamish*

This case presents the "relevant parcel" question in an entirely different context than the Murrs. Here, Kinderace is a developer who wanted to build a pizza restaurant on Parcel 9032, in the City of Sammamish, Washington. The property is in a major commercial area, situated on a busy arterial, and is surrounded by other development including a bank, a Starbucks, and a City owned storm water facility.

Parcel 9032 is approximately 3/4 acre in size and is completely encumbered by wetlands and stream critical area buffers, leaving only 83 square feet along the southern boundary available for development. A small creek (George Davis Creek) cuts diagonally through the entirely of Parcel 9032. The City concedes that under new critical area buffers, all economically viable use is precluded, thus apparently meeting the *Lucas* test for a categorical taking. After all, the entire Parcel 9032 is completely precluded from any economic development. But there is more to the story.

In 2003, Kinderace was also developing the adjoining Parcel 9058 with a KFC fast food outlet and a day care facility. The developers realized that a storm water pond would be required for the proposed development. Accordingly, they purchased Parcel 9032 with the intent that the area to the **north** of George Davis Creek would serve well as an area for the storm water pond. At that time, the buffer from the creek was 25 feet on each side, thereby leaving enough room on the north side for the pond.

When they purchased Parcel 9032, the developers knew that George Davis Creek precluded a single development that encompassed both sides of the creek. Accordingly, from the beginning, the plan was to utilize the north portion for the detention pond to serve Parcel 9058, and retain the large area **south** of the creek for future development. Consistent with that plan, the developers requested and secured approval from the City for a boundary line adjustment so that the area north of the creek became included as part of Parcel 9058. The area south of the creek was retained for future development as Parcel 9032.

The KFC outlet and daycare were approved and constructed. At that time, the substantial area south of the 25 foot buffer remained available for development.

Unfortunately, in 2006, the City adopted new restrictions that greatly expanded environmentally critical area buffer requirements. As a result, the entire area south of the creek is now precluded from development except for the 83 square foot sliver of land.

Kinderace sought and was denied a reasonable use exception to allow development of the pizza restaurant on Parcel 9032. In rejecting Kinderace's subsequent takings claim, the trial court concluded that the relevant parcel for takings analysis purposes is Parcel 9032 combined with the adjacent Parcel 9058. Of course, because Parcel 9058 is developed with commercial buildings, there was no taking of the "parcel as a whole," as that was defined by the trial court.

The Kinderace facts therefore present a recurring issue facing property owners in all types of similar contexts. Parcel 9032 is a discrete and separate parcel that, absent the severe buffers, would have independent economic viability. Nevertheless, the use of a portion of the property for a detention pond to serve Parcel 9058 gave the trial court a basis to conclude that the "parcel as a whole" must be this larger unit combined.

The case is now on appeal to the Washington Court of Appeals, and PLF is providing the representation in the appellate proceedings. PLF will contend that the better rule is that proposed by John Fee.

> The regulatory taking inquiry should instead focus on whether the property interest proposed to have been taken is in fact substantial enough to warrant Fifth Amendment protection as an independent bundle of rights.
>
> ...
>
> [A]ny identifiable segment of land is a parcel for purposes of regulatory takings analysis if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding land segments.

Fee, 61 U. Chi L. Rev. at 1557.

Under this proposed rule, the relevant parcel depends on the ability to make independent economic use of the regulated portion. This is consistent with the purpose of the Fifth Amendment to protect rights in property, while also precluding takings claims of areas set aside by setbacks and buffers where that restricted area otherwise does not have independent economic use. In the *Kinderace* example, but for the extreme buffers, Parcel 9032 obviously had independent economic use available for use as a pizza restaurant.

In evaluating government regulations, particularly in the context of imposing new and broad reaching environmental buffers, the relevant parcel issue will continue to present significant legal problems for property owners and government. All effort should be made to limit buffers and similar restrictions so that economic viability is not eliminated for private owners. Pacific Legal Foundation will continue its efforts to seek precedent from the Supreme Court that provides more a more protective approach for property owners beyond the general statement of considering the "parcel as a whole."

B. *Williamson County* Ripeness Requirement To Seek State Remedies

The ripeness doctrine in regulatory takings law has been a barrier for landowners seeking to protect their constitutional rights in federal court. This stems from the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). The Court there established that before a takings claim is ripe in federal court, compensation must first be pursued in state court through the procedures available

under state law.

Because of *Williamson County*, a plaintiff may not simultaneously file a claim pursuant to state remedies in state court while also seeking compensation under the Takings Clause in federal court. *Sansotta v. Town of Nags Head*, 724 F.3d 533, (4th Cir. 2013). However, a plaintiff may seek state law remedies in state court and include the federal takings claim in that same case, as long as state law remedies are being pursued. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 346 (2005).

This background provided the strategy employed by the government in many cases of removing the federal takings claim to federal court, and then seeking dismissal of that claim based on ripeness. But the Fourth Circuit in *Sansotta* did not succumb to that devious strategy.

> Here, the owners did exactly what *San Remo* permits: they filed both their takings claims and their inverse condemnation claim, see N.C. Gen Stat. 40A - 51, in state court. The town then removed the case to federal court as it was permitted to do... because the complaint raised a question of federal law. The town then invoked the *Williamson County* state litigation requirement and asserted the Owner's taking claim was unripe.

Sansotta, 724, F.3d at 544-45. The Fourth Circuit continued:

> Because *Williamson County* is a prudential rather than a jurisdictional rule, we may determine in some instances, the rule should not apply and we still have the power to decide the case. This case is such an instance.

Id. at 545.

Unfortunately, not all federal courts have received the message. In *Perfect Puppy, Inc. v. City of East Providence*, __ F. Supp. 3d __ (March 31, 2015), the District Court dismissed the federal takings claim after removal from state court. Slip op. at 7. The case is proceeding on appeal to the First Circuit. Representation is being provided by Pacific Legal Foundation in an effort to apply the *Sansotta* decision to the First Circuit, or alternatively, to ultimately have the issue determined by the Supreme Court.

The ripeness rule illustrates one of the many issues facing litigants seeking to protect their federal constitutional rights. In an ongoing effort concerning these and other issues, Pacific Legal Foundation appreciates the interest and concern of this committee.

Mr. FRANKS. Thank you, Mr. Groen.

I would now recognize our third witness, Mr. Echeverria.

Is that the correct pronunciation?

Mr. ECHEVERRIA. That's correct.

Mr. FRANKS. And make sure you have got your microphone on, sir.

TESTIMONY OF JOHN D. ECHEVERRIA, PROFESSOR OF LAW, VERMONT LAW SCHOOL

Mr. ECHEVERRIA. Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, thank you for the opportunity to testify today. As the Chairman mentioned, I'm a professor of law at Vermont Law School, where I teach property, including the law of takings. And I have frequently written on the topic of takings and property rights. I have had the privilege of representing parties and amici curiae in takings cases at all levels of the Federal and State court systems. I am honored to be here today.

In the interest of time, I will confine my remarks to the eminent domain issue, but I will be happy to address any questions you may have about regulatory takings during the Q&A.

Congress has so far refrained from adopting one-size-fits-all national legislation governing the use of eminent domain for economic development. I submit to you that Congress should mark the 10th anniversary of the *Kelo* decision by maintaining that wise course.

The judicious use of eminent domain is essential for overcoming the holdout problem that impedes important redevelopment activity. In older communities, the division of land ownership into smaller parcels prevents the assembly of useful, economically viable redevelopment areas through voluntary market transactions. Without eminent domain, a few individual owners can derail redevelopment projects by refusing to sell at any price or by seeking an judicial windfall.

In my view, the Supreme Court in the *Kelo* case wisely refused to embrace novel interpretations of the public use requirement of the Takings Clause that would have made it harder for State and local governments to address the holdout problem. Not only is the *Kelo* decision good legal policy, but it is consistent with over 100 years of U.S. Supreme Court precedent interpreting the meaning of the phrase "public use," and therefore, contrary to what you've heard previously this afternoon, it is in my view a model of traditional restraint.

Today, 10 years after the *Kelo* decision, the case for Congress not proceeding with national eminent domain legislation has only gotten stronger. While the *Kelo* decision upheld the use of eminent domain for economic development, the court recognized "that the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate."

The court, in effect, invited the States to consider imposing their own State-level restrictions on the use of eminent domain, and the States have responded to that invitation with great enthusiasm. Over 40 States have adopted different types of reform legislation. A number of States have also adopted through their judiciaries new restrictive interpretations of the public use requirements in their own takings clauses.

Naturally, given the diversity of our States, the States have adopted very different approaches to the issue of reforming the use of eminent domain in the aftermath of *Kelo*. I noted in the testimony of the first witness that he observes that every single State that has addressed the *Kelo* question has addressed it in a different fashion. In other words, we have over 40 distinctive approaches to *Kelo* reform in the State legislatures.

In my view, it would be both unwise and destructive for Congress to pass legislation contradicting all this good work in the States. Not only have the States acted, but they have acted in a wide variety of different ways that reflect the specific values, interests, and redevelopment challenges in the individual States. New Mexico, to pick one example, has essentially abolished the use of eminent domain to promote economic development. New York, by contrast, has declined to do that. And in between those two positions many other States have adopted a wide variety of other reform approaches.

National legislation would trump all this State lawmaking activity, wasting all this State effort and overriding the considered judgements of elected State officials about what uses of eminent domain are appropriate in their States. Lawmakers in Washington, D.C., would improperly substitute their wisdom for that of the leaders of the States, the laboratories of democracy, by passing national legislation addressing the use of eminent domain at the local level.

For all these reasons, I respectfully submit that Congress should continue to stay its hand on the eminent domain issue.

Thank you again for the opportunity to testify. And as I said at the outset, I would be happy to respond to any questions, including any questions about the regulatory takings issue. Thank you.

[The testimony of Mr. Echeverria follows:]

Testimony of John D. Echeverria
Professor of Law
Vermont Law School

Before the Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
United States House of Representatives

Hearing on "The State of Property Rights in America Ten Years After Kelo v. City of New London"

July 9, 2015

Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, thank you for the opportunity to testify today. I am honored by the invitation.

Introduction

The subject of this hearing is plainly very broad and I could address a variety of topics in the time allotted to me. I believe I can probably be most useful to the Subcommittee by commenting on pending and potential takings-related legislation in this Congress.

By way of background, I am a Professor at Vermont Law School, where I teach property law, including the law of takings, and frequently write on the topic of takings and property rights. I have had the privilege to represent parties as well as *amici curiae* in many of the modern takings cases before the U.S. Supreme Court. In *Kelo*, I (along with Professor Thomas Merrill) represented the American Planning Association and the Congress for Community Economic Development as *amici curiae*. In 2007, based largely on my takings work, I received the Jefferson Fordham Advocacy Award from the ABA Section on State on Local Government to recognize outstanding excellence within the area of state and local government law over a lifetime of achievement.

Kelo and Eminent Domain

In the decade since the *Kelo* case was decided, the House of Representatives has several times debated and passed bills to impose severe restrictions on the use of eminent domain for economic development. Each time the House has passed this legislation, the Senate has declined to move forward with it. One question implicitly raised by the convening of this hearing is whether the House should once again invest valuable time and effort on a similar legislative effort. In my view, the case for congressional intervention in the *Kelo* was weak to begin with. With the passage of time, the argument for Congress *not* to inject itself into this issue has only become stronger.

Eminent domain is obviously an important governmental power the exercise of which (even when accompanied by "just compensation," as mandated by the Constitution) can severely intrude on the personal lives of citizens and the operations of private businesses. Yet the eminent domain power is as old as the Republic and is essential to achieve many important public objectives. While virtually everyone would prefer that the government not take private property (just like everyone would prefer not to have to pay taxes to the government) the judicious use of eminent domain is a useful, indeed essential, tool for promoting the nation's long term economic health and vitality.

It has long been recognized that the use of the eminent domain power to seize private property is both lawful and appropriate to advance the nation's war efforts and address other national emergencies. Thus, the U.S. Supreme Court upheld government seizure of a private coal mine in order to keep the mine operating at the height of World War II. *See United States v.*

Pewee Coal Co., 341 U.S. 114 (1951). *See also United States v. General Motors Corp.*, 384 U.S. 127 (1966) (applying the eminent domain provisions of the Second War Powers Act of March 27, 1942). In addition, in an example that is somewhat analogous to the kind of government-compelled private-to-private transfers at issue in *Kelo*, the Supreme Court upheld a government order during World War I requiring a private firm holding water rights used to generate electricity to transfer the water rights to a second private firm. *See International Paper Co. v. United States*, 282 U.S. 399 (1931). The Court upheld this compelled transfer as a legitimate taking for "public use" because the second firm could make better use of the electricity produced by the water to help mobilize the nation for war.

Second, the use of eminent domain has long been understood as essential to address the so-called holdout problem. The holdout problem is perhaps most obvious in the context of major infrastructure projects, such as interstate natural gas pipelines, electric transmission lines, or interstate highways. A long linear project of this type, whether owned and operated by the government or by a private firm, cannot succeed if the project developer has to obtain the voluntary agreement of each and every property owner to sell or grant a right-of-way across the portions of their lands affected by the project. In the absence of the eminent domain power, individual property owners would frequently if not inevitably derail such projects because one or a few owners would prefer not to sell (at any price) or because they would demand too much in the hope of obtaining a financial windfall. Thus, the federal Natural Gas Act has long granted operators of interstate gas pipelines the authority to exercise eminent domain in order to secure rights of ways across private property for their pipelines. State laws grant broad authority for the assembly of corridors for the construction of electric transmission lines. Finally, the eminent domain power was obviously used very extensively to construct the nation's interstate highway system.

There is no gainsaying the fact that many thousands of families, farmers and businesses have been involuntarily displaced from their properties in order to construct these types of facilities, particularly interstate highways. In some instances, the use of the eminent domain power and the other effects of highway construction generated so much public opposition that certain limited segments of the interstate system were never completed. But the United States still succeeded in creating a modern highway system and many, probably the overwhelming majority of U.S. citizens are proud of the fact that the U.S., like every other economically advanced country in the world, has a modern, efficient highway transportation system. One cannot embrace or even accept the benefits of our modern highway system, which many of us use on daily basis, without acknowledging the essential role the eminent domain power played in bringing that system into existence.

The same holdout problem that afflicts infrastructure projects also commonly afflicts redevelopment projects of the kind at issue in the *Kelo* case. A major, often insuperable obstacle to revitalization of American cities and its older suburbs is the severe fractionation of land ownership among many different owners. In many urbanized communities, old land use

practices have left multiple small, sometimes irregularly shaped, lots that free market forces cannot reassemble into larger property holdings suitable for modern development projects. A private entrepreneur can seek to redevelop deteriorated neighborhoods, but her efforts will often be thwarted by individual landowners who do not wish to sell or who hold out for a windfall profit. As a practical matter, just as the use of eminent domain has proven necessary to facilitate modern infrastructure development, it is also necessary to facilitate urban revitalization.

One response by private property rights advocates to the holdout problem is to contend that developers can and should proceed to assemble disparate properties under a shroud of secrecy. According to this theory, if a developer could succeed in negotiating purchases without alerting owners in the community to his land assembly plan, individual owners would not be able to hold out in the hope of receiving windfall gains, and land could successfully be assembled at reasonable cost. In my view, this response to the holdout problem fails miserably. First, while there are examples where developers (particularly in rural areas) have managed to assemble relatively large parcels in secret, there is a serious risk that a secret land assembly plan will be detected, meaning that significant time and effort invested in assembling land could be wasted if prospective sellers become aware of project before the land assembly has been completed. Second, and more importantly, the idea that developers should proceed with major steps toward development while keeping the landowners and the surrounding community completely in the dark is fundamentally inconsistent with democratic government. People can and do disagree on the proper balance between private property rights and the rights of citizens to comment on and control development affecting their community. But most people recognize that the public should have *some* opportunity to comment on proposed developments in their neighborhoods. The secrecy tactic would severely undermine public input on important development projects. By contrast, a public eminent domain proceeding is a relatively open and transparent process.

Examples of the use of eminent domain to overcome property fractionation and promote valuable downtown development abound. Attached to my testimony are copies of several pages from a 2006 report I coauthored titled "*Kelo's Unanswered Questions*," which graphically illustrate how divided property ownership can be an obstacle to valuable development. A few examples of highly successful development projects in the United States made possible by the use of eminent domain include Lincoln Center and the recently refurbished 42nd Street district in New York City, Baltimore's inner harbor area, and the National's baseball stadium a few blocks down the hill from the U.S. Capitol. Another pending project which depends on the use of eminent domain is the planned Skyland Mall in the Anacostia neighborhood of this city; there is enthusiastic community support for this project, which will bring valuable new shopping opportunities to a community that is currently badly underserved with commercial development.

Congress should not intervene in the *Kelo* issue by attempting to impose national, one-size-fits-all constraints on the use of eminent domain for economic development. The Supreme Court in *Kelo*, it bears emphasis, upheld the constitutionality of the use of eminent domain for economic development. While different observers obviously can and do take different positions

on the question, I believe *Kelo* was correctly decided based on the language of the Takings Clause and the limited historical evidence we have about the original purpose of this provision of the Bill of Rights. In addition, the decision was consistent with over a hundred years of Supreme Court precedent defining a taking of private property for "public use." Importantly, the Supreme Court in *Kelo* did not suggest that use of the eminent domain is beyond all judicial control in egregious circumstances, in particular when the asserted public purpose of a taking is a mere "pretext" to benefit some private individual or firm. But, in the main, the Court reaffirmed its traditional deferential stance, recognizing that the determination of whether a proposed taking serves a public use should largely be left to our elected representatives and their appointees, subject of course to the constitutional requirement to pay just compensation to the owner of the property subject to the taking. Significantly, the Takings Clause is one of the very few money-mandating provisions of the Constitution, meaning that the government can only take private property for a public use if it is able and willing to pay for it; this important requirement imposes a self-enforcing limitation on the extent to which the government can exercise the eminent domain power. Consistent with our system of federalism, the U.S. Supreme Court wisely left to our state and local governments a broad discretion to decide whether and how to use the eminent domain power for economic development. After *Kelo* was decided, there was no good reason for Congress to pass legislation superseding the *Kelo* standards for the use of the eminent domain power and thankfully Congress did not do so.

It is important to emphasize that while private property rights advocates pressed Congress to act immediately after the *Kelo* decision, there was also broad opposition to the proposed legislation. The mayors of many major cities, including the mayor of Washington, D.C. and New York City, made public statements insisting that large-scale redevelopment would be impossible in their communities without eminent domain. Kelo's Unanswered Questions, at 18. The mayors of nineteen U.S. cities, ranging from Miami to San Francisco, signed a resolution making the observation that the problem of land assembly is "one of the biggest obstacles to the revitalization of our metropolitan areas," and affirming that "eminent domain is . . . critically important for municipalities to promote sensible land use, revitalize distressed communities . . . and alleviate the problem of unemployment and economic distress by fostering economic development." Michael R. Bloomberg et al. Resolution on Eminent Domain (December 22, 2005) (signed by the Mayors of New York City, San Francisco, Sacramento, Boston, Denver, San Jose, Salt Lake City, Carmel, San Leandro, Chicago, Dearborn, Philadelphia, Miami, Oklahoma City, Kansas City, Baltimore, Charleston, Providence and Bridgeport). The National Conference of Black Mayors declared that "eminent domain is often a municipality's only recourse when faced with reclaiming forgotten communities in the face of uncooperative absentee landowners and vice establishments." National Conference of Black Mayors, Resolution Supporting Neighborhood Renewal (April 28, 2006).

If national eminent domain legislation was a bad idea immediately after the *Kelo* decision, it would be an even worse idea today. The reason is that the States, including not only

the legislatures but the state courts, have listened to and carefully weighed public concerns about the use of eminent domain for economic development and have adopted a wide variety of reforms in response. This wave of reform activity was hardly accidental; it was a direct response to an explicit invitation made by the Supreme Court itself in the *Kelo* decision. After affirming that the Takings Clause, properly interpreted, gives states and local government's considerable discretion in exercising the eminent domain power for economic development, the Court stated:

> 'We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate."

Kelo, 545 U.S. at 489.

The states responded to this invitation from the U.S. Supreme Court with enormous energy; according to scholar Ilya Somin, more state legislation has been adopted in response to the *Kelo* decision than in response to any other Supreme Court decision in history. I suspect that, by now, the appropriate use of eminent domain to advance economic development has been debated in every statehouse in the nation. Over 40 states have adopted some kind of post-*Kelo* reform legislation. Also, several state supreme courts have adopted new interpretations of their state Takings Clauses restricting the use of eminent domain for economic development.

The most important feature of the post-*Kelo* activity at the state level for present purposes is the *very wide diversity* of responses by the different states. Some states, such as Florida and New Mexico, have essentially abolished the use of eminent domain to promote private economic development activity. Other states, such as Maryland and New York, have largely or completed retained their pre-*Kelo* eminent domain authority. And, in between these two positions, many other states have adopted a variety of reforms, including laws that distinguish between so-called "blight" takings and pure economic development takings, laws that provide for payment of above fair-market-value compensation in certain cases, laws that impose new procedural constraints on the use of eminent domain, and so on and on.[1] The bottom line is that different states have adopted different positions that reflect the values and preferences of their citizens and the relative need for eminent domain as a tool for urban revitalization in each state. As the founding fathers

[1] The wide variety of post-*Kelo* reform measures adopted by different states are described in detail on the website of the National Conference of State Legislatures, *see* http://www.ncsl.org/research/environment-and-natural-resources/eminent-domain-legislation-and-ballot-measures.aspx

intended, the states are not only charting their own paths but they are serving as the laboratories of democracy, testing different approaches to the use (and non-use) of eminent domain.

Congress should not step in now and in effect squelch all of this state reform activity by imposing a one-size-fits-all national policy on the use of eminent domain for economic development. National legislation would preempt and largely make a waste of all this recent state law-making activity. National legislation would also trump the considered judgments of elected state officials about what uses of eminent domain are appropriate to address the local redevelopment needs of each state. National legislation would also prevent us from learning the different costs and benefits of different approaches to the use of the eminent domain. For all these reasons, Congress should continue to stay its hand on the eminent domain issue.

Regulatory Takings Issue

The topic of regulatory takings presents very different questions from those presented by the topic of eminent domain. In an eminent domain case, there is typically no debate about whether a taking has occurred, and the government is generally able and willing to pay "just compensation," but the question is whether or not the taking serves a "public use." If the taking is not for a public use, it cannot go forward under the Takings Clause, regardless of whether the government is willing to pay just compensation. By contrast, a regulatory taking claim proceeds on the premise that the government regulation serves a "public use," for example by protecting the neighborhood or preserving important resources, and the issue is whether or not a "taking" has occurred; if so the government can continue to enforce the regulation only if it is able and willing to pay compensation.

While there are continuing debates about the scope of the regulatory takings doctrine, most regulatory restrictions on the use of property do not amount to takings. When the Supreme Court first embraced the concept of regulatory takings less than a hundred years ago in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the Court emphasized that a regulation will turn into a taking only when the regulation has gone "too far." Subsequently, the Court emphasized that the regulatory takings doctrine is reserved for "extreme circumstances." *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 126 (1985). In *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994), Chief William Rehnquist made clear that the regulatory takings doctrine was not intended to interfere with what he called "the commendable task of land use planning."

The Supreme Court has adopted some reasonably straightforward rules to evaluate whether a regulation rises to the level of taking. In all events, the Court has emphasized, its regulatory takings jurisprudence is governed by the understanding that the purpose of the Takings Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A paradigmatic taking occurs when the government directly

appropriates or physically invades private property, a rule the Court has recently affirmed applies equally to real property as well as personal property. *See Horne v. Department of Agriculture*, 2015 WL 2473384 (U.S. June 22, 2015). In addition, the Court has said that regulatory restrictions can also be takings when, by virtue of the "severity of the burden" they impose, they are "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron USA*, 544 U.S. 528, 539 (2005).

The Court's precedents identify two categories of regulatory action that should be regarded as *per se* takings under the Takings Clause: first, when the government requires an owner to suffer a "permanent physical invasion of her property,"*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and second, when a regulation deprives an owner of "all economically beneficial us[e]" of her land. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1019. Outside of these two relatively narrow categories, the Supreme Court has said that regulatory takings claims are governed by the multi-factor *Penn Central* analysis, which focuses on the economic impact of the regulation, the extent to which the regulation has interfered with "distinct investment-backed expectations," and the "character" of the regulation. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

Lastly, the Court has developed a special set of rules to govern so-called development "exactions." *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Each of these cases involved a government requirement that a property owner dedicate an easement for use by the public as a condition of obtaining a development permit. The Court analyzed each case based on the premise that, if the government had simply appropriated the easement, there would have been a *per se* physical taking. At the same time, the Court assumed that the government could have denied the development applications in each case without giving rise to takings liability. In these special circumstance, the Court concluded, the government could impose an exaction as a condition of granting a permit only if there was an "essential nexus" between the condition and the purpose that would have been served by a permit denial, *see Nollan*, 438 U.S. at 837, and if the burden imposed by the condition was "roughly proportional" to the impact of the proposed development. *Dolan*, 512 U.S. at 391. *See also Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013) (extending *Nollan/Dolan* to monetary exactions).

Three major considerations support the Court's understanding that the regulatory takings doctrine is necessarily confined to extreme circumstances. First, the historical record makes quite clear that the drafters of the Bill of Right did not contemplate that the Takings Clause would apply to mere regulatory restrictions on the use of the property. As Justice Antonin Scalia has explained, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1028 n. 15; *see also id.* at 1014 ("it was generally thought that the Takings Clause reached *only* a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's]

possession"). The leading scholarly investigations of the history of the Takings Clause have confirmed Justice Scalia's conclusions. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Columbia Law Review 782, 783 (1995) ("While the evidence of original intent is limited, it clearly indicates that the Takings Clause was intended to apply only to physical takings."); John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv.L.Rev.1252, 1253 (1996). While it is almost certainly too late in the day for the Supreme Court to restore the original meaning of the Takings Clause, the historical record certainly supports a restrained reading of this provision in the regulatory context.

Second, unless the Takings Clause is confined to "extreme circumstances," modern government simply could not operate. It is important to recall that as prominent a place as property has in our Constitution, the opening words of the Constitution are: "We the people of the United States, In Order to Form a more perfect Union . . ." In other words, the Constitution contemplates the establishment of a Republican form of government in which elected representatives can adopt laws, including laws controlling the exercise of private property interests, to advance the public welfare. However, as Justice Oliver Wendell Holmes warned in *Mahon*, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Mahon*, at 413. According to some critics, the modern property rights movement arose specifically for the purpose of impeding the operation of government. As famously recounted by a former Solicitor General of the United States, early property rights advocates "had a specific, aggressive, and it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe break upon federal and state regulation of business and property." Charles Fried, *Order and Law: Arguing the Reagan Revolution – A Firsthand Account* (1991). In sum, if government is to continue to function, especially at the state and local level, the regulatory takings doctrine needs to be kept within reasonable, predictable bounds.

A third important consideration relates to the fairness of regulatory restrictions. Accurate appraisal of the fairness of regulatory burdens must consider the fact that most regulations serve to protect property and the general community and thereby tend to stabilize and increase property values. A typical zoning ordinance restricts what a property owner can do with her property, limits the profits she can make from developing the property, and thereby tends to depress the value of the property. But the very same regulation, applied to others in the community, also tends to enhance the first owner's property values, both by protecting the community as whole and making the community a more attractive place to live, and by restricting the number of development opportunities available in the community. In order to accurately assess the impact of regulations on property values, one needs to take into account both the negative and the positive effects of regulation. In some cases, property owners complain about how regulations have reduced the value of their property, basing the claim of lost value on the difference between

the price their property would fetch if it were not subject to the regulation at issue with the market value of the property subject to the regulation. But this kind of calculation, although easy for appraisers to perform, is inherently misleading because it ignores how the neighbors' compliance with the regulation inflates the apparent unregulated value of the claimant's property. The relevant economic question, which is hardly ever asked or answered, is not what a property would be worth if it was not regulated, but what a property would be worth if no regulation applied to anyone.

I am unaware whether the Subcommittee intends to proceed to address the subject of legislation on regulatory takings issues. I know of one pending bill, H.R. 510, the Defense of Property Rights Act, which I gather has been referred to the Subcommittee. In my view this is a very radical bill that would dramatically change the law of takings to the detriment of the American people. While there is much to criticize in this bill, I will highlight just a few concerns.

- The bill is extraordinarily broad in scope. It would apply to an "agency," which is defined to include a "department, agency, independent agency or instrumentality" of either the United States or "an individual state." I take this to mean that the bill would apply to any governmental entity at the federal, state or local level. Thus, if Congress were to enact this bill, it would not only be imposing a new burden on the federal government but on every state and local government in the country.

- In many different ways the bill would expand the scope of government takings liability beyond that imposed by the Takings Clause as interpreted by the U.S. Supreme Court. Section 4(2) of the bill would define a taking as including not only a constitutionally-defined taking but also a government action "that unreasonably impedes the use of property or the exercise of property interests or significantly interferes with investment-backed expectations." This vague language would undoubtedly subject governments to a multitude of new lawsuits in which many, many thousands of hours of legal time would have to be expended figuring what the new test means. This section also would apply the same standard of liability to permanent and temporary restrictions, contradicting the Supreme Court's judgment that temporary restrictions raise lesser concerns under the Takings Clause than permanent restrictions. Section 5(a) would apply the new standard of liability by focusing only on "the part of the property" affected by the regulation, contradicting the Supreme Court's longstanding "parcel as a whole" rule. Finally, Section 5 would establish a low statutory threshold for takings liability that would generate routine findings of takings liability.

- Section 5(a) would create a claim for just compensation based on government action that "does not substantially advance the stated governmental interest to be achieved by the

legislation or regulation on which the action is based," contradicting the Supreme Court's unanimous repudiation of the so-called "substantially advance" takings test in 2005 in *Lingle v. Chevron USA*, 544 U.S. 528 (2005).

- Section 4(5) includes a laundry list of interests that the bill would define as "private property," contradicting the established understanding, deeply rooted in our federalism, that property interests for takings purposes are generally defined by state law. As the Supreme Court has frequently affirmed, "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

- Finally, Section 6(c) of the bill would authorize the U.S. Court of Federal Claims to invalidate agency actions "that adversely affects private property rights in violation of the Fifth Amendment in the United States Constitution," contradicting the longstanding understanding that the exclusive remedy for a taking for public use under the Takings Clause is a suit seeking just compensation, not invalidation of the government action, at least so long as the compensation remedy is actually available. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127–28 (1985).

CONCLUSION

Thank you again for the opportunity to present this testimony. I would be delighted to respond to any questions that members of the Subcommittee may have.

APPENDIX

Robert G. Dreher & John D. Echeverria,
Kelo's Unanswered Questions: The Policy Debate Over the Use of Eminent Domain for Economic Development,
pp. 28-31 (GELPI 2006)

(full text available at http://www.gelpi.org/gelpi/current_research/documents/GELPIReport_Kelo.pdf)

THE HOLDOUT PROBLEM

"[E]minent domain applies where market exchange, if not impossible to achieve, is nevertheless subject to imperfections.... [C]onsider the most common situation in which we see the exercise of eminent domain: a public or private project requiring the assembly of numerous parcels of land.... Without an exercise of eminent domain, [the developer] must obtain [land] from each of hundreds of contiguous property owners. Each owner would have the power to hold out, should he choose to exercise it. If even a few owners held out, others might do the same. In this way, assembly of the needed parcels could become prohibitively expensive; in the end, the costs might well exceed the project's potential gains."

—Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 75 (1986).

The Cincinnati Enquirer/Glen Hartwig

Houses of property owners who refused offers for voluntary sale on the site of the Rookwood Exchange Project, Norwood, Ohio.

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Developers of a large office building in Washington, D.C. were forced to build around this townhouse/office when its owner demanded up to 75 times its assessed value.

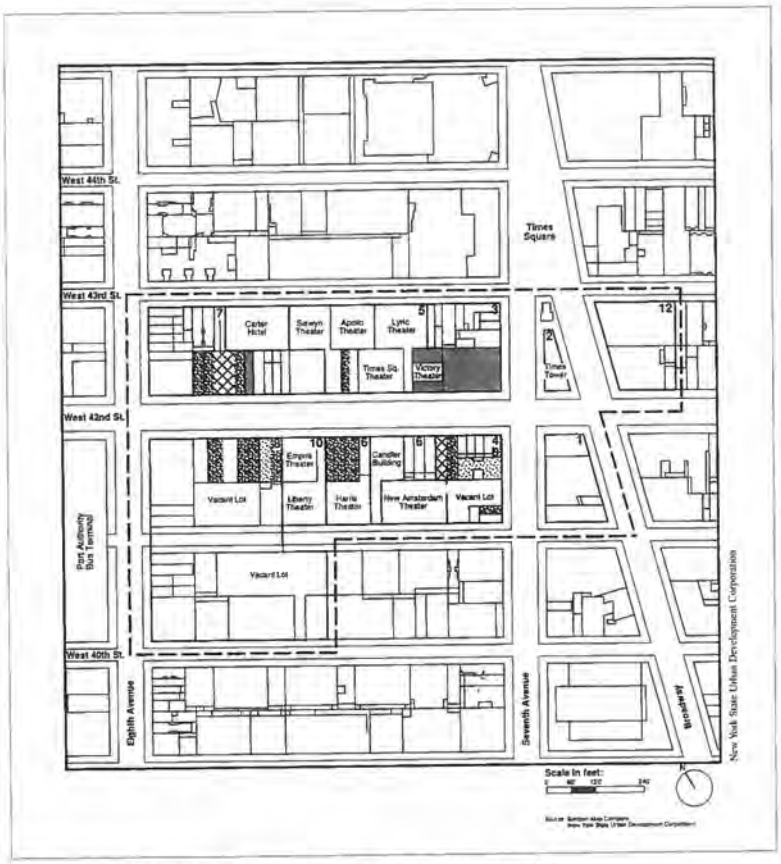
THE HOLDOUT PROBLEM

Site map of Metrotech project in Brooklyn, N.Y., showing fractionated property lines.

"[A] major obstacle to economic revitalization of urban cores is 'over-subdivision,' where old land use patterns leave the artifact of multiple small lots under different ownerships that the unassisted market, even over time, cannot assemble into lots of a shape and size that would accommodate contemporary land uses. If the private sector attempted to redevelop such a deteriorated area, some owners would sell or join as partners in a revitalization effort, but others would simply hold out for a higher price, one that rendered an already pioneering project financially impossible."

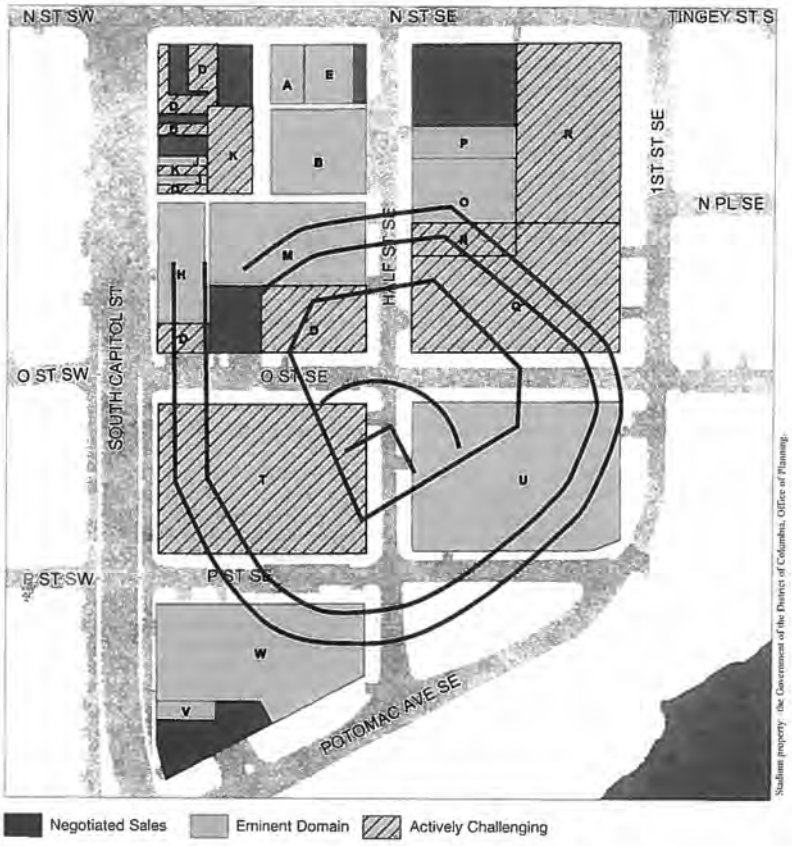
—Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court*, in THE SUPREME COURT AND TAKINGS: FOUR ESSAYS 41, 45, (2006).

Holdouts controlled the central properties needed for the Skyland Shopping Center in Southeast Washington, D.C.



Site map of New York City's Times Square redevelopment, showing highly subdivided plots.

THE HOLDOUT PROBLEM



Resisting property owners would have made construction of the new baseball stadium in Washington, D.C. impossible.

Mr. FRANKS. Thank you, sir.

And I would now recognize our fourth and final witness, Mr. Seasholes.

And, sir, if you'd make sure your microphone is on too.

Mr. SEASHOLES. I think it is.

Mr. FRANKS. Yes, sir.

TESTIMONY OF BRIAN SEASHOLES, DIRECTOR, ENDANGERED SPECIES PROJECT, THE REASON FOUNDATION

Mr. SEASHOLES. All right. Good to go.

Chairman and Committee Members, thank you for the opportunity to testify. My testimony today focuses on endangered species conservation, specifically landowners and their concerns, which include property rights and values, because they are the linchpin for the conservation of this country's biodiversity, particularly endangered species. And the main reason for this is that private landowners own most of the habitat for endangered species.

Over the past several decades, however, it has unfortunately become apparent that the Endangered Species Act is doing enormous harm to endangered species, because its penalty-based approach works against landowners by infringing on their property rights and negatively impacting their property values and the ability to earn income from their land.

Due to this penalty-based approach, the Endangered Species Act discourages landowners from harboring endangered species, as well as from allowing scientists and researchers onto their land, and encourages landowners to rid their property of endangered species, and the habitat necessary to support them, as well as keep quiet and hope the presence of endangered species on their land is not noticed by regulatory authorities, as well as groups that support the Endangered Species Act.

Regrettably, pressures on landowners and the anticonservation incentives they create are in the process of getting much worse due to a number of factors.

First, the number of listed species is increasing dramatically as a result of a 2011 lawsuit settlement.

Second, most of the species covered under the lawsuit settlement are based in freshwater aquatic habitats, which means entire watersheds, not just discrete parcels of land, may well be subject to the Endangered Species Act's regulations, as one of the groups involved in the lawsuit settlement has indicated.

Third, the recent expansion of the Clean Water Act under the Waters of the United States rule is likely to create a regulatory nexus with the Endangered Species Act.

Fourth, the Administration's recent efforts to expand the Endangered Species Act, particularly under the critical habitat rule and definition.

And lastly, very aggressive groups that excel at litigation but don't do any real conservation work have been driving the agenda.

In order to address these problems, substantive reform is necessary. Various reforms over the past two decades have proven ineffective because they leave intact the penalties that cause harm to species and landowners. Substantive reform starts with eliminating these penalties.

Fortunately, an answer for a new successful approach to conserving endangered species is hidden in plain sight and has been around for over 100 years. It is called cooperative extension. It exists in every State and provides technical assistance and information to help farmers, ranchers, forest owners, and others improve their land use and natural resource practices.

There is a reason why landowners voluntarily pick up the phone and call their local cooperative extension office. But most landowners would not dream of calling the U.S. Fish and Wildlife Service if they thought they had an endangered species on their property. The reason is that cooperative extension comes with technical help, some financial assistance, and it is voluntary. By comparison, endangered species result in fear, intimidation, compulsion and reduced property values.

The incentive-based approach of cooperative extension stands in stark contract to the penalty-based approach of the Endangered Species Act.

This beautiful country of ours is blessed with an incredible diversity of species, but the conservation of these species depends on the good will and willing cooperation of America's landowners. America has a long and proud tradition of private conservation, which is very much a part of the spirit of volunteerism, civic-mindedness, and patriotism that are hallmarks of American culture.

As the success of cooperative extension shows, America's private landowners are ready, willing, and able to conserve this country's land, water, and wildlife so long as they are not punished, their property rights and values are not threatened, and they are shown the open hand of friendship, not the closed fist of regulation.

While there are enormous problems with how this country goes about conserving endangered species, there that are larger opportunities to fix these problems by charting a new course for endangered species conservation that respects landowners and their property rights.

This concludes my remarks, and I would be happy to answer any questions.

[The testimony of Mr. Seasholes follows:]

THE IMPORTANCE OF PROPERTY RIGHTS FOR SUCCESSFUL ENDANGERED SPECIES CONSERVATION

Written testimony of
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U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
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PROPERTY RIGHTS AND ENDANGERED SPECIES CONSERVATION

INTRODUCTION

The central point of my testimony is that landowners and their concerns, which include their property values and property rights, are the key to the conservation of this country's biodiversity, particularly endangered species. Unfortunately, one of main ways the United States goes about trying to conserve endangered species—the Endangered Species Act—is especially counterproductive because it is a penalty-based approach that often violates landowners' property rights, and negatively impacts property values and the ability of people to earn income from their land. Due to this approach, the Act discourages landowners from harboring and conserving endangered species, encourages landowners to rid their property of endangered species and the habitat necessary to support them, and discourages landowners from allowing scientists and researchers on their land to study endangered species.

ESA's PENALTIES and PROPERTY RIGHTS

It's not hard to understand why the Endangered Species Act is so feared by landowners, which results in the Act being so counterproductive. By violating landowners' property rights, the Act makes otherwise normal and legal forms of land and resource use illegal, such as farming, homebuilding and timber harvesting. Furthermore, through the Act's prohibition on "harm" to listed species, the federal government can prohibit land use that merely occurs in a type of habitat suitable to a listed species even if the species is not necessarily present.

The ESA's penalties are severe: $100,000 and/or 1 year in jail for individuals committing misdemeanor harm to a fish, bird, or even its habitat, which increases to $250,000 for a felony. For corporations the jail time is the same but the fines double to $200,000 for a misdemeanor and $500,000 for a felony. When these fines are combined with two other factors—(1) that there are no objective standards for what constitutes harm to species habitat so the process by which the federal government determines this is necessarily arbitrary and unpredictable for landowners, and (2) federal regulatory agencies have the ability to use the ESA to lock up vast amounts of land and resources—the Act's fearsome reputation becomes apparent.

PRIVATE LANDOWNERS ARE THE KEY

The Endangered Species Act's penalty-based approach is especially counterproductive to the goal of conserving species because private landowners are the linchpin for the conservation of this country's biodiversity, including endangered species. There are several reasons for this:

1) Private landowners own most of the habitat for endangered and imperiled species.

- Almost 80% of endangered species depended on private land for all or some of their habitat, compared to 50% for federal land. In addition, 91% of all endangered species had at least some habitat on nonfederal land.[1]

2) Private lands are also crucially important for endangered species in states with large amounts of federal land because private landowners own most of the well-watered land, which also tends to be the land with the most biodiversity.

A good example of this is the greater sage grouse, which is being considered for listing under the Endangered Species Act across 10 states and over 160 million acres. The sage grouse is usually associated with public lands because 61% of its habitat is on federal land, compared to 31% on private land (with the remaining 8% split among state and Native American lands). Yet a new study of sage grouse habitat in California, Oregon and northwest Nevada found that 81% of the critically important moist habitat—irrigated meadows, streamsides, and seasonal wetlands—sage grouse depend on for food in summer is privately owned, despite that it constitutes only 2% of the bird's total habitat.[2]

3) In the past 10 years it has become increasingly clear that many endangered species are what is known as "conservation reliant." This means that these species will depend indefinitely on a variety of conservation activities to ensure their continued survival because the threats to these species are impossible to eliminate. These actions can include predator and parasite control, prescribed fires, and mowing and grazing.[3] A classic example is the red-cockaded woodpecker of the southern U.S., which evolved requiring frequent, low-intensity fires to maintain the open, park-like forests it inhabits. Historically, fires would occur due to lightning or Native Americans setting them to improve habitat for hunting. Over the last hundred years or so, fire suppression by humans has reduced the frequency of fires. So the red-cockaded woodpecker is reliant on people maintaining its habitat through controlled fires, mechanical brush removal or application of herbicides.

A number of prominent scientists estimate that 84% of species under the Endangered Species Act are conservation reliant. The implication of this is quite profound because it means that the Act's ultimate goal—recovering species so that they no longer require the Act's protection and can be delisted—is unattainable for the vast majority of species.[4]

The fact that so many species will likely require perpetual conservation has an important implication. It provides justification for eliminating the Endangered Species Act's penalties because the goodwill and willing cooperation of private landowners will be *the* key factor in determining the fate of species that require ongoing help from the landowners that harbor them.

4) Endangered species are spread across hundreds of millions of acres, often on private lands in rural areas that are sparsely populated and far from the eyes of regulatory authorities. So it is simply impossible for enforcers and supporters of the Endangered Species Act to patrol constantly this country's hundreds of millions of acres of endangered species habitat. Short of turning the U.S. into a police state, private

landowners will always be able lawfully to make habitat unsuitable for species that are already listed or proposed for listing, lawfully refrain from notifying authorities about the presence of rare species on their land, and most landowners will be able to break the law without detection by destroying species and habitat. Given these realities, the government must find a way to trust and gain the willing cooperation of landowners, many of whom good conservationists, proud to conserve species and would respond positively to incentives instead of penalties.

FOUR WAYS ESA HARMS SPECIES

There are four ways in which the Endangered Species Act can harm species.

1) Scorched Earth: Due to the Act's punitive nature, some landowners are financially encouraged to pursue a "scorched earth" strategy, destroying habitat in order to make it unsuitable for endangered species. This is the most damaging because habitat destruction is the leading cause of imperilment for species in the U.S.[5] Not only are imperiled species harmed by ESA-induced habitat destruction but so are many more common species that depend on the same habitat.

2) Deny Access: Landowners deny researchers and public agencies access to their land because they fear that the discovery of species or suitable habitat will result in land and resource use restrictions.

3) Keep Quiet: For essentially the same reasons as those landowners who deny access, other landowners keep quiet in the hope that the presence of endangered or potentially endangered species, as well as suitable habitat, is not noticed by regulatory authorities or non-profit groups that are proponents of the Endangered Species Act and often assist regulatory authorities.

4) Shoot, shovel, shut-up: Because it consists of a catchy phrase that has been repeated in the media, direct persecution of species and then destroying the evidence is likely the most well-known way the Endangered Species Act causes harm to species, yet it also likely occurs least frequently among the four ways the ESA causes harm to species because it is often difficult to kill wildlife, especially rare and elusive species, many people likely have a moral aversion to wanton killing of wildlife, and many people also are likely averse to breaking the law.

The Endangered Species Act's penalties so effectively undermine the incentives for private landowners to conserve species that species appear to be faring much worse on private land than public land. The ratio of declining to improving species on private land is an abysmal 9 to 1, whereas on federal lands the ratio is a much better 1.5 to 1.[6]

EVIDENCE OF HARM TO SPECIES

1) Expert Opinion

During the late 1980s and early 1990s, as the harm to wildlife and habitat caused by the Endangered Species Act was becoming an increasingly significant problem, accounts of landowners dealing with this problem by destroying habitat began to proliferate.[7] In 1994, Michael Bean, while still at the Environmental Defense Fund but currently at the Interior Department, made the following observation:

> *There is, however, increasing evidence that at least some private landowners are actively managing their land so as to avoid potential endangered species problems...Now it's important to recognize that all of these actions that landowners are either taking or threatening to take are not the result of malice toward the red-cockaded woodpecker, not the result of malice toward the environment. Rather, they're fairly rational decisions motivated by a desire to avoid potentially significant economic constraints. In short, they're really nothing more than a predictable response to the familiar perverse incentives that sometimes accompany regulatory programs.*[8]

This is an important admission from the person who is likely the foremost expert on the ESA and one of the Act's foremost proponents.

2) Empirical Evidence

In the 2000s, as the anecdotal evidence that the Endangered Species Act was causing significant harm to species mounted and became more widely known, the issue began to attract the attention of academic researchers.

<u>Red-Cockaded Woodpecker</u>

The red-cockaded woodpecker referenced by Michael Bean, which lives in the pine forests of the southern U.S., has been the focus of a number of research projects that found landowners took a number of actions to avoid land use restrictions due to the Endangered Species Act:

- Landowners preemptively cut trees in efforts to deny the red-cockaded woodpecker habitat.[9]
- Landowners who did harvest timber were 21% more likely to clear-cut, rather than selectively cut, due to the desire to deny woodpeckers habitat.[10]
- Landowners within a one-mile radius of a red-cockaded woodpecker colony were 25% more likely to harvest their timber than landowners who were not within a one-mile radius.[11]
- Private landowners were 5% less likely to reforest the land once it had been cut if their land was near red-cockaded woodpeckers.[12] While 5% might not seem to be much, it is for an imperiled species like the woodpecker that needs every bit of habitat to survive.

Preble's Meadow Jumping Mouse

Researchers surveyed landowners in the habitat for the Preble's meadow jumping mouse about their attitudes toward the mouse. The results are sobering: 26% of the land area surveyed was being managed to make it inhospitable to the mouse, and most landowners would not let their land be surveyed for the mouse.[13] "The efforts of landowners who acted to help the Preble's mouse were canceled by those who sought to harm it," according to the study. "As more landowners become aware that their land contains Preble's habitat, it is likely the impact on the species may be negative."[14]

Cactus Ferruginous Pygmy-Owl

In Tucson, Arizona the land proposed to be designated as critical habitat for the cactus ferruginous pygmy-owl was developed one year earlier than habitat out of the critical habitat zone. There is "the distinct possibility the Endangered Species Act is actually endangering, rather than protecting, species" surmised the authors of the study on the effects of critical habitat designation on development.[15]

Utah Prairie Dog

The U.S. Fish and Wildlife Service estimated prairie dogs cost farmers in the southern Utah habitat of the Utah prairie dog $1,500,000 annually due to lost crops and damaged equipment.[16] A survey revealed that one-third of landowners had taken actions to discourage prairie dogs from inhabiting their property. Also, very few landowners were willing to have prairie dogs translocated to their land, a management strategy for the species.[17]

3) Harming Species Not Yet Listed

The Endangered Species Act is so detrimental to conservation that species not yet listed under the Act, but under consideration for protection, are also harmed. All indications show this has been occurring for most of the ESA's 40-year history.

San Diego Mesa Mint

Following the 1978 proposal to list the San Diego mesa mint, a plant from San Diego County, California, a developer who owned 279 acres on which he planned to build 1,429 houses became worried that the development would be derailed. Days before the mesa mint was listed in 1979, the developer engaged in the scorched earth strategy by bulldozing the plants.[18]

Black-Tailed Prairie Dog

In 1998 several pressure groups petitioned Fish and Wildlife to list the black-tailed prairie dog under the Act across its entire range, an enormous region of the grassland

stretching from Arizona, New Mexico and Texas, through Oklahoma, Colorado, Kansas, Nebraska, Wyoming, North Dakota, South Dakota and Montana.

Landowners' response to the listing petition was predictable. "The petition has created difficulties for us," said Dennis Flath, a biologist with the Montana Department of Fish, Wildlife and Parks, in an article in *High Country News*. "Now private landowners don't want us to find out if there are any prairie dogs. They want to get rid of prairie dogs quickly, while they have the opportunity," before listing occurs.[19] The Montana Department of Agriculture would typically get 20 or so requests annually to help ranchers poison prairie dogs, which are perceived as competing with cattle for grass. Following the petition, however, the Department had already received approximately 30 such requests by March 1999.[20]

INCREASING PRESSURE ON PRIVATE LANDOWNERS

The pressures put on landowners by the Endangered Species Act are in the process of getting much worse due to a couple of factors.

1) The Number of Listed Species Is Increasing

Due to a 2011 lawsuit settlement between the U.S. Fish and Wildlife Service and two environmental pressure groups, the Service is now obligated to consider for listing 757 species. Of these species, final listing decisions must be made about 253 species by 2016, while the remaining 504 species are in the "hopper" awaiting listing decisions.[21] To date, final listing decisions have been made about approximately 156 species, or 21% of the total, which means the final status of 79% of species has yet to be finalized or determined.[22] The listing of these lawsuit settlement species could increase the number of listed species by as much as 50%. Moreover, regions of the country that have been relatively unaffected by the Endangered Species Act—such as the Midwest, Great Plains and Intermountain West—are going to be heavily impacted by these lawsuit settlement species.

2) Freshwater Aquatic Species

Most of the species covered under the 2011 lawsuit settlement are based in freshwater aquatic habitats, including all 374 species that are concentrated in the Southern U.S. but also extend across essentially the entire Eastern portion of the country and much of the Midwest.[23]

This means entire watersheds, not just discrete parcels of land (as is the norm for terrestrial species), may well be subject to the Endangered Species Act's punitive regulations. Due to the extensive and transboundary nature of watersheds, land uses and

other human activities many miles away from the habitat occupied by freshwater aquatic species listed under the Act could very possibly be subject to the Act's regulations.

It appears that any human activity that can affect water quality or quantity is going to be in the sights of groups that excel at filing lawsuits under the Endangered Species Act to force federal agencies to implement stricter measures for land and resource control. In the petition to list these 374 species submitted by the Center for Biological Diversity, one of the two plaintiffs involved in the 2011 lawsuit settlement stated:

> *Southeastern aquatic biota are threatened not only by direct physical alteration of waterways, but also by activities in the watershed that directly or indirectly degrade aquatic habitats such as residential, commercial, and industrial development, agriculture, logging, mining, alteration of natural fire regime, and recreation. Land-use activities can alter water chemistry, flow, temperature, and nutrient and sediment transport, and can interfere with normal watershed functioning... Thus, when identifying habitat threats to aquatic species, entire watersheds must be considered and not just localized sites where species occur.*[24]

The petition adds:

> *[T]he Clean Water Act is not effective at preventing activities within a watershed which negatively impact water quality, and the health of aquatic systems needs to be evaluated and regulated on a watershed-wide scale.*[25]

3) Intersection of the Clean Water Act and the Endangered Species Act

In May 2015 the Environmental Protection Agency significantly expanded the definition of waters under jurisdiction of the Clean Water Act with its "Waters of the United States" rule.[26] The agency claims the new rule contains a more limited definition of waters than previously fell under the jurisdiction of the Clean Water Act.[27] Yet this is not the case because under the new definition of Waters of the U.S. the scope of waters that fall within the jurisdiction of the Clean Water Act is significantly expanded.[28]

The expansion of the Clean Water Act, if it survives expected challenges in court, could well create significant problems for landowners, corporations, municipalities and states via the Endangered Species Act. The Waters of the U.S. rule could create a significant regulatory nexus that would oblige the Environmental Protection Agency and the Army Corps of Engineers—the two agencies that implement the Clean Water Act—to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service—the two agencies that implement the Endangered Species Act—if they think that an actual or proposed action, such as a landowner maintaining a drainage ditch or a municipality building a bridge, may affect a species listed under the Endangered Species Act.

The Environmental Protection Agency is already working closely with the U.S. Fish and Wildlife Service and National Marine Fisheries Service to coordinate implementation of the Clean Water Act and Endangered Species Act. The three agencies signed a Memorandum of Understanding in 2001 "because EPA and the Services believe that a national statement detailing how these programs protect an important component of the aquatic environment, i.e., endangered and threatened species, will help achieve the complimentary [*sic*] goals of the Clean Water Act (CWA) and the Endangered Species Act (ESA)," according to the Environmental Protection Agency. "In recent years, EPA and the Services have increased their efforts to achieve greater integration of CWA and ESA programs."[29] Given the regulatory expansion of the Clean Water Act, this coordination and integration will only increase.

In addition to the large number of species covered under the 2011 lawsuit settlement that are based in freshwater aquatic habitats, a 2008 study found that more than 67% of the watersheds in the lower 48 states have private forests that contain a minimum of one at-risk species. Watersheds that contain the most at-risk species are in the West Coast, Midwest and Southeast.[30]

SUPERFICIAL REFORM

There is a view among some that the Endangered Species Act only needs to be tweaked and implemented creatively to address its counterproductive nature. At best, these reforms, which offer limited incentives to certain landowners, merely put a velvet glove over the Act's iron fist because they leave intact the penalties that cause the Act to fail on private lands by only softening the penalties around the edges.

These superficial reforms fail to address the negative conservation incentives created by the Endangered Species Act for several reasons:

1) Given the regulatory uncertainty surrounding the Endangered Species Act—such as the unpredictable and arbitrary way Fish and Wildlife treats landowners and the penchant of pressure groups to sue the agency to make the law even more onerous—landowners, especially those who have to make a living off their land, will find it very difficult to measure the value of a particular incentive now against the probability of being hit by the Act's penalties in the future.

2) As increasing numbers of species are listed, more and more landowners are becoming aware of the Endangered Species Act's penalties, and as a result want little to do with the law.

3) Landowners are wary of accepting "carrots" from the government because there are always strings attached, and they are also very hesitant to allow biologists on their land for fear other endangered species will be found. With the exception of Habitat Conservation Plans, which are part of the Act's 1982 amendments, these so-called

reforms have been implemented administratively and are subject to change at the whim of federal regulatory agencies.

4) Common sense dictates that adding incentives on top of existing disincentives is inefficient because the disincentives counteract the incentives. It would be far more efficient to start with a clean slate by removing the disincentives and then adding incentives so that the true costs of conserving species could be seen by all. This approach would also be much more transparent and easier for all involved to understand, most importantly those harboring endangered species.

SUBSTANTIVE REFORM

Substantive reform of the Endangered Species Act to make it more successful at conserving species starts with eliminating the penalties that harm species by violating landowners' property rights, which causes landowners to take any one of the four actions outlined in this testimony—and acknowledged by experts and confirmed by empirical research—that are detrimental to endangered species.

A Path Toward Substantive Reform

Fortunately, a path forward has been offered by six of the Endangered Species Act's foremost proponents. Sam Hamilton, while he was head of the Fish and Wildlife Service in Texas, observed in *U.S. News and World Report*:

> *The incentives are wrong here. If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears.*[31]

It just so happened that Hamilton's boss at the time knew how to solve the problem. Mollie Beattie, while Director of the Fish and Wildlife Service, in an extraordinary moment of candor, compared the Endangered Species Act to the U.S. Department of Agriculture's Conservation Reserve Program (CRP) in *Beef Today*, a trade publication of the cattle industry:

> *I think this [the CRP] really, really opened people's eyes to what could be achieved in a basically non-regulatory, voluntary program. If there were an incentive to make the best habitat [for endangered species], we'd be miles ahead.*[32]

Michael Bean, and his then-colleagues at the Environmental Defense Fund—Robert Bonnie, Tim Male and Tim Searchinger—understood very well this two-step process of first removing disincentives and then adding incentives. According to them:

> *Removing perverse incentives is a necessary first step to effective conservation. Ensuring that private stewardship is rewarded and that it is made easy by both federal and state laws is also an important part of encouraging landowners to manage their lands in ways that conserve natural ecosystems.*[33]

Landowner Surveys

Perhaps most significantly, a growing number of actual landowners who have been, or potentially could be, affected by the Endangered Species Act's regulations provide crucial insights into the issues that encourage and discourage landowners from conserving species. Some of the issues identified in these surveys that affect landowners' willingness to conserve imperiled species are:

- Landowners have significant concerns about risks to their property values and livelihoods associated with protecting endangered species.[34]
- For the most part, landowners think they should be compensated for conserving species that are endangered or close to being endangered. In many cases compensation increases landowners' willingness to conserve endangered species.[35]
- Other financial assistance, such as technical assistance and cost sharing, can also improve landowners' willingness to conserve endangered species.[36]
- Landowners do not like long-term contracts or permanent conservation easements.[37] This strongly suggests that landowners don't like many of the Habitat Conservation Plans under the ESA, which run for long time periods.
- Landowners prefer shorter (5–10 year) contracts to conserve endangered species.[38]
- Independence and autonomy are very important values to landowners, and these values exert a strong influence over their willingness to become involved in conservation initiatives in general.[39] Landowners strongly prefer to have some management and decision-making authority if they are involved in a program to conserve wildlife and very much object when they do not.[40]
- Many landowners have a strong sense of stewardship.[41]
- Landowners are more likely to join incentive programs if they are approached by trusted intermediaries, instead of public officials from regulatory agencies.[42] Similarly, landowners are more likely to be involved in incentive programs if they receive positive signals from their social networks and peer groups.[43]

Successful Species Conservation and Landowner Confidentiality

Another important concern of landowners is that, if they become involved in an effort to conserve an endangered species or a species that is at-risk or a candidate to be listed under the Endangered Species Act, their identities and data about species be kept confidential. This concern is quite understandable, given the Act's formidable penalties, ability to regulate land and resource uses, and the fear landowners have of the federal agencies that implement the Act. Landowner confidentiality is also important to encourage landowners to participate in initiatives to prevent species from being listed under the Endangered Species Act.[44]

Lessons Learned

Taken together, all of these factors that motivate and are of importance to landowners provide strong evidence of the need to move away from the current penalty-based Endangered Species Act and protect landowners' confidentiality and property rights. These issues also strongly support the idea that removing the ESA's penalties, providing compensation and other financial incentives for conserving endangered species, and giving landowners more control and autonomy is not only a viable approach but one that will likely result in better conservation outcomes. Moreover, these issues and attitudes point away from many of the superficial reforms that are often touted as substantive, such as Habitat Conservation Plans, Safe Harbor and No Surprises.

100-YEAR-OLD ANSWER HIDDEN IN FRONT OF US

Fortunately, the answer for a new, more successful approach to conserving endangered species is in front of us, hidden in plain sight and has been around for over 100 years. Cooperative agricultural extension is highly popular with landowners, exists in many states and could serve as a model for how to conserve endangered species successfully while fostering better relationships with landowners and protecting their property rights.

The researchers who conducted the survey of landowners impacted by the Utah prairie dog saw how counterproductive the Endangered Species Act's approach was and that cooperative extension could be a more successful approach. The survey's authors conclude:

> *The fear generated by ESA regulation is a poor motivator for species conservation on private lands. Rather, incentive based approaches that consider the needs of landowners are more likely to result in species conservation over the long term.*[45]

This survey was based largely off of the PhD research of Dwayne Elmore, who is currently a professor in the Department of Natural Resource Ecology and Management at Oklahoma State University. According to Elmore, state universities' cooperative extension services, which typically include education and natural resource management advice for landowners, are a good model for organizing endangered species conservation efforts:

> *Cooperative Extension is an ideal facilitator for volatile wildlife issues such as endangered species management on private lands. Often, lack of trust in government agencies or fear of Endangered Species Act regulations hinders conservation efforts on these private lands. Extension personnel have close ties to local affected communities and thus can be instrumental in educating landowners regarding options that may be available to them in regards to sensitive, candidate, threatened, or endangered species.*[46]

Cooperative extension is quite a contrast to the Endangered Species Act. The Act is characterized by:

- Conflict, antagonism, divisiveness, compulsion, hard feelings, top-down dictates from afar, and it is intimidating and fear-inducing for landowners.

By contrast, cooperative extension is characterized by:

- Collaboration, give-and-take, open lines of communication, flexibility, voluntarism, accommodation, and the type of mutual respect that results from shared purpose.

There is a reason why landowners willingly and eagerly pick up the phone and call their local federal or state agricultural extension office. But most landowners would not dream of doing so for endangered species. The reason is cooperative extension comes with help, some financial assistance and little if any punitive regulations. By contrast, endangered species and the federal agencies that implement the Endangered Species Act result in fear, intimidation, and reduced land values.

If this country embarked on an approach to endangered species conservation based on cooperative extension, it would most likely result in tens or even hundreds of thousands of landowners emerging from the shadows and volunteering that they have endangered species on their land. If landowners were free from the fear of being clobbered by the Endangered Species Act, then the most significant barrier standing in the way of a more successful approach to conserving endangered species would be removed.

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[44] Victoria J. Dreitz and Fritz L. Knopf, "Mountain Plovers and the Politics of Research on Private Lands," *BioScience*, vol. 57, no. 8 (2007), p.683; David W. Wolfe, K. Brian Hays, Shannon L. Farrell, and Susan Baggett, "Regional Credit Market for Species Conservation: Developing the Fort Hood Recovery Credit System," *Wildlife Society Bulletin*, vol. 36, no.3 (2012), pp. 426-427.

[45] Elmore et al., "Perceptions of wildlife damage and species conservation," p. 85.

[46] R. Dwayne Elmore, "Extension's Role in Endangered Species Management," Proceedings, 11th Triennial National Wildlife & Fisheries Extension Specialists Conference, October 14–18, Big Sky, Montana, p. 146.

Mr. FRANKS. Well, thank you, sir, and thank you all for your testimony. We'll now proceed under the 5-minute rule with questions. I'll begin by recognizing myself for 5 minutes.

Mr. Alban, I'll start with you, sir. Ten years have passed since the *Kelo* decision was handed down, and during that time the House has three times passed legislation on a broad bipartisan basis to address that decision. Most States have also enacted legislation, at least in part, that addresses the problem. Is there still a need for Congress to pass legislation to address *Kelo* further or would such an effort be a waste of time or redundant, in your mind?

Mr. ALBAN. Thank you very much for the question.

Yes, there is still a strong need for Congress to take action because, as I detail in my written testimony, there are countless examples of Federal funding still being used for projects that engage in eminent domain abuse, taking private property from one person and transferring it to another private person.

The Federal funding that is available is not stopped by many of the State reforms that have been passed after *Kelo*. There has been a very wide variety of reforms. And in some cases, such as Alabama, the reform that they passed after *Kelo* has since been repealed.

So there have been some States that have taken very good action and effectively ended eminent domain in their States, but there have been other States, such as New York, that have taken no action at all, and other States that have taken actions, legislative reforms that do very little to protect the property rights of property owners. And I think it's important that Federal taxpayers not fund these continued abuses of eminent domain.

Mr. FRANKS. Well, thank you, sir.

And, Mr. Groen, I'd like to ask you two interrelated questions. First, if property owners were more fairly compensated for regulatory takings of their property, would this somehow threaten the ability of government to function? And second, given your experience in representing property owners, do you believe that the clients that you represent were out to impede the government's ability to operate or were they essentially just seeking to be compensated for the burdens that government has put on their ability to use and enjoy their land?

Mr. GROEN. Thank you for the question.

The answer from my perspective is very simple: The Takings Clause and the enforcement of it by landowners does not in any way impede the ability of government to function and to make policy choices with regulation.

What it does require is that the cost of those regulations not be borne exclusively by the people who are subject to them. When there are situations where the *Armstrong* principal that we discussed, in fairness and justice those burdens should be borne by the public as a whole.

And so the Takings Clause and the constitutional command of just compensation does not preclude government from acting, but what it does do is require the payment of compensation when that action is so severe on impacting private owners that the result is a taking. That does not limit government, but it conditions the exercise of the governmental power by the constitutional balance of the Just Compensation Clause.

Mr. FRANKS. Mr. Seasholes, could you give us an example, sir, of an endangered or threatened species that has been harmed by how the Endangered Species Act treats property owners? And explain how a more broad, more balanced approach that protects both property rights and the environment would better serve that species than this current approach.

Mr. SEASHOLES. Sure. I'd be happy to.

There's been, over the past several decades as this issue has become more prominent, there has emerged in the scholarly literature a number of species, one of which is the red-cockaded woodpecker, which inhabits the pine forests of the southern United States. There have been several empirical research projects that have been published in the literature showing several things. One, landowners destroying property preemptively to try to preclude woodpeckers from moving in. Also, not replanting property or planting with species that may be unfriendly to the woodpeckers. And there are a number of others detailed in my testimony.

In terms of evidence for how a more incentive-based approach would work better, I'd just like to call your attention to, and it's my written testimony, over the past decade there have been a number of landowner surveys into the factors that encourage and discourage landowners from conserving endangered or potentially endanger species. And these landowner surveys have shown a number of things. One thing is landowners want to be compensated, they don't like to be regulated, they don't like permanent conservation easements.

And so what these landowner surveys kind of give shape to is, I think, a really new approach that would be more effective that points towards, as I said, the cooperative conservation or cooperative extension approach that has been very successful. And landowners across the country engage it, I'm sure many of your constituents perhaps even, they like it, they have very good relationships with State-based, Federal even, from U.S. Department of Agriculture extension agents. It is very different, the relationships they have with the Fish and Wildlife Service, which tend to be very negative.

Mr. FRANKS. Well, thank you, sir.

And I would now recognize the Ranking Member for his questions for 5 minutes.

Mr. COHEN. Thank you, Mr. Chair.

Mr. Alban, your group is Institute for Justice, that's who you work with. Is that correct?

Mr. ALBAN. Yes, sir.

Mr. COHEN. Does the Institute for Justice generally favor local governments, State governments, or Federal overreach and control?

Mr. ALBAN. The Institute for Justice generally favors people's constitutional rights being respected by any level of government.

Mr. COHEN. I know that. That's not the question I asked. And you're a very smart man, you can respond to a question.

Does the Institute for Justice have a preference for local and State decisionmaking, grassroots, or Federal, Washington, one-size-fits-all programs?

Mr. ALBAN. I don't think the Institute for Justice has a general position on that. I think in some cases, obviously, local and State

governments are more informed about what's going on, and in other cases the Federal Government is more prepared to act.

Mr. COHEN. And why do you think in this case that the Federal Government should act and not local governments when it deals with local property rights?

Mr. ALBAN. Well, because the proposal that I'm suggesting is not, in fact, the Federal Government acting. It's the Federal Government saying that Federal tax dollars cannot be used for eminent domain abuse. So it is not a one-size-fits-all solution. New York, which has not passed any eminent domain reforms, could still continue to engage in eminent domain abuse, it just couldn't use Federal taxpayers dollars to do it.

Mr. COHEN. Well, I would disagree with your analysis of that, because I think really what you're saying is it would be one Federal policy with Federal tax dollars and it's the Federal Government determining through the tax dollar measurement whether or not they can do it or not. But I would disagree.

Mr. Groen, you work with Pacific Legal Foundation. What are the principal sources of the Pacific Legal Foundation?

Mr. GROEN. The principle sources of funding?

Mr. COHEN. Yes, sir.

Mr. GROEN. Primarily from individuals.

Mr. COHEN. And who are your largest three individuals, financially, not by weight?

Mr. GROEN. I have no idea.

Mr. COHEN. You have no idea?

Mr. GROEN. I do not.

Mr. COHEN. Koch brothers? Koch brothers?

Mr. GROEN. I have no idea.

Mr. COHEN. You have no idea.

And how about the same thought, do you think local government is the better place to make these decisions or Federal?

Mr. GROEN. Well, when you say these decisions, I'm not sure what you're talking about. Certainly there is regulation that takes place at the local level, State level, and at the Federal level, all of which impact property owners.

The key is that we have a Constitution that governs all levels of government, and it is important and necessary in our system that that constitutional provision be properly enforced. And that's the focus that I'm coming from.

Mr. COHEN. Mr. Seasholes, the Reason Foundation is easier to determine. We know David Koch is a member of your board, is that not right?

Mr. SEASHOLES. I believe so. I've been there about a year and a half, so I'm kind of still learning the ropes.

Mr. COHEN. And the Koch family foundations provide much of your funding, do they not?

Mr. SEASHOLES. I do not know. I'm sorry. It's a bit above my pay grade.

Mr. COHEN. Well, it's interesting how agnostic folks are about who funds their salary.

Mr. SEASHOLES. I'm not agnostic, Mr. Cohen. I don't know. I've been there for about a year and a half.

Mr. COHEN. Well, that's kind of the same thing, is not knowing, not caring. I don't mean agnostic as distinguished from religious.

Mr. SEASHOLES. I may be ignorant, but I don't necessarily not care.

Mr. COHEN. Okay. Well, I would care.

Mr. Echeverria, tell us what your responses would be to the testimony of these gentlemen concerning the *Kelo* decision.

Mr. ECHEVERRIA. Well, there's so much to say. Let me respond to some of the comments on regulatory takings. I think it's just simply not correct to say that an unconstitutional, unhistorical, expansive reading of the Takings Clause would not interfere with government's ability to operate. Justice Holmes famously remarked in the Mahon case that government could hardly go on if government had to pay every time it imposed a piece of general legislation.

Charles Fried, a very distinguished professor at Harvard Law School, wrote a book recounting his experiences in the Reagan administration where this novel, expansive theory of regulatory takings was first developed, and he was very explicit in saying, from his perspective, as the number three person in the Justice Department, that the regulatory takings agenda was designed to impede regulatory action.

So if the law were changed and established precedent were altered and government were required to pay for every kind of regulatory restriction, the fact of the matter is that government would grind to a halt. And I suggest to you that is the objective of groups like the Reason Foundation, the Pacific Legal Foundation, and the Institute for Justice.

Mr. COHEN. Thank you, sir. I appreciate it.

Mr. FRANKS. I thank the gentleman.

I would now recognize the Chairman, Mr. Goodlatte, for his questions.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Echeverria, I'm not going to ask you what liberal organizations might have contributed to Vermont Law School. I'm going to assume that you do your work based upon what you think is right and that your intellectual——

Mr. ECHEVERRIA. Many hard-working students contribute to our support.

Mr. GOODLATTE. Right. Absolutely. And I'm sure you have donors as well as and that you, like other organizations, pride yourself on your intellectual integrity. And I'm sure——

Mr. ECHEVERRIA. I'm not being paid to be here by any institution.

Mr. GOODLATTE. I'm sure that these other gentlemen pride themselves on their intellectual integrity as well.

But I do want to ask you about your defense of the *Kelo* decision. It appears that the economic development that brought about the takings in *Kelo* was a failure. And I wonder if you've seen other failed economic development takings where owners were forced out of their homes only to have the redevelopment plans fail.

In previous hearings we've had Susette Kelo here testifying. It's a very heartwrenching and compelling thing to have someone have their home taken away from them, not for the pipelines and so on

that are referred to in your statement, where obviously in order to move electricity or natural gas or whatever the case might be, water, you need to have some things that transit property lines. But her property was entirely taken, not for a governmental purpose, but for a private economic development purpose. And the real basis for it was that there would be new higher tax revenues generated for that.

So I'm wondering if you have other examples like that where——

Mr. ECHEVERRIA. I can't offhand. I mean, I wouldn't doubt that there may be some.

I think it is important to emphasize, you mentioned infrastructure facilities, that pipelines and highways can be as destructive to homeowner interests as any other form of eminent domain.

Mr. GOODLATTE. Sure. Absolutely. But they connect people and they have a long history of doing that. But shopping malls don't have as long a history of using eminent domain powers to take private property from one individual and give that private property to another individual or corporation for the purpose of building something bigger and grander and more glorious than that person's home.

Mr. ECHEVERRIA. I don't think that makes any difference to the homeowner. The representative of the National Association of Colored People who spoke at a recent Cato anniversary celebration argued that if Congress were to address the question of eminent domain, Congress——

Mr. GOODLATTE. Let me interrupt you because my time is limited.It may not make a difference to the homeowner, but it does make a difference in terms of establishing where the line is on when government can take property and when they cannot. There are certain types of things that have historically been deemed to be appropriate for government to take for the broader public good and there are certain places where they have not. And that line, I think, was completely breached by the *Kelo* decision.

Do you disagree with the dissenting opinion that the public purposes aspect of the Fifth Amendment was nullified by the *Kelo* decision?

Mr. ECHEVERRIA. I was simply trying to share with you the advice——

Mr. GOODLATTE. Answer my question.

Mr. ECHEVERRIA. Can I answer the question, the first question?

Mr. GOODLATTE. You already did.

Mr. ECHEVERRIA. No, I never got my chance.

Mr. GOODLATTE. No, you said you didn't know of any other——

Mr. ECHEVERRIA. You asked another question, you raised infrastructure, and I was trying to respond to that part of your question.

Mr. GOODLATTE. Well, I didn't ask you a question about that. I just told you that I knew the difference between infrastructure and others and asked you if you could draw the line.

Mr. ECHEVERRIA. And I just was trying to tell you that many people do not see a distinction there and do not think that Congress should draw such a distinction.

On the question of the——

Mr. GOODLATTE. Let me ask Mr. Alban if he knows of other examples, other than the *Kelo* decision, where private property was

taken and transferred for other private purposes and then nothing happened, the whole thing was a failure.

Mr. ALBAN. Sure. I'll give three fairly local examples.

The *Berman v. Parker* decision took all of Southwest D.C. via eminent domain, and many areas in Southwest D.C. are still being revitalized now, 60 years later. There are large swaths of Southwest D.C. that were never replaced with the proposed developments.

In the testimony by Mr. Echeverria that he submitted, there is an example, the Skyland shopping center in Southeast D.C., in Anacostia, where the land was taken, and they're still searching for an anchor tenant that would be able to allow the property to go forward.

There's also a development in Baltimore.

Mr. GOODLATTE. Those people have been displaced from their homes in the meantime.

Mr. ALBAN. Homes and businesses, yes.

Mr. GOODLATTE. They've lost their homes.

Mr. ALBAN. Their businesses for the most part, yes.

Mr. GOODLATTE. Thank you.

Mr. Groen, the Supreme Court has made it difficult, if not impossible to bring Fifth Amendment taking claims against State and local governments in Federal court. Can you think of any other situations in which a fundamental right written in our Constitution is left up to State courts to decide whether or not to enforce?

Mr. GROEN. I cannot. From my experience, it is a very unique situation where the Williamson County decision forces people with Federal takings claims to bring their cases in State courts.

We're working on that right now, there's a case heading to the Fourth Circuit called *Perfect Puppy v. City of Rochester*, to try and make inroads on that doctrine. I discuss that briefly in my materials.

The only other situation that I can think of also involves the Takings Clause, and that is the Court of Federal Claims requires that if you're bringing a takings case against the United States Government for over $10,000, you cannot bring it in Federal district court, you bring it in the Court of Federal Claims, which does not have article III judges with life tenure and security of no diminution in pay. And so that is the only other situation, and again, it is a Takings Clause situation.

The Federal constitutional protection of citizens' rights and property, the Federal courthouse doors should be open for them to litigate in their communities, in their Federal district court.

Mr. GOODLATTE. Thank you.

My time has expired. Thank you, Mr. Chairman.

Mr. FRANKS. I thank the gentleman.

I would now recognize Mr. King for his questions.

Mr. KING. Thank you, Mr. Chairman.

I thank the witnesses for your testimony and interaction with the questions that have been asked.

I would state first that I have this dj vu feeling. It's been 10 years since the *Kelo* decision. I recall some of the debate on the floor of the House of Representatives when we brought a resolution of disapproval on the *Kelo* decision. And I remember I was queued

up to speak right behind Mr. Barney Frank of Massachusetts, and I sat down in the front row with my notepad anticipating that I would take notes on my anticipated rebuttal.

Barney Frank and I had exactly the same position on the *Kelo* decision, which was an usual thing. And I made the statement then, not having read any of the dissent, that I believe that it struck three words out of the Fifth Amendment, "for public use," which was the point of the question Mr. Goodlatte asked a moment ago. And I go back and read that Fifth Amendment today, and today it reads, "nor shall private property be taken without just compensation."

That's an appalling thing to me, and this Congress rose up and rejected that decision. And so I wanted to pose this question, I think first to Mr. Echeverria.

Our Founding Fathers gave us the means to amend the Constitution, and I don't think they actually anticipated Marbury, but it's here and it's a couple of centuries behind us. And so with that in mind, an appropriate way to address this, at least from a technical but not a practical perspective, would be to draft an amendment if we wanted to restore the property rights as understood prior to *Kelo*. And I'd ask if you could give us some counsel on how one might write such an amendment to restore the property rights as understood before the *Kelo* decision.

Mr. ECHEVERRIA. Well, I would be loathe to do that because I think *Kelo* reaffirmed 100 years of precedent. Can I explain why I think——

Mr. KING. Well, I'd just as soon not, given my clock is burning down, but I want to rather instead, if I could just start from a left, if anyone has a recommendation on how we might draft an amendment to put the property rights back together that existed and were drafted into the Fifth Amendment prior to the *Kelo* striking the three words out, "for public use." How would we write that? Would we write the same thing or was there another way to say it more firmly such as, "for public use and we really mean it?"

What would you recommend, Mr. Alban.

Mr. ALBAN. Well, I think it's actually the role of the courts to properly interpret the Constitution and those words, "public use." So I don't think it needs amendment. I think the courts need to give those words the actual meaning they have.

But if you're looking for language that excludes this expansive definition of public purpose, I think you can look to the Bond amendment or to the Private Property Protection Act, which both describe the sorts of takings that are permitted and the sorts of takings that are not permitted.

Mr. KING. Thank you.

Mr. Groen.

Mr. GROEN. I think the easier solution is that the public use requirement is limited to ownership controlled by the Federal Government. What was particularly disturbing about the *Kelo* decision is the transfer of title to a private entity, from one private person to another private person, and that is an appropriate place for drawing the line. Otherwise, public use can be read fairly extensively, but not to the point of transferring property from private person to another private person.

Mr. KING. And in your narrative that you discussed, Mr. Groen, of the property that was a half-acre that it was adjacent to, I would just state it this way, and I'd ask if you'd agree with me. Up until *Kelo*, when a person bought a piece of property, we had an expectation that we could utilize that according to the law in a lawful manner for the duration of our lifetime. And so the *Kelo* decision that's allowed now for the—that's brought about the State legislation, has that altered the expectation nationally and made it an undecided circumstance where if you buy property today, you can't know what kind of decision might come back upon that because of public officials that would use the condemnation?

Mr. GROEN. Well, I think that there is certainly some uncertainty for property owners. With respect to the Wisconsin example that I mentioned in the paper, that is not so much a public use issue as it is a problem with the combination of separate and discrete parcels where there is a longstanding history, as you mention, where individuals do have an expectation that they will be able to use each of those separate and discrete parcels and not have them forced to be merged together by government regulation and be declared as a parcel as a whole for the purpose of eliminating their right to compensation.

Mr. KING. Thank you, Mr. Groen.

If I might just conclude with the Chairman here, is that it did not trouble me and it does not trouble me if I see a residential home sitting in the middle of an asphalt parking lot at a shopping mall out of respect to the Fifth Amendment and the property rights. That says something about a pillar of American exceptionalism that I think was seriously damaged by *Kelo*.

Thank you, and I yield back.

Mr. FRANKS. I thank the gentleman.

I now recognize Mr. DeSantis from Florida for his questions.

Mr. DESANTIS. Thank you, Mr. Chairman.

Mr. Alban, the *Kelo* decision, do you view that as being broader than the *Hawaii Housing Authority v. Midkiff* decision, broader in a sense of not protecting private property rights?

Mr. ALBAN. Absolutely, because it clarified that now property could be taken for the explicit purpose of economic redevelopment for the benefit of a private developer who the only public benefit that was being promised was additional tax dollars in the city's coffers.

Mr. DESANTIS. So that's a significant departure from the historical understanding?

Mr. ALBAN. Absolutely it is, yes.

Mr. DESANTIS. The economic development that was promised in *Kelo* actually turned out to be a failure. Have you seen other instances of where you had economic development takings and yet people forced out of their homes while the plans end up failing?

Mr. ALBAN. Yes, there have been a number of examples. As I was mentioning earlier, in Southwest D.C., almost the entire area was taken through eminent domain, and it is still being transformed and there are still promises about what's going to be done there.

There's the Skyland development in Anacostia. And in a case that I'm handling currently in Atlantic City, New Jersey, there is redevelopment takings around the Revel Casino, which has twice

filed for bankruptcy and now closed its doors, but the State redevelopment agency there is still trying to take people's homes for no particular purpose whatsoever. They just want to acquire land around what is now a failed casino.

Mr. DESANTIS. And some will say, well, gee, if you interpreted the Fifth Amendment the way you're suggesting, it's going to be more difficult to have economic development. And I guess my question is, if a constitutional, explicit constitutional protection does create some inconvenience in other parts of American life, has that ever been deemed sufficient to simply write it out of the Constitution and ignore it?

Mr. ALBAN. No, certainly not, and there are great inconveniences on homeowners and small business owners when their properties are taken through eminent domain, particularly when it's taken to give to another private party for that private party's personal profit.

Mr. DESANTIS. Mr. Groen, let me ask you. With the Supreme Court's posture in this, it's very difficult to go into Federal court and bring a Fifth Amendment claim if your property's been seized in violations of the Takings Clause. Are there any other situations in which a right that's fundamental that's explicitly protected in the Constitution is simply just left to kind of the State courts to decide whether they want to enforce or not?

Mr. GROEN. None that I'm aware of. As I mentioned earlier, the only other situation is where litigants suing for over $10,000 for a taking are forced to the Court of Federal Claims, and that raises an article III question.

This situation for parties being forced into State court is a result of the 1985 Williamson County decision by the Supreme Court, and that is simply a requirement that has to change. And we're working on that through litigation, but it's been since 1985, and we're still working on it. Help from Congress is always welcomed.

Mr. DESANTIS. Well, it's really strange. I mean, I think that if you go back when the Constitution was ratified, I mean, the right of private property, and that was a major, major right, and in fact, infringing on that right, that was what they viewed was probably the most direct threat to liberty. And then here we are now, it's almost like people have got to beg to have these rights enforced in Federal court.

Now, Professor Echeverria contends that if the requirement to provide compensations under the Takings Clause is not limited to extreme circumstances, it would be very difficult for kind of the modern state to function. In your opinion, could the government continue to function if courts enforced the Taking Clause in a more robust way?

Mr. GROEN. I'm really glad you asked me that, because Professor Echeverria cited to the Mahon case Justice Holmes, where he did say that if the government had to pay for every change in the law it could hardly go on. But he continued in that case and said, ah, but if regulation goes too far, then it is a taking and we have to obey the constitutional command of compensation. It is a balance.

The Takings Clause—not every interference with property rights is going to be a taking. It simply isn't. And government has vast room to regulate and diminish property values without becoming a

taking. But when it crosses that line, when it goes too far, it is the duty of the courts to obey the command of just compensation, and that is where the difficulty has been in the regulatory takings arena.

We have made a lot of progress, but as interference continues and grows through ever-increasing regulations, we continue to have to litigate these cases and have a vigorous defense of the Takings Clause.

Mr. DESANTIS. Thank you. My time has expired. I yield back.

Mr. FRANKS. And I thank the gentleman.

And I apologize to the gentleman from Ohio, Mr. Jordan, for skipping over him.

Mr. JORDAN. Not a problem.

Mr. FRANKS. I now recognize him for 5 minutes.

Mr. JORDAN. Yeah. For Mr. DeSantis, it's fine.

Thank you, Mr. Chairman, and I apologize for missing part of it. I had to get back to my office for a meeting.

But thank you all for being here.

The title is "The State of Property Rights in America." I would say "The State of Rights in America." We've got the *Kelo* decision and the takings, we've got what the Chairman has brought up about regulatory takings, but, I mean, I point to things even more recent. When the bondholders at Chrysler were told to take the deal back during the auto bailout, that is, in my judgment, a fundamental violation of people's rights. People's religious liberty rights under ObamaCare, people's First Amendment free speech rights under the IRS targeting groups for exercising that very right, their free speech rights to speak out against the government.

So I was curious, Mr. Alban, Mr. Groen, if you could comment on not just this takings issue, but a broad—people right here in the District of Columbia, I think in many ways, denied their Second Amendment rights.

We're obviously concerned about the takings issue, but I think, in a broader sense, just people's fundamental liberties under the Constitution as Americans and the impact we're seeing from government policies on the broader question.

Mr. Alban, your thoughts?

Mr. ALBAN. Yes, I think that's right. I don't know how much of it is directly connected to the *Kelo* decision, but there has certainly been a severe erosion of rights. We litigate cases involving people's economical liberty, the right to earn a living that is being severely repressed all over the country.

And something that does fall under the scope of property rights that's been a severe problem for people has been the growth of civil forfeiture, where folks have had their property taken without being charged with a crime. So that's another example that we're actively litigating where——

Mr. JORDAN. And, frankly, told not to talk about it, right?

Mr. ALBAN. In some cases, yes.

Mr. JORDAN. Some of the John Doe investigations we have had some people write about in Wisconsin that took place over the last few years.

Mr. Groen.

Mr. GROEN. Your question reminds me of what Justice Holmes talked about in *Pennsylvania v. Mahon* in 1922. He recognized that when you're dealing with the police power, the power of government to regulate, he said the natural tendency is for there to be more and more and more regulation until at last—and he was in the context of property—until at last private property disappears. That's the natural tendency.

The barrier to stop that is the Constitution. And so I think you're right, that natural tendency we see playing out in all kinds of rights.

The other aspect that I would emphasize is we talk about property rights, but it was pointed out by Justice Stewart that property does not have rights. People have rights.

Mr. JORDAN. Well said.

Mr. GROEN. And the right to enjoy property.

Mr. JORDAN. Uh-huh.

Mr. GROEN. As well as all your other civil rights. They're interrelated. And if you eliminate rights in property, then you threaten all your other liberties as well. That is the big picture that I think is at stake. We see it played out in property rights, but if that natural tendency is allowed to grow more and more and you don't have the police power balanced by the constitutional protection, then our rights disappear.

Mr. JORDAN. It's one of the reason you've seen the Members up here in this Committee, and particularly the Chairman, focus so much on this—and I'm changing the subject a little bit, but to your point—so much on the fact that you had an agency with the power of the Internal Revenue Service systemically and for a sustained period of time target groups for exercising their most fundamental right under the First Amendment, their right to speak out against the government. And we should be able to do that and not be harassed for doing it. But that's exactly what the Internal Revenue Service did.

So when you couple that with the takings issue, the regulatory takings that are taking place, people's religious liberty, I mean, it's why this Committee is so concerned about what we see happening in our great country.

And I appreciate you all being here.

And with that, I yield back, Mr. Chairman.

Mr. FRANKS. And I thank the gentleman.

And certainly thanks to all the witnesses for attending. It was worth the hearing to me today to be reminded that property does not have rights, people have rights, and the diminishment of the people's rights in one area is a diminishment of their rights in other areas as well. And so we are grateful that you were here.

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

And once again I thank all of the Members, the witnesses, and the people who attended today. And this hearing is adjourned.

[Whereupon, at 3:45 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Response to Questions for the Record from John D. Echeverria, Professor of Law, Vermont Law School

John D. Echeverria
Professor of Law
Vermont Law School
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August 13, 2015

Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Goodlatte,

This is in response to the questions you posed to me in your letter of July 21, 2015, following the hearing held by the Subcommittee on the Constitution and Civil Justice on "The State of Property Rights in America Ten Years After Kelo v. City of New London." Thank you for this opportunity to supplement my oral and written testimony.

Question No. 1. Does the use of eminent domain to promote infrastructure development have the same effects on homeowners and other property owners as the use of eminent domain to promote economic development?

The available evidence strongly suggests that there is no difference in the effects of the use of eminent domain on homeowners and other property owners based on whether the eminent domain power is being used to facilitate economic development projects or to facilitate infrastructure projects such as roadways or pipelines. In either case, the use of eminent domain can result in displacement of families, interruptions of businesses and loss of established communities. These effects of the use of eminent domain are obviously a matter of legitimate public policy concern, and the nature and seriousness of the concerns do not vary with the type of eminent domain involved. Thus, to the extent Congress wishes to address the burdens imposed by the use of eminent domain, a fair and balanced approach to the issue would address all types of exercises of the eminent domain power.

In support of this statement, I cite Robert Caro's well-known account of the use of eminent domain to facilitate construction of a segment of the interstate highway system through the Bronx in New York City in the 1960's. According to his account, many thousands of units of housing were destroyed and many thousands of families were displaced to make way for the new highway. See Robert A. Caro, The Power Broker 837-94 (1974). More recently, ranchers and other landowners in the Midwest have objected to the use of eminent domain to seize their properties to promote the Keystone pipeline. See "TransCanada Is Seizing People's Land To Build Keystone, But Conservatives Have Been Dead Silent," ClimateProgress,

March 1, 2105), available at http://thinkprogress.org/climate/2015/03/01/3625804/keystone-kelo-eminent-domain-property/ effects.

Lastly, Hillary Shelton, Senior Vice President for Policy & Advocacy of the NAACP, addressed this issue during a presentation at the Cato Institute on June 11, 2015, in connection with a conference about the *Kelo* case:

> "We raise broader concerns about the use of eminent domain for any purpose, including those purposes traditionally viewed as public purposes, such as highways, utilities, and even waste disposal. Even these traditional uses of eminent domain have a disproportionate burden on citizens with the least political power, the poor, minorities, and working class Americans."

http://www.cato.org/events/property-rights-10th-anniversary-kelo-v-city-new-london

Question No. 2. The Supreme Court's Williamson County decision effectively requires most claimants to litigate takings challenges to state and local government actions in state courts; are there other contexts in which parties raising a federal constitutional issue may be required to litigate the issue in state court?

Yes, it is a well-recognized principle that litigants cannot claim a right of unfettered access to the federal courts and, therefore, litigants may properly be required to litigate federal law issues in state court. Indeed, the Supreme Court has explicitly rejected the idea that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in federal court." Allen v. McCurry, 449 U.S. 90, 103 (1980). This principle is based on the sound premise, which reflects the highest ideals of our system of federalism, that "[s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and uphold federal law." Stone v. Powell, 428 U.S. 465, 493 n.35 (1976). Thus, the Supreme Court's ruling in Williamson County does not single out takings claimants for special treatment by according them uniquely inferior access to federal court. For example, the Supreme Court has recognized that an individual required to litigate a Fourth Amendment search and seizure claim in a state criminal proceeding is barred from asserting his constitutional claim in a subsequent section 1983 action in federal court. Allen v. McCurry. See also Matushita Elec. Indus. Co., Ltd v. Epstein, 516 U.S. 367, 385 (1996) (affirming, in the context of a federal securities lawsuit, "the general proposition that even when exclusively federal claims are at stake, there is no universal right to litigate a federal claim in a federal district court") (internal quotations omitted).

Most importantly, in 2005, in San Remo Hotel, L.P v. City and County of San Francisco, 545 U.S. 323, 342-44 (2005), the Supreme Court expressly reaffirmed this principle as applied to takings claims. I quote the Court's lengthy discussion of this issue below:

> "[B]oth petitioners and Santini [a Second Circuit ruling] ultimately depend on an assumption that plaintiffs have a right to vindicate their federal claims in a federal forum. We have repeatedly held, to the contrary, that issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court. See, e.g., Migra v. Warren City School Dist. Bd. of Ed., 465

U.S. 75, 84 (1984); Allen, 449 U.S., at 103–104. This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules. See *id.*, at 104. The relevant question in such cases is not whether the plaintiff has been afforded access to a federal forum; rather, the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment.

In Allen, the plaintiff, Willie McCurry, invoked the Fourth and Fourteenth Amendments in an unsuccessful attempt to suppress evidence in a state criminal trial. After he was convicted, he sought to remedy his alleged constitutional violation by bringing a suit for damages under 42 U.S.C. § 1983 against the officers who had entered his home. Relying on 'the special role of federal courts in protecting civil rights' and the fact that § 1983 provided the 'only route to a federal forum,' the Court of Appeals held that McCurry was entitled to a federal trial unencumbered by collateral estoppel. 449 U.S., at 93. We rejected that argument emphatically.

> 'The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself . . . . There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.' Id., at 103–104 (footnote omitted).'

As in Allen, we are presently concerned only with issues actually decided by the state court that are dispositive of federal claims raised under § 1983. And, also as in Allen, it is clear that petitioners would have preferred not to have been forced to have their federal claims resolved by issues decided in state court. Unfortunately for petitioners, it is entirely *unclear* why their preference for a federal forum should matter for constitutional or statutory purposes."

Question No. 3. Does the ruling in *Kelo* that the use of eminent domain to promote economic development can constitute a legitimate "public use" represent a departure from prior Supreme Court precedent?

Absolutely not. In a long series of decisions stretching back well over a century the U.S. Supreme Court has repeatedly embraced a reading of the term "public use" that is consistent with the use of the eminent domain power to support the kind of economic development at issue in the *Kelo* case. As early as 1837, the Court recognized that the eminent domain power could properly be used to promote "the public interest and convenience." *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 542 (1837) (observing that state legislators had taken and extinguished a ferry franchise through eminent domain because "the public

interest and convenience would be better promoted by a bridge in the same place"). When the Court began to apply the Fifth Amendment to the states at the close of the 19th century and the beginning of the 20th century, it interpreted the term "public use" to mean public purpose, and rejected the notion that actual physical use by the public was required to support reliance on the eminent domain power. The Court gave great deference to the states' determinations, based on local conditions, of what constitutes a public use, upholding the use of eminent domain, for example, to promote economic development by mill owners, see, e.g., Otis Co. v. Ludlow Mfg. Co., 201 U.S. 140, 151 (1906); mining companies, see, e g., Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906); and farmers. See, e g. Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112 (1896).

Later in the 20th century, the Court applied this established interpretation of the term "public use" in two additional cases, one involving urban redevelopment, see Berman v. Parker, 348 U.S. 26 (1954), and another arising from Hawaii's effort to dismantle the state's land oligopoly, see Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). As the Midkiff Court explained, applying then settled law, "[t]he public use requirement is . . . coterminous with the scope of a sovereign's police powers."

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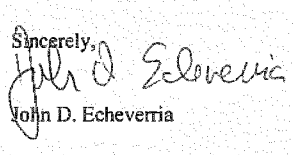
Thank you again for the opportunity to submit this supplemental information.

Sincerely,



John D. Echeverria

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