

TESTIMONY
OF
WILLIAM W. BUZBEE

PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER

BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
2141 RAYBURN OFFICE BUILDING

MARCH 30, 2017, 9 A.M.

HEARING ON H.R. 1689
THE PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2017

Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee,

I thank you for inviting me to discuss my views of the Private Property Rights Protection Act of 2017.

Introduction and summary:

I believe that the bill under consideration today, the Private Property Rights Protection Act of 2017, H.R. 1689, would constitute an imprudent interference with state and local governments. This bill would trample on the very sort of federalism virtues that are often a source of that great congressional rarity, bipartisan agreement. Eminent domain can play an important role for governments seeking to revitalize their economies and cities. It can also be abused, as can any political power. But even that risk of abuse does not logically mean that a federal bill should impose a one-size-fits-all set of federal incentives and penalties on all states and cities. This bill, if it became law, would chill state and local development and revitalization efforts that can be crucial to the health of state and local jurisdictions and generate jobs. Economic development efforts to create jobs is of great importance when, as is the case today, so many Americans are economically struggling, especially in deindustrialized smaller cities and towns. This bill's blunt monetary bludgeon and paperwork burdens fail to be tailored in any way to the diverse economic and legal settings of this nation's states and local governments.

During this past decade, states and local government in legislation and also in their courts have adopted an array of strategies that shape when and how eminent domain powers can be exercised. Dozens of such changes limit the use of eminent domain, but through diverse approaches. Some jurisdictions have left their laws unchanged. Hence, many state and local governments are responding to risks of eminent domain abuse already, but legal variety is what we find. State and local policy experimentation is at the heart of federalism's benefits. Congress should respect this variety and not impose a uniform national policy on all state and local governments. There is a place for federal law and, at times, even uniform federal requirements, but those circumstances are limited and not present in the circumstances addressed by this bill.

Background:

I am a Professor of Law at Georgetown University Law Center. I currently teach Administrative Law, Legislation and Regulation, Environmental Law, and advanced courses on regulation. I have also taught Land Use and Property Law. I have also been a professor of law or visiting professor of law at Columbia Law School, Cornell Law School, Emory Law School, and University of Illinois School of Law. I am also a member-scholar of the Center for Progressive Reform, a regulatory think-tank. I have published extensively, with books published by Cambridge University Press, Cornell University Press, and Wolters Kluwer, and dozens of articles and book chapters, including articles on regulatory and administrative law issues in *Stanford Law Review*, *NYU Law Review*, *Cornell Law Review*, *Michigan Law Review*, *University of Pennsylvania Law Review*, *George Washington Law Review* and numerous other journals.

Much of my scholarship examines the intersection of federalism and regulation, an intersection

at the heart of today's bill. Before becoming a professor, I practiced law in New York City. As a lawyer, I have represented leading corporations, government entities, individuals, and not-for-profits, with a substantial amount of that work involving land use regulation and litigation. I was a law clerk for United States Judge Jose A. Cabranes and am a graduate of Columbia Law School and Amherst College. I have previously testified at numerous hearings on regulatory and environmental issues before committees of both the House of Representatives and the Senate.

I am here on my own behalf at the invitation of the committee and not on behalf of any organization or entity.

The Bill's Apparent Impetus and State and Local Developments Since *Kelo*

Based on my review of the bill's text and review of transcripts and reports addressing past related bills, I believe that this bill is based on the assumption that state and local governments abuse their eminent domain powers, especially where the taken parcel is subsequently transferred to another private actor or entity. I'll generally refer to this as a "private-to-private" taking setting. Concern with alleged abuses in this setting rose to new heights when the United States Supreme Court in 2005 in the *Kelo v. City of New London* case did not create any absolute bar on uses of eminent domain in the setting of economic development plans and private-to-private takings. *Kelo* called for judicial deference to state and local governments about such uses of eminent domain. *Kelo*, like some other eminent domain cases, can involve disheartening tales, especially when the takings do not result in anticipated development benefits.

I should add, however, that supporters of this bill in past testimony have often mischaracterized the *Kelo* case. It did not make radical new law, but logically followed a line of preceding cases dating back roughly a hundred years. It does call for judicial deference to state and local judgments about public purposes, but it also repeatedly emphasizes that so called "purely private takings" are not permitted. It also again and again points out that in *Kelo* the disputed taking was part of a legitimate economic development plan and that there was no evidence of illegitimate purpose. Through this discussion, the Supreme Court created strong incentives for risk averse jurisdictions to exercise eminent domain power in conjunction with publicly disclosed and politically accountable economic development plans.

In addition, as discussed at past hearings on similar bills, in the wake of *Kelo*, citizens and advocacy groups heard the Supreme Court's suggestion that eminent domain reform could be achieved at the state and local level. State and local governments undoubtedly have authority to limit uses of such eminent domain powers. And through legislative reforms and also new judicial opinions, most states---over forty, I believe---have revisited eminent domain process and often created new barriers to uses of eminent domain, especially in the *Kelo* setting of eminent domain where the taken land ends up in another private entity's possession as part of an economic development plan. But studies show that state and local governments have adopted a diverse array of measures and strategies. And that includes some states and cities that have made no substantial post-*Kelo* legal changes. This is certainly not a setting of systemic state refusals to

address an ill. State and local governments have responded, but with resulting law showing variety.

The Need to Consider All Cases and Systemic Effects, Not Just Worst Cases

So I'll assume for the sake of argument that eminent domain can involve actions that feel wrong and involve unsympathetic government actors and wealthy interests and smaller private property holders who don't want to sell. Nevertheless, no national legislature seeking to enact effective and prudent national policy should draft or vote bills into law in light of only the worst-case scenario. In addition, even if a problem persists, that does not necessarily mean that federal law is the answer.

Effective regulation always needs to be drafted with consideration of all resulting effects. It must reflect consideration of how it will shape conduct directly or indirectly. It needs to be shaped in light of the incentives and interests of everyone who might be affected or empowered by the law. Federal legislators also need to consider what they know, but also what others may know better. And with our Constitution's creation of a federalist form of government, federal law absolutely must consider the interests of state and local governments. Such heightened legislative consideration of state and local interests is both due to their constitutional place and due to the reality that this bill would target and have systemic impacts on state and local governments.

Relatedly, if this bill gains momentum towards passage into law, I hope that this committee will first hold a hearing that includes witnesses from a cross section of this nation's varied states, cities, and towns. They could provide important insight into when they use eminent domain, how this bill would affect them, and how dependent they are on this bill's key category of potentially lost federal "Economic Development Funds." Such sensitivity to the degree of coercion federal conditional federal spending creates is now also a constitutional necessity in light the Supreme Court's 2012 holding in *NFIB v. Sebelius*. Conditional federal spending enticements can slip into unconstitutional coercion if they threaten states with too much of a loss. Congress needs to know what, in aggregate, federal "Economic Development Funds" constitute as a percentage of state and local budgets.

Disputed eminent domain cases, as well as cases that will be highlighted by property rights advocacy groups, will by definition involve a contentious and likely unsympathetic taking. Someone doesn't want to sell, and a government sees enough public benefit so it is willing to take the considerable political heat and bad press and pay fair market value for a parcel where earlier arms-length negotiations had failed.

But no national law can be shaped by a focus on only the abusive case, especially when that might be the outlier. Eminent domain has long played a legitimate and predictable part in helping governments handle neighborhoods in transition. Sometimes they may be economically thriving, and the next step in further advancement involves a development and a property holdout. State and local governments use eminent domain for a range of reasons, some excluded

from coverage under this bill, but all state and local governments focus intensely on spurring new development, strengthening the tax base, and attracting new employers. Eminent domain is one of the tools they can use to spur greater economic vitality. And that sort of vitality will often involve a private actor who, down the road, will end up being the new taken property's owner, but also an employer and source of economic vitality. So private-to-private uses of eminent domain are not an extreme rarity in the economic development planning setting. Eminent domain can be essential to assemble parcels to create a large property suitable for a large employer or project.

But a property owner may act as a holdout, making that revitalization difficult or impossible. That holdout may simply love the property and hence really not want to sell for any price. Or sometimes the government and private party simply can't agree on the fair price so go before a factfinder to determine the fair market value.

In addition, as land use scholars and others have long identified, the holdout may also try to command a massive premium as development plans proceed and increasingly large investments in that development are threatened. In that setting, where negotiations fail and the property owner is demanding what seems exorbitant, eminent domain provides the answer. The government has to pay, and it has to pay fair market value.

But it is important to keep in mind that the exercise of eminent is always a bad alternative, with political risks and costs, often bad press, and purchase and often litigation costs also borne by the government. So today's bill needs to be assessed in light of all uses of eminent domain.

Congress Needs to Consider Varied State and Local Needs and Laws and Federalism Rationales for Federal Regulation

Congress also needs to assess how this bill will change political and economic dynamics, how it might be used strategically, and how well it fits into the federal, state, and local legal fabric.

Today's Private Property Protection Act bill would apply in a setting where state and local governments have adopted varying answers and procedures to handle eminent domain in the private-to-private taking setting. It would impose its private-to-private eminent domain prohibition and potentially disastrous penalties on all state and local governments, apparently under the assumption that federal legislators know that this law's answer is right for the entire nation.

Several rationales typically justify federal regulation, but none fit here. In fact, they strongly weigh against federal legislation. A role for federal regulation is broadly embraced to address a social ill or harm where the federal government provides benefits through economies of scale, especially where information and science are best aggregated or created by a larger, more expert federal actor. This can be important where, due to free rider dynamics, smaller units of government or private actors might refrain from action for fear of investing in knowledge with

little likelihood of concomitant personal benefit. Another rationale for federal regulation involves creation of a uniform federal performance standard to prevent regulatory “races to the bottom,” but with no rigid federal dictating of means to achieve the federally specified level of safety. Federal regulation also can address harms that flow across jurisdictional lines or result from interjurisdictional dynamics. A federal cop on the beat is sometimes needed to address such cross-border harms.

But let’s examine today’s bill from a federalism policy rationale angle. Is there something about the economic development uses of eminent domain that justifies a uniform federal law answer? I cannot identify any special federal knowledge or expertise here. I also cannot identify some special expertise that would allow Congress to know with great confidence that a uniform federal prohibition and the particular choices reflected in this bill represent the optimal policy. If this bill reflects a congressional view that property is especially sacrosanct and that eminent domain should be chilled in a uniform way across the entire nation, what is the basis for this view? Even if of great importance, why impose a uniform and punitive federal penalty? After all, state and local land, economic, and fiscal circumstances are undoubtedly varied. Who knows state and local conditions and needs best? Again, not Congress. The diversity of circumstances and different political cultures and aspirations found in different states and localities would normally weigh strongly against uniform federal regulation. Furthermore, as the Supreme Court has repeatedly noted, state and local governments have long been the primary regulators of land use, although federal environmental laws and natural resource protections make this an area of shared turf.

If successful economic development involves a context-sensitive optimal mix of laws and then economic development planning so politicians both protect property holders and encourage economic vitality, it is hard to see any argument for a one-size-fits all federal mandate. How can it make sense to impose the same federal policy on Miami, Manhattan, Paterson (New Jersey, that is), and Detroit? Where parts of the nation face deindustrialization and pockets of economic devastation while other cities and states may be booming, what is the logic behind a single blunt federal law? Why undercut state and local legal variety and policy experimentation? If anything, given today’s internationally competitive economy, shouldn’t federal laws allow or even encourage state and local governments to tailor economic development laws and efforts to their particular circumstances and aspirations?

If there is any area where latitude for difference and experimentation makes sense, it is in the realm of land use and economic development efforts where governments have to balance goals of economic vitality and respect for all citizens’ rights and desires for stable homes and gainful employment.

It is for this reason that the Supreme Court in *Kelo* and long established law before that called for deference by federal courts when assessing state and local judgments about what is a “public use.” And, as mentioned above, *Kelo*’s deference—which is explicitly rooted in federalism principles and attention to what level of government knows best--- is accompanied by emphasis on the virtues of economic development planning and reaffirmation of the prohibition on purely

private takings that lack a public purpose.

The Risk of Strategic Super Holdouts and Other Regulatory Costs

A vote for this bill means its supporters are confident that a uniform federal law chilling all government economic development land acquisitions is the correct policy.

You may think this a wrong premise since this bill does not target all development acquisitions or eminent domain takings, just takings that eventually result in a transfer from one unwilling private actor to another private actor. Nonetheless, it would likely have a much broader chilling effect.

Resistant property holders—really all property holders considering a sale-- have considerable incentives to use any available leverage to command a higher property price when an area is undergoing transition and under consideration for development. This bill, if it becomes law, would greatly empower all property holders across the nation, chilling all transactions by causing a spike in the selling price. It would likely result in draining of state and local coffers that would pay for all government land acquisitions, not just exercises of eminent domain power.

Such a spike in demanded prices would likely occur for the following reasons. Were this bill law, a single property owner could, by exercising this bill's complaint and lawsuit options, subject a state or local government to loss of *all* Federal Economic Development Funds for two years after a finding of violation of this law. And even if dozens or hundreds of neighboring property holders reached agreement on prices or accepted an eminent domain fair market valuation in connection with an economic development parcel assemblage, that single person—I'll call such people Strategic Super Holdouts—could use the leverage of this law to demand a premium. But any half decent lawyer aware of this law would logically advise *all* possible consensual or eminent domain involuntary sellers to become or threaten to become Strategic Super Holdouts. So state and local governments would end up systemically paying more. In effect, all property owners would hold the innate value of their land for some future land use, plus the value of their ability to threaten state and local governments with loss of federal Economic Development Funds.

In addition, due to this bill's lightly sketched process and lack of clear notice, exhaustion requirements, or settlement mechanisms, state and local governments would have no way of truly knowing if a factfinder's fair market value determination marked the end of a parcel acquisition dispute.

If I read this bill correctly, the involuntary seller who demanded an eminent domain proceeding could take the fair market value payment, walk away, then up to seven years later stick it to the jurisdiction. They could threaten the offending jurisdiction with loss of millions of federal dollars based not on an unfair price, but on the presence of a mere private-to-private eminent domain use. After all, this bill says such loss of federal funding is triggered by the character of the transaction alone—the private-to-private eminent domain transfer—not some other indication

of abuse, corruption, or unfairness.

The effect would be to chill eminent domain use and all economic development acquisitions across the entire nation. And in the settings where it is most important—jurisdictions in transition or struggling to regain their footing—the risk of the Strategic Super Holdout or reluctant angry involuntary seller would lead all jurisdictions either to shy away from use of eminent domain or to pay more for properties. And because this bill offers no mechanism to eliminate in advance a possible complaint charging a federal law violation, it would provide no clear way to avoid massive financial uncertainties. A jurisdiction fearing loss of federal Economic Development Funds might see little choice but to surrender the use of eminent domain where a new private actor might at some point develop and use a taken site. (I discuss this a bit more below.)

Some Problems with H.R. 1689's Drafting

H.R. 1689, if it became law, would have vast effects on this country's real estate markets and change virtually all state and local efforts to encourage development. If this bill actually gains momentum, it would greatly benefit from a number of improvements. A few are especially apparent and important in light of the concerns covered in this testimony. I will leave more detailed parsing of its details to others.

The law should declare what count as "Federal economic development funds":

Rather than leave to a future Attorney General specification of exactly what sorts of federal dollars would be threatened, I encourage this bill's supporters to specify what program's dollars are threatened and quantify how important they can be to state and local governments. That clarity will influence congressional votes, but will also let stakeholders, like state and local governments, understand what this bill means and, if enacted, what risks they face. Then let state and local government and others with stakes in such federal funding weigh in on this bill.

The private cause of action should include some way to require advance notice of intent to use this bill's rights and require prompt action:

As suggested above, this bill will create incentives for Strategic Super Holdouts to demand selling premiums and also would leave state and local governments vulnerable to loss of critically important federal dollars for up to seven years after a use of eminent domain. I think this bill a bad idea, but if its core idea gains legislative momentum, it would be less problematic if complaining property holders (the eminent domain sellers) had to raise prompt objections under some variant of this bill *expressly* and long *before* eminent domain proceedings are finished. And if they didn't, they would surrender rights under this federal law. Relatedly, a bill like this should create some way so state and local governments could reach an effective binding commitment with a seller declaring that the seller is satisfied with a fair market valuation and surrendering any possible later right to trigger a Private Property Rights Protection Act-based loss of federal dollars.

Also, I don't believe this bill makes clear what happens to fair market valuation dollars received

for property when that property owner subsequently triggers this law's remedies. Clarity should be provided on this important monetary issue.

The "common carrier" exclusion language is a problem:

The uses of eminent domain that are excluded specify, among other excluded settings, takings for "common carriers." This is a broad term with numerous historical meanings. To avoid litigation over its reach, it needs to be defined or another term used.

Conclusion

Although eminent domain can be utilized in problematic settings, that does not mean that it is a good idea to pass a uniform federal law engendering litigation, transactional uncertainty, state and local paperwork, and uncertain risks of loss of federal Economic Development Funds. This is not a setting for a uniform, one-size-fits-all federal answer. Congress should respect the variety of state and local laws, conditions, and political aspirations. Chilling economic development across the whole nation would be bad federal policy.