

1 NATIONAL CAPITOL CONTRACTING  
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4 MARKUP OF H.R. 1689  
5 "PRIVATE PROPERTY RIGHTS  
6 PROTECTION ACT OF 2017"  
7 Wednesday, April 25, 2018  
8 House of Representatives,  
9 Committee on the Judiciary,  
10 Washington, D.C.

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

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

19 Staff Present: Shelly Husband, Majority Staff Director;  
20 Brandon Ritchie, Majority Deputy Staff Director; Zach

21 Somers, Majority Parliamentarian and General Counsel; Bobby  
22 Parmiter, Majority Chief Counsel, Subcommittee on Crime,  
23 Terrorism, Homeland Security, and Investigations; Jason  
24 Cervenak, Majority Counsel, Subcommittee on Crime,  
25 Terrorism, Homeland Security, and Investigations; Meg Barr,  
26 Majority Counsel, Subcommittee on Crime, Terrorism, Homeland  
27 Security, and Investigations; Paul Taylor, Majority Chief  
28 Counsel, Subcommittee on the Constitution and Civil Justice;  
29 David Greengrass, Minority Counsel; James Park; Matthew  
30 Morgan, Minority Counsel; Danielle Brown, Minority  
31 Legislative Counsel; Joe Graupensperger; Rachel Calanni,  
32 Minority Professional Staff Member; and Alley Adcock, Clerk.

33 Chairman Goodlatte. The Judiciary Committee will come  
34 to order. Without objection, the chair is authorized to  
35 declare a recess at any time. Our first order of business  
36 is ratifying an updated subcommittee roster. Every member  
37 should have a copy on his or her desk.

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

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

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

55 Mr. Nadler. Mr. Chairman?

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

58 Mr. Nadler. I just want to comment briefly on the  
59 issue of our consideration of criminal justice reform. I  
60 want to first recognize the hard work of crime subcommittee  
61 member Sheila Jackson Lee, Hakeem Jeffries, Doug Collins,  
62 Karen Bass, and others including the chairman, who have  
63 attempted to develop a consensus bill on prison reform. I  
64 understand that the chairman intends to continue to work on  
65 that legislation during the coming weeks. During this time,  
66 I hope that we will also return to discussions concerning  
67 sentencing reform.

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

77 Chairman Goodlatte. Would the gentleman yield?

78 Mr. Nadler. Sure.

79 Chairman Goodlatte. I thank the gentleman for  
80 yielding, and the gentleman knows my longstanding interest  
81 in also doing sentencing reform. We have not been able to  
82 reach a meeting of the minds on that, and I am fully

83 dedicated to continuing to do that. We also have a number  
84 of other criminal justice reform measures, including related  
85 to civil asset forfeiture, mens rea or criminal intent,  
86 policing strategies, making sure that innocent people do not  
87 go to prison. And I am committed to doing as much work as  
88 possible in all of those areas, provided that we can achieve  
89 the kind of bipartisan consensus that we have achieved with  
90 regard to prison reform and prison reentry reform.

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

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

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

107 Ms. Adcock. H.R. 1689, to protect private property

108 rights --

109 [The bill follows:]

110 \*\*\*\*\* INSERT 1 \*\*\*\*\*

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

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

121 This clause created two conditions to the government  
122 taking private property. First, the subsequent use of the  
123 property must be for the use of the public. And second,  
124 that the government must pay the owner just compensation for  
125 the property. However, more than a decade ago, the Supreme  
126 Court, in a controversial 5-to-4 decision, in *Kelo v. City*  
127 *of New London*, expanded the ability of State and local  
128 governments to exercise eminent domain powers beyond what is  
129 allowed by the text of the Constitution, by allowing  
130 government to seize property under the vague guise of  
131 economic development, even when the public use turns out to  
132 be nothing more than the generation of tax revenues by  
133 another private party after the government takes property  
134 from one private individual and gives it to another private  
135 entity.

136           As the dissenting justices observed, by defining public  
137 use so expansively, the result of the Kelo decision is  
138 effectively to delete the words "for public use" from the  
139 takings clause of the Fifth Amendment.

140           The specter of condemnation hangs over all property.  
141 The government now has license to transfer property from  
142 those with few resources to those with more. The Founders  
143 cannot have intended this perverse result. In the wake of  
144 this decision, State and local governments can use eminent  
145 domain powers to take the property of any individual for  
146 nearly any reason. Cities may now bulldoze citizens' homes,  
147 farms, churches, and small businesses to make way for  
148 shopping malls and other developments.

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

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

158           Specifically, the Private Property Rights Protection  
159 Act would prohibit State and local governments from  
160 receiving Federal economic development funds for two years

161 when they use economic development as a justification for  
162 taking property from one person and giving it to another  
163 private entity. In addition, this legislation grants  
164 adversely-affected landowners the right to use appropriate  
165 legal remedies to enforce the provisions of the bill and  
166 allows State and local governments to cure violations by  
167 giving the property back to the original owner.

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

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

183 This legislation has passed the House three times  
184 previously, either by voiced vote or with the support of at  
185 least 80 percent of House members in an overwhelmingly

186 bipartisan vote -- only to be stalled in the Senate. But  
187 the fight for people's homes continues, as will this  
188 committee's efforts to protect Federal taxpayers from any  
189 involvement in eminent domain abuse.

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

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

198 [The prepared statement of Chairman Goodlatte follows:]

199 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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

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

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

221 This legislation seeks to overturn *Kelo* by prohibiting  
222 the use of eminent domain for the purpose of economic  
223 development through private-to-private property transfers by  
224 any State or local government that receives Federal economic

225 development funds. The bill defines "economic development  
226 funds" broadly, to include any Federal funds distributed to  
227 States and localities under laws designed to improve or  
228 increase their economies. Should a State or local  
229 government violate this prohibition, it is subject to the  
230 loss of all such funds for two years.

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

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

247 The loss of all Federal economic development funds is  
248 so draconian and misguided a penalty, that a government that  
249 never takes a prohibited action would be financially hobbled

250 by it. Municipal bonds could not be sold or could be sold  
251 only for very high interest rates because of the fear that  
252 the municipal government might, in the future, use eminent  
253 domain improperly, and thereby lose all Federal economic  
254 aid, and with it, the ability to repay the bonds.

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

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

264 For example, H.R. 1689 allows the use of eminent domain  
265 to give property to a private party "such as a common  
266 carrier that makes the property available for use by the  
267 general public as a right." Does that include, for example,  
268 a stadium? A stadium is privately owned and available for  
269 use by the general public as a right. Affordable housing,  
270 such as the HO-6 program, which uses Federal money to  
271 encourage private development of mixed-income housing as a  
272 way to respond to failing public housing projects, or the  
273 Nehemiah Program, a faith-based affordable housing program  
274 in Brooklyn, could never have gone forward.

275           So, under this bill, public housing completely  
276 constructed by the government is permissible, but public-  
277 private partnerships for affordable housing are not.

278           In addition, the bill is unnecessary. Since the Kelo  
279 decision, there have been new developments that call into  
280 question whether Congress should even act at this point. In  
281 response to Kelo, more than 40 States have moved  
282 aggressively to narrow their eminent domain laws. In doing  
283 so, States have carefully considered the implications of  
284 this decision and the needs of their citizens.

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

294           Finally, H.R. 1689 undermines federalism and may raise  
295 constitutional concerns. Subject to the takings clause,  
296 local land use decisions are generally left to the judgments  
297 of State and local governments, which are in the best  
298 position to weigh local conditions and competing interests.  
299 This is the essence of federalism, and Congress should not

300 be in the business of sitting as a national zoning board.

301 Also, the loss of all economic funding, even for  
302 projects that may have nothing to do with takings, is so  
303 draconian that it may amount to an unconstitutional coercion  
304 of State and local governments.

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

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

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

324 [The prepared statement of Mr. Nadler follows:]

325

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

326 Chairman Goodlatte. Thank you, Mr. Nadler. And I want  
327 to join you in expressing the committee's appreciation to  
328 Ms. Gray for her service to the --

329 Ms. Jackson Lee. Does the gentleman yield?

330 Mr. Nadler. Certainly.

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

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

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

349 My bill aims to restore the property rights that the  
350 Supreme Court usurped in 2005. Our nation's Founders

351 recognized the importance of the individual right to  
352 personal property and enshrined it in the Constitution. The  
353 Fifth Amendment plainly states, "Nor shall private property  
354 be taken for public use without just compensation."  
355 However, our legal understanding of public use changed  
356 drastically by the Supreme Court when it ruled, in *Kelo v.*  
357 *the City of New London*, that economic development can be a  
358 public use under the Fifth Amendment's takings clause.

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

368 Even 13 years after *Kelo*, polls show that Americans  
369 overwhelmingly oppose property being taken and transferred  
370 to another private owner, even if it is for the public  
371 economic good -- read, more taxes. If the Private Property  
372 Restoration Act is needed to restore these individual  
373 property rights that the Supreme Court invalidated --  
374 although several States have passed legislation to limit  
375 their power of eminent domain, a number of State supreme

376 courts have barred this practice under their State  
377 constitution. And these laws only exist to a varying  
378 degree.

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

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

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

398 [The prepared statement of Mr. Sensenbrenner follows:]

399 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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

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

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

418 And I was livid at that decision of the Supreme Court.  
419 I could not think it could be more starkly wrong. And when  
420 the Court comes down with a decision that does not match up  
421 to what the Constitution says, then we look at that and we  
422 think, "Well, how are we going to amend the Constitution to  
423 fix this one?" And the only words we could come up with  
424 were "And we really mean it this time; put those three words

425 back in." Of course, we know that is not any more effective  
426 than the original words that were there.

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

441 I brought, also, an amendment to the appropriations  
442 bill to strike, as my memory tells me, \$1.5 million from the  
443 administrative budget of the Supreme Court, which was a  
444 nominal amount of the property that was confiscated in New  
445 London. And of course, that amazingly did not pass off the  
446 floor of the House at that time. But it sent a message to  
447 the Court, and the Court was completely out of bounds. I  
448 hosted a breakfast with Justice Scalia some months after  
449 that. And this a part that I wanted to make sure goes into

450 the record. He said he expected the erroneous -- that is my  
451 word, "erroneous" -- I will just put it this way: he  
452 expected the Kelo decision, at some point, to be reversed by  
453 the Court. I look forward to that day, and we are doing  
454 what we can do this day to restore as many property rights  
455 as we can, legislatively.

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

458 [The prepared statement of Mr. King follows:]

459 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

460 Chairman Goodlatte. The chair thanks the gentleman.

461 Are there any amendments to --

462 Mr. Nadler. Mr. Chairman?

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

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

466 Chairman Goodlatte. The clerk will report the  
467 amendment.

468 Ms. Adcock. Amendment to H.R. 1689, offered by Mr.  
469 Nadler of New York. Page 1, Line 8, strike "in general."  
470 Page 2, strike Line --

471 [The amendment of Mr. Nadler follows:]

472 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

473 Chairman Goodlatte. Without objection, the amendment  
474 is considered as read and the gentleman is recognized for 5  
475 minutes on his amendment.

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

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

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

490 The penalty is the loss of all economic development  
491 funding for a two-year period. As the bill does not specify  
492 what the term "economic development funding" means, we can  
493 only guess. We can assume that if it includes most of the  
494 programs we normally associate with economic development,  
495 the loss of that funding or the requirement that it be  
496 repaid to the Federal Government would be financially  
497 devastating to the jurisdiction hit by the penalty.

498           Given the tight budget States and localities face, it  
499 would probably bankrupt most of them. But the problem does  
500 not end there. In view of the threat of the bill's penalty  
501 and in view of the uncertainty of what a subsequent mayor  
502 and governor might do, it is inescapable that no  
503 jurisdiction could ever float another bond again. No  
504 prudent bond underwriter would ever take a chance that, over  
505 the life of a bond, over the 25 to 30-year life of the bond,  
506 a future administration might make a mistake and compromise  
507 its ability to repay the note by giving up the Federal aid  
508 for two years, by an improper taking at some future time.

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

515           And it makes no sense, because the bill does not even  
516 help aggrieved property owners since it does not let them go  
517 to court until the condemnation has been completed. At that  
518 point, they have lost their property, and they have received  
519 whatever compensation they are entitled to under the law.  
520 The bill does not give them the opportunity to stop the  
521 condemnation. It does not give them the ability to go to  
522 court to have their property returned. It does not give

523 them any damages. The only thing they can get is the  
524 perverse satisfaction of bankrupting their community.

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

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

540 Now, frankly, somebody asked, if I do not like this  
541 bill, why am I making it effective? And the answer is  
542 because I do not want every locality, whether they ever use  
543 eminent domain or not, to have a cloud on their future  
544 Federal aid that will inhibit them from floating bonds. So,  
545 to prevent the cloud on the future Federal aid that would  
546 limit or eliminate the ability of local governments to float  
547 bonds, and to give property owners faced with an improper

548 taking the ability to stop that taking, rather than to sit  
549 around, cry after it, and do nothing to get compensation or  
550 get equitable relief to stop it, but only to ruin their  
551 community, I move this amendment. I yield back the balance  
552 of my time.

553 Mr. Sensenbrenner. Mr. Chairman?

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

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

558 Chairman Goodlatte. The gentleman is recognized for 5  
559 minutes.

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

568 Now, in many cases, the economic development funds are  
569 used to help finance the taking. So, you know, where are we  
570 at? You know, if you do not have that kind of a penalty,  
571 you are going to see communities that want to take people's  
572 property because they can get more tax revenue out of

573 putting a shopping mall or a Four Seasons Hotel up instead  
574 of the old house or houses that are there, going ahead and  
575 trying to do that as well, as a way of relieving their  
576 budget problems.

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

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

592         You know, Mr. Nadler's complaint about bond counsel  
593 being very squeamish about authorizing or signing off on  
594 bond issues, in my opinion, is a canard. You know, the  
595 thing is, there are all kinds of laws on the books. And  
596 maybe there will be a penalty involved, and bonds cannot be  
597 marketed if they break another part of the law that does not

598 deal with this. So, I think we have to assume that the  
599 States and localities will be law-abiding. They will follow  
600 this law as they have to follow all of the other laws  
601 relative to the flotation of bonds or other types of debts.  
602 And we even give the states or localities some wiggle room  
603 to get out of this simply by offering to return or replace  
604 the property. I believe that this amendment should be  
605 overwhelmingly rejected. I urge a no vote and yield back  
606 the balance of my time.

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

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

611 Chairman Goodlatte. The gentleman is recognized for 5  
612 minutes.

613 Mr. Raskin. Mr. Chairman, thank you very much. I rise  
614 in support of the amendment, not just because it makes the  
615 underlying intent of the bill effective, as Mr. Nadler says,  
616 but because it makes the bill constitutional. Otherwise,  
617 without it, I think the way the bill is written is  
618 unconstitutional. Everybody here knows about the Supreme  
619 Court's decision in NFIB v. Sebelius in 2012, which struck  
620 down the provision in the Affordable Care Act -- in  
621 Obamacare -- which said that "If you, the State, do not go  
622 along with the Medicaid expansion, we are going to cut off

623 all Medicaid funds to you." And the Supreme Court said that  
624 that was coercive and abusive use of the spending power. It  
625 must be much more closely targeted so that it could only  
626 really be said, "if you do not expand, you will not get the  
627 money that we are giving to the States that are, in fact,  
628 expanding."

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

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

644 But let me just also --

645 Mr. Sensenbrenner. Will the gentleman yield?

646 Mr. Raskin. Please.

647 Mr. Sensenbrenner. Okay. You know, I believe the

648 court in Sebelius made it clear that Congress may attach  
649 appropriate conditions to the Federal taxing and spending  
650 programs to preserve its control over the use of Federal  
651 funds. You know, that is --

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

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

656 Mr. Raskin. Okay. Well --

657 Mr. Sensenbrenner. -- 132 Supreme Court --

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

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

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

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

672 Mr. Raskin. By all means.

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

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

687 Mr. Raskin. By all means.

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

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

698 Charlottesville and Roanoke.

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

702 Mr. Rothfus. Will the gentleman yield?

703 Mr. Raskin. Yes, by all means.

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

711 Mr. Raskin. Well, let's see. Except that if you look  
712 at the beginning of it, "No State or political subdivision  
713 shall exercise its power of domain or allow the exercise of  
714 such power by any person or entity," et cetera. As you  
715 know, under Dillon's rule, all power in the local  
716 governments is derivative of State power. So any power that  
717 Charlottesville or Richmond has, or Alexandria, or  
718 Arlington, comes from the State. The State would be  
719 allowing it to exercise its eminent domain power in a way  
720 that is antithetical to congressional purpose. So, I think  
721 unless we clarify it, all of the public funds would have to  
722 be revoked at that point. Mr. Chair, if I could just

723 reclaim my time --

724 Chairman Goodlatte. The time of the gentleman has  
725 expired. The chair recognizes himself in opposition to the  
726 amendment in defense of the Commonwealth of Virginia and its  
727 subdivisions and yields to the gentleman from Wisconsin.

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

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

747 Mr. Raskin. Will the gentleman yield?

748 Mr. Sensenbrenner. The time belongs to the Chairman.  
749 Chairman Goodlatte. I will be happy to yield.

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

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

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

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

769 Mr. Raskin. But the constitutionally relevant point  
770 is, what percentage of the funding is cut off? And here it  
771 would be 100 percent of economic development funding that  
772 would be --

773 Chairman Goodlatte. To the community that had violated  
774 law, and a court had found them to have violated the law,  
775 very different than the Sebelius case in which the Supreme  
776 Court noted that the States had agreed to and were  
777 participating in the existing Medicaid program. And the  
778 Federal Government saying they would cut off all of those  
779 funds for not expanding the program is a very different  
780 dynamic than breaking the law and saying you are going to  
781 lose the funds if you break the law.

782 Mr. Nadler. Would the gentleman yield?

783 Chairman Goodlatte. I will yield.

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

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

794 Those opposed, no.

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

797 Are there further amendments to H.R. 1689? A reporting

798 quorum being present, the question is on the motion to  
799 report the bill H.R. 1689 as amended favorably to the House.

800 Those in favor will respond by saying aye.

801 Those opposed, no.

802 In the opinion of the chair, the ayes have it, and the  
803 bill is ordered reported favorably. Members will have two  
804 days to submit views. And before we adjourn I would like to  
805 take a moment to welcome back to the committee a returning  
806 veteran of the committee, and that is Representative Keith  
807 Rothfus. He previously served on the committee in the 113th  
808 Congress, and we are very thrilled to have him rejoin us.

809 As the representative of Pennsylvania's 12th District,  
810 his experience in the private sector helping small  
811 businesses expand and create jobs for Americans will be  
812 invaluable once again to the committee. So, please join me  
813 in welcoming him back.

814 Does the gentleman from New York seek to say anything  
815 on this subject?

816 Mr. Nadler. Yes, I join the chairman in welcoming the  
817 gentleman from Pennsylvania back to the committee. Some  
818 good sense from Pennsylvania is always to be desired.

819 Chairman Goodlatte. I thank the gentleman from  
820 Pennsylvania. This concludes our business for today.  
821 Thanks to all the members for attending, and the markup is  
822 adjourned.

823           [Whereupon, at 4:03 p.m., the committee adjourned  
824 subject to the call of the chair.]