

Protecting Private Property from Eminent Domain Abuse

Testimony before the House Committee on Land and Resource Management

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Mr. Chairman, members, thank you for the opportunity to appear before you today. The Texas Public Policy Foundation has been actively engaged in reforming eminent domain law since July 2005 when the U.S. Supreme Court issued its infamous *Kelo* decision, where a narrow 5-4 majority of the court said that it was okay to take the property of Susette Kelo and her neighbors on the vague hope by the city of New London, Connecticut that it could enhance its tax revenue.

I had the opportunity to speak with you last week about this, and will have several more opportunities today. So I won't go over everything we have done again, but will summarize the focus of the Foundation's work over the last six years with these four key points:

When the government allows the private property of its citizens to be taken by the state, the taking should be for a legitimate public use, the property owners should be fully compensated for whatever damages incurred because of the taking, the property once taken should be actually used for the public use for which it was taken within a reasonable period of time, and the condemnor should bear the burden of proving the taking is legitimate and necessary.

You will hear a lot today on this issue and I'd like to make a few points to firmly place the discussion before you in the context of private property rights.

First, the ability to own and use property is the most fundamental of all of our rights. Property should be taken by the government only for the most legitimate and necessary instances of public use.

Second, while condemnation is not used in every instance of the acquisition of property by a condemnor, every acquisition of property by a condemning entity is made under the threat of eminent domain. There are very rarely any willing sellers in property transactions where property is acquired by an entity with eminent domain.

Third, many of the government entities you may hear from on this issue have a vested interest in maintaining the status quo when it comes to the use of eminent domain. For instance, when *Kelo* was issued, the Texas Municipal League said that *Kelo* "simply confirms what cities have known all along: under the Fifth Amendment to the U.S. Constitution, economic development can be as much a 'public use' as a road, bridge, or water tower."

Finally, I am sure you have heard and may continue to hear that this bill should be passed without any changes because it is too important a bill to risk its passage because of potential opposition to those changes. However, I would suggest to you that property rights are too important to pass a bill that could have done more to protect them.

One example—the buyback provision—will suffice to show the need to improve SB 18.

Currently, while property can only be taken for a public use, there is no requirement that the property—once taken—must be used for that same use. For a real life example, property owners near San Antonio might find their property taken for a reservoir eventually being used for a Toyota plant. SB 18 has a provision to address this problem, but it is unfortunately worse than current law. And worse than the provision in HB 2006 that this body passed in 2007.

According to SB 18, a government entity has to meet two of seven criteria to demonstrate that it is using a property for the public use for which it was taken—and thereby avoid the requirement to offer the property for sale back to the original owner. However, one of those seven criteria is that the government entity pass a resolution saying they will only meet one of the other six! Then four of those six are requirements that the government entity 1) apply for a permit, 2) apply for funds, 3) take two properties for the same use, or 4) spend some money on an architect. No property owner will ever get her property back under SB 18.

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There are at least four specific ways in which SB 18 can be improved:

- Allow property owners to repurchase their property at the price paid when it was taken if the property taken is not used for the public use for which it is taken within 10 years.
- Ban the use of eminent domain if a taking is not necessary for a public use.
- Replace all references to “public purpose” with “public use” where the law grants the power of eminent domain.
- Require condemnors to bear the burden of proof that they are taking land for a public use, and that the taking of the land is necessary for that purpose.

I’ve talked to just about every property rights group advocating for the passage of this bill. None of them have objected to the changes we propose. Likewise, even some of the condemning entities I have talked with don’t object to some of our proposals, like changing the buyback provision. And I have heard from many legislative leaders and members that they are committed to producing the best bill to protect private property rights, not just this bill as is.

In this context, I hope that the members of this committee and the House would look favorably upon the changes that we propose. The details of those changes are in our packets that you have before you.

Thank you for the opportunity to testify. I’d be happy to answer any questions. ★

